

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 73 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ELIKANA KAGUNDA NJOROGE.....ACCUSED

RULING

Elikana Kagunda Njoroje, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the evening of 9th August 2012 at Kimende within Kiambu County he murdered Tabitha Wanjiru Miruru. The accused pleaded not guilty to the charge and the case proceeded to full trial. The prosecution called a total of 13 witnesses in support of its case. This is a ruling to determine whether the evidence by the prosecution discloses a prima facie case against the accused in order to require this court to place him on his defence.

The facts of the case can be stated briefly that the deceased was killed on 9th August 2012 at the home she shared with her mother Lilian Wangui Miruru, PW5. PW5 had seen her daughter around 7.00pm that day at Kimende shopping centre where PW5 operated a shop. The deceased had been buying eggs to go home and prepare supper. When PW5 arrived home, a 10 minute walking distance from the shop, she found all the lights in their 3 roomed-house on. She found her daughter lying with her legs protruding from the bedroom into the sitting room. She thought her daughter had fainted and tried to wake her up but without success. When she noticed that her daughter's neck was loose and could not hold the head, she screamed attracting her neighbours. They took the deceased to Orthodox Hospital where she was pronounced dead. The matter was reported to the police. The post mortem was conducted and the opinion of Dr. Peter Muriuki Ndegwa was that the cause of death was ligature strangulation. The accused was traced at his home at Moi's Bridge in Kitale through mobile phone data and arrested.

The prosecution has put up a theory that the accused killed the deceased. From what can be discerned from the mobile phone data the accused and the deceased were in a relationship. On 9th August 2012 the accused is said to have checked in and spent the night at Topville Hotel in Kimende. The Hotel is owned by Peter Kuria, PW1, who was related to the deceased as her uncle. In the morning of 10th August 2012, PW1 received a call from mobile telephone number 0722968299. The person who telephoned him wanted help in opening the gate to allow him leave the hotel and also where to leave the keys. Investigations revealed that this telephone number belongs to the accused and through the data held by Safaricom Service Provider the accused was traced and arrested. The number was traced to Lari area on 9th August 2012. It was also found to have communicated with the deceased through her telephone number 0725644627 on 9th August 2012. Communication records of deceased's telephone number 0725644627 also showed that the two phones were traced to the same Lari area. After presenting this evidence, the prosecution counsel urged the court to find that the prosecution has established a prima facie case against the accused and place him on his defence.

Mr. Nyangayo, advocate for the accused, however submitted a no case to answer against the accused. He submitted that the prosecution case is based on suspicion that the accused killed the deceased and that suspicion however strong cannot be a basis for placing an accused on his defence. Counsel submitted that the watchman at Topville Hotel and the people said to have been constructing chicken house near the deceased's house as well as deceased's neighbours were not called to testify; that there are contradictions in evidence in that deceased's mother said she had not seen the accused before while the Investigating Officer said that she is the one who gave him accused's photographs and that there were no specimens

taken to prove sexual assault. Counsel urged the court to find that the accused has no case to answer and acquit him.

The defence cited several authorities including **Ramanlal Tranbakkal Bhatt v. Republic [1957] EA 332** to support their submissions that the accused does not have a case to answer. I have carefully read the evidence adduced by the prosecution, considered the submissions by opposing counsels and read the cited authorities. At this stage of the trial the court has only heard one side of the evidence. The law is clear that the onus of proof lies with the prosecution and never shifts to the accused. I have considered that the accused was placed in Lari area on 9th August 2012. It is not disputed that he knew the deceased and that they were in a relationship. There is no evidence that he was seen killing the accused but this court takes into account that the accused communicated to the deceased on this day. He does not live in Lari or Kimende but in Moi's Bridge in Kitale. In my considered view there is circumstantial evidence sufficient to establish a prima facie case against the accused. I will therefore, and do hereby, make a finding that the accused has a case to answer. He is hereby placed on his defence. This court has complied with section 306 (2) of the Criminal Procedure Code and informed the accused of his rights to inform this court whether he will give a sworn or unsworn statement and whether he will call any witnesses in his defence. Orders shall issue accordingly.

Dated, signed and delivered this 23rd day of June 2016.

S. N. MUTUKU

JUDGE