



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 97 OF 2010**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**EVANS OKETCH MAWERE.....ACCUSED**

**RULING**

1. The accused **EVANS OKETCH MAWERE** is 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 2<sup>nd</sup> day of June, 2010 at Ngai II Estate in Huruma within Nairobi Area jointly with others not before court murdered **ALPHONCE NGUI MATIVO**.

2. He pleaded not guilty to the said charges and on 25/5/2011 his trial commenced before Justice N.R.O Ombija as he then was who heard the evidence of eleven witnesses and partly heard PW12 before he retired from the Judiciary and upon compliance with the provisions of Section 200 of Criminal Procedure Code, the matter proceeded before me when **PW12 CPL COSMAS KATINDI** completed his evidence in chief and was cross examined by the Advocate for the defence.

**SUBMISSIONS**

3. At the close of the prosecution case, the parties herein were invited to make their submissions. On whether the prosecution has established a prima facie case to enable the court place the accused person on his defence,

**PROSECUTION'S SUBMISSIONS**

It was submitted that the deceased was last seen alive at Valley View Bar and Restaurant on the 2<sup>nd</sup> June, 2010 and that his body was recovered on 3<sup>rd</sup> June, 2010 along Juja House Street on the grass along the road and the cause of his death was ascertained to be due to a stab wound into his heart. It was submitted that the accused was found to be in possession of the deceased mobile phone immediately after the fatal attack on 4<sup>th</sup> June, 2010 and therefore on the doctrine of recent possession the prosecution had established a prima facie case against him.

**DEFENCE SUBMISSIONS**

4. On behalf of the accused it was submitted that the deceased, as the evidence tendered, was last seen in the company of **PW1 FESTUS MUSYOKA MADHUVA, PW2 JOSEPH KIMEU NDEMANGE and PW8 CAROLINE KANINI MUSYOKA** whose testimonies were contradictory. It was further submitted that the ownership of the said mobile phone the subject matter of the doctrine of recent possession connecting the accused with the offence herein was not established in support of which the case of **BONIFACE MUGENDI KINYUA v REPUBLIC COURT OF APPEAL AT NYERI CR. APPEAL NO. 468/2010** was submitted.

5. It was therefore submitted that the prosecution had failed to establish a prima facie case and to put the accused on his defence would be to get the accused fill the gaps in the prosecution case and reference was made to the following cases:-

1. ANTHONY NJUE NJERU v REPUBLIC (2006) eKLR

2. RAMANLAL TRAMBAKLAL BHATT v REPUBLIC Criminal Appeal No. 76 of 1957 EALR 332.

6. At this stage, the issue is not whether or not the prosecution has established a case against the accused person beyond reasonable doubt but whether a case has been made to justify calling upon the accused person to offer an explanation as was stated in the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

*“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 a defence, it may be a strong case or 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.”*

7. From the evidence tendered before the court and without saying much I am satisfied and find that the prosecution has established a prima facie case to enable the court put the accused on his defence which I hereby do. The accused is therefore advised on his rights under Section 300 of Criminal Procedure Code.

DATED, DELIVERED and SIGNED at Nairobi this 19<sup>th</sup> day of September, 2017.

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Meroka for the State*

*Miss Kilonzo for the accused*

*Accused present*

*Tabitha court clerk*