REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER CASE NO. 5 OF 2012

REPUBLIC.....ACCUSED

VERSUS

FRANCIS KIBAYA NGARE.....APPELLANT

RULING

The accused person is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. He denied the charge. The prosecution to call 10 witnesses in efforts to prove the charge against him. At the close of the case for the prosecution, the parties were to put in written submissions on whether or not the accused has a case to answer but they failed to do so. I proceeded to give a date for the ruling.

The issue for determination is **Whether or not the accused has a case to answer.**

The **Criminal Procedure Code Section 306** provides as follows:

> ***(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.***
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> ***(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 on his own behalf or make unsworn statement and to call witnesses in his defence…..***

The definition of what amounts to a prima facie case was considered in Republic v Benson Ochieng Oyungi [2016] eKLR

The Court held;

> **A definition as to what amounts to a prima facie case was given in the case of *Bhatt –vs- R [1957] EA 332*. In that case the Court of Appeal expressed itself on this issue:**
>
> **"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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 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."**

At this stage, the court need not give reasons for reaching a finding of a case to answer as this may prejudice the defence of the accused. It is sufficient for the court to communicate its decision without giving reasons for that finding. The court under **Section 306 C.P.C.** (Supra) considers if there is evidence that the accused committed the offence.

I have considered the evidence which was tendered before this court and considering the test in **Bhatt –v- R** which I have cited above. I find that there is sufficient evidence to warrant the accused to be called upon to address the court or make unsworn statement and to call witnesses in his defence in line with **Section 306 C.P.C**(Supra). I find that the accused has a case to answer.

Dated at Kerugoya this 22nd day of November 2018.

L. W. GITARI

JUDGE