REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 8 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

JONES MUTUA ANTHONY & 3 OTHERS.....ACCUSED

RULING

1. The accused herein are charged with the offence of murder contrary to section 203 as read section 204 of the ***Penal Code***. It is alleged that on 31st January, 2012 at Mukalala Village of Mjini Location within Machakos county murdered **Makau Muthoka**.

2. The prosecution's case as can be gleaned from the evidence of the witnesses called was that on 31st January, 2012, PW3, an Enforcement Officer with the County Government of Machakos deployed the accused persons to Machakos Bus Park to ensure that there was order and smooth flow of traffic. In the course of performing the said duties, it was averred that the accused persons arrested some touts including the deceased for the offence of touting and shouting. After the arrest, the said touts were taken to the council cells in Machakos. Apparently it was then decided that the touts be taken to the police cells. However, along the way the deceased attempted to run away but was later apprehended and locked in police cells.

3. However, at night the deceased complained that he had chest pains and that he had fallen into a hole. He was then removed and taken to Hospital for treatment but apparently passed away before being treated.

4. Although there was no evidence as to what actually happened between the time the deceased attempted to escape and the time he was apprehended, the evidence was that the deceased was in good health when he was first arrested by the accused persons and that his problems started after he was apprehended the second time.

5. The only evidence on record that can explain how the deceased met his death was the evidence emanating from the post mortem examination carried out after the deceased's death. While one of the reports was to the effect that the injuries sustained by the deceased and which led to his death could have been occasioned by a fall, the other post mortem ruled out the possibility of the said fatal injuries having been caused by a fall.

6. 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.***

7. I have considered the submissions of learned counsel for the accused, **Mr Makundi,** 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 the accused 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, 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 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."

8. 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."

9. 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."

10. ***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."

11. 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."

12. I am alive to the fact that there is no direct evidence linking the accused to the injuries leading 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.

13. 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. 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.'"**

14. 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."**

15. In this case however, one of the post mortem reports seems to suggest that the injuries sustained by the deceased could not have been occasioned by the deceased's fall and the evidence so far is that the accused were the people who chased the deceased before he was eventually apprehended. 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.

16. 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."**

17. 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."***

18. 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, that the accused has no case to answer. Based on the post mortem report and the evidence of PW6, 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.

19. I accordingly put them on their defence.

20. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 8th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Muli for Mr Makundi for the accused persons

Ms Mogoi for the State

CA Geoffrey