REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 16 of 1997

REPUBLIC ……..
PROSECUTOR

AND

STEPHEN KILEMI …….....…….…….
ACCUSED

RULING OF THE COURT

The accused herein, STEPHEN KILEMI was initially jointly charged with one ERNEST KIRIAMBURI, now deceased, with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that:-

"***On the 12th day of October 1996 at Githu sub-location Tigania East Division of Nyambene District within the Eastern Province, jointly murdered Geremano M'Amuru."***

At the close of the prosecution case, Mr. Kibera for the accused submitted that the prosecution had failed to establish a prima facie case against the accused as would require the accused being put on his defence. The prosecution's case was that on the fateful day the deceased was in the company of his wife, Theresia Murea (PWI) and their child (PW2) as they walked home from their farm. The time was about 3.00pm and the deceased was walking about 50 metres behind PWI. As they walked PWI heard a loud bang and on looking behind she saw Mbithi (the 1st accused now deceased) cutting the deceased. PWI also testified that she saw the accused now in court standing where the deceased lay and that both accused and his deceased brother were armed with pangas. According to the evidence of PWI, this incident took place just next to the house of Mbiti. PWI screamed and by the time she got back to where the deceased lay, she found he was already dead. While at the place where the deceased lay, this accused cut PWI on the hand and also hit the deceased with a stick on the ribs. PWI's screams brought other people at the scene, among them the sub-area (PW3). A report was made to the police by PW3 and subsequently the accused and his deceased brother were arrested.

This is the evidence Mr. Kibera submits falls short of establishing a prima facie case against the accused. He contends that the person who killed the deceased was Mbiti and not the accused and that even if Mbiti had been alive it was clear that Mbiti killed the deceased in self-defence. That in addition, there are such glaring discrepancies in the prosecution case that to put the accused to his defence would be tantamount to inflicting further punishment to the accused.

In response, Mr. Muteti dismissed Mr. Kibera's submissions and submitted that the prosecution had

established a prima facie case against the accused to warrant his being put on his defence. That the evidence by PWI and PW2 is clear that the accused, together with his deceased co-accused brother jointly murdered the deceased and that allegations of the accused being implicated in the murder case is far fetched. That it does not matter what part the accused played in the death of the deceased. Mr. Muteti relied on the case of **WIBIRO alias MUSA V. R. (1960) E.A. 184** and submitted that at this stage of the proceedings, the prosecution is not required to prove its case against the accused person beyond any reasonable doubt. That submissions on behalf of the accused are to the effect that the court should at this stage consider whether the prosecution has proved its case beyond any reasonable doubt when all that is required is a prima facie case against the accused.

In **WIBIRO V. R.** (above) the Court of Appeal expressed itself as follows at pages 185 and part of page 186 on what is meant by "prima facie case":-

"***By his use of the phrase "prima facie case" the learned judge has left this court in doubt as to his precise meaning. It is a phrase more commonly used at the close of the prosecution's case than at the end of the whole case at which stage the only question is whether the prosecution has proved its case, on the whole on the whole of the evidence, beyond reasonable doubt. The question of what constitutes a prima facie case was dealt with by this court in 1957 in the case of Ramanlal Trambklal Bhatt V. R. (1957) EA 332 (E.A.) and the following passage was taken from the judgment of the court at [age 334 and p. 335 ……***

"***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 true as WILSON J, said, 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. It 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."***

I have given careful scrutiny to the evidence before me so far, and considered the law as above outlined and have come to the conclusion that the prosecution has established a prima facie case against the accused person requiring him to be put on his defence. The accused was jointly charged with his now deceased brother of killing the deceased. The accused was clearly seen at the scene of the crime standing over the body of the deceased while armed with a panga and a walking stick. The accused was seen hitting the deceased with the walking stick. The accused accompanied his deceased brother to the sub-area to report the killing. The fact that the deceased may have been murdered in self defence does not mean that the accused did not participate in the crime.

For the reasons given above, the accused has a case to answer and he is thus put on his defence. It is so ordered.

Dated and delivered at Meru this 23rd day of February 2005.

RUTH N. SITATI

JUDGE