



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL CASE NO.5 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SILAS MAGONGO ONZERE alias FREDRICK NAMEMA.....ACCUSED**

**RULING**

The accused person Silas Magongo Onzere alias Fredrick Namema was indicted before this court on the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The state alleged that on the 22<sup>nd</sup> day of August 2008 at PCEA area Kiserian Township, within Kajiado North Sub-County accused murdered Kevin Ngugi.

During the time of plea, the accused pleaded not guilty and thereby placed the state on notice to adduce the evidence to prove the charge beyond reasonable doubt. He is represented at the trial by learned counsel Mr. Itaya whilst the prosecution is being conducted by the senior prosecution counsel Mr. Akula.

In order to prove the contrary on the presumption of innocence of the accused, the state summoned seven witnesses. The following elements of the case arose as a result of the evidence by each of the witnesses.

PW1 Benard Wanjau who testified as the finger prints expert from the National Bureau of Registration gave evidence in respect of the accused registration as a citizen of Kenya. The gist of PW1 testimony was to profile and isolate finger prints impression taken on Form P20 and C24 and the owner of ID No. xxxxxxx. According to PW1 the finger prints impression comparisons with ID No. xxxxx revealed to be that of Silas Magongo Onzere and not Fredrick Namema. He therefore confirmed that the registration forms and finger prints belong to one and only person identified as Silas Onzere and not Fredrick Namema. The reference in exhibit C indicative to be that of a different person in the name and style of Fredrick Namema is untrue. The finger prints on the forms save for the name was made by one and the same person.

PW2 Jacob Muinde testified as the father to the deceased on the report he received from his wife PW4 Agnes Wangari Ngugi and also the mother to the deceased. In the testimony by PW2 and PW4 prior to the deceased death he had complained to them that he was assaulted by one Fredrick Namema. That is when PW2 and PW4 took upon themselves the step of escorting him to Ngong Hospital for medical checkup. From the observation and examination the deceased received some treatment but his condition never improved. PW2 and PW4 further told this court that they decided to seek a second opinion at Kenyatta National Hospital where he was admitted on 4/9/2008. As per the discharge summary the initial complaint by the deceased was that of injury to the head and neck. He was therefore put on medication but on the 7/9/2008 at 10.30pm he passed on.

Following the death of their son he was taken to the City Mortuary where PW7 – Dr. Johansen Oduor

performed the postmortem. PW2 and PW4 confirmed in their evidence that they did identify the body of the deceased prior to PW7 conducting the postmortem. The evidence on identification of the body of the deceased is also corroborated by PW5 Joseph Karauri. The postmortem examination which was conducted by PW7 Dr. Johansen Oduor subsequently revealed that the deceased suffered no physical injuries prior to his admission to Kenyatta National Hospital. What was observed by PW7 on the body of the deceased was the presence of pus in the surface of the brain. The pathologist PW7 indicated positive findings from the pus signs of increased intracranial pressure. He gave the cause of death as increased intracranial pressure due to pus on the surface of the brain.

The content of the medical legal postmortem report compiled by PW7 was tendered in evidence as exhibit 5. According to PW7 the body of the deceased did not sustain any physical injuries from the time it was alive upto the time the autopsy was performed on it. The evidence on identification of the body is also corroborated by PW5 testimony one Joseph Kaurari.

PW6 Peter Irungu, a neighbour to the deceased family at their Kiserian home testified that on 22/8/2008 he was walking home in company of the deceased. According to PW6, the accused a man known to him as Fredrick Namema emerged from the opposite direction and demanded the whereabouts of his DVD from Kevin the deceased. PW6 further told this court that the accused approached the deceased held him by his neck and the same time used a piece of wood picked from the donkey cart to beat him on the head. When he was done PW6 stated that he threatened the deceased with dire consequences if the incident on assault ever reaches the parents PW2 and PW4. PW6 was later to learn that the deceased passed away and his death was a subject of police investigations. He was therefore required to record a statement on what he witnessed on 22/8/2008.

At the close of the state case both counsels filed written submissions on their perspective of the case being advanced against the accused. The issue at stake here is whether at the conclusion of the state case the prosecution has produced sufficient evidence to establish a prima facie case?

I have weighed and evaluated the charge, submissions by both counsels for the state and the defence. The evidence by the seven witnesses summoned by the prosecution on behalf of the state to prove the elements of the charge has also been scrutinized and its quality to establish whether a prima facie case against the accused exist.

### **The burden of proof:**

It is the law in Kenya as entrenched in the constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: ***“whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”***

As to what constitutes the burden of proof beyond reasonable doubt the case of **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

**“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”**

In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. So likewise at the close of the prosecution case under section 307 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused

person to be called upon to answer.

