



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 44 OF 2016

REPUBLIC.....RESPONDENT

VERSUS

PAMELA INDIATSI ACHURA.....1ST ACCUSED

ESTHER AKINYI ANDATI.....2ND ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 12th day of May, 2016 at Lucky Summer in Ruaraka Kasarani Sub-County within Nairobi County murdered baby **ALFA OKUSIMBA ACHURA**.
2. On 7/6/2016 they made their first appearance in court and on 15/6/2016 took their plea when a plea of not guilty was duly entered for both of them and the case set down for hearing which commenced before me on 23/01/2017 after the accused person were denied bond.
3. To prove its case the prosecution called a total of eight (8) witnesses and produced the necessary exhibits and at the end of the prosecution case, it was submitted that save for minor errors on the postmortem report on the gender of the deceased, which is a mistake curable through the evidence on record for which the case of **MBOYA NDINDI v REPUBLIC CA NO. 32 OF 2005** was produced, the prosecution had established a *prima facie* case to enable the court place the accused on their defence. This submission was captured in the written submission filed by the prosecution.
4. On behalf of the accused persons, in addition to their written submissions their advocate on record Mrs. Nyamongo submitted that no *prima facie* case was established. She submitted that the conduct of the accused persons were those of innocent persons, they went to Kenyatta when called by **PW1** where the deceased and his mother were admitted and willingly went to the police with him where he pointed them out as the suspects. It was submitted further that there were contradictions between the prosecution witnesses and that very vital witnesses were not called to testify including the fire experts to identify what might have been the cause of the fire in the house. It was submitted that the evidence tendered by the prosecution witnesses was not watertight and therefore not beyond reasonable doubt.
5. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a *prima facie* case to enable the court place the accused persons on their defence. *Prima facie* case has been defined in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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 may not be easy to define what is meant by 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.”

(Emphasis added)

6. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

“All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

(Emphasis added)

7. The court is further cautioned not to make elaborate comments on the evidence on record if the same was to put the accused on his defence so as not to prejudice the defence which the accused might opt to offer.

8. With that in mind I have looked at the prosecution case and in particular the evidence of **PW5** and weighed it against the evidence of **PW4** a teacher at the school where **PW2** was a pupil and **PW5** and find that the prosecution has established a *prima facie* case to enable me put the accused persons on their defence which I hereby do. The accused are advised of their rights under the provisions of **Section 306** of the **Criminal Procedure Code**.

DATED, DELIVERED and SIGNED at Nairobi this 11th day of October, 2018.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mrs. Nyamongo for the accused

Accused present

Court assistant - Karwitha