



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL DIVISION
CRIMINAL CASE NO. 89 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MBOGO WAMBUGU.....ACCUSED

RULING

1. The accused **FRANCIS MBOGO WAMBUGU** was 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 20th day of April, 2005 at Bahati Estate within Nairobi County murder **JADIEL WAMBUGU MBOGO**.
2. He pleaded not guilty to the said charges and to prove its case against him the prosecution called a total of seven (7) witnesses and at the close of the prosecution case it was submitted by the prosecution that a prima facie case had been made out to enable the court place the accused on his defence based on the ground that the accused was seen with the deceased while alive and the accused was subsequently found in his house wherein the body of the deceased and the murder weapon was found.
3. On behalf of the accused it was submitted that the prosecution had not made up a prima facie case as defined in the case of **REPUBLIC v BENARD OBUNGA OBUNGA (2015) eKLR** which referred to the case of **RAMNALAL TRAMBAKLAL BHATT v REPUBLIC [1957] EA 332**. It was submitted that there was no direct evidence identifying the accused person as the perpetrator and that mere suspicion cannot be treated as credible evidence.
4. At this stage of the proceedings the law that guides the court is set out in **Section 306** of the Criminal Procedure Code in the following terms:-

“306 (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considered that there is no evidence that the accused or any one of several accused committed the offence shall after hearing if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty.

306 (2) When the evidence of the witnesses for the prosecution has been concluded, the court if it considered that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each of the accused persons committed the offence, shall inform each of the accused person of his right to address the court, either personally or by his advocate (if any) to give evidence on his behalf, or to make an unsworn

statement and to call witnesses in his defence and in all cases shall require him or his advocate (if any) to state whether he intends to call any witnesses as to fact other than the accused person himself and upon being informed thereof, the judge shall record the fact.

306(3) If the accused persons says that he does not intend to give evidence or make an unsworn statement or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person, but if the accused person says that he intends to give evidence or make an unsworn statement or to to adduce evidence, the court shall call upon him to enter upon his defence.”

5. The court has to consider whether a prima facie case has been made out which prima facie case was defined in **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** at pg 334 as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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 may not be easy to define what is meant by 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.” (Emphasis added)

6. This legal position must be weighed against Justice Ojwang (as he then was) in **REPUBLIC v SAMWEL KARANJA KURIA CRIMINAL CASE NO. 130 OF 2004 Nairobi (2009) eKLR** in the following terms:-

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled”.....

In the Court of Appeal No. 77 of 2006 the Court of Appeal expressed that too detailed analysis of the evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted.”

7. With that in mind and having looked at the prosecution evidence on record thereon at this stage of trial and in particular the evidence of PW1 and PW2 I am satisfied and hold that the prosecution has made out a prima facie case to enable me put the accused on his defence which I hereby do. The accused is therefore advised of his rights under **Section 306(2)** and **307** of the Criminal Procedure Code and is now called upon to make an election through the legal advice of his advocate how he intends to defend himself.

DATED, DELIVERED and SIGNED at Nairobi this 16th day of October, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Wakaba for the accused

Accused present

Court clerk Tabitha