In the instant case the accused is facing a charge of murder contrary to section 203 of the Penal Code. What is murder in law? Under section 203 it is defined as to ***“when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

Pursuant to section 203 the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or commission of the accused. Secondly, that in killing the deceased the accused did so actuated by either express or implied malice aforethought. Thirdly, it is incumbent upon the prosecution to place the accused at the scene of the murder.

The question under section 306 of the Criminal Procedure Code is whether on objective consideration of the situation the state has presented a prima facie evidence implicating the accused with the death of the deceased. The scope and ambit of the prosecution case must fall within any of the defined circumstances under section 206 of the Penal Code on what constitutes malice aforethought.

Section 206 defines malice aforethought is deemed to be established by evidence when any of the following circumstances are proved by evidence adduced against any defendant:

**(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.**

**(c) An intention to commit a felony.**

**(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The issue at stake in the present case is whether given the evidence and the ingredients of the offence under section 203 as read together with section 206 of the Penal Code the accused has a case to answer or not. The relevant provision to this question falls under the provisions of section 306 (1) and (2) of the Criminal Procedure Code which provides inter alia that ***“when the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal.”***

In the alternative if from the evidence of witnesses for the prosecution the court concludes that there is evidence to support the charge against the accused it shall invite him to tender evidence personally or call witnesses in his defence. The court is obligated to exercise discretion under section 306 (1) of the Criminal Procedure Code to determine the evidence of a prima facie case at these half-time submissions of the trial in a criminal case.

As I have stated elsewhere the legal definition of what constitutes a prima facie is nowhere found in our code Cap 75 of the Laws of Kenya. The courts have however come to aid the law by developing the judicial meaning of the phrase prima facie case. The following cases have articulated the standard and guidelines on what satisfies the definition of a prima facie case.

In examining similar situations like ours the English Court in *May v O’Sullivan [1955] 92 CLR 654* stated as follows:

**“When at the close of the case for the prosecution a submission is made that there is no case**

**to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”**

In later years the court in *Republic v Prazad [1979] 2A CRIM R 45 King CJ* held the very same standard on a prima facie case:

**“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”**

In this sense the English courts have made it clear that prima facie case is distinguishable with presumption. The key foundation on this issue is a finding whether the prosecution has in fact made out a case to warrant the accused person to proceed in tendering his defence in any of the options provided for under section 306 (2) of the Criminal Procedure Code. Under section 306 (1) of the Penal Code what the courts look for is prima facie evidence for the prosecution which unless controverted would be sufficient to establish the elements of the offence.

The English court in the case of *Republic v Galbraith [1981] WLR 1039* articulated the issue which I consider relevant in our situation in the following passage on a motion of no case to answer and held 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 interment 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 jury 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 witnesses’ reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”***

In applying the principles in this case in the context of our local approach I take notice that Kenya does not operate a jury system. Taking into account the provisions of section 306 of our Criminal Procedure Code the arguments and principles elucidated in the above cited authorities are persuasive and applicable in the present case while exercising discretion on a motion of no case to answer. This is what the defence counsel Mr. Itaya submitted for the court to apply its mind and make a finding that the accused has no case to answer.

The Kenyan criminal law is anchored under Article 50 of the Constitution 2010 and any other statute law on the right to a fair hearing. The golden thread woven from the constitution to statute laws is that the duty of the prosecution is to prove the accused guilty beyond reasonable doubt. However, at half-time submissions fortunately so the use of the expression beyond reasonable doubt is not the consideration.

The courts in Kenya taking the cue from English Law have elaborated and articulated the meaning of a prima facie case drawing inspiration from the principles in the landmark case of *R.T. Bhatt v Republic [1957] EA 332 – 335* where the Eastern Court of Appeal stated as follows:

**“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the 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 will fill the gaps in the prosecution case. Nor can we agree 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 a prima facie, 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.”**

Given this background it is of course my duty this far to establish whether prima facie evidence does exist in favour of the prosecution. I propose to deal by way of scrutinizing the evidence visa viz the ingredients of the offence of murder contrary to section 203 of the Penal Code to make a finding for the state to proceed further or discharge the accused person.

**(a) The death of the deceased:**

The deceased Kevin Ngugi is dead. PW2 and PW4 who testified as father and mother respectively gave a chronology on the treatment and admission of the deceased in both at Ngong and Kenyatta National Hospital. The deceased died while undergoing treatment at Kenyatta National Hospital on 7/9/2008. PW2, PW4 and PW5 (Joseph Karauri) identified the body prior and during the postmortem at the City Mortuary. The death of the deceased was corroborated by medical evidence given by PW7 Dr. Johansen Oduor who conducted the postmortem on 16/9/2008. The postmortem report was admitted in evidence as exhibit 5.

This ingredient has been proved by the prosecution.

