



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 39 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KEMBOI.....ACCUSED

RULING

[1] In this case, wherein the accused, **Joseph Kemboi**, was charged with the murder of **Peres Jepkorir** on the night of 7th and 8th November 2012 at Outspan Trading Centre within Uasin Gishu County, the Prosecution closed its case on **24 September 2019**, having called a total of 8 witnesses; and although Counsel for the Defence had no submissions to make at this stage, the Court is under obligation to satisfy itself that a *prima facie* case has been made out against the accused person to require him to answer, in terms of **Section 306** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

[2] As to what amounts to a **prima facie** case, it was held thus in the case of **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332**:

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 final 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.”

[3] Thus, a consideration of the evidence presented by the 8 Prosecution Witnesses shows that the deceased and the accused were lovers and were, at all times material to this case, cohabiting as such in a rental house at Outspan Trading Centre, within Uasin Gishu District. **PW1**, who was a co-worker of the deceased at a hotel in Outspan Trading Centre owned by **PW2** and **PW3**, told the Court that the deceased worked as usual on the **7 November 2012**; that, at about 7.30 p.m. they closed the hotel and he left the deceased in the company of the accused as the two prepared to leave for home. It was his evidence that the deceased did not report for work the following morning; and that out of concern, he went to her house at about 10.00 a.m. because his calls to her went unanswered. **PW1** further testified that, on arrival at the house which the deceased shared with the accused, she found the deceased lying in a pool of blood on the floor with injuries on the head. She was weak and complained of headache and pain on the head. He notified their employer, **PW1**, and thereafter, arrangements were made to have the deceased taken to Moi Teaching and Referral Hospital for treatment; a fact confirmed by **PW3**.

[4] **Dr. Philemon Choge (PW6)** of **Moi Teaching and Referral Hospital**, told the Court that indeed the deceased was admitted at their facility for treatment between **8 November 2012** and **13 November 2012** when she was discharged; and that the provisional diagnosis at the time was parietal linear fracture and cerebral oedema. He added that she was confused, was bleeding profusely from the head, and also

complained of chest pain. **PW6** added that the deceased was placed on conservative treatment and was discharged on **13 November 2012**.

[5] **PW4** and **PW5**, the brother and cousin of the deceased testified that they got to hear that the deceased had been hospitalized following an assault and visited her at Moi Teaching and Referral Hospital; and that she was treated and discharged but died thereafter. And **Sgt. Mulongo (PW7)** who investigated the case stated that he visited the scene and recovered several bloodstained items, including a stone which he submitted to the Government Chemist for analysis; and that the blood type on the exhibits was found to match that of the deceased. He also recovered a pair of trousers which he believed belongs to the accused, to demonstrate that he was then cohabiting with the deceased in that house.

[6] Regarding the cause of death, **Dr. Evans Kibiwot (PW8)** of **Kapsabet County Referral Hospital** testified on behalf of **Dr. Ayabei** who conducted the postmortem on the body of the deceased. He accordingly produced the postmortem form filled by **Dr. Ayabei** which he opined that the cause of death of the deceased was cerebral oedema due to a linear fracture on the left side of the head.

[7] In the premises, there is credible evidence to show that the cause of death of the deceased was attributable to an unlawful act of assault; and that the person who assaulted her and hit her on the head with a stone intended to cause her grievous harm. There is also credible *prima facie* evidence that connects the accused with the said unlawful act. He is accordingly placed on his defence to answer the Charge of Murder pursuant to **Section 306(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER, 2019

OLGA SEWE

JUDGE