REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 95 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON KIPROTICH KOMEN.....ACCUSED

RULING

[1] On the **20 December 2013**, the Accused person herein, **Nahashon Kiprotich Komen,** was arraigned before the Court upon Information by the Director of Public Prosecution that he had committed that offence of Murder in contravention of **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** It was alleged in the particulars thereof that, on the **18th day of December 2013** at Kahuho Village in Wareng District within Uasin Gishu Gishu County, jointly with another not before the court he murdered **Elijah Thuku** and **Samuel Thande**; a charge which the Accused denied.

[2] At the close of the Prosecution Case on the **22 January 2019**, the Prosecution had called only two witnesses, none of whom connected the the Accused with the murder of either **Elijah Thuku** or **Samuel Thande**. **PW1, Samuel Kamau Njoroge**, told the Court that, at about 9.00 p.m. on the night of **17 December 2013**, he was at his home in Mathare area of Uasin Gishu County when he heard some screams from the direction of the nearby saw mill. He went there and found his neighbour, **Elijah Thuku,** lying down dead. He then informed the Police who went to the scene and removed the body. **PW1** further stated that, he did not know who killed the deceased; and added that the only body he saw was that of **Elijah Thuku**.

[3] Dickson Maina Kariuki (PW2) was then attached to Kahugo Administration Police Post. He confirmed that on **18 December 2013**, he was on duty at the Post when he received a telephone call from his Officer in Charge with instructions to go to Saw Mill Area and ascertain what may have taken place there. He accordingly proceeded to the scene with a colleague and found two bodies identified to be the bodies of **Elijah Thuku** and **Samuel Thande.** He was at the scene at around 9.00 p.m. and that by that time a crowd of people had gathered there. He accordingly arranged for the bodies to be collected and taken to Moi Teaching and Referral Hospital mortuary pending investigations. He mentioned that he saw head injuries on the body of **Elijah Thuku**; and that on the following day, the Accused Person herein, **Nahashon Komen**, was arrested. He said he did not know him or get to see him after his arrest.

[4] Given the foregoing evidence, it was the submission of **Mr. Miyienda**, Learned Counsel for the Accused, that the Prosecution had failed to make out a case against the Accused Person to require his response. He pointed out that no medical evidence was adduced to help the Court know what caused the death of the deceased; and that the Investigating Officer was not called to shed light on how the death could have occurred. Counsel further submitted that the Accused Person was neither linked to the alleged murder nor identified as the offender. He urged for the acquittal of the Accused Person at this stage of the proceedings.

[5] Needless to say that it is a requirement of the law that a *prima facie* case be established by the Prosecution before an accused person can be called upon to answer the Charge against him. Hence, in **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** it was held thus:

> **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 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] According to **Section 203** of the **Penal Code**, any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to prove, albeit on a *prima facie* basis are: the fact of death; that the death was caused by the Accused by an unlawful act or omission; and malice aforethought on the part of the Accused Person. Accordingly, in **Republic vs. Andrew Omwenga [2009] eKLR**, it was held that:

"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

(a) The death of the deceased and the cause of that death.

(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."

[7] Whereas there is evidence that **Elijah Thuku** died on the night of **18 December 2013**, there is absolutely no evidence as to the cause of his death. **PW1** went to the scene after the fact and was therefore unable to tell the Court what transpired thereat. Likewise, **PW2** was instructed to visit the scene after the incident had been reported to the Police. His role was to arrange for the removal of the dead bodies from the scene. He was unable to tell what may have caused the head injury that he saw on the body of **Elijah Thuku**. As for **Samuel Thande**, there was completely no of evidence that he died as alleged, let alone the cause of his death.

[8] There being no evidence connecting the Accused with the death of either **Elijah Thuku** or **Samuel Thande**, or to show that their demise was attributable to some unlawful act or omission on the part of the Accused, the question of malice aforethought would not even arise. In **Tubere s/o Ochen vs. Republic [1945] 12 EACA 63,** it was held thus by the Court of Appeal for Eastern Africa:

"In arriving at a conclusion as to whether malice aforethought has been established the Court must consider the weapon used, the manner in which it is used and the part of the body injured."

[9] The Prosecution did not avail evidence from which a determination can be made by the Court as to the cause of death of the deceased persons, or the circumstances under which they died; or what weapons if any, were used to commit the alleged crime. Moreover, it was manifestly improper for the Accused to be charged with the murder of two people in one Charge.

[10] For the foregoing reasons, it is my finding that the Prosecution has not established a *prima facie* case in this matter to warrant the placement of the Accused Person on his defence. He is accordingly hereby acquitted of the Charge of Murder pursuant to **Section 306(1)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE