REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 55 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

FREDRICK NTHIGA MWANIKI.....ACCUSED

RULING

1. The accused **FREDRICK NTHIGA MWANIKI** 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 of 28th day of June 2014 at Dagoretti corner in Dagoretti District of Nairobi County murdered **FRANCIS AMBUNDO**.

2. He pleaded not guilty to the said charges and to prove its case against him the prosecution called a total seven (7) witnesses and the close of the prosecution case it was submitted on behalf of the prosecution that **Section 206 (a)** of the **Penal Code** defines malice aforethought as an intention to cause death of or to do grievous harm to any person whether that person is the person actually killed or not. **Section 206 (b)** states that knowledge that the act or omission causing death will probably cause death or grievous harm to the person although such knowledge is accompanied by indifference that an act or omission causing death or will probably cause death or grievous harm whether death or grievous harm is caused or not by a wish that it may not be caused still amounts to malice aforethought. It was submitted that the accused did know that his conduct could cause death or grievous harm and that the court can convict him on the basis of the evidence or record if he opt to remain quiet.

3. On behalf of the defence it was submitted that on the cruelty of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** to establish a prima facie case, the prosecution need to adduce evidence that meets the threshold of **Section 203** of the **Penal Code**. It was submitted that the accused did not have malice aforethought with the shooting being spontaneous and only used the firearm to ward off **PW1** and the deceased. It was submitted that the prosecution did not establish facts that are consistent with the existence of malice aforethought for which the case of **TUBERE S/O OCHEN v REPUBLIC [1945] EACA 65** was submitted where the Court of Appeal held that in determining whether malice aforethought has been established the following elements should be considered:-

a. The nature of the weapon used.

b. The manner in which it was used.

c. The part of the body targeted.

d. The conduct of the accused before, during and after the incidence.

4. It was therefore submitted that there was no scintilla of evidence to prove malice aforethought an unlawful act on the part of the accused to require his rebuttal and should not be put on his defence under the provisions of **Section 306** of the **Criminal Procedure Code.**

5. Section 306 (1) and **(2)** of the **Criminal Procedure Code** provide the court with two options that is to say – **(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 committed the offence record a finding of not guilty whereas, **(2)** provides that if the court considers that there is evidence that the accused committed the offence should inform him of his right to address the court on his own behalf or make unsworn statement and call witnesses in his defence.

6. At this stage what the court is required to do is to establish whether a *prima facie* case has been established under the principles set out in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** 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… <u>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</u>."

(Emphasis added)

7. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

"All the court has to decide at the close of evidence 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 it may be 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, <u>in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction</u>."

(Emphasis added)

8. In the case of **REPUBLIC V GALBRAITH [1981] 1 WLR 1039** at 1042 the court in setting out the test for the court to consider at no case to answer had this to say:-

"How should a judge approach a submission of no case?

(1) 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.

(2) 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 jury 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 or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the Defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course as always in this branch of law, be borderline cases. They can safely be left to the discretion of the judge."

9. In the **Botswana Case** of **THE STATE v GURA BLR 102** which I find relevant it was held that :-

"1. A submission of no case may be upheld only:

a) where there is no evidence that the accused committed the offence charged in the indictment or summons; or

b) <u>any other offence of which he might be convicted thereon.</u> (Emphasis added)

2. The question which the judge has to consider at the close of the prosecution case was whether the prosecution has given reasonable evidence of the matters in respect of which it has the burden of proof. It was for the judge as a matter of law to determine whether the evidence adduced has reached that standard of proof prescribed by law. The standard of proof required by law at this stage of proceedings was not proved beyond reasonable doubt which only comes after the conclusion of the whole case.

3. A submission of no case ought to be upheld if the judge was of the view that the evidence adduced would not reasonably satisfy a jury, that is to say when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or is so contradictory, or was manifestly unreliable that no reasonable tribunal or jury might safely convict upon it."

10. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** advises that an elaborate comment on the evidence adduced by the prosecution at this stage is not safe should the court opt to put the accused on his defence.

11. With this in mind I have looked at the evidence of **PW1 BOAZ ABUNDO** and **PW2 FRANCIS ANDREW NABUCHIRI** both eye witness to the offence and **PW3 DR. DOROTHY NJERU** who performed postmortem examination on the deceased together with the evidence of **PW6 HENRY NJUGUNA** the investigative officer and without commenting in details upon the said evidence, have come to the conclusion that a *prima facie* case has been established by the prosecution to enable me put the accused on his defence which I hereby do, so

as to state his side of the story should he opt to do so, the prosecution having discharged their initial burden against him.

12. The accused is therefore placed on his defence and is advised of his rights under **Section 307** of the **Criminal Procedure Code** and it is so ordered.

Dated, delivered and signed at Nairobi this 25th day of October, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for Kemo for the State

Ms. Mbogo for Gachumba for the accused

Accused present

Court assistant Karwitha