



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 112 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GILVANCE OCHIENG OUNDA.....ACCUSED**

**RULING**

1. The Accused **GILVANCE OCHIENG OUNDA** 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 the 6<sup>th</sup> day of November, 2014 at St. John's High School in Majengo, Kamukunji Area within Nairobi County murdered **JAFFER OMAR HASSAN**.

2. He pleaded not guilty and to prove its case against him the prosecution called a total of nine (9) witnesses. At the close of the prosecution case both the prosecution and the defence opted not to make any submissions and left it upon the court to make a determination on whether the accused had a case to answer based upon to the evidence on record.

3. At this stage of the proceedings the court is required to make a determination under **Section 306** of the **Criminal Procedure Code** whether the prosecution has made up a *prima facie* case to enable the court place the accused on his defence. **Section 306 (1)** of the **Criminal Procedure Code** provides:-

*“(1). When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or defence may desire to submit, record a finding of not guilty.*

*“(2). When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused or any one of more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.*

*“(3). If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement or to adduce evidence, the court shall call upon him to enter upon his defence.”*

4. This legal principle has been interpreted by the then East African Court of Appeal in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 at pg 335** as follows:-

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”*

*A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to*

define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (Emphasis added)

5. What therefore the court is called upon is to determine whether there is sufficient evidence tendered to enable the court put the accused on his defence. The test as to what constitutes *prima facie* case is whether should the accused person opt to exercise his constitutional right under **Article 50 (2) (1)** that is to remain silent and not to testify during the trial, the court may proceed and convict him on the basis of the evidence on record.

6. I have taken into account the evidence of **PW2 AP CORP. KIPKEMOI TANUI** who arrested the accused, **PW3 QUINTER ABOK** the school Principal, **PW5** and **PW6** fellow student at St John’s Secondary School and **PW7 DR DOROTHY NJERU** who performed post mortem examination on the body of the deceased and without giving a detailed analysis of the said evidence, I am satisfied that a *prima facie* case has been made out against the accused person to enable me put him on his defence which I hereby do. The accused is therefore advised on his rights under **Section 306** stated herein above, and is called upon to choose how he intends to defend himself.

**DATED, SIGNED and DELIVERED at Nairobi this 12<sup>th</sup> day of April, 2018.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Wegulu for the state*

*Mr. Ogada for the accused*

*Accused present*

*Court assistance Paul*