REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 92 OF 2012

REPULIC…….....……PROSECUTOR

VERSUS

DAVID MALAKWEN LIMO.....ACCUSED

RULING

[1] The Accused person herein, **David Malakwen Limo,** was arraigned before the Court on a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The particulars thereof are that, on the night of **5th and 6th December 2012** at **Kamngetuny Sub-location** in Nandi County he murdered **Mark Kimaiyo Serem**. He denied the charge, in proof of which the Prosecution called a total of six witness. The sum total of the evidence of the six witnesses is that the deceased was at the home of **Petro Kipchumba (PW2)** on the night in question. He had visited his girlfriend, **Mercy Cherono (PW4),** a niece to **PW2** and a former girlfriend to the Accused person; and that while in the house at about 12.00 midnight., the Accused appeared, knocked the door and before it could be opened for him, he forced his way into the house armed with a knife, with which he cut **PW4** on the right hand. **PW4** immediately ran out of the house screaming for help, thereby attracting the attention of her uncle, **PW2. PW2** in turn summoned **Simeon Chumba (PW3)** for help and by the time they went to the house where **PW4** had left the deceased and the accused, they found the deceased lying dead on the floor, with a knife placed beside his body. **PW1, PW2, PW3** and **PW4** were unanimous that the body had stab wounds on the chest and stomach.

[2] The other witnesses were **David Kipkemboi (PW5)**, one of the people who identified the deceased's body for purposes of postmortem; and **PW6,** a police officer then attached to **Kapsabet Police Station**, was one of the police officers who visited the murder scene. The Prosecution failed to call the Investigating Officer and the doctor who performed postmortem on the body of the deceased notwithstanding that it had been accorded numerous opportunities to do so. Consequently, it was the submission of the Defence Counsel, **Mr. Okara**, that the Prosecution had not made out a *prima facie* case against the Accused person to warrant his being placed on his defence.

[3] According to **Mr. Okara**, nearly all the witnesses who testified for the Prosecution, save for **PW4**, merely gave hearsay evidence; and that their testimonies did not directly link the accused with the murder of the deceased; and that even in the case of **PW4,** she ran out of the house and was therefore not present to witness the murder incident. Counsel further faulted the failure by the Prosecution to avail before the Court the Postmortem Report; and submitted therefore that it is not known exactly what caused the death of the deceased person. Consequently, **Mr. Okara** urged the Court to give the benefit of the doubt to the Accused person and acquit him of the charge at this stage, the Prosecution having failed to establish a *prima facie* case against him.

[4] In **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** it was held that:

> **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."**

[5] In the instant matter, there is an eye witness account, namely the evidence of **PW4,** placing the Accused at the murder scene and, to prove that he was armed with a knife, with which he wounded **PW4**, before **PW4** ran out of the house, screaming for help; and that shortly thereafter the deceased was found lying dead in the house where **PW4** had left him with the deceased. The body of the deceased had stab wounds on the chest and stomach. From the totality of the evidence, I am satisfied that a *prima facie* case has been made out against the Accused and he is accordingly hereby placed on his defence pursuant to Section **306(1)** of the **Criminal Procedure Code, Chapter 75** of the

Laws of Kenya.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER, 2018

OLGA SEWE

JUDGE