



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 7 OF 2013**

**REPULIC.....PROSECUTOR**

**VERSUS**

**TIMOTHY KIPLAGAT.....ACCUSED**

**RULING**

[1] The Accused person herein, **Timothy Kiplagat**, was arraigned before the Court on a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars thereof are that, on the **27 day of December 2012** at around 8.00 p.m. at Kipsaya Sub-location within Elgeyo Marakwet County, he murdered **AK**. The Accused denied the charge, in proof of which the Prosecution called four witness. The sum total of the evidence of the four witnesses is that the deceased had been sent by his father, **Andrew Kipkoech Chelanga (PW2)** to fetch milk from one **Maritim Kibet**. He returned in the evening and reported to **PW2** that he had been beaten by the Accused Person on the stomach, chest and back. The deceased died on the **27 December 2012**, about one month later; and according to the doctor who performed postmortem on the deceased's body, **Dr. Wilfred Kimosop (PW4)**, the cause of the deceased's death was multiple organ injuries affecting the lungs, liver and intestines.

[2] One of the Prosecution witnesses, **Moses Kiptoo Kiptum (PW1)** stated that he witnessed the beating of the deceased by the Accused inside the Accused's **Aror River Hotel at Kipsanya**, and even saved the child from further beatings. **PW3** an uncle to the 13 year old victim, confirmed that the deceased was taken to hospital following his beating but succumbed to the injuries he had received. The Prosecution was unable to call the Investigating Officer, despite several adjournments for that purpose. Accordingly, the Defence Counsel, **Mr. Otieno** was of the submission that no prima facie case had been made out at the close of the Prosecution case to warrant the accused being put on his defence. He urged for his acquittal at this stage of the proceedings.

[3] It was the argument of **Mr. Otieno** that many questions remained unanswered at the close of the Prosecution Case, such as the questions about the whereabouts of the deceased from **28 November 2012 to 27 December 2012** when he died; whether or not the deceased sought medical attention; whether the murder weapon was recovered; and whether there was an intervening cause of death of the deceased. He also faulted the failure by the Prosecution to call the Investigating Officer and cited the case of **Bwaneka vs. Uganda [1967] 1 EA 768** in support of his submission that there must be some evidence which has been kept from the court, leading to the inference that the Accused person was wrongly charged. Counsel further relied on **Republic vs. Daniel Muthee M'Ituruchiu [2005] eKLR** and **Republic vs. Wachira [1975] 1 EA 262** in urging the court to terminate these proceedings by acquitting the Accused person of the charge of Murder.

[4] It is well settled that, at this stage, the court need not be satisfied beyond reasonable doubt as to the guilt of the Accused Person. It suffices that a prima facie case be established. In **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** it was held that:

**Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the 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 would 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 agree 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 is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “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.”**

[5] From the totality of the evidence, it is manifest that the deceased was beaten by the Accused, and that he died of injuries that were consistent with the beating. I am therefore satisfied that a *prima facie* case has been made out against the Accused and he is accordingly hereby placed on his defence pursuant to **Section 306(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 18<sup>TH</sup> DAY OF DECEMBER, 2018**

**OLGA SEWE**

**JUDGE**