**(b) The unlawful cause of death by either acts of omission or commission:**

Death of a human being is unlawful when it is caused by another in circumstances which are not authorized or permitted by law. (See the principle in the case of *Guzambizi S/O Wesonga v Republic [1948] 15 EACA 65*). This legal proposition is consistent with Article 26 of our constitution which provides for the right to life for every person. The justified exceptions the law recognizes is in execution of a court sentence, for the defence of property or defence of the life of self or any person from unlawful violence.

The prosecution therefore has a duty to prove that the accused person caused the death of the deceased in this case through unlawful acts. Proving the cause of death in Kenya may either be through direct or circumstantial evidence. The circumstances which the court will hold an accused person liable for the death of another are provided for under section 213 of the Penal Code (Cap 87 of the Laws of Kenya).

It is trite law as espoused in the case of *Joan Chebichii Sawe v Republic [2003] eKLR* that ***“before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”***

Now turning to the present case the prosecution called seven witnesses in support of the killing of the deceased. The evidence on record in this case is not in dispute. According to PW4 Ann Wangari the

mother to the deceased it was on 23/8/2008 when she noticed swollen face and complaints of a headache from Kevin her son herein (deceased). In the course of further inquiry PW4 further stated that the deceased revealed that he had met the accused on the road who in turn assaulted him with a piece of timber inflicting harm on the head. In this situation PW4 bought some medicine but the deceased condition did not improve. That is when in conjunction with PW2 the father to the deceased decided to take him to Ngong District Hospital. The deceased was duly examined but his condition continued to deteriorate.

The next medical facility to attend to the deceased was Joska Hospital at Kiserian who on diagnosis referred him to Kenyatta National Hospital. This was the hospital the deceased was to be admitted from the 4/9/2008 to the 7/9/2008 when he succumbed to death. The deceased body was taken to the City Mortuary for postmortem examination to determine the cause of death. According to the testimony of PW2, PW3, PW4, PW5, the doctor who carried out the autopsy is one Johansen Oduor who was summoned as PW7. The doctor in his postmortem report admitted in evidence as exhibit 5 ruled out any evidence of assault or harm to the body of the deceased prior to his admission to Kenyatta National Hospital. In the doctor's opinion during an examination of both internal and external parts of the body the only positive findings was presence of pus in the surface of the brain. This caused intracranial pressure. It is evident from PW7 testimony that the postmortem examination revealed no traces of injuries. Besides the autopsy report PW7 presented before court the discharge summary from Kenyatta National Hospital admitted as exhibit 6.

The circumstances of the deceased admission, complaints, and investigations reveal the following:

**Complaints:** severe headache, throat pain, inability to swallow, severe fever.

**Physical findings:** sick looking febrile, throat hyperemic, no tonsillar enlargement, stiff neck, incoherent speech.

The prosecution on causation relied heavily on the testimony of PW6. According to PW6 he was walking on the same road with the deceased when suddenly the accused emerged took out a piece of wood and hit the deceased on the head. The deceased was initially seen at Ngong and Joska Hospital before being referred to Kenyatta National Hospital.

This court is not privy to the diagnosis and examination findings at these two facilities. The deceased admission and discharge at Kenyatta National Hospital is well captured in the discharge summary of 8/9/2008 admitted as exhibit 6. There are a number of factors to be drawn conclusively from the testimony of PW6 and PW7. The deceased complained to PW4 that his health condition is associated with the assault by the accused. This was also the testimony of PW6 who can be better described as the star witness for the prosecution in this case. There are all these allegations by the deceased and also the witness statement by PW6.

What is intriguing is the variance on the clinical findings made by the doctor who treated the deceased at Kenyatta National Hospital and the evidence by PW6. The discharge summary dated 8/9/2008 never made a finding from the investigations that the deceased sustained head injury of the nature of an assault. The deceased complaint was severe headache but the physical findings revealed throat hyperemic, stiff neck, kernings and incoherent speech. The CT scan of the head confirmed subdural empyema. In the explanation by PW7 subdural empyema is an intracranial focal collection of purulent material between the dura mater and arachnoid mater. According to PW7 the inflammatory mass of pus in the surface of the brain which increased the pressure and caused the death of the deceased. The deceased was therefore being treated and managed for subdural empyema a complication of bacterial meningitis and not the head injury from assault. The physical postmortem examination by PW7 was in agreement with the discharge summary of 8/9/2008. PW7 went further to confirm that the body system of the deceased had no signs of physical injuries. That therefore leaves the testimony of PW6 a stand-alone version to support as what one can say is evidence as to what caused the death of the deceased. There is no link between the evidence of PW6 and the death of the deceased. We are not told whether the inflicting of injury by the accused triggered the subdural empyema or the stiff neck deduced from the clinical findings and the postmortem

report. In my view the prosecution has not led evidence to bring this case within the scope of section 213 of the Penal Code on causes of death.

