REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NUMBER 4 OF 2011

REPUBLIC ……...…….…..……...PROSECUTOR

VERSUS

RAPHAEL MBOGO WACHIRA.....…..……..1ST ACCUSED

TERESIA WANGUI MAINA.....…… ….……...2ND ACCUSED

RULING

The two accused persons are charged with the offence of murder contrary to section **203** as read with section **204** of the Penal Code. It is alleged that on the night of 23rd and 24th day of January 2011 at Kinaiyu village within Nyeri they jointly murdered a one George Maina Gatheya.

At the close of the prosecution case, the court is now called upon to determine whether a *prima facie* case has been made out against the accused persons to warrant to put them on their defense.

PW1'S evidence was that he was delivering milk in the wee hours of the morning when he saw a body lying on the side of the road. Shortly other villagers joined him and upon moving closer one person recognized the body. The body had cuts on the head and neck. He telephoned the area chief who came and called the police. The crowd noted blood stains which they followed up to the home of the deceased's grandfather, and upon entering the kitchen they noted more blood and a blood stained axe, a piece of wood and a padlock which items the witness identified in court. The house was occupied by the first accused who was called and admitted having committed the offence and pleaded with the public not to beat him. The second accused is a wife to the deceased.

PW2 the deceased mother received a call from PW1, she proceeded to the scene and identified the body. It had deep cuts on the head and chin. PW3 identified the body at the scene. PW4 only identified the body during the post mortem. PW5 produced the psychiatrist reports declaring both accused persons mentally fit to stand trial.

Evidence tendered was that the first accused's house was freshly swept, ashes had been poured on the floor and there was a piece of wood which was used as a stool and it had blood stains at the back side. The upper side had been cleaned. A blood stained axe was recovered from the said house. Ashes on the floor revealed they were covering blood. The deceased's house was locked with a padlock which had blood stains.

PW7 was the investigating officer, he visited the scene and together with members of the public they

followed blood stains up to the house of a man who was extremely old, over 100 years old, and blood stains led them to a house in the said compound. The house was locked with a padlock. The first accused lived in the said house. He had been employed to take care of the old man. They arrested the second accused. At the police station upon further interrogation, the first accused appeared to be confessing and as the law demands the confession is supposed to be taken before a magistrate. He also appeared to implicate the second accused. He narrated how they did the killing. The first accused was escorted to the Resident Magistrate where he recorded a statement.

PW8 testified that he heard people talking in the house of the first accused and he was able to identify the voices of the first accused and the deceased. He also saw the first accused when he was taken before a magistrate to record a statement and to him he looked normal. PW9, the area assistant chief accompanied the police to the scene and was present when both accused were questioned and implicated each other. The area acting chief also visited the scene.

PW11 stated that government chemist lab examination revealed that the axe and the piece of wood were lightly stained with blood, the red sweater, padlock, shirt, green sweater and blue skirt had no blood stains, and that the DNA profile generated from the blood stains on the wood matched the DNA profile of deceased's while the profile on the blood stains on the axe were of unknown male.

PW12 escorted the first accused to the Residents Magistrates court at Othaya to record a confession. He stated that the accused was normal and had no complaints. PW13 produced the post mortem report and stated that cause of death was severe head injury caused by a sharp object and bleeding to death. PW14 was the magistrate who recorded the confession of the first accused which also implicated the second accused. PW15 produced the exhibits and the prosecution closed its case.

Counsels opted to file written submissions. As at 27th June 2016 only counsel for the second accused had filed his submissions. A further mention date was scheduled for 20th July 2016 and on the said date counsel for the DPP asked for two weeks to file and a further mention was scheduled for 14th September 2016 and again counsel for the DPP asked for 2 weeks to file and a mention date was fixed for 18th October 2016 but by the said date no submissions has been filed, hence, I gave a date for the ruling and directed the DPP to file their submissions within two weeks from the said date. However, as at the close of business on 1st November 2016, the DPP had not filed their submissions, hence I proceeded to write this ruling.

In his written submissions, **Mr. Gori**, counsel for the first accused submitted that the police conducted shoddy investigations and that the prosecution did not prove the case beyond reasonable doubt and urged the court to acquit the first accused person under Section **210** of the Criminal Procedure Code while Mr. Njuguna, counsel for the second accused submitted that the prosecution did not establish a *prima facie* case against the second accused as stated in the case of *Bhatt vs Republic*. Counsel submitted that if the second accused opts to remain silent, then the evidence on record is not sufficient to convict her. Counsel submitted that there was no eye witness and that no circumstantial evidence was tendered connecting the second accused with the murder. Further, counsel submitted that the exhibits recovered from the second accused were examined and there was nothing to link the second accused with the death of the deceased and that the second accused did not confess to the killing. Counsel also submitted that the alleged confession by the first accused was not proved to have been voluntary or free from torture and cited the case of *Republic vs Elly Waga Omondi* and *Kanini Muli vs R* where the court of appeal citing authorities held that a trial judge has the discretion to exclude a statement which has been obtained by improper questioning or other improper means.

