REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SULEIMAN MWAGANDI KIPONDA.....1ST ACCUSED

TONY MWAGANDI KIPONDO alias MUMBA.....2ND ACCUSED

SAFARI MWALIMU alias NGONYO.....3RD ACCUSED

RULING

1. The 3 Accused persons are jointly charged with the offence of murder contrary to section 203 as read section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 20th day of February, 2016 at Kandahar area, Langoni Location in Lamu West Sub- County within Lamu County, jointly murdered Fauz Abubakar.

2. The trial started before Ongeri J who heard 7 witnesses. When I took over the case, the Accused elected to proceed with the trial without recalling any witnesses. I heard the last two witnesses before the prosecution closed its case on 15th July, 2020. In summary, the cumulative testimony of the witnesses placed the 3 Accused at the scene while the murder weapon was recovered from the 3 Accused when they went to report an assault case at the local police station.

3. In the course of the trial, the Accused made an application seeking to expunge part of the forensic evidence from the record. Consequently, the court rendered a ruling dated 15th May, 2020 which now forms part of the record. At the conclusion of the Prosecution case, both the prosecution and defence counsel filed written submissions.

4. In considering the evidence on record and the submissions, I have borne in mind the provisions of section 306 of the Criminal Procedure Code and what constitutes a prima facie case.

5. In **Anthony Njue Njeru –vs- Republic (2006) eKLR,** the Court of Appeal **cited with approval the case of *RAMANLAL TRAMBAKLAL BHATT V. R [1957] E.A. 332 at p. 334-335,* which e**xplained 'a prima facie' case as follows:-

> ***"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."***
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> ***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.***
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> ***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."***
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> ***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."

6. When making a finding on a prima facie case, a trial court is not expected to render a detailed analysis of the evidence unless the ruling leads to an acquittal and to safeguard the integrity of the defence. This principle was clearly stated by Ojwang J (as he then was) in **Republic V Samuel Karanja Kiria Cr. Case No.13 Of 2004 Nairobi [2009] eKLR** thus:-

"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. I have carefully considered all the evidence on record and the respective submissions of the parties. It is my finding that the prosecution has discharged the burden of establishing a prima facie case against each Accused. I find that each Accused has a case to answer and each Accused is therefore invited to elect his mode of defense in accordance with section 306 of the Criminal Procedure Code.

8. Orders accordingly.

Judgment delivered, dated and signed this 10th day of September, 2020.

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R. LAGAT KORIR

JUDGE

Due to COVID – 19 Pandemic, this Ruling has been delivered in the physical presence of the 1st Accused and the virtual presence of the 2nd and 3rd Accused(at the GK Malindi Prison), Mr. Mwangi(Prosecution Counsel), Ms. Aoko(defence Counsel) and Mr. Juma(Court Assistant).