

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MULYUNGI KITUI.....1ST ACCUSED

BENSON MUSYOKA MUTISYA.....2ND ACCUSED

R U L I N G

1. **Mulyungi Kitui** (1st Accused) and **Benson Musyoka Mutisya** (2nd Accused) are charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the 7th day of **April, 2007** at about **9.00 p.m.** near **Kitui Municipal Stadium** in **Kitui District** of the **Eastern Province** jointly with others not before Court murdered **Joyfred Mwithi Kiminza** (Deceased).

2. Facts of the case are that on the 6th day of **April, 2007**, PW1 **Judith Muthini Mwithi** and the Deceased, her husband and their friends, PW2 **Jeddy Mwendu Musee** and PW3 **Jacob Nsimula Kangotu** were attacked by persons they did not identify upon returning home at about **10.00 p.m.** In the course of the incident the attackers took away from them some cell phones amongst other items. One of the intruders made the Deceased walk towards a nearby thicket. After they left she failed to trace him. The police visited the scene searched and found his body lying on the ground. It was moved to the mortuary. Thereafter a post-mortem was conducted. It was concluded that the cause of death was severe head injury.

3. In the course of investigations carried out, the police arrested individuals who were using some cell phones believed to have been robbed off PW1 and the Deceased. The individuals mentioned the Accused persons herein as the ones who sold the cell phones to them. Following the circumstantial evidence, the Accused persons were arrested and charged.

4. In the case of **Ramanlal Trambaklal Bhatt vs. Republic (1957) EA 332** it was stated thus:

“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 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.”

5. In the case of **Republic vs. John Gachamba Mwangi (2006) eKLR** it was stated as follows:

“A prima facie, in my understanding, is a well-based case which, at a first glance, carries clear pointers that the Accused has a substantial involvement in the circumstances attending the commission of the offence; so that a close examination of those circumstances could well lead to a finding that the Accused did commit the offence – and hence it makes practical sense that the Accused be given a chance to explain his position in the matter.”

6. The investigators traced PW8 **Nicholas Kasomo Maluki** who identified the 1st Accused as the person who sold to him the cell phone. A second cell phone was found in possession of **Joseph** who identified the 2nd Accused as the person who sold to him.

7. At the close of the Prosecution’s case there is sufficient evidence requiring the Accused persons to render an explanation pursuant to the provisions of **Section 306(2)** of the **Criminal Procedure Code**.

8. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of July, 2019.

L. N. MUTENDE

JUDGE