



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 89 OF 2010**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**ROBERT KIILU WAMBUA.....ACCUSED**

**RULING**

1. The accused herein is charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that on 22<sup>nd</sup> December, 2010 at Kiliku Village, Kayatta sublocation, Kyanzavi Location in Matungulu District within Machakos County, the accused murdered **Isaac Musyimi Kimote**.
2. The prosecution's case as can be gleaned from the evidence of the witnesses called was that on 22<sup>nd</sup> December, 2010 in the evening the deceased was drinking in a bar known as Stage Bar at a place called **Kwa Mwaura**, when the accused entered the said bar and an argument ensued between them. As a result, the deceased who was an assistant chief slapped the accused and the accused left the bar after threatening the deceased. That was at about 5.00 pm. At about 6.00pm the accused was seen at a nearby butchery where he took some soup and uttered words to the effect that someone would sleep in the mortuary that night. After 6.45 pm the accused was at his home looking drunk where, according to one prosecution witness, he took a *panga* saying that someone had hit him at the market and he was going to kill him. He even named the said person as the deceased, according to this witness. It was the witnesses' testimony that though the *panga* was snatched from him by his mother, he took a *jembe* (hoe) and ran towards the market. One hour later he returned and stated that he had finished the work of killing the deceased. By then he did not have the *jembe* with him. He then stated that he was going to kill himself.
3. The following day the body of the deceased was found lying in a coffee farm with serious injuries to the head. According to one of the prosecution witnesses, it was the accused who led them in recovering what was believed to be a tick from the *jembe*. The body was identified as that of the deceased and the accused was then charged with the present offence.
4. On behalf of the accused, reliance was placed the case of **Pius Arap Maina vs. Republic [2013] eKLR (Criminal Appeal No. 247 of 2011)**, by his learned counsel, **Mr Muthama**, and it was submitted that there are too many glaring contradictions in the prosecution case and that this casts doubt as to whether the accused person committed the alleged offence. Whereas the prosecution witnesses a total of 11 witnesses, none of the witnesses ever saw the accused murder or attack the deceased. According to the accused, threats do not amount to actions and in this case none of the witnesses presented by the prosecution ever saw the accused person attack the deceased or in any way harm the deceased to lead to his death. Further, the items recovered from the accused person never pointed to the accused being responsible for the death of the deceased and there was no direct evidence linking the accused with the murder of the deceased.
5. According to the accused therefore, the case against the accused is purely circumstantial and based on **Sawe vs. Rep [2003] KLR 364**, **Abanga alias Onyango vs. Rep Cr. A No.32 of 1990(UR)** and **Teper v. R [1952] AC at p. 489** the circumstantial evidence to link the accused with the crime does not exist at all. While the prosecution doubles down on the fact that the deceased was in a scuffle with the deceased, they have left out that the deceased was also in a confrontation with 3 other young men on the same night and at the same place. These were never pursued as suspects by the state. If indeed the only link between the deceased and the accused was the deceased slapping the accused who we again stress never retaliated, then the other 3 young men seen confronting the deceased should have been held as viable suspects. While the Investigating officer stated during evidence that he arrested 2 suspects in the case being the accused and another person, no indication was ever given as to why the other person was never charged with the crime. It seems that the state through its police are also unsure of its own circumstantial case against the accused as they have arrested another in connection with the crime.
6. It was therefore submitted that the shaky evidence and the glaring contradictions in the evidence adduced by the prosecution witnesses cannot just be wished away and like in every criminal case, there arises doubt which should be resolved in favour of the accused person.

7. The accused therefore prayed that this Court finds that the prosecution has failed to establish a *prima facie* case against the accused person and he should be acquitted of the charges against him.

8. On behalf of the prosecution, **Miss Mogoi**, learned prosecution counsel relied on the record and left the matter in the hands of the court.

9. Section 306(1) of the **Criminal Procedure Code** provides as hereunder:

**When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.**

10. I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where 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 him to give their 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, 8<sup>th</sup> 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:**

**“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.”**

11. 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.”**

12. 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:**

**“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 determination can only properly be made when the case for the defence has been heard. 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.”**

13. **Oxford Companion of Law at pg 907** defines “*prima facie*” in the following terms:

**“A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”**

14. 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.”**

15. I am alive to the fact that there is no direct evidence linking the accused to the death 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.

16. 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 case or a case that is dead on arrival. It was therefore held by the Court of Appeal decision in the case of **Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR** that:

**“Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case..., we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused.”**

17. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution vs. Zainal Abidin B. Maidin & Another** that:

**“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in**

**Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:**

**‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”**

18. The court in **Republic vs. Prazad [1979] 2A CRIM R 45, King CJ** held the very same standard on a prima facie case in the following terms:

**“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”**

19. In this case however, the evidence was that the accused was with the deceased in the evening before the body of the deceased was discovered and that the two seemed to have had some bitter exchanges. That however may not necessarily lead to the inference that it was the accused who caused the death of the deceased since apart from the accused, there is evidence that the deceased also exchanged some words with other persons the same evening. However, there is testimony to the effect that the accused was seen leaving his home with a *jembe* after uttering words to the effect that he was going to cause harm to the deceased. This evidence is however denied by the accused’s mother.

20. Whereas upon consideration of 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 his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts 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.

21. The English Court in **May vs. O’Sullivan [1955] 92 CLR 654** therefore held that:

**“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”**

22. The test in such matters was therefore laid down in **Republic vs. Galbraith [1981] WLR 1039** in the following words:

**“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.**

**(2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:**

**(a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.**

**(b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses’ reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”**

23. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I am unable to find, at this stage at least, that the accused has no case to answer. Based on the evidence of the prosecution witnesses, albeit their circumstantial nature, I am satisfied that the prosecution has established a *prima facie* case for the purposes of a finding that the accused has a case to answer. As to whether the said evidence meet the threshold for convicting an accused based on circumstantial evidence is a matter that will have to be considered at the end of the trial.

24. I accordingly place the accused on his defence.

25. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 22<sup>nd</sup> day of July, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Miss Jerobon for Mr Mutua Makau for the accused**

**Miss Mogoi for the State**

**CA Geoffrey**