REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.17 OF 2016

REPUBLIC…….…….....PROSECUTOR

-VERSUS-

MELITA OLE KAIPON……ACCUSED

RULING

MELITA OLE KAIPON hereinafter referred as the accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the charge are that on 12/9/2016 at 2200 hrs at Nomaiyanat village – Kimana Location Loitokitok Sub-County within Kajiado County accused murdered Kaipon Toro nkei hereinafter referred as the deceased.

The accused who was represented at the trial my Mr. Chege advocate pleaded not guilty. The prosecution case was led by Mr. Akula the senior prosecution counsel.

The prosecution called eight witnesses to prove the guilty of the accused person.

The facts which emerged from the evidence reflect as follows:

PW1 CHRISTINE WAKESHO testified that on 12/9/2016 while at her homestead with the children and the deceased a domestic quarrel arose between the accused and his wife. As a result of the quarrel the wife of the accused came to their house to seek that safely from the deceased in order to restrain the accused from any further beatings. According to PW1 it was at that moment when the deceased went to inquire from the accused why he was always beating his wife. According to PW1 there was no physical contact save that the deceased instructed the accused to go back to his house for them to sort the differences the following day. PW1 further told the court that it appeared as if the accused had heeded the call to return to his house as the deceased sought to go and close the gate.

What PW3 heard was a voice from the deceased in the following words, “Mtaita nimewekwa kisu” (Taita I have been stabbed with a knife). In response to this distress call PW1 testified that she moved towards the direction of the deceased only to confirm that he had bodily harm. Through screams made by PW1 the family members who were sleeping in separate houses woke up and gathered at the scene.

PW2 KAIPON JOEL testified that when he responded to the distress call by PW1 he found the deceased lying on the ground having sustained fatal injuries.

PW3 PETER NTININA further testified that on the 12/9/2016 after a family dinner making he retired to his house. In a short while he heard PW1 screaming that we go for aid of the deceased as the accused was beating him. In the evidence by PW3 on arrival he found the deceased had been stabbed by the accused

and was bleeding from the left side of the stomach.

PW4 IP CHARLES MWITA attached to Kimana Police Station received the death report and did visit the scene. The evidence by PW4 reveals that when they arrived at the home of the deceased he was already dead. At this stage PW4 testified that an investigation was instituted involving the accused as the prime suspect. The focus of the investigations involved recovery of the murder weapon, a knife which was dispossessed from the accused. PW4 further testified that they made arrangements to transport the body to Loitokitok District Hospital Mortuary. The postmortem was conducted by PW6 Dr. Mwongela who on examination noted the following; blood stained face, deep cut wound left side of the scalp, cut wound left ear posteriorly and stab wound left side of the chest. In the testimony of PW4 the accused was arrested at the scene as a result of the report made by the family members.

PW7 MWANGI G. GITAU Assistant SP gazetted scenes of crime officer received exhibit memo together with photographic storage media. This was analysed and processed to come up with various photographs documenting the scene. The bundle of photographs was admitted as exhibit 1(a) and the report as exhibit 1(b) in support of the prosecution case.

PW8 PC OGUTU MAXWELL stated on his role as the investigator of the murder incident. PW3 proceeded to record statements from the witnesses, collect the exhibits like the clothings worn by the deceased, the murder weapon. PW8 confirmed that from his observations and the materials put together at the scene he recommended the charge of murder against the accused.

At the close of the prosecution case the learned counsel for the accused Mr. Chege moved a motion of a no case to answer under section 306 (1) of the Criminal Procedure Code. Mr. Chege submitted that save that the deceased was stabbed there was no eye-witness however as to who stabbed him. What emerged in the circumstances of this case according to Mr. Chege were various people who arrived at the scene and found the deceased lying on the ground. Learned counsel relied on the case of ***Republic v Daniel Musyoka Muasya & 2 Others Cr. Case No. 42 of 2009.***

On the part of the state learned prosecution counsel submitted that from the evidence of the eight witnesses it is describable that a prima facie case in their favour has been established as required by law. He felt the disputes relates as to whether there is sufficient evidence to prove the elements of the offence of murder contrary to section 203 of the Penal Code.

To this end learned prosecution counsel opined there is firmly in place prima facie evidence that: the deceased is dead, that his death was unlawfully caused. That whoever caused the death had malice aforethought. Finally, that the accused was the one who caused the death.