Counsel also cited the court of appeal decision in *James Maina Karero & Others vs R* where the court held *inter alia* that in considering a confession by a co-accused, such a confession can only be taken into account when considering other available evidence and that such evidence is not only accomplice evidence, but is evidence of the weakest kind.

What constitutes a *prima facie* case was ably stated in the frequently cited case of *Ramanlal T. Bhatt v. R***,**

which was cited by counsel for the second accused. True, the said decision still remains good law on what constitutes a *prima facie* case. It has been cited with approval in numerous court decisions in this country to the extent that it has acquired the singular distinction of law. However, there has been little attempt to define the term *"prima facie"* and the steps that should guide the court in arriving at the conclusion that indeed a *prima facie* case has been established or not. I find it fit to explain the meaning of *"prima facie"* and state the steps that should guide a court in making a determination as to whether or not to place an accused person on his defence.

Prima facie means *"at first glance,"* or *"at first appearance."* It is generally used to describe a situation on initial observation. In the legal system, *prima facie* is commonly used to refer to either a piece of evidence which is presumed to be true when first viewed, or a legal claim in which enough evidence is presented to support the validity of the claim.

Modern English tends to use the term to mean *"on face of it,"* in conversational English, academic philosophy, and the Law. *Prima facie* implies that evidence exists which, unless disproven, is sufficient to prove a certain fact or circumstance. Evidence that may be accepted as *prima facie* is any evidence which, if accepted at face value, supports the case, or a necessary element of the case.

Thus, a *prima facie* case is that amount of evidence which would be sufficient to counter-balance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove other facts inconsistent with it, and the establishment of a *prima facie* case does not take away the presumption of innocence which may in the opinion of the court be such as to rebut and control it.

Admittedly, there is no statutory definition of what is a *prima facie* case. Oxford Companion of Law gives the definition as:-

> *"A case which is sufficient to call an answer while prima facie is evidence which is sufficient to establish a case in the absence of any evidence to the contrary but is not conclusive"*.

Mozley and Whiteley's Law Dictionary, defines *prima facie* case as:-

> *"A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."*

A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence. It must be such that, if un rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts

existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

When A trial court rules that the prosecution has established a *prima facie* case against an accused person, the accused person assumes a definite burden. It becomes incumbent upon accused to adduce evidence to meet and nullify, if not overthrow, the *prima facie* case against him. This is due to the shift in the burden of evidence, and not of the burden of proof.

When a *prima facie* case is established by the prosecution in a criminal case, the burden of proof does not shift to the defense. It remains throughout the trial with the party upon whom it is imposed—the prosecution. It is the burden of evidence which shifts from party to party depending upon the exigencies of the case in the course of the trial.

A *prima facie* case need not be countered by a preponderance of evidence nor by evidence of greater weight. Accused's evidence which equalizes the weight of accuser's evidence or puts the case in equipoise is sufficient.[9]

A *prima facie* case is an early screen for a court to determine whether the prosecution can go forward to try the accused fully for the crime. As such, the standard of proof that the prosecution must satisfy at the *prima facie* case stage is lower than that for proof that the defendant is guilty. In order to establish a *prima facie* case, a prosecutor needs only to offer credible evidence in support of each element of a crime. By contrast, a prosecutor must prove defendant's guilt as to each element beyond a reasonable doubt to win a conviction. So, even if a prosecutor can present enough evidence to establish a *prima facie* case as to all elements of a crime, the prosecution must nevertheless still prove defendant's guilt beyond a reasonable doubt. This is a constitutional requirement.

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 really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests upon the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it , it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact.

More recently the New South Wales Supreme Court held that "[t]here is no necessary inconsistency between a Court deciding that the defendant has a case to answer, and then proceeding to hold, in the absence of any further evidence, that the

case for the prosecution does not warrant a conviction."

I find myself in agreement with the following steps laid down by the High court of Malaysia which should guide a trial court at the close of the prosecution's case. These are:-

> *a. at the close of the prosecution's case, the court should subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence, then draw the inference that is most favourable to the accused;*
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> *b. the presiding judge or Magistrate should ask himself/herself the question "If I now call upon the accused to make his defense and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;*
>
> *c. If after the defence is called, the accused elects to remain silent, then convict;*
>
> *d. If after defence is called, the accused elects to give evidence, then if you accept the explanation given by the accused, then you must acquit.*

If the court accepts the explanation given by or on behalf of the accused, it must of course acquit. But this does not entitle a court to convict if the court does not believe the explanation, for the accused is still entitled to an acquittal if it raises in the mind of the court a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

Turning to the present case, I have carefully evaluated the above evidence and following the steps enumerated above and the above authorities, I am persuaded that the prosecution has established a *pima*

face case to warrant this court to place the accused persons on their defence.

Signed, Dated at Nyeri this 19th day of December 2016.

John M. Mativo

Judge

Delivered at Nyeri this 19th day of December 2016

Hon. Justice Jairus Ngaah

Judge