



**Republic v Maina & another (Criminal Case 203 of 2017)
[2024] KEHC 1211 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 203 OF 2017
TM MATHEKA, J
FEBRUARY 13, 2024
(FORMERLY MACHAKOS HCRC 35&36 OF 2016, KITUI
HCRC 26 OF 2016 & MILIMANI HCRC 29 OF 2018)**

BETWEEN

REPUBLIC PROSECUTOR

AND

GILBERT MAINA 1ST ACCUSED

PAUL ODOYO NGOMA 2ND ACCUSED

RULING

1. Part IX of the [Criminal Procedure Code](#) provides for the Procedure In Trials Before The High Court. Section 306 provides for what should happen at the close of the case for the prosecution in a murder trial. It states;

Close of case for prosecution

- (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
- (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an



unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

- (3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.
2. The court is not expected to give reasons for its finding unless the court accepts the submissions made by the defence on no case to answer.
3. So, in this case Gilbert Maina and Paul Ooyo Ng'oma were charged with murder c/s 203 as read with section 204 of the Penal Code. It was alleged that between 24th and 25th August 2016 at Mwingi District Hospital in Mwingi Sub County Kitui County, they, jointly with others not before the court, murdered Ngandi Malia.
4. This matter has a chequered and tortured history which should go on record this early in the day. The accused persons were at material time based at Kitui Criminal Investigation Department Office where 2nd accused was the official driver. The case for the prosecution was that on the morning of 24th August 2016, CID officers went to the home of Ngandi Malia , picked him up and took him to some place named Sosoma off the Kitui Garissa Road. They took him into some bushes, shot him and left him for dead. He did not die and as soon as his would be killers disappeared, the bleeding man found his way to the road side where he got assistance to be taken to Hospital. Those who assisted him stopped at the police road block at Ukasi where he was taken by police to Ukasi Dispensary for treatment. He had gunshot wounds.
5. At Ukasi dispensary he was give first aid and referred to Mwingi Hospital for treatment. He was admitted with gunshot wounds.
6. In the meantime, the OCS Ukasi and others visited the scene of the shooting in the bushes at Sosoma where they collected one bullet and soil with blood. The government analyst was to later confirm that the blood at the scene belonged to Ngandi Malia ,the deceased.
7. The record shows that at Mwingi Hospital Ngandi Malia told those who attended to him what had happened to him. His sister visited him. He told her what had happened and he was really fearful. He wanted to leave the hospital. CID officers from Mwingi visited him at the Hospital that evening. Later around 2:00am two men walked into the ward and in the presence of the sister and her friend shot Ngandi Malia . 17 bullets were shot at him and 6 (six) actually entered and exited his body. Even when he fell down the gun man continued shooting as though to ensure that this time round he was really dead.
8. The matter was reported at Mwingi Police and the officers came back only to find the body of Ngandi Malia lying on the floor of the surgical ward.
9. The Prosecution did not want to prosecute the case in Kitui because the suspects were police officers from Kitui Police station. Files were opened in Machakos and initially there were 4 suspects. After the application by the accused persons succeeded, Hon Ogola J. sent the matter to Kitui. There Hon Mutende LJ recused herself from the matter as the 1st accused was a member of her Court Users Committee and all suspects were well known to the staff at the Court.



10. The matter was came to Makeni. At that time the High Court was at Court room in a compound where the rest of the building had been condemned. There was fear for some witnesses who had been placed under the Witness Protection Agency and the matter, upon directions by then Hon Chief Justice, was taken to Mililmani for the hearing of the evidence of the protected witnesses. These four were heard at Milimani in Nairobi by the Hon C. Kariuki J. Thereafter Hon Ong’udi LJ took over and heard PW5 to PW10. Upon her transfer Hon Dulu J took over and heard PW11 to 20.
11. I took over in 2023 upon my transfer and heard PW21 after which the prosecution closed its case. It now falls upon me to determine whether or not the prosecution has established a prima facie case to warrant the accused persons to be placed on their defence.
12. I have read and also heard oral highlights of the submissions by counsel. I have read the record and I have considered all the evidence. I must admit to the shortcoming of not having heard or seen the 20 witnesses testify and must rely on the record put in place by the other Judges who heard the matter before me.
13. I have taken guidance from *Ramanlal Trambaklal Bhatt vs R* (1957) EA 332 on what a prima facie case is, and *Anthony Njue Njeru vs Republic* [2006] eKLR on the reason why it is not advisable to give reasons when the court does not uphold the submission of no case to answer.
14. It is my finding that in the totality of the foregoing the prosecution has established a prima facie case to warrant the accused persons to be placed each on his defence as per s. 306(2) of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 13TH DAY OF FEBRUARY 2024

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Mumbua T Matheka

Judge

CA Nelima/Elizabeth

Accused 1- Present

Accused 2- Present

For the first Accused: Muchoki & Kinyanjui

For the 2nd Accused: Onyango

For the State: Tanui

13th February 2024

Before Mumbua T Matheka

CA Nelima/Elizabeth

Accused 1- Present

Accused 2- Present

For the first Accused: Muchoki & Kinyanjui

For the 2nd Accused: Onyango

For the State: Tanui

Ruling Delivered.



s. 306(2) CPC complied with:

Mr. Muchoki; We shall give sworn testimony we shall call three witnesses.

Mr. Onyango: We shall give sworn testimony. We may be calling two witnesses.

Court: Defence hearing on the 21st May 2024

B/E

Mumbua T Matheka

Judge

13th February 2024

