REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JUSTUS KOROBEI NGIKUNO.....ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code, the particulars of which were that on the 10th day of August, 2019 at Nakalale in Turkana North Sub-county murdered EWOTON LOSAPIREIT.

2. He pleaded not guilty to the charges, and to prove the case against him, the prosecution called and examined a total of six (6) witnesses, at the close of which both the prosecution and the defence opted not to make any submissions as to whether the prosecution had established prima facie case to enable the court place the accused on its defence and lift it to the court to make determination there on based on the evidence on record.

3. To sustain a conviction on a charge of murder, the prosecution is under both legal and evidential obligation to prove the following elements of the offence:-

a) The fact and the cause of death

b) That the said death was unnatural

c) That it was carried by an act of omission and commission on the part of the accused person

d) That it was caused with malice aforethought as defined under section 206 of the penal code.

4. At this stage of the proceedings what the court is required to do is to establish whether a prima facie case has been established under the principles set out in the case of RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 as follows:-

i. *"Remembering that the legal onus is always on the* ***prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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."***

ii. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence… It may not be easy to define what is meant by 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."

(Emphasis added)

5. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR it was held** as follows:-

"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to

prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."

(Emphasis added)

6. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v KARANJA KIRIA CR.CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on prima facie case:-

"The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted."

(Emphasis added).

7. With the injunction by Justice Ojwang in mind and without saying too much thereon so as not to compromise the defence the accused is likely to offer, the fact and the cause of death was proved through the evidence of PW6 Dr. EDWARD KARANI KARUGU through the post mortem report dated 15/8/2019 to be severe head injury due to blunt trauma to the head, thereby, confirming that it was unnatural death.

8. PW1 DELFINA AKARU LOSAPIRET, PW2 FELISTUS DAVID and PW3 SYLVIA ATABO ROSAPIREIT all placed the accused at the scene. With the evidence on record I am satisfied that the prosecution has placed adequate evidence before me and has discharged the evidential and legal provider at the stage is not beyond reasonable doubt, to enable me put the accused on his defence, which stated in a different way, this court will safely if the accused offer not evidence, convict the same on the strength of evidence available

9. By reason of the matter stated herein, the accused person is hereby put on his defence and is called upon to exercise his rights under section 306(2) and 307 of the criminal procedure code, while taking into account his constitutional right under article 50 of the constitution that is his right to remain silent.

10. The accused through the advice of his advocate on record is now called upon if he so wish to select how he would like to defend himself and it is so ordered.

Dated, Signed and Delivered at Lodwar this 4th day of March, 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Tanui for the State

Accused present

Court Assistant: Biwott

Interpreter: Susan