



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 28 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

SIMON NZOMO.....ACCUSED

RULING

1. There are two errors on the face on the record. One, that the matter was scheduled for judgment on 20th December 2018 instead of a ruling on whether the accused has a case to answer or not; and two: since I did not sit on that day and the matter was mentioned before the duty judge, the matter was scheduled for defence hearing on 4th March 2019.
2. The correct position is that the matter is for a ruling on the issue whether accused has a case to answer or not to warrant his being put on the defence.
3. The accused person Simon Nzomo was jointly charged with Samuel Tomno Chemobo with murder c/s 203 as read with s. 204 of the Penal Code.
4. It was alleged that on the 15th August 2011 at Kimahuri Trading Centre in Kieni East Nyeri County jointly murdered Eliud Wanjohi.
5. From the record, the second Accused Samuel Tomno Chemobo died on 7th January 2013. The surety appeared before the DR on 22nd April 2013 and produced a copy of the certificate of death and was discharged.
6. A new information was substituted on 21st October 2015 and the accused herein took plea afresh before Justice Ngaah.
7. The prosecution called 14 witnesses. At the close of their case the issue is whether the prosecution has established a *prima facie* case to warrant the accused being put on the defence.
8. The prosecution demonstrated through their witnesses that the deceased was 'arrested' by the accused person and his deceased colleague from the bar to the police post. When he left the bar he was alive.
9. The postmortem report showed that he was found dead in the police cells. Cause of death was indicated as 'asphyxia secondary to smothering and throttling'.
10. There are eye witnesses who testified that they witnessed the accused person and his colleague struggling with the deceased who was refusing to be removed from the bar.
11. The standard for a prima facie case is that set out in Bhatt vs Republic
12. I have carefully considered the evidence and the rival submissions by the Mr. Magoma for the state, and Keli & Mwaura Advocates for the accused person on whether or not a prima facie case has been made out against the accused to warrant his being put on the defence. Some of the issues e.g. that the accused was acting in self defence, raised by the defence at this stage are matters for the defence hearing and I will not deal with them.
13. My view is that there is a prima facie case to warrant the accused being placed on the defence under s. 306(2) of the CPC.

Dated, delivered and signed at Nyeri this 11th Day of February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Accused: Present

Magoma for state

Mr. Theuri Mwangi holding brief for Mr. Mwaura

Mr. Theuri: I do not have instructions with regard to compliance with s. 306(2) of the CPC. Mr. Mwaura requests for defence hearing on 5th of March 2019 when he shall comply.

Mr. Magoma: no objection.

Court: compliance with s. 306(2) of CPC and defence hearing 5th March 2019

Mumbua T Matheka

Judge

11/2/19