REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 26 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD NDUNGU WANJIKU .....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 2nd August, 2015 at unknown time at Dandora within Nairobi County jointly with another not before the court murdered **LEWIS WANJOHI KAMORE.**

2. He placed not guilty to the charges and to prove its case the prosecution called and examined a total of eight (8) witnesses and the end of which the parties were called to make submissions on whether the prosecution had placed enough evidence before the court to enable it place the accused on his defence.

3. Ms Odembo for the accused and Ms Ogweno for the prosecution when called upon to make submissions opted to rely upon the evidence on record and left it to the court to make a determination thereon.

4. At this stage of the proceedings the court is called upon to make a determination under the provisions of Section 306 (1) and (2) of the Criminal Procedure Code which provides as follows: -

> ***"306 (1) Where the evidence of the witnesses from the prosecution has been concluded the court, if it considers that there is no evidence that the accused or any of one of several accused committed the offence, it shall after hearing, if necessary, any argument which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty.***
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> ***(2) when the evidence of the witnesses for the prosecution has been concluded the court if it considered that the accused person or any one or more of several accused persons committed the offence, shall inform each of such accused person of his right to address the court in his own behalf or make unsworn statement and call witnesses in his defence.***

5. What amounts to prima facie case was stated in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 at pg 334** thus:-

> ***"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."***
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> ***A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence… <u>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</u>." (Emphasis added)***

6. Justice Ojwang as he then was in the case of **REPUBLIC v SAMUEL 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 <u>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."</u> (Emphasis added).

7. The position by **Justice Ogwang** finds support in the determination by **Odunga J** in **REPUBLIC v JONES MUTUA ANTHONY & 3 OTHERS [2019] EKLR AS FOLLOWS: -**

> ***"That there is a danger in making definitive finding at this stage, especially where the court finds that there is a case to answer is not farfetched and the reason for not doing so are obvious. As was appreciated by Trevelyan and Chesoni, JJ in Festo Wandera Mukando v Republic (1980)Eklr 103 :-***
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> ***'……we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and in the extreme case may require an appellate court to set aside an otherwise sound judgment where a submission of 'no case' is rejected, the court should say no more than that, it is. It is otherwise where the submission is upheld when reasons should be given for them that is the end of the case or the court or courts concerned.***

8. I have taken into account the fact that the death of the deceased is not disputed and that the accused was living together with him and PW1 (the mother) who was his wife and that he was the last person to had been seen with the deceased while he was alive.

9. I am therefore satisfied that based on the evidence produced before the court a prima facie case has been made out to enable me put the accused on his defence, which I hereby do.

10. The accused is therefore called upon through the advice of his Advocate on record to select how he intends to defend himself, being alive to his constitutional right and Article 50(2) (1) of the Constitution.

Dated, Signed and Delivered at Nairobi This 8th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

<u>In the presence of: -</u>

Mr. Okeyo for the State

Mr. Obuya for the Accused

Accused present

Court clerk Karwitha