



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 92 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MANGO OTIENO.....ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 19th day of August, 2013 along Tom Mboya Street jointly with others not before the court murdered **JACKSON OUMA SANDE**.

2. On 10/9/2013 he took his plea before Justice R.L Korir and on 19/5/2015 his trial commenced before Ombija J, (as he then was) who heard the evidence of four (4) prosecution witnesses before retiring from the Judiciary. On 17/10/2017 upon compliance with **Section 200** of the **Criminal Procedure Code** his trial proceeded for further hearing before me wherein three prosecution witnesses **PW5, PW6** and **PW7** testified and at the close of the prosecution case the parties were invited to make submissions thereon under **Section 306** of **Criminal Procedure Code**.

3. On behalf of the prosecution it was submitted that the accused had been placed at the scene through the evidence of the prosecution witnesses having been arrested thereat with the murder weapon in his possession and that though it was night there was adequate lighting from the security lights from adjacent buildings to enable the arresting officer see the unfolding events.

4. On behalf of the defence it was submitted that at the close of the prosecution case the evidence of the witnesses left many questions and gaps to be filled and that it was not the duty of the court to do so. It was submitted that there was contradiction between the evidence of **PW1, PW5** the arresting officers and **PW2** who examined the accused three days after the incident as regards an alleged injury sustained by the accused person. It was further submitted that an HTC mobile phone alleged to had been recovered at the scene was never produced as an exhibit and neither was there any record produced to confirm the ownership thereof. It was submitted that no fingerprints were taken from the murder weapon which would have linked or eliminated the accused from the crime.

5. At this stage, the issue is not whether or not the prosecution has established a case against the accused person beyond reasonable doubt but whether a case has been made to justify calling upon the accused person to offer an explanation as was stated in the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

“All the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively beyond reasonable doubt. A ruling that there is a case to answer would be justified in my opinion in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

6. I have looked at the evidence tendered and in particular the evidence of **PW1** and **PW5** who arrested the accused person and without saying much on their evidence at this stage of the proceedings I find and hold that the prosecution has established a *prima facie* evidence to enable me put the accused on his defence which I hereby do. The accused is therefore advised of his rights under **Section 306** of the **Criminal Procedure Code** to choose how he intends to defend himself.

DATED, SIGNED and DELIVERED at Nairobi this 22nd day of February, 2018

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Ms. Ojiambo for the accused

Accused present

Court clerk Tabitha