



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS KALUME KINGI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Ruttoh advocate for the accused person

R U L I N G

The accused person herein **Thomas Kalume Kingi** faces a charge of murder contrary to Section 203 and 204 of the Penal Code. The brief particulars being that on 16th June, 2018 the accused murdered **Kache Mzomba Kimanje**. He pleaded not guilty and the prosecution was put on notice to prove the charge beyond reasonable doubt. In this sense under Article 50 (2) (h) of the Constitution, the state appointed Learned Counsel **Ms. Ruttoh** to appear on behalf of the accused. In this regard, the prosecution case was conducted by prosecution counsel **Mr. Mwangi**.

The case for the prosecution in support of the charge, the prosecution adduced evidence from seven (7) witnesses. I have reviewed the evidence of each of the witnesses literally and on application of it to the elements of the offence of murder contrary to Section 203 of the Penal Code that is proof of death of the deceased. Secondly, that the death was unlawfully caused. Thirdly, in causing death, the accused had malice aforethought and finally, the evidence is conclusive that it was the accused who killed the deceased.

Many of the legal battles in our Court are countered around the question in terms of Section 306 of the Criminal Procedure Code as to what is a conclusive *prima facie* case or a motion of no case to answer in the construction of the code. For the Court to rule in favor of a *prima facie* case, the set of facts must establish at the earliest that the prosecution can go forward to try the accused fully for the crime charged.

As this phrase implies, the prosecution has the burden of proof against the accused person to present sufficient evidence to support each of the elements of the offence. Whereas on the other hand a motion of no case to answer entails a legal position which the prosecution fails to discharge the burden of proof for the offence against the accused. As indicated in the above scenarios, the contentious point is whether the trial Court findings that there is a *prima facie* case in favor of the prosecution, it means there is sufficient evidence to convict the accused.

It is clear from the code by analogy that if the accused offers no rebuttal evidence to the statement of the offence a reasonable tribunal directing its mind to the facts would be at liberty to enter a verdict of guilty and subsequent conviction. Sufficient evidence is defined as that which is satisfactory and adequate to meet the threshold of the elements of the offence. All what the law demands of the prosecution at this stage is to place before Court admissible and reliable evidence to prove the accused committed the offence or offences he or she is charged of necessary to call upon him or her to offer a rebuttal. In the case of **Rex v Jacobson & Levy {1931} AD 466 Stratford J. A** defined:

“Prima facie evidence in its usual sense, is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving the evidence in the absence of further evidence from the other side, the prima facie proof carried conclusive proof and the party giving it discharge, his onus it is a not, however in every case that the burden of proof can be discharged by giving less than complete proof on the issue. It depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue if the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence calls for an answer, then, in such case, he has produced prima facie proof, and in the absence of an answer, from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given, it is equivalent to an answer and the prima facie proof, being undestroyed again amounts to full

proof.”

In my view applying these principles to the facts of the case and on the basis of the evidence advanced by the prosecution there are good reasons to call upon the accused person to answer the charge in accordance to Section 306 (2) and 307 of the Criminal Procedure Code.

The accused be and is hereby placed on his defence.

DATED, SIGNED ON 15TH . DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Accused person
2. Mr. Mwangi for the DPP
3. Ms. Ruttoh Advocate for the Accused person