

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 5 OF 2015

REPUBLIC.....STATE

VERSUS

LESAYA OLELE TASUNA.....1ST ACCUSED

ERICK ODHIMBO OUKO.....2ND ACCUSED

RULING ON NO CASE TO ANSWER

1. The Accused Persons – Lesaya Olele Tasuna (“1st Accused Person”) and Erick Odhiambo Ouko (“2nd Accused Person”) face the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence as contained in the Information are that it is alleged that on the night of 28th and 29th day of January, 2015 at Neissuit Location in Njoro Sub-County, within Nakuru County the two Accused Persons jointly with others not before court murdered Masambe Ole Tanini (“Deceased”).

2. The Prosecution called seven witnesses in its bid to prove its case against the two Accused Persons. The general theory of the Prosecution is that the two Accused Persons were the last persons to be seen with the Deceased as they all left a bar after a night of drinking on the night of 28th and 29th day of January, 2015. The following morning, the lifeless body of the Deceased was found lying in a pool of blood by the roadside. It had stab wounds and burn marks. Given the evidence of opportunity, the Prosecution charged the two Accused Persons.

3. At this point in the proceedings, I am required to make a determination whether the Accused Person should be put on his defence. The test to be used at this point in the trial is the test for *prima facie* case long ago established in the celebrated case, ***Bhatt –vs- R [1957] EA 332***. It was held in that case that a *prima facie* case is not 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.

4. So, to paraphrase the authorities, a *prima facie* case is defined in the negative: A *prima facie* case is not established if at the end of the Prosecution case there is no evidence upon which, if the evidence, taken at its highest, is accepted, a reasonable court could convict. (See ***R v Galbraith 73 Cr. App. R. 124***).

5. Here, the Prosecution theory of the case is a straightforward one: it is circumstantial evidence based on the doctrine of opportunity. At this point in the case, it would be improper to assess the strength or weakness of the prosecution evidence by taking a view of the witness reliability unless I came to the conclusion that the state of the evidence called by the Prosecution, taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable that no court, properly directing its mind, could properly convict on the evidence. In my view, this forbiddingly high threshold is not satisfied here, since there is some evidence which, if accepted and “taken at its highest”, would entitle the Court to convict. At this point, the less I say, the better.

6. ***The Accused Person is, consequently, found to have a case to answer and is put on his defence.***

Dated and delivered at Nakuru this 6th day of June, 2019

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JOEL NGUGI

JUDGE