



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAJIADO**  
**CRIMINAL CASE NO.34 OF 2015**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**MUSEMBI NGULA MUTHUSI.....ACCUSED**  
**RULING**

The accused person **Musembi Ngula Muthusi** was indicated before this court for the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya.

The brief particulars as per the information in the charge sheet are that the accused on 23<sup>rd</sup> day of December, 2013 at Bondeni area near slaughter house in Loitokitok District within Kajiado County, murdered **Augustine Ndinda Muema** hereinafter referred as the deceased.

Accused when arraigned in court denied the charge and particulars thereof. At the trial accused was represented by counsel Ms. Moinket while the prosecution was lead by Mr. Akula senior prosecution counsel. The prosecution in support of their case called 23 witnesses and 27 exhibits touching on various issues of the case.

This application at this stage is made pursuant to the terms of section 306 (1) (2) of the Criminal Procedure Code Cap 75 of the Laws of Kenya. That section provides *interalia*:

**“If at the close of the prosecution case the court considers that there is no evidence that the accused committed the offence charged or any of the offences of which he might *be convicted*, the court may return a verdict of not guilty; or**

**(2) when the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person committed the offence shall inform him of his right to address the court personally or by his advocate.....by electing to give sworn, unsworn statement including calling witnesses if any in support of the defence.”**

It is essential that I set out the brief background of facts as can be summarized from the evidence tendered by the prosecution. The deceased on 23/12/2013 was at her place of work in a bar and restaurant owned by PW1. It is on record from PW14 that she was on duty with the deceased till 6.30 pm leaving her in the bar to continue with normal duties.

PW17 narrated to the court how they worked together on the material day with the deceased. It was her testimony that the deceased who reported on duty at 5.00 pm sat on the table with other customers within.

She continued working with deceased until 12.00 am (midnight). She further testified that deceased started receiving calls. They closed the bar at about 1.00 am in the night and left for home. According to PW17, on reaching the gate, deceased opted to remain to await bodaboda PW18 to pick her later. It was her testimony (PW17) that she was dropped home on understanding that PW18 was to go for her. However, in the testimony of PW18 he did not go back to pick the deceased because the police had started a raid within the town. He feared that he might be arrested in the operation.

There is evidence that in the following day on 24/11/2013 the deceased body was discovered at Bondeni area. The matter was reported to the police as per the testimony of PW20 C.IP Libao. The police swung into action by visiting the scene collecting the body which was taken to Loitokitok District Hospital Mortuary.

The investigations were conducted by PW23 IP Kibet. He adduced evidence on how he went about recording statements from witnesses. He further told the court regarding the leads and movements of the accused prior to the murder and after. It was his evidence that the statements from witnesses and call data from Safaricom linked the accused to the murder of the deceased.

The postmortem report was conducted by Dr. Opiyo. In his opinion the cause of death of the deceased was cardiopulmonary collapse following hypovolemic shock due to multiple deep cut wounds.

In light of the evidence, it is the duty of this court to make a finding whether accused is entitled to a discharge at the close of the prosecution case or be called upon to answer the charge. I have evaluated the evidence by the prosecution witnesses. The prosecution case is majorly based on circumstantial evidence in discharging the burden of proof on charge of murder against the accused. On this issue the duty of the court is to make a finding at the close of the prosecution case whether the threshold of a prima facie case has been met.

Superior courts in Kenya have provided guidelines to be considered in making a finding on a prima facie case. There is a long line of cases but the one which laid the foundation being **R.T. Bhatt v Republic [1957] EA**. The test whether the court ought or must discharge the accused at the close of the prosecution in this case has been set out as follows:

**“The court should enter a verdict of not guilty and acquit the accused at the close of the case for the prosecution where:**

- (1) There is no evidence to prove an essential element of the offence.**
- (2) There is no evidence on which a reasonable court acting carefully might properly convict.**
- (3) The evidence adduced on behalf of the prosecution is so manifestly unreliable that no reasonable court/or tribunal safely act on it.”**

On the other hand an inquiry in terms of section 306 is to determine whether the prosecution has placed before court sufficient evidence to require the accused to be called upon to answer in rebuttal.

In this exercise of discretion at the close of the prosecution case this court should be able to answer the question whether there is evidence in which a reasonable tribunal or court may convict if no evidence is forthcoming from the defendant? If on maximum evaluation of the evidence in totality as offered by the prosecution the answer is in the affirmative, then the accused in those circumstances ought to be placed on his defence to answer the charge. This sentiment is also echoed in **R.T. Bhatt Case (Supra)**. This test guides the court to evaluate the evidence by the prosecution and where it falls short a prima facie case against the accused has not been established.

Going by these cardinal principles in the **Bhatt Case (Supra)** a prima facie case is a case where one can say there has been shown by way of evidence led a probable cause to call the accused to answer the charge. The probable cause on a prima facie case is where all the essential elements of the offence of

murder like in the instant case against the accused have been proved.

At this stage the court should bear in mind that the test is not that proof of beyond reasonable doubt. It is where it can be argued that on the standard of proof the essential elements constituting the offence of which accused is indicted do exist to require an answer in rebuttal.

What the prosecution evidence must show at this stage relates to the elements of the charge of murder against the accused comprise of:

- (a) That the deceased died.**
- (b) That accused killed the deceased by inflicting the fatal injuries.**
- (c) That there was malice aforethought on the part of the accused.**
- (d) That the accused has been identified and placed at the scene of the crime.**

On the other words the totality of the prima facie evidence must be such that a reasonable court, acting carefully and diligently may convict the accused for the offence on which he can be disclosed by the evidence.

In the instant case the evidence by the prosecution so far relates to how the accused person during and after the offence on the circumstantial evidence extracted from Safaricom mobile data network establishes sufficient evidence to implicate him with the death of the deceased. That evidence of recovery of a mobile phone belonging to the deceased raises a probable cause to put the accused on his defence.

In the result I hold that a prima facie case has been made out by evidence adduced by the prosecution to warrant accused to be called upon to answer as per the provisions of section 306 (2) of Criminal Procedure Code.

The provisions of section 306 (2) regarding right and options he can elect to state his defence explained to the accused in presence of his counsel.

**Dated, signed and delivered in open court at Kajiado on 20/7/2016.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Accused present

Mr. Kimeu for Moinket for accused - present

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant