REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO.6 OF 2015

Lesiit, J.

REPUBLIC……..…….PROSECUTOR

VERSUS

ISAAC KARIUKI MURONG'A……..ACCUSED

RULING

1. The accused person has been charged with one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge are that:

> **"The accused person on the night of 25th/26th December, 2014 at UmojaInnercore Estate within Nairobi County murdered Purity GacheriGikundi"**

2. The Prosecution called only one witness, PW1 AloisRwagasore. He testified that he was a student at the time of this incident, and that he had come fromRwanda. He was livingin house no. 20. Plot No. A97 at Umoja Inner coresince 2014.He said that he knew the deceased as a neighbourbecause she was living in the same house as the accused, who was the Caretaker of the building where he lived. PW1 lived on the 3rd floor.

3. PW1 testified that he was at his house watching a movie at about 1am when 2 of his neighbours came and knocked on his door.One of those who came was called Rose. He said that when he opened the two neighbours told him that Njeri who is the deceased was bleeding.

4. Rose took him to her house, next to his which was house no. 19. PW1 said that he found the deceased lying on the sofa bleeding from her female genitals. PW1 said that deceased who told him that she had taken medication to procure an abortion.

5. PW1 went and called the deceased's husband, the accused in this case. PW1 says that when the accused came and looked at the deceased person and tried to wake her up by tapping her head but she did not respond.The accused thenuttered the words; ***"that is her problem"*** before leaving and returning to his house. PW1 said that theytried to seek for help from theirneighboursto find out whether any of them had any emergency numbers for an ambulance that they could call for assistance, but none of them responded.

6. PW1 said that he went back to hisneighbour Rose's place before he retired to sleep at his house at 2.30 am. The following morning, he was woken up and informed by his neighbour Rose that the deceased had

died. He saw the police come with the accused to his house. He later went to Buru Buru police station where he recorded a statement.

7. During cross examination PW1 said that the accused and deceased loved taking alcohol and that he often saw them drunk. He also said that when he asked the deceased if he could tell her husband what she had done, the deceased shook her head signaling the fact that she did not want her husband to know about the abortion.

8. That was all the evidence we had in this case.

9. Regarding other witnesses in the case, Counsel for the State informed the court that she could not procure the other two witnesses as one had relocated to Sudan whereas the other one was a student in Nyanza had just undergone an operation and could not be availed. Counsel proceeded to close the case without asking for time to call these witnesses. Prior to that, the State had indicated that directions on the future conduct of the case were being sought from the DPP. Nothing materialized from that effort.

10. Counsel for the Defence was Mr. Wamwayi. In his submissions he urged that the Prosecution had not adduced sufficient evidence to justify placing the accused on his defence. He urged that the deceased had told PW1who was the first one to reach the scene that she had taken some medicine with the intent to abort and did not want the accused to know about it. PW1 further said that when the accused came where the deceased was, the deceased was unconscious and when he called her and tried to wake her up she did not respond. Counsel argued that it was not possible for the accused to have caused the death of the deceased as no malice aforethought was established. Mr. Wamwayi urged that since no arresting officer, Doctor or Pathologist had testified in court, the court should acquit the accused person.

11. Ms. Wafula conducted the prosecution of this case. She made no submissions after the close of their case.

12. At this stage of the case, the court is required to consider the evidence adduced by the prosecution and make a finding whether a prima facie case has been made out to warrant the court to ask the accused to answer the charge facing him. The standard of proof as to whether the prosecution has established a prima facie case was laid down in the celebrated case of **RAMANLAL TRAMBAKLAL BHATT – VS – REPUBLIC (1957) E.A. 332** 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 full consideration might possibly be though sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, rather hopes the defence will fill the gaps in the prosecution case.**
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> **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 accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson – J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that that determination can only properly be made when the case for the defence has been heard. 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."**

13. And in **R. VS- JAGJIVAN M. PATEL AND OTHERS 1, TLR, 85** the learned Judge said:

> **"All the court has to decide at the close of evidence 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 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 conclusiveness of the prosecution evidence, is yet of opinion that the case made out one which on full consideration might possibly be thought sufficient to sustain a conclusion."

14. The prosecution in this case closed its case after calling one witness. The evidence of the witness does not answer the critical matters of evidence in relation to the ingredients needed to be proved for the charge to stand. PW1 said he found the deceased bleeding inside the house of one Rose. PW1 could not tell why the deceased was in that house while she had her own house in the same block of flats.

15. Secondly PW1 saw the deceased bleeding, yet he could not tell what caused the bleeding. He could not tell whether the bleeding was as a result of an assault on the deceased, or by what means the injuries were inflicted.

16. The post mortem form was not adduced in evidence and therefore the court does not know what the cause of death was, and whether it had anything to do with the bleeding.

17. The prosecution did not call the Investigating Officer in this case. We do not know the nature of the investigations he carried out and with which results. Without the evidence of the witnesses I have mentioned above in the very least, it cannot be possible for the prosecution to establish a prima facie case.

18. As the Court held in **Bhat V Rep,** supra, **"A mere scintilla of evidence can never be enough:"** In **R. V. Jagjivan,** supra, "**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 conclusiveness of the prosecution evidence, is yet of opinion that the case made out one which on full consideration might possibly be thought sufficient to sustain a conclusion."**

19. The prosecution did not adduce any evidence at all which even in the very least of consideration would justify a belief by the court that it is a borderline case which would justify the court taking the next step to hear the defence, if the defence wishes to be heard, so as to reach a conclusion, one way or the other. The evidence was so weak that even that other step would be a waste of judicial time, and wholly unjustified.

20. Counsel for the State said that she could not procure the other witnesses for the reason one had relocated to Sudan whereas another was a student in Nyanza and yet another had just undergone an operation. I also note that no arresting officer, Doctor and Pathologist testified and it would have been useful to have their evidence on record to enable this court arrive at a conclusive finding. These witnesses can be available, at least most of them for the purpose of the inquiry.

21. Although I find that having closed its case without calling the witnesses in this case the prosecution has failed to establish the charge against the accused person to warrant the court to place him on his defence, the matter should not be left to end there. A life was lost and the family must be eager to know what transpired with their kin. The court respects the sanctity of life and for that reason, I find that making an order for an inquiry will best express the courts position in that regard.

22. I am fully aware that the accused having been acquitted in this case the acquittal will stand as a bar from future prosecution. The accused will therefore not suffer any prejudice if an inquiry is held in this matter.

23. In conclusion I find that the prosecution has failed to establish a prima facie case and I acquit the accused of the charge of murder contrary to **section 203** of the **Penal Code** under **section 306** of the **Criminal Procedure Court**.

24. It is further ordered that an Inquest into the death of the deceased be held in this case. The prosecution

is directed to register an inquest in this case before the Magistrates' Court for hearing and determination.

25. Those are the orders of this court.

READ, DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25th FEBRUARY 2016

LESIIT, J.

JUDGE.