In this case let us agree for a moment that the accused assaulted the deceased. The onus of proof was on the prosecution to establish that the deceased death on 8/9/2008 was as a result of the unlawful act of the accused. The evidence placed before me shows that prior to 22/8/2008 the accused suffered no injury or diseases who acts or omission by the accused hastened his death.

The test is simple: is there evidence capable of proving that the deceased died out o an unlawful act of the accused. The position of the law is that as a general rule this court may act on the testimony of a single witness to proof a fact support of the offence. (See *Phipson, Hodge Malek on Evidence 17<sup>th</sup> Edition 2010*).

I have carried out an examination of the evidence of PW6 with the greatest care as a single identifying eye witness on the assault of the deceased. PW6 uncorroborated evidence is not one that this court can warn itself and place reliance on it to establish a prima facie case. It appears to me there was an assault but absence of corroboration this single fact has been disapproved by the expert evidence of PW7 Dr. Oduor.

It defeats logic that the deceased was physically assaulted on 22/8/2008 but no such signs of lacerations, abrasions or trauma were noticed by either doctors at Ngong or Kenyatta National Hospital. In deed prima facie evidence under section 306 for an offence of this nature must be water tight. I cannot find the evidence of such an examination from various medical facilities linking the deceased illness to an incident of an assault.

In order to appreciate the current jurisprudent within our jurisdiction this is one case I am unable to rely on uncorroborated evidence of PW6 to rule in favour of the prosecution on existence of a prima facie case. The medical evidence by PW7 contradicts that of PW6.

In the context of this case I find it unbelievable as PW6 told this court that the deceased was assaulted four times on the head with a piece of wood and yet no iota of evidence found during medical examination by PW7. There is therefore scarcity of evidence in the case on the part of the prosecution to satisfy the element of unlawful cause of death. In this situation the prosecution has fallen short of the threshold on the sufficiency of the evidence to attach culpability at this stage of the trial against the accused.

**(c) Malice aforethought on the part of the accused:**

Malice aforethought is a technical term associated with the state of mind of the accused charged with the offence of murder. The distinct state of mind and circumstances the state must prove on any one of them is clearly stated under section 206 of the Penal Code:

**(a) The intention to kill.**

**(b) The intent to do/cause grievous harm.**

**(c) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.**

**(d) An intention to commit a felony.**

**(e) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The state through the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. This leads to the question when can a court infer malice aforethought in the crime of murder?

The Eastern Court of Appeal favoured this approach in the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63***. The court held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

- (1) The nature of the weapon used.**
- (2) The manner in which it was used.**
- (3) The part of the body targeted.**
- (4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.**
- (5) The conduct of the accused before, during and after the incident.**

I am satisfied that the Tubere test case continue to be the guide even in the latest cases in interpreting the circumstances and definition of malice aforethought under section 206 of the Penal Code i.e. ***George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic [1991] KLR 622***.

I have reviewed the evidence of the seven witnesses PW1 – PW7 at the close of the prosecution case. It is clear under the circumstances of this case: first the alleged murder weapon was not recovered for the court to make conclusive findings on its nature and any physical harm inflicted. Secondly, parts of the body allegedly targeted as per the testimony of PW6 no probative evidence from the medical examination established the deceased suffered harm. Thirdly, the manner in which PW6 stated the weapon was used did not seem to inflict either a single or multiple wound upon the deceased. As pointed out elsewhere in this ruling there is no nexus between PW6 testimony with the discharge summary and the autopsy report by PW7. This loose ends rendered the testimony of a single witness PW6 casting a doubt on its credibility.

Going by the same analogy the prosecution failed to present before court the alleged murder weapon used to inflict harm as stated by PW6. From the evidence given by PW2 and PW4 both doctors at Ngong and Joska Hospital never confirmed that the deceased diagnosis and treatment was due to an assault or physical harm. The pathologist who finally conducted the postmortem ruled out any injuries as having been inflicted upon the deceased. What that has done to the prosecution case is the failure to link the accused with the infliction of injury and the deceased death.

I am therefore of the conceded view that malice aforethought was not established to warrant the accused person to be called upon to answer. Upon maximum evaluation of the whole evidence adduced at the close of the prosecution case on halftime submissions of the trial, am satisfied that there is lack of sufficient evidence to establish a prima facie case against the accused. It is clearly a case if the accused is put on his defence and elects to remain silent or call no evidence this court would have nothing to go by to render an adverse conviction against the accused.

As a result I hereby find in favour of the defence by entering a verdict of not guilty and do acquit the accused under section 306 (1) of the Criminal Procedure Code. The charge of murder contrary to section 203 of the Penal Code remains unproven. The accused is at liberty unless otherwise lawfully held.

**Dated, signed and delivered in open court at Kajiado on 14/12/2017.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Accused present

Mr. Itaya for accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant