



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL CASE NO. 8 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**GEOFFREY WAMBUA MUSAU ALIAS MUTUA.....ACCUSED**

**RULING**

**GEOFFREY WAMBUA MUSAU** alias **MUTUA** hereinafter referred as the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The particulars of the murder charge alleged that on the 7<sup>th</sup> day of November 2010 at Kajiado Township in Kajiado District within Kajiado County accused murdered Rebecca Wanjeru hereinafter referred as the deceased. The accused denied the charge and particulars that he committed the offence.

At the trial he was represented by Mr. Kamanda advocate who in the course of the trial withdrew legal representation. The Deputy Registrar retained the services of Ms Mageto advocate to take over the defence from Mr. Kamanda. The state was represented by Mr. Alex Akula, a Senior Prosecution Counsel. The prosecution availed nine (9) witnesses in support of the charge whose evidence was to establish the following ingredients beyond reasonable doubt.

- 1. That the deceased died.**
- 2. That the deceased death was unlawful.**
- 3. That in causing death the perpetrator had malice aforethought.**
- 4. That the accused before court was involved or participated in killing the deceased.**

**The brief summary of the prosecution case at the trial:**

According to the testimony of **PW1 Mercy Mutwiri** on the 7/11/2010 while in company of her late husband Samuel they received a telephone call from one Mutuku regarding hospitalization of the deceased and her child. PW1 further testified that a search on the whereabouts of the deceased revealed that she was not admitted in the hospital as alleged but was found dead in her house. According to PW1 testimony the previous night on the 6/11/2010 the deceased was on duty at the bar when she left in company of the accused and another man at about 11.30 pm in the night. She was able to identify the body of the deceased at the mortuary.

PW2 Deborah Mbae stated that she was a neighbour to the deceased and accused who lived next door to their house. In her testimony regarding the events of 6/11/2010, PW2 described hearing a knock at the

door of the deceased on or about 2.30 am. In a little while PW2 told this court that she heard people quarreling but continued with her sleep. According to PW2 when she woke up in the morning of 7/11/2010 at about 6.00 am the accused passed by from their house carrying a bag. It was only later in the day at about 6.30 pm she learnt that PW3 – Eunice Kanyi who used to take care of the deceased's child had raised concerns of the absence of the mother since the 6/11/2010.

PW3 in her testimony confirmed that the deceased had left her with the child in the morning of 6/11/2010 but never went to pick her up in the evening as expected. The testimony of PW2 and PW3 further confirmed that a report was made to the police regarding the absence of the deceased at her place of work.

The police PW8 Cpl Kimuku responded to the report by visiting the scene. PW8 testified that while at the scene in company of other police officers they broke into the deceased house which had been padlocked to gain entry with a view to confirm her whereabouts. According to PW8 the door was broken into and the deceased body discovered hidden under the bed with a string around her neck. The body was transported to Kajiado District Hospital where arrangement for the pathologist to conduct the postmortem was made.

PW4 Solomon Mbogo and PW5 Margerine Mbura relatives to the deceased described how they were telephoned regarding the death of the deceased. According to PW4 and PW5 they made arrangements to travel to Kajiado where they participated in identifying the body of the deceased at the mortuary. It was also their testimony that the deceased used to stay with the accused as husband and wife at Kajiado.

On the 11/11/2010 Dr. Omar carried out a postmortem examination on the body of the deceased who was identified by PW4, PW5 and PW8. The report was produced in court by Dr. Musita PW6 on behalf of Dr. Omar and in compliance with section 77 of the Evidence Act. The postmortem report shows that the deceased had sustained fracture cervical spine, compressed at CI–CII and she died of cardiopulmonary arrest secondary to asphyxiation. There was also evidence of internal and external bleeding.

PW9 C.IP Mwangi from the scenes of crime department visited the scene and took various photographs in support of the death of the deceased. The photographs were produced as bundle and admitted as exhibit 1 – 24.

PW8 Cpl James Kimuku investigated the matter by recording statements from witnesses. The suspect who happened to be a husband to the deceased was sought and arrested by PW7 to be charged with the offence.

In reference to the evidence at the close of the prosecution case, the court is mandated to make a determination under the provisions of section 306 (1) (2) of the Criminal Procedure Code on the issue: Whether the prosecution has made out a case against the accused in order for him to be called upon to answer the charge. This determination by the court is what falls under the phrase of what is commonly referred to as a prima facie case. The procedure to guide the high court in making a finding on a prima facie case is clearly provided for under section 306 (1) (2) Supra.

