



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**HCCR MURDER NO. 28 OF 2014**

REPUBLIC .....REPUBLIC

V E R S U S

SAMMY MUTHIE GACHOKI.....ACCUSED

**RULING**

1. The accused person was charged with the murder of Sammy Muthie Gachoki contrary to **Section 203 as read with Section 204 of the Penal Code Cap 63**. He denied the charge thereby forcing the prosecution to call 7 witnesses in efforts to prove the charge against him. At the close of the case for the prosecution, the parties took a date for ruling on whether or not the accused has a case to answer.

2. The issue for determination is:

**Whether or not the accused has a case to answer.**

3. The procedure to determine the issue is under **Criminal Procedure Code Section 306** which provides as follows:

*(1) 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 recording a finding of not guilty.*

*(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....*

4. In **Republic v Benson Ochieng Oyungi [2016] eKLR**

The Court in a persuasive decision stated;

A definition as to what amounts to a prima facie case was given in the case of *Bhatt –vs- R [1957] EA 332*. In that case the Court of Appeal expressed itself on this issue:

**“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 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.”**

5. The court considers the evidence tendered to determine whether it has sufficiently established a prima facie case to warrant the accused to be put on his defence.

6. The evidence adduced by the prosecution witnesses can be summarized as follows:

7. PW 1 – David Njuki Kariuki, a neighbour and nephew of the accused person. On the incident date, he heard someone scream from his neighborhood. He went to the compound of the accused and found him fighting with the deceased. He reported to the chief who told him to take them to hospital or police. He took a motorbike and found accused on the road who requested to be taken to the police station. As they were going, the chief called and talked to the accused who informed him that the deceased had passed away. He left the accused and went home.

8. PW 2 – Gilbert Karimi Mureithi, the assistant chief. On the incident date PW 1 called him and informed him that the deceased and the accused had been fighting. He told him to take them to hospital. He later called and the accused told him he had killed the deceased. On reaching accused's compound, he found the deceased. the accused told him, the deceased used to go sleep with his wife in his house.

9. PW 4 – Dr. Joseph Thuo, a psychiatrist. He examined the accused persons, found that he had no mental illness and was fit to stand trial.

10. PW 5 – PC Morris Kimotho, the investigating officer. The OCS called him they visit a murder scene. They were led to the accused's home by PW 2. They found the deceased tied with a rope on both hands against a mango tree and besides him there was a stone. He established that the accused was at home with his wife, he went for call of nature and on coming back saw the deceased advancing to his house. A confrontation started and the deceased was overpowered whereby the accused kicked him on the stomach. Then the accused ordered his son to bring a rope and tied the deceased. The accused was admitting so he forwarded him to the OCS to record a confession.

11. PW 6 – Dr. Jean Claude. He conducted the post mortem and the cause of death was Cardiac Pulmonary arrest secondary to severe head injury.

12. PW 7 – Cpl Said Sudi Saro, he was the OCS of Kerugoya. He recorded a confession from the accused on 05/11/2014 made before his brother George Karimi Gachoki. The same was made freely without any coercion and after being cautioned that it may be used against him in evidence. The accused, his brother and himself signed the statement on all the pages. During cross-examination, he stated that there was an error in the date and the same should read 05/12/2014.

13. From the evidence placed before court, the test of a prima facie case in terms expressed in **Bhatt -vs- R** case has been met by the prosecution to warrant the accused person to be called upon to defend himself.

14. The court need not give reasons for that finding as the accused may be prejudiced in his defence. It is sufficient to make a finding and inform the accused that he has a case to answer. The accused will proceed as provided under **Section 306 (2) of the Criminal Procedure Code** and address the court or make unsworn statement and call witnesses.

**Dated at Kerugoya this 9<sup>th</sup> day of July 2019.**

**L. W. GITARI**

**JUDGE**