



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCR NO. 35 OF 2015**

**(FORMERLY MERU HCCR NO. 67 OF 2015)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER KITHAKA KIRIGA.....ACCUSED**

**R U L I N G**

1. **PETER KITHAKA KIRIGA** the Accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented to this court are that the Accused herein murdered **ALICANGEL MUGAO MAKARA** (the deceased) on 6<sup>th</sup> September, 2014 at Nkondi market, Tharaka South District Tharaka Nithi County. The Accused denied the offence and the prosecution called a total of five (5) witnesses in support of their case and at the close of prosecution's case, this court is required to determine whether sufficient evidence has been laid to warrant the Accused person being placed on his defence.

2. Both the defence and the prosecution have filed their respective submissions on their respective position in this regard. The defence has submitted that the prosecution has not established a prima facie case against the Accused person to require him defend himself. Mr. Mutani learned counsel for the Accused has contended that the prosecution's case is hinged on one eye witness and wondered how that could be possible given that there were many other people at the scene. In his view though a fight could have been established, the necessary ingredient of malice aforethought as required under **Section 206** of **Penal Code** was not proved. The defence has further alluded that the cause of death of the deceased was not established as no evidence was tendered by the prosecution in that regard. The defence has pointed out that no post mortem report was tendered in evidence and that in his view showed that the cause of death of the deceased is unknown and that the prosecution had a burden to prove their case and not leave any room for speculation particularly on the cause of death. The defence has cited the decision in **RAMANLAL TRAMBAKLAL BHAT -VS- REPUBLIC [1957] EA** to support his contention that a prima facie case is only made out if at the close of the prosecution case, the evidence tendered is sufficient to sustain a conviction and that it was not the responsibility of the defence to fill the gaps left out by the prosecution in their case. The decision in the case of **REPUBLIC - Vs- JOHN MUTUGI RWANDA [2016] eKLR** was also cited in this regard.

3. On the other hand, the state has submitted that they have established a prima facie case as per the principle elucidated in the cited decision of **RAMANLAL TRAMBAKLAL BHAT-VS- REPUBLIC [1957] EA**. The state has contested the defence view that without the post mortem report no prima facie case can be established. The prosecution contends that failure to adduce medical evidence to prove the cause of death is not in itself fatal as their view the case can be established without medical evidence and cited the decision in the case of **Ndungu - Vs- Republic [1985] KLR 487** to support their contention. Another authority cited was the Court of Appeal case of **DORCAS JEBET KETTER & ANOR -VS- REPUBLIC [2013] eKLR** where the court observed that in some rare instances especially if it is established that the deceased died in the hands of the accused person conviction can still lie in the absence of medical evidence.

4. This court has considered the evidence tendered and submissions made by both counsels. I have made a significant observation of what the Accused herein told the court when the plea was taken and when the same is taken together with evidence tendered by the prosecution. I am satisfied that a prima facie case has been made out against the accused sufficient enough to place him on his defence. He has a case to answer.

**Dated and Delivered at Chuka this 28<sup>th</sup> day of June, 2017.**

**R .K. LIMO**

**JUDGE**

**28/6/2017**

**Court:**

Ruling dated, signed and delivered in the open court in the presence of Mutani for Accused and Machirah for state.

**R.K. LIMO**

**JUDGE**

28/6/2017