The code set out what is expected of the prosecution and courts consideration at this stage of the trial. Section 306 (1):

**“When the case and evidence by the prosecution witnesses has been concluded the court must consider whether there is evidence to support the charge against the accused. If the court finds there is no evidence a verdict of not guilty ought to be entered in favour of the accused or order for an acquittal.**

**(2) in the second limb if the court finds when the evidence of the witnesses for the prosecution has been concluded there is evidence that the accused committed the offence charge, then the court shall call upon the accused to answer the charge or outer his defence.”**

It is worthy to note that our criminal procedure code does not use the word prima facie case but through

case law a determination under these provisions is on whether a prima facie case has been made out by the prosecution against the accused. These judicial pronouncements provide the legal principles which must be applied by the courts in exercising discretion under the provisions of section 306.

I will therefore endeavour to look at the decisions from other jurisdictions which we share a common law heritage to shed light on the matter. South Africa section 174 of the Criminal Procedure Act has similar provisions like our section 306 (1) of the Criminal Procedure Code. The catch words in both statutes though operating in different jurisdictions being, ***“If at the close of the prosecution case the court considers there is no evidence that the accused committed the offence in the charge....”***

The court’s interpretation has been reflected in various landmark decisions to serve as a guide, which in my view will be of assistance in reaching a decision in the present case. In reference to section 174 the court in South Africa had this to say in the case of ***State v Lubala [2001] SACR 703:***

***“I have no doubt that an accused person (whether or not he is represented is entitled to be discharged at the close of the case for the prosecution if there is no possibility of conviction other than if he enters the witness box and incriminates himself the failure to discharge an accused person in those circumstances, if necessary (Mero Motu), is in my view a breach of the rights that are guaranteed by the constitution and will ordinarily vitiate a conviction based exclusively on his self incriminatory evidence.”***

The same effect is the holding in the case of ***State v Phuravhatha & Others [1992] (2) SACR 544*** the court; **Dutoita J** stated thus:

***“The presumption in favour of innocence, the fact that the onus rests on the state, as well as the dictates of justice in my view will normally require an exercise of the discretion under section 174 (read section 306 of Criminal Procedure Code Cap 75 of the Laws of Kenya) in favour of an accused person where the state case is virtually and basically non-existent. Strengthening or supplementation of a non-existent state case is a physical impossibility.”*** *the underlined emphasis mine.*

In my view these proposition lays the foundation that it is the prosecution duty to prove all the ingredients of the offence against an accused person beyond reasonable doubt. There is no room for an accused person to answer the charge in order to supplement a weak case presented by the prosecution.

In exercising discretion under section 306 the court must be satisfied at the conclusion of the evidence by the prosecution that there is admissible evidence properly considered that might result in a conviction. The burden of proof as provided for under section 107 (1) of the Evidence Act rests with the prosecution at all times save where the statute creates an exemption.

The Malaysian courts in interpreting section 180 of Criminal Procedure Code which has similar provisions with our section 306 of Criminal Procedure Code had this to say on the determination of a prima facie case. In the case of ***Public Prosecutor v Chin Yoke [1940] 9MLJ 47*** **Gordon Smith Ag. JA** held inter alia:

***“One is quite familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution (particularly in a trial with a jury), which he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a prima facie case against the accused and it is submitted that accused should not be called on for his defence. It is then that it is the duty of the magistrate or judge to consider the evidence already led and decide to call on the accused for his defence, and the question arises what is a prima facie case?”***

In ***Mozley and Whiteley’s Law Dictionary 5<sup>th</sup> Edition*** it states:

***“A litigating party is said to have a prima facie case when the evidence in his favour is***

**sufficiently strong for his opponent to be called to answer it. A prima facie case then is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.”**

On the same issue the Federal Court of Appeal in *Looi Kow Chai v Public Prosecutor [2003] 2MLJ 65* dealing with the provisions of section 180 of the Criminal Procedure Code held as follows:

**“It therefore follows that there is only one exercise that a judge sitting alone under section 180 of the Criminal Procedure Code read as section 306 of the Kenyan Criminal Procedure Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, I am prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.”**

It must be remembered at all times by the trial courts that the standard of proof under section 306 on a prima facie case does not mean prove beyond reasonable doubt. See *(Uganda v Mulwo Aramathan Cr. Case No. 103 of 2008 (UR))*. The question which this court must answer is whether the prosecution evidence by the nine (9) witnesses establishes a prima facie case against the accused. In answer to the question I will reiterate and in summary appraise the prosecution case vis viz. The elements of the offence of murder under section 203 of the Penal Code:

**a. The death of the deceased.**

It is not in dispute that the deceased died on 7/11/2010 at Kajiado Township. PW4 and PW5 a brother and sister to the deceased identified the body at mortuary as that of the deceased. PW8