REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 32 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JAMES SIOYI KIPKANIA.....1ST ACCUSED

GEOFFREY MAKANA NYAUNDI.....2ND ACCUSED

RULING ON NO CASE TO ANSWER

1. The Accused Persons, James Sioyi Kipkania and Geoffrey Makana Nyaundi are jointly charged with murder contrary to section 203 as read together with section 204 of the Penal Code. It is alleged that in the night of 19th and 20th July, 2013, at Kagaa area within Kiambu County, jointly with others not before the Court, they murdered Bernard Irungu Kirubi.

2. Both Accused Persons pleaded not guilty and the case proceeded for a full hearing. The Prosecution has called ten witnesses and then closed its case. The theory of the case is that the two Accused Persons allegedly kidnapped the Deceased over some money he owed them and demanded his family to pay it back lest they kill him. Since the monies were not paid within the stipulated time, the theory is that the Accused Person proceeded to kill the Deceased and dumped his body where it was later found.

3. At this stage, the Court is not required to make a definitive verdict on whether the case has been established beyond reasonable doubt. At this stage the Court is only required to determine whether the evidence presented warrants putting the Accused Person on his defence. The task of the Court at this stage in the proceedings is to decide if Prosecution has made out a sufficient case for the Accused Persons to be placed on their defence. The test to be utilised by the Court in making that determination was famously stated in the ***Bhatt –vs- R [1957] EA 332***. In plain terms, the Court is expected to determine if there is enough reliable evidence to warrant the Court to hear from the Accused Persons or if the case should be stopped at this point.

4. The test was stated in the ***R v Galbraith*** **[1981] 1 WLR 1039** thus:

> *If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a [Court] properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability ….and where on one possible view of the facts there is evidence upon which a [Court] could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to [proceed for Defence hearing]…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge*.

5. In the instant case, after considering the testimonies of the ten Prosecution witnesses, all the evidence tendered, and the submissions of the Defence Counsel, I have come to the conclusion that the evidence presented, "taken at its highest", meaning without final determination as to its creditworthiness or weightiness (See ***R v Galbraith 73 Cr. App. R. 124***) – could lead a reasonable court to convict if no

explanation is offered by the Defence. It follows, then, that the evidence adduced so far is enough to put the Accused Persons on their defence. That, then, is the verdict of the Court at this point: the Accused Persons have a case to answer and are placed on their defence.

6. Consequently, the case shall be set down for defence hearing.

Delivered at Kiambu this 2nd day of August, 2018.

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JOEL NGUGI

JUDGE