



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE NO. 8 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GLADYS BWARI ICHWARA.....ACCUSED**

**RULING ON A CASE TO ANSWER**

1. The accused herein GLADYS BWARI ICHWARA charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 20<sup>th</sup> January, 2013 at Kibwaberi village, Mogusu Sub-location in Kisii Central District within Kisii County, jointly with others not before the court, murdered **NEWLY BORN BABY BOY**.

2. Only one witness, Simon Nyachachi, the accused's cousin testified in support of the prosecution's case. His testimony was that on 21<sup>st</sup> January 2013, one Peter Oeri informed him that a baby had been thrown into a pit latrine at the home of one James Nyaboya. He accompanied his informer to the said home where he established that there was the report and that the police came to the scene and retrieved the body of the baby that appeared to be of a 6 month old fetus. He alleged that he had previously noted that the accused was pregnant.

3. The prosecution closed its case with the evidence of only one witness as none of the other witnesses they had lined up turned up in court to testify despite numerous adjournments being granted to the prosecution to avail all its witnesses. The court is at this juncture tasked with the duty of establishing whether or not a prima facie case has been established against the accused person so as to warrant her being placed on her defence. What then is a prima facie case? The answer to the question on whether or not a prima facie case has been established can be found in the oft cited case of **Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332** wherein the court held:

*"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.*

*"(ii) The question whether there is a case to answer cannot depend 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."*

4. In the instant case, as I have already stated in this ruling, only one witness testified in support of the

prosecution's case. Apart from his claim that he had earlier on seen the accused pregnant, no other evidence was presented to even remotely link the accused person to the murder of the baby. Not even the post mortem report was produced so as to establish the cause of death. The actual age of the baby was not established as PW1 claimed that the body appeared to be of a fetus of 6 months which begs the question on whether the baby was alive at the time it was delivered or if it was a still birth.

5. My finding therefore is that the prosecution's case was based on mere speculation and guess work as there was no scintilla of evidence linking the accused person to the murder. Placing the accused persons on their defence in the face of insufficient evidence that raised more questions than answers would be tantamount to assisting the prosecution to fill in the gaps in their own case which should not be the case in view of the well-hackneyed principle in Criminal Law that the burden of proof rests on the prosecution and must be to the standard of beyond reasonable doubt. From the brief summary and analysis of the evidence tendered before the court, I am not satisfied that the evidence tendered by the prosecution meets the test of a prima facie case that would warrant an order placing the accused persons on their defence.

6. It is quite regrettable that the life of a baby/fetus was lost in unclear circumstances but implicating the accused person in such a heinous crime without cogent proof an exercise in futility and I therefore find that no prima facie case has been established against the accused person so as to warrant her being placed on her defence.

7. Consequently, I acquit the accused person under Section 306 (1) of the Criminal Procedure Code and direct that she shall be set at liberty forthwith unless she is otherwise lawfully held.

**Delivered, dated and signed in at Kisii on 6<sup>th</sup> of March 2018.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Mr. Okewnye for the Accused
- Omwoyo court clerk