REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL CASE NO.20 AND 21 OF 2016

REPUBLIC……..……...PROSECUTOR

VERSUS

NICHOLAS KIPKOECH…….……..……1ST ACCUSED

VICTOR CHERUYOIT ROTICH…….……..……2ND ACCUSED

RULING

1. The 1st accused, Nicholas Kipkoech and the 2nd accused, **Victor Cheruyoit Rotich**, are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 3rd day of June 2016, at Kapkitony sub-location in Chemamul Location, Kericho West sub-location, the accused persons jointly murdered Leonard Kiprotich Sang.

2. The prosecution called 10 witnesses. At the close of the prosecution case, the defence indicated that it would make submissions that the prosecution had not established a *prima facie* case against the accused to warrant their being placed on their defence.

3. In her submissions, Ms. Keli for the state contended that a *prima facie* has been established that warrants the accused being placed on their defence. The prosecution had called 10 witnesses who were, in the view of the state, credible, reliable and consistent, and their testimonies corroborated each other. Four of the prosecution witnesses, PW1, PW4, PW2 and PW5, were eye witnesses who clearly saw the accused persons and the deceased fighting. Further, that two of the prosecution witnesses, PW2 and PW5, saw the 1st accused rush to his homestead and come back to the scene of crime armed with a panga. They had also seen him stab the deceased in the chest with the panga, which was produced in evidence.

4. The prosecution had also called the doctor who performed the post mortem on the body of the deceased, and who produced the post mortem report. The evidence was that the deceased had died as a result of the fatal injuries sustained in the assault by the accused. The prosecution relied on the decision in **Criminal Appeal No. 76 of 1957 – Ramanlas T. Bhatt vs R**- with respect to when a *prima facie* case has been established. It was its submission that a *prima facie* case had been made out by the prosecution and the accused persons should be placed on their defence.

5. On behalf of the accused, Learned Counsel, Mr. Kiprono, submitted that the prosecution has not established any case against the accused persons, and to put them on their defence would be a waste of precious judicial time. From his analysis of the evidence, the only eye witness was PW5 who could not clearly testify that he had seen the accused stab the deceased. Counsel further submitted that according to the evidence of PW5, the panga presented in court as the one with which the 1st accused had stabbed the deceased was not the one which was used. The weapon used during the incident was not therefore before

the court.

6. It was also the submission of Counsel for the defence that there is no mention of the 2nd accused by the witnesses presented by the prosecution, except the investigating officer, whose evidence was that the 2nd accused had presented himself at the police station stating that he was the one who stabbed the deceased. In the view of the defence, the prosecution case was neither credible nor consistent, and a *prima facie* case had not been established.

7. I have considered the submissions of Counsel for the parties in this matter against the evidence adduced by the prosecution in support of its case. In accordance with the precedents established in this jurisdiction, the prosecution is required to establish only a *prima facie* case at this juncture. In **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335** as follows:

> ***"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."***

8. The case against the accused is that the deceased fought with the 1st accused person at a bar in Chemamul location. The evidence of three of the prosecution witnesses, PW1, PW2 and PW5, was that they saw the 1st accused ran to his home, which was about 200 metres from the bar where the incident took place, and return with a panga which he used to stab the deceased. The post mortem report produced by PW9 shows that the deceased died as a result of the injuries sustained in the attack.

9. Taking all the facts and circumstances of this case as presented by the prosecution, I am satisfied that the prosecution has established a *prima facie* case against the 1st accused to warrant placing him on his defence. This is borne out by the fact that he was seen by eye witnesses fighting with the deceased, and was then seen to ran to his home and return with a panga, with which he stabbed the deceased.

10. With respect to the 2nd accused, the prosecution's case is that he had a common intention with the 1st accused to cause the death of the deceased. The evidence is that he was in the company of the 1st accused. He heard that the 1st accused was fighting with the deceased and he left home, armed with a knife, with which he stabbed one Geoffrey Mutai who was trying to separate the 1st accused and the deceased. The following day he surrendered himself to the police.

11. In the case of **R vs Jagjiwan M. Patel and Others (1) T.L.R. (R) 85** the court stated that:

> ***"…..all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his 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, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."***

12. The evidence suggests that the 2nd accused, who rushed from his home armed with a panga, intervened and stabbed the person who was trying to separate the deceased and the 1st accused. The prosecution case is that the 1st and 2nd accused had a common intention to attack and cause death to the deceased.

13. At this stage, I am not required to decide whether or not the evidence before me is weighty enough, if believed, to prove the case beyond reasonable doubt. This determination can only be made after the case for the defence has been heard.

14. I am therefore satisfied that the prosecution has made out a prima facie case against the accused. I accordingly place the accused on their defence in accordance with section 306 of the Criminal Procedure Code.

15. I also wish to inform the accused of their right under section 306 (2) of the Criminal Procedure Code to inform this court whether they intend to give a sworn or unsworn statement in their defence and whether they intend to call any witnesses.

Dated Delivered and Signed at Kericho this 27th day of September 2017.

MUMBI NGUGI

JUDGE