REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 24 OF 2011

(Coram: Odunga, J)

REPUBLIC.....PROSECUTOR

VERSUS

FELIX MANENO KIAWA.....ACCUSED

RULING

1. The accused, **Felix Maneno Kiawa,** was charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on or about 9/4/2011, at Nyaani, Machakos County, the accused unlawfully murdered one **Joshua Wambua Muli.**

2. From the prosecution's evidence, the only evidence linking the accused to the death of the deceased was circumstantial. The circumstances were, according to PW1 and PW6, that the last person to have been seen with the deceased was the accused at Victoria Club Nyaani.

3. In this ruling the court is being called upon to decide whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon the accused to give his defence. In other words, does the accused have a case to answer? In **Republic vs. Abdi Ibrahim Owl [2013] eKLR** a *prima facie* case was defined as follows:-

> **"Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:**
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> **"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." 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. 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". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence…It is 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."**

4. The question that this court has to deal with and answer at this stage is therefore whether based on the evidence before this Court, the Court after properly directing its mind to the law and the evidence can convict if the accused chose to give no evidence. It was therefore held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 it is stated as follows:

> **"It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."**

5. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not

farfetched and the reasons for not doing so are obvious. As was appreciated by **Trevelyan and Chesoni, JJ** in **Festo Wandera Mukando vs. The Republic [1980] KLR 103**:

> **"…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 an extreme case, may require an appellate court to set aside an otherwise sound judgement. 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 then that is the end to the case or the count or counts concerned."**

6. According to the defence, through learned counsel, **Mr Muumbi**, since there is no direct evidence linking the accused to the killing of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence without any evidence of a single eye witness, there is no evidence at all to put the accused on his defence.

7. The prosecution, though Learned Prosecution Counsel, **Ms Mogoi**, on the other hand, while appreciating that the evidence in this case is purely circumstantial in nature, contended that the fact that there is evidence that the accused was the last person to be seen with the deceased alive, was sufficient to warrant placing the accused on his defence.

8. In my view, where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless or a case that is dead on arrival.

9. Having considered the material placed before me I cannot state at this stage that the accused her no case to answer. While, when considering the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a *prima facie* case has not been made out. As has been said time and again a *prima facie* case does not necessarily mean a case which must succeed. In other words despite finding that a *prima facie* case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether based on the fats and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer.

10. Accordingly, I will refrain from delving further in this matter. I am however satisfied that the prosecution has a prima facie case. I accordingly find the accused has a case to answer and put him on his defence.

11. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 16th day of January, 2019.

G V ODUNGA

JUDGE

In the presence of:

Miss Mogoi for the Prosecution

Mr Nthiwa for Mr Muumbi for the accused

CA Geoffrey