From the above ingredients the learned prosecution counsel submitted that as the time the offence was committed PW1 evidence established clearly that the accused was at the scene. Learned prosecution counsel further contended that the identity of the accused as the culprit cannot be faulted. The same night of the incident learned counsel submitted that PW1 raised a distress alarm requesting assistance from her other children and neighbours from what had happened to the deceased; that the alarm made the sons and other neighbours to reconvent like PW2, PW3, PW5 immediately on answer to PW1 call by rushing to the homestead. The police assistance also had been required through phone calls made as supported by the testimony of PW4 and PW8. According to learned counsel submissions the police arrested the accused at the scene. The knife which became to be associated with the killing of the deceased was recovered from the accused. Learned counsel argued and submitted that the autopsy report from the pathologist indicated that the deceased suffered physical harm from which he finally succumbed to death.

It therefore follows according to learned prosecution counsel that at the close of the prosecution case a prima facie case has been made out to warrant the accused to answer.

I have considered the rival submissions and the evidence at the close of the prosecution case. From the evidence the following facts are undisputed:

That the deceased in this case Kaipon Toronkei was stabbed and killed on the 12/9/2016. The deceased was the husband to PW1 and father to PW2 and PW3. The knife which was used to stab the deceased was recovered at the scene by PW4. The deceased was found lying on the ground in a pool of blood within his homestead from the stab wounds. The wife PW1 was standing next to the body of the deceased. That earlier before the incident the wife of the accused had gone to the deceased house to seek help for the deceased to be restrained from his conduct of violence against her. It was in this set of circumstances according to PW1 that the deceased was attacked occasioning bodily harm. The prosecution case as presented by PW1, PW2 and PW3 the incident of stabbing must have been occasioned by the accused. The matter was then reported to the police and investigations commenced to establish the cause of death. That is the evidence to be analysed to make a finding whether the accused is to be called upon to answer.

Under section 306 (1) of the Criminal Procedure Code the law requires of this court to consider the evidence at this stage as follows:

> **(1) Whether there exists evidence linking the accused with the offence charged or any other offence.**
>
> **(i) In the event the prosecution fails to place before court such evidence as envisaged under (1) above this court is to make a finding of not guilty and acquit the accused.**

Secondly, if the court on evaluation of the charge and evidence at the close of the prosecution case finds there exist sufficient evidence implicating the accused of the offence or any other than the accused shall be called upon to answer or adduce evidence in rebuttal.

What therefore this court is being asked to do by the defence and prosecution counsel at this half time submissions is to determine whether a prima facie evidence exist to place the accused on his defence. In the event no such evidence has been availed by the prosecution the defence submits that a decision to discharge or acquit the accused should be exercised in their favour.

The concept on what constitutes a prima facie case is not defined in our statute law or the criminal procedure code. However the definition has found its way in case law and jurisprudence developed over time by the superior courts within and without the region.

The very early opportunity arose when the Eastern African Court of Appeal in the case of ***Bhatt v Republic [1957] EA 332*** discussed the principle and held *interalia*:

> **"That a prima facie case must mean where a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defendant. That the question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, but sufficient ought to put the accused on his defence. A mere scintilla of evidence can never be enough, nor of worthless discredited evidence"**

What the wording in this cited authority indicates is that a mere prima facie case is not sufficient to support a conviction but a tribunal or a court could convict on such evidence in the event there is no rebuttal. What is to be borne in mind is the peculiarity of the facts and circumstances of each case. There could be no general rule to this application of a prima facie evidence.

In another jurisdiction the Federal Court of Malaysia in the case of ***Balachandran v Public Prosecutor 2 MLJ 301*** spelling out the meaning of a prima facie case under section 180 of their CPC with similar provisions like our section 306 had this to say *interalia*:

> **"The test at the close of the case for the prosecution would therefore be: is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a**

consideration of the existence of any reasonable doubt in the case for the prosecution. If there is such doubt there can be no prima facie case."

When I consider the prosecution evidence and the evidence in line with the principles in ***R.T. Bhatt*** and ***Balachandran Case*** (Supra) I am of the considered view that the prosecution has made out a case against the accused to warrant him to be called upon to answer as provided for under section 306 (2) of the Criminal Procedure Code. The provisions of section 306 (2) as read with section 307 of the Criminal Procedure Code read and explained to the accused.

Dated, delivered and signed in open court at Kajiado this 19th day of April, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Mateli Court Assistant

Mr. Nyaata for accused present

Mr. Akula for Director of Public Prosecutions - present