

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 74 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DAVID NJOROGE NGANGA.....ACCUSED

RULING ON NO CASE TO ANSWER

1. The Accused Person, David Njoroge Ng'ang'a ("Accused Person") is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Salome Wangui Gitau on 15/12/2014 at Nyanduma Location, Kiambu County.

2. The Accused Person pleaded not guilty and the trial was set down for hearing. The Prosecution called nine witnesses. The Prosecution narrative as brought out by the nine witnesses was that the Deceased, a twelve-year old girl, was working at a tea farm with her mother who shared an employer with the Accused Person. According to the Prosecution witnesses, at some point in the mid-morning, the Deceased went to the employer's homestead to pluck some plums. Several witnesses testified that only the Accused Person was at the homestead at the time. That was the last the Deceased was seen alive. Her body was later discovered in some bushes about 100 metres away with an allegedly fresh clear foot path from the Accused Person's house to the place where the body was found. The Pathologist who testified concluded that death was due to asphyxia. A physical examination of the body also showed that the Deceased had been sexually assaulted.

3. Aside from the evidence of opportunity, the Prosecution also led evidence based on the conduct of the Accused Person after the incidence – where he allegedly disappeared – from which it seeks inference that it is consistent with the Accused Person having committed the offence.

4. On its part, the Defence says that there is no sufficient evidence to put the Accused Person on his defence. In particular, Mr. Ndung'u, counsel for the Accused Person, impressed on the Court to note that the only available evidence is circumstantial and it is not strong enough to warrant putting the Accused Person on his defence.

5. At this stage in the criminal trial, the Court considers the Prosecution evidence presented as well as the submissions by the Prosecution and Defence whether the evidence presented warrants putting the Accused Person on his defence. The task of the Court at this stage in the proceedings is to decide if Prosecution has made out a sufficient case for the Accused Person to be placed on his defence. The test to be utilised by the Court in making that determination was famously stated in the ***Bhatt –vs- R [1957] EA 332***. In plain terms, the Court is expected to determine if there is enough reliable evidence to warrant the Court to hear from the Accused Persons or if the case should be stopped at this point.

6. The test was stated in the ***R v Galbraith [1981] 1 WLR 1039*** thus:

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a [Court] properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where

however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliabilityand where on one possible view of the facts there is evidence upon which a [Court] could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to [proceed for Defence hearing]...

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

7. In the present case, taking the Prosecution case at its highest that is, without considering the “weightiness” of the evidence or coming to a definitive conclusion of the reliability of the witnesses, I am of the opinion that the case should be allowed to proceed for defence hearing.

8. Consequently, the Accused Person is put on his defence. The case shall be set down for defence hearing.

Delivered at Kiambu this 23rd day of November, 2017.

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JOEL NGUGI

JUDGE