REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 60 OF 2009

REPUBLIC……..…....…….PROSECUTOR

VERSUS

BEN NZIOKA KASOA……ACCUSED

PETER KYALO KASUSU……ACCUSED

RULING

[1] This is a ruling on whether the Prosecution in this case has established in accordance with section 306 of the Criminal Procedure Code a *prima facie* case calling for the putting of the accused on his defence to the charge of murder before the Court. Section 306 (2) of the Criminal Procedure Code provides as follows:

> *"(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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence,*** *and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."*

The Principles

[2] A prima facie case has been defined as '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". See Ramanlal Trambaklal Bhatt v. R [1957] EA 332 and Anthony Njue Njeru v. R Court of Appeal at Nairobi Criminal Appeal No 77 of 2006).

[3] It has been counseled by precedent that if the Court concludes that a prima facie case has been made out against the accused, it is not advisable to give reasons for that finding because it may appear as if the Court has finally made up its mind even before hearing the defence. See ***Eustace Kibera Karimi v. R.***, High Court at Nairobi Criminal Appeal No. 911 of 1978; ***Festo Wandera Mukando v. R*** [1980] KLR 103; ***Anthony Njue Njeru v. R***, Court of Appeal at Nairobi Cri. Appeal No. 77 of 2006).

[4] In ***R. v. Wachira,*** (1975) EA 262, Trevelyan and Hancox, JJ. held that –

> *"[I]t has been settled for many years that the sufficiency or otherwise of the evidence at close of prosecution case, so as to require an accused to make his defence thereto, is a matter of law. A court is only entitled to acquit at that stage if there* ***no evidence of a material ingredient of the***

offence *or if the* ***prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict****…. Apart from these two situations, a tribunal should not in general be called upon to reach a decision s to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer. "*

[5] See also a decision of this Court on revision in KBT HC Cri. Revision No. 2 of 2017 ***Wesley Kiptui Rutto & Anor. v. R.***, as follows:

"23. There is, in my respectful view, no conflict between the holding in ***Murimi*** *[****Murimi v. R.*** *(1967) EA 542] that failure by the trial court to acquit an accused at the interlocutory stage where no case is established on the evidence presented by the prosecution is an error of law and* ***Karimi*** *[****Kibera Karimi v. R*** *(1979) KLR 36] that the trial Court should not give reason for its decision to reject a submission of no case to answer. The two principles co-exist in their application to different circumstances; it is only a question as to what stage to correct the error of law in the circumstances of each case. The position of the matter may be resolved as follows:*

a. There is power to revise all orders except order for acquittal;

b. The court, however, gives full reasons in the case of an acquittal, except where perhaps one accused is acquitted while the co-accused are put on their defence, in which case the reasons for the acquittal of the one may await final judgment of the case so as not to prejudice the trial of the co-accused;

c. There is no appeal from a decision on submission of no case to answer;

d. In finding that the accused has a case to answer it is not advisable to give detailed reason therefor; and

*e. The court should not give reasons for the rejection of a plea of no case to answer so as not to prejudice the fair trial of the case.****"***

Determination

[6] Curiously, although the Counsel Janet Mutua is shown on the court record as having been appointed to appear for the two accused persons in this matter, submissions were made in respect of only the first accused as shown on the titling of the Submissions drawn by M/S J. M. Mutua & Co Advocates dated 23rd February 2016 as *Republic v. Ben Nzioka Kasoa*. The DPP's Submissions, if filed, were not placed on the Court file.

[7] Having considered the evidence presented by the Prosecution and the submissions on no case to answer made by Counsel for the Defence and the Prosecution the in this case, the court is satisfied there is sufficient evidence that the accused committed the offence to warrant the calling of the accused to make his defence in terms of section 306 (2) of the CPC.

[8] Being mindful of the judicial policy against detailed reasoning in the event of rejection of a submission of no case to answer, the Court only observes as regards Accused 1, Ben Nzioka Kasua, that despite the challenge on admissibility of the accused's alleged confession as involuntary, and the formal validity thereof because the confession was not proved by the Inspector of Police before whom it was taken, there was evidence that the 1st accused, Ben Nzioka Kasoa, led the police to the recovery of the murder weapons, which, if it remains unrebutted, is proof of involvement in the offence. The Court notes the Court of Appeal decision in ***Kanini Muli v. R*** Nairobi Criminal Appeal No. 238 of 2007, a leading

decision on involuntary confession, which does not apply as no formal confession was produced before the Court, in accordance with section 25A of the Evidence Act.

[9] As regards Accused 2, Peter Kyalo Kasusu, while detailed analysis of the evidence and reasons will be given in the final judgment, so as not to prejudice the 1st accused's case, the only evidence against him was that of PW5 PC James Maina that he had arrested the accused on 7.10.2009 at 7.30pm "members of the Public brought in the 2nd accused on allegations that he was found attempting to break into the house". PW5 was later informed by Cpl. Mwangi that the 2nd accused had been charged with murder. The only other references to accused 2 were by investigating officer PW7 and the lead investigator Cpl. Naftali Muiuria Mwangi (PW8) both which do not strongly implicate the 2nd Accused. PW7 testified that "several suspects were arrested among them Peter Kyalo. He was arrested by PC Maina. Ben Nzioka was arrested on 8.10.2009. Peter had been arrested on the 7.10.2009".

[10] PW8, the lead investigator testified that-

> *"The police were given names of suspects. Kyalo Kasoso previously had a case with the deceased. They had stolen her fencing posts with Peter Mutuku. The case was settled at the Police station. They agreed to pay for the posts before 15.9.2009. Kyalo Peter declined to pay and told her as much."*

It may be that the 2nd accused was mentioned by the 1st accused in his alleged confession as stated by the lead investigator PW9 in cross-examination, but that confession being invalid cannot be evidence in support of a conviction of the 2nd accused in terms of section 32 of the Evidence Act.

[11] The Court does not find in terms of section 306 (2) of the Criminal Procedure Code with regard to the 2nd accused that "***there is evidence that the accused person … committed the offence***" and acquits the 2nd accused of the charge of Murder contrary to section 203 as read with 204 of the Penal Code.

Orders

[12] Accordingly, for the reason set out above, the Court rejects the submission by the 1st accused, Ben Nzioka Kasoa, on no case to answer and directs that the accused shall, in accordance with section 306 (2) of the CPC, be ***informed of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence.***

[13] The Court finds no evidence that the 2nd Accused Peter Kyalo Kasusu committed the offence or was involved in the commission of the offence charged, and is therefore acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

[14] There shall, therefore, be an order that the 2nd accused Peter Kyalo Kasusu be released from custody forthwith unless he is otherwise lawfully held.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY, 2018.

D. KEMEI

JUDGE

Appearances: -

M/S J.M. Mutua & Co. Advocate for the Accused.

Mr. Machogu for the Respondent