**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL CASE NO. 15 OF 2011.**

**REPUBLIC :::::::::::::::::::::::::::::::::::::::::::::: PROSECUTOR.**

**VERSUS**

**KEVIN KIPTOO BARABARA :::::::::::::::::::::::::: ACCUSED.**

**R U L I N G.**

1. For an accused person to be placed on his defence, after the closure of the case for the prosecution, a "***prima facie"*** case ought to have been established by the evidence already availed.

   Such a case is one in which a reasonable court properly directing its mind to the law and evidence before it would convict if no explanation is offered by the defence.

   Therefore, the evidence by the prosecution must not only be sufficient but credible enough to establish the necessary ingredients of any one charge facing the accused.

   A scintilia of evidence nor any amount of worthiness discredited evidence would be incapable of establishing a ***"prima facie"*** case.

2. Herein, the prosecution closed its case after having called a total of ten (10) witnesses.

   It has now submitted by the defence through the learned counsel **Mr. Koros,** that the evidence is insufficient such that the ingredients of the charge of murder have not been established against the accused and in particular considering that the alleged cause of the death of the deceased was not due to a criminal act on the part of the accused but rather due to pre-existing illness on the part of the deceased. The learned defence counsel suggested that the failure by the prosecution to call the investigating officer as a witness was fatal to the prosecution case.

3. On his part, the Learned Prosecution Counsel, **Mr. Kakoi,** submitted that the evidenced by the prosecution was sufficient enough to establish a ***"prima facie***" case warranting the accused to be placed on his defence and that it remained unshaken by the submissions put forward by the defence counsel.

   It was the contention of the learned prosecution counsel that the failure to call as a witness the investigation officer was not fatal to the prosecution case as his role was merely to collect, collate and repeat what other witnesses stated.

   In that regard, Learned Prosecution counsel relied on the decision of the Court of Appeal in the case of **P.M. and others Vs. Republic [2014] e KLR** and urged this court to place the accused on his defence.

4. Having considered the arguments by both sides on the basis of the evidence adduced at the close of the case for the prosecution, the opinion of this court is that the evidence is sufficient and reasonably credible to warrant that the accused be placed on his defence. The ingredients of the charge of murder under section 203 of the penal code have been established but whether these have been established against the accused would be determined after a full and conclusive hearing of the case on the part of both the prosecution and the defence.

5. With regard to the failure by the prosecution to call the investigating officer as a witness, the issue ought to have been reserved for final submissions after close of both the prosecution and defence cases. In any event, the failure to call the investigating officer would not be fatal to the prosecution case as was held by the Court of Appeal in the case cited hereinabove. Indeed, it is only in rare circumstances where the investigating officer's evidence would play a major role for a sound determination of a case in favour of the prosecution.

Otherwise, the role of the investigating officer is to collect, collate and repeat what other witnesses have stated as their evidence.

6. In sum, the accused has a case to answer and is now called upon to make his defence.

[**Read and signed this 24th day of March, 2015.]**

**J.R. KARANJA.**

**JUDGE.**