REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 10 OF 2009

REPUBLIC .....PROSECUTOR

VERSUS

DAVID WANJALA KASIALI .....ACCUSED

RULING

DAVID WANJALA KASIALI is charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code.*

The particulars of the offence being that on the 12th day of February, 2009 at Langas Kona Mbaya in Uasin Gishu District within Rift Valley province, the accused murdered *Douglas Mokaya.*

This is a case of the year 2009 as can be seen in the charge sheet. It is a matter which have experienced many twists and turns in the course of its hearing. By 19th June 2014 when the prosecution closed their case before *Hon. Justice Ngenye*, 8 witnesses had offered evidence on the side of prosecution. On 28th October 2014 the said judge made a ruling that the accused had a case to answer. However, before the defence case was

heard, the said judge was transferred to Nairobi and the matter taken over by *Hon. Justice Githua.* On 17th February 2015 the provisions of Section 200(3) of the Criminal Procedure Code were complied with and the accused opted to have the matter heard De Novo. Prosecution requested for time to respond to the said defence position, allegedly in view of the amendment to Section 200 of the Criminal Procedure Code. On 26th February 2015 the prosecution made a very strong argument against the defence position, in interest of justice to both sides, given the position the case had reached. They made a profound suggestion that *Hon. Justice Ngenye* be recalled to complete the matter. The defence requested for time to liaise with the alleged amendments to *Section 200 (3)* before making a response. However, on 21st April 2015 before the defence responded, the prosecution requested to withdraw their submissions of 26th February 2015, on the ground that it was based on a mistaken understanding that *Section 200(3)* of the *Criminal Procedure Code* had been amended, of which they ascertained was not. The court in its wisdom did not give directions under *Section 200(3)* of the *Criminal Procedure Code* but sought to find out whether *Hon. Justice Ngenye* could be available to complete the matter. On 15th July 2015 it was stated that *Justice Ngenye* could not come back to complete the matter. Provisions of *Section 200(3)* of the *Criminal Procedure Code* were restated to the accused who still opted for a De Novo hearing. The state did not object to it but said they will try their best to avail witnesses. The court made an order for a de novo hearing. By 13th April 2016 the matter had not been heard as directed. *Justice Ngenye* was in court and it was mentioned before her. Directions were sought given that there was an order for De-Novo hearing. *Justice Ngenye* indicated that since she was available to hear the matter the previous order for De-Novo hearing was vacated. She did not however proceed with the matter.

On 24th May 2016 it reverted back to *Hon. Justice Githua*. Given that De-Novo hearing orders had been vacated, she sought fresh position from the accused under *Section 200(3)* of the *Criminal Procedure Code*. Accused still opted for a De-Novo hearing. The state did not object. The court made an order for a Denovo hearing. It never proceeded for lack of witnesses till 30th August 2018 when the matter came before me. We were also faced with the same problem of lack of witnesses till 16th October 2018 when the prosecution closed their case.

I am therefore called to determine as to whether a prima facie case is established against the accused person so as to warrant him be placed on his defence. The legal position in this matter is simply that since there was a court order for a De-Novo hearing, and the prosecution did not call any witness thereafter before the closure of their case, there is no evidence for the court to evaluate in that respect and definitely a prima facie case is not established against the accused person. However, while this is the position this court must pronounce, it is disturbing given the history of the case as the court had even at one point found that the accused had a case to answer and accordingly placed him on his defence. An accused position under *Section 200(3)* of the *Criminal Procedure Code* is not an absolute right of which the court must comply with. The prosecution need state the practicability of the matter being heard De-Novo, and if not practicable for one reason or another, the court in interest of fairness and justice to all the parties, can direct otherwise. I find this a matter where such should have been done. If not so, a strong case should have been made for *Hon. Justice Ngenye* to pursue it to the end. The cost of a De-Novo hearing were more, by whatever standard, than that of availing the judge to hear the defence case and make a finding. This is a case where the acquittal of the accused is not very comfortable to this court, but which however must be done. He stands acquitted of the offence under *Section 210* of the *Criminal Procedure Code.*

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **8th** day of **October,** 2019.

In the presence of:-

(1) Miss Ominga holding brief for Mr. Nyambegera for the accused

(2) Mr. Chacha for state /prosecutor

(3) Ms Abigael - Court Assistant

Court:-

The surety is discharged.

S.M GITHINJI

JUDGE

8/10/2019