



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL CASE NO 6 OF 2011**

REPUBLIC.....PROSECUTOR

VERSUS

ABDI IBRAHIM OWL.....ACCUSED

**RULING**

At the close of the prosecution case on 25<sup>th</sup> July 2013 the prosecution had called only one witness in support of its case. This followed the ruling by this court denying the prosecution a further adjournment because of the reasons given in the ruling of this court read on 25<sup>th</sup> July 2013. The court is called upon to determine at this stage whether a prima facie case has been made out against the accused person so as to call upon him to give a defence. To put this matter into perspective it is crucial to give some background of this case.

This is one of the cases transferred from the High Court Nairobi. The plea was taken on 12<sup>th</sup> May 2010 but hearing of this case did not start in Nairobi although the record shows that on 13<sup>th</sup> July 2011 the prosecution had two witnesses in court. The file was transferred to Garissa and placed before me on 15<sup>th</sup> November 2011 when the case was mentioned first. The biggest challenge this court faced was to engage a defence counsel for the accused since the one who was representing him in Nairobi failed to turn up in Garissa. This necessitated the Deputy Registrar of this court to assign this case to another advocate as directed by this court. The counsel on record was engaged and appeared before me on 18<sup>th</sup> January 2012. From that date it took one year to have a prosecution witness in court.

On 13<sup>th</sup> February 2013 the prosecution had two witnesses in court. However after Acting Superintendent Joseph Chesire (PW1) testified, the learned state counsel sought an adjournment preferring to call the other witness, being the investigating officer, later after other witnesses had testified. The investigating officer came to court on 24<sup>th</sup> July 2013 with the file but without the exhibits. Hearing could not proceed. The court was further informed that there was no indication that the other witnesses had been served with summons to attend court. The prosecutor applied for an adjournment. This was declined by the court leading to the closure of this case. The issue for consideration is a simple one, namely whether the prosecution has made out a prima facie case against the accused person. This leads me to pose here and ask, “What is a prima facie case”?

“*Prima facie*” is a Latin word defined by Black’s Law Dictionary, 8<sup>th</sup> Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “*Prima facie case*” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, the court stated 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 made out if, at the close of the prosecution, the case is merely one “which on full consideration might *possibly* be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. 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 the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It is 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.” (Underlining is mine).**

The same Court in **Wibiro alias Musa v. R [1960] E.A at 186** revisited with approval the **Ramanlal case above** on the issue of prima facie case. The courts in East African including our own have cited these cases with relish and for a good reason: it is good law!

Turning to the case before me, I now wish to analyze the evidence tendered to determine if the standard in the above cases has been reached. One witness testified and it is to his evidence I wish to turn.

The accused before this court faces a charge of murder. It is alleged that Abdi Ibrahim Owl murdered Deisey Mouldid Kahim on 24<sup>th</sup> April 2010 at Banane Location in Wajir South contrary to section 203 read with section 204 of the penal code. PW1, the only witness to testify, told the court that on 24<sup>th</sup> April 2010 at about 7.30am he received report from the District Officer of Habaswein that a murder had occurred at Banane. In company of other officers he visited the scene where he found the deceased, said to be accused’s wife, lying on a bed with a lot of blood on the floor. PW1 saw stab wounds on the deceased’s stomach and left side of the body. In total PW1 counted seven stab wounds. The doctor who had accompanied PW1 examined the body and confirmed she was dead, he completed a post mortem report at the scene and the body was released to the family for burial.

The police went back to the Administration Police Camp where they found the alleged assailant, whom PW1 identified as the accused before the court, having surrendered himself to the police at the Camp. PW1 took over the accused and a Somali sword, the alleged weapon of the murder. The accused was charged with this offence. PW1 further testified that he collected blood stained dress which he identified in court and the same was marked “MFI-1”. That is as far as it gets. Due to circumstances explained in this ruling, the case for the prosecution was closed.

Murder is defined under section 203 of the Penal Code thus:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

From this definition, the state has the onus of proving that death has occurred: that death was caused by an unlawful act or omission of the accused person before the court and that the accused person caused that death with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.
- c. Intent to commit a felony.
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

There is no further evidence expected from the prosecution given that the case has been closed. When the evidence of PW1 is put to the test, the standard laid down by the law as enunciated in the above case, can this evidence pass the test? Can this court, properly directing its mind to the law and that evidence convict the accused if no explanation is offered by the defence given that the onus of proving a criminal case lies with the prosecution? I am of the view that this evidence cannot pass that test.

The reasons are that there is no proof that death of the deceased occurred; that it was caused by unlawful action or omission of the accused and that the accused acted with the intention of causing that death. Life is sacrosanct and any person who unlawfully causes the death of another must face the legal consequences. But before those consequences can befall the offender, there must be proof beyond reasonable doubt that he/she is the person who caused the death.

I must comment here that this is one of those unfortunate cases. The delay in the conclusion of this case, and the circumstances surrounding that delay which delay finally became fatal for the prosecution was caused by officers who became negligent in the manner the case was handled. For a prosecutor to perform optimally, he/she must be facilitated by the officers mandated to gather evidence by investigating the case, tracing and bonding witness and availing the file, the witnesses and the exhibits to court. This court is alive to the difficulties the Office of the Director of Public Prosecutions, Garissa went through to persuade the court to allow them one more chance to bring prosecution materials to court and every time this happened, some officer somewhere was to blame in playing his role.

Unfortunately, trials involve rights of individuals. This court has been lenient enough and had to step in and stop this endless game. The court is placed in a difficult situation where it has to balance the rights of the victim and that of an accused person. To ensure justice for all, every player in the administration of justice needs to take up their roles and play them professionally. I wish to give a word of unsolicited advice to the learned state counsel and his colleagues in Garissa, sometimes withdrawing a case might be a better idea where difficulties of the nature portrayed in this case exist. This gives them a chance to re-arrest and charge a suspect afresh once witnesses are traced and evidence gathered. I have said enough on that matter.

This court has no alternative but to make a finding that the prosecution has not established a prima facie case and therefore this court has no basis to call upon the accused person to defence himself. I therefore acquit the accused person, Abdi Ibrahim Owl, of the charge of murder. He is free to go unless for any other lawful cause he is held in custody. I make orders accordingly.

**S.N.MUTUKU**

**JUDGE**

Dated, signed and delivered this 10<sup>th</sup> day of September 2013 in open court in the presence of:

Mr. Mulama for the State

Mr. Kullow for the Accused person

Abdi Ibrahim Owl the accused person

Mr. Ahmed the Court Clerk/Somali Interpreter

Mr. Martin Court Clerk