REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 11 of 2006

REPUBLIC………………………………………………...PROSECUTOR

-VERSUS-

MARTIN THIONG'O KIOI…......………………….…….….……..ACCUSED

RULING

I have carefully considered all the evidence tendered by the prosecution; I have addressed my mind to the preliminary submissions; and I have looked at the persuasive authority cited by counsel in aid of the accused's case. Although I have looked at the specific details, before arriving at my overall assessment, it is *undesirable that I should set it all out in this ruling*, as doing so, in the event I state that there is a case to answer, *could* prejudice the professional conduct of defence, by diverting it to *pre-selected sign-posts*; and a defence thus directed may not necessarily be the best one, in the circumstances. I will, therefore, only touch on *key points* raised by counsel, and also guide myself on the basis of well-recognised principles of law relating to the *prima facie* case. Within those beacons, and by *inherent judicial discretion*, I will determine the question as follows.

Learned defence counsel contended that there was no witness who saw the accused deliver the fatal stab of the screw-driver. But this is not so, because PW1, *Geoffrey Kirumba Kinuthia,* testified that he was walking towards his home, on the material date, and saw the fatal stab take place. At this stage, that testimony is to be taken at face value, as it betrays no doubts, and the witness did not show the makings of an untruthful witness.

Learned counsel next urged that the prosecution did not prove *malice aforethought* – and therefore, there was no *prima facie* evidence of a murder having been committed.

Now, whether or not the person who killed the deceased was actuated by malice aforethought is a *detailed inquiry that cannot rightly be made at this stage.* The law requires the crucial decision at this stage to be made on just *appearances*. Osborne's Concise Law Dictionary, 6th ed by *John Burke* (London: Sweet & Maxwell, 1978) thus defines a *prima facie* case, the case required to be made at this stage for the accused to be called upon to answer (p.262):

"*[Of first appearance.] A case in which there is some evidence in support of the charge or allegation*

made in it, and which will stand unless it is displaced. In a case which is being heard in court, the party starting, that is, upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer, and the case will have to be dismissed."

As already noted, PW1 has brought *some* evidence touching on the role of the accused, at the material time. The question whether malice aforethought would have attended the fatal stab, lies on a *secondary plane*, and is, in any case, an issue entailing *complicated technical tests* – such as, was the mode of assault itself consistent with intentional killing? It is not a relevant point, at this stage.

Whether or not there is a *prima facie* case requiring an accused person to be put to his or her defence, is a question guided by the Court of Appeal decision in *Ramanlal Trambaklal Bhatt v. R.* [1957] E.A. 332. In that case the following passage (*per Sir Newnham Worley, P*, at p.335) appears:

"*A mere scintilla of evidence can never be enough, nor can any amount of worthless, discredited evidence. It is true... that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard."*

For the reasons I have already stated, and taking into account the governing principles as to the nature of a *prima facie* case, I find and hold that, indeed, in the instant matter a *prima facie* case has been made. Consequently, I hereby put the accused to his defence.

As to mode of defence, I do state that there are three courses open to the accused: (i) he can opt to *remain silent*; and in that case he will not be asked any question; he will be at liberty, nonetheless, to *call any witness or witnesses;* (ii) he can opt to make an *unsworn statement;* in that case, he will not be asked any question; but he will still be free to *call any witness or witnesses*; (iii) he can elect to give a *sworn defence*; and in that case he will be cross-examined by counsel for the prosecution; of course, in that case, again, he will be free to *call witnesses.*

I will allow learned counsel for the accused an opportunity to consult with his client, before he formally states what line of defence the accused prefers. Thereafter, I will be able to give further directions on the conduct of the trial.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 23rd day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Accused: Mr. Gatumuta

For the Prosecution: Mrs. Ogoma