REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 9 OF 2018 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE OKAKA OYIRO.....1ST ACCUSED

LUKAS ONYANGO OYIRO.....2ND ACCUSED

RULING ON A CASE TO ANSWER

1. The two accused persons **GEORGE OKAKA OYIRO** and **LUKAS ONYANGO OYIRO** are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the Information dated 14th November, 2018 signed by David M. Okachi Senior Principal Prosecution Counsel are that on the night of 1st and 2nd March 2018 at Ulafu Sub location East Alego Location in Siaya District within Siaya County the two accused persons jointly with another not before the court murdered **Stephen Ochieng Omwonya**.

2. The accused persons were initially charged separately but their respective Information was later consolidated with the trial commencing on 5/11/2018 after they took plea on 11th December 2018 denying the offence.

3. The prosecution called 5 witnesses who testified after which the defence led by Mr. Ooro and Miss Akinyi Advocates submitted on no case to answer.

4. Mr. Ooro Counsel for the 1st accused person submitted that the 1st accused was arrested on mere suspicion and not because he was seen committing the offence as the person who would have placed him at the scene of crime is the wife to the second accused person but that she was not called as a witness yet she is a competent and compellable witness against him. He urged the court to acquit his client at this stage.

5. Miss Akinyi for the second accused submitted that there was no eye witness to the offence and that the only evidence linking her client to the offence is that of PW2 who testified that the second accused went looking for the deceased in the evening which evidence was not sufficient to link the second accused to the offence herein.

6. **Section 306 of the Criminal Procedure Code** requires the court, after closure of the prosecution case, to make a considered determination on whether an accused person has a case to answer. The section provides:

> ***"36(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 record a finding of not guilty.***
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> ***(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….."***

7. On what constitutes a prima facie, the case of **Bhatt v R [1957] EA 332** comes in handy. In this case, the Court of Appeal held:

> ***"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."

8. I have considered the prosecution evidence on record and the submissions on no case to answer. At this stage, the court is not expected to make any finding on the guilt of the accused person but to assess the evidence and determine whether the accused persons, on the material placed before the court should be called upon to give their defence to the charge. This is so because giving reasons for a finding that an accused person has a case to answer would be prejudicial to an accused person, hence such a determination if arrived at must be made without giving reasons.

9. This court is conscious of the legal principle that the burden of proof lies with the prosecution throughout the trial to prove the guilt of the accused person. That burden does not shift to the accused person.

10. However, having considered the evidence as adduced by all the prosecution witnesses and as a whole, I am satisfied that the prosecution has established a prima facie case against the two accused persons to warrant them be placed on their defence.

11. Accordingly, I order that the accused persons **George Okaka Oyiro** and **Lukas Onyango Oyiro** shall tender their defence(s) in this case. The provision of **Section 306 (2) and (3) of the Criminal Procedure Code** is hereby complied with by calling upon the accused persons to elect what mode of defence they wish to tender before the court.

Dated, signed and delivered at Siaya, this 16th day of October 2019.

R.E. ABURILI

JUDGE

In the presence pf:

Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Ooro Advocate for the 1st accused person and holding brief for Miss Akinyi advocate for the 2nd accused person.

CA: Brenda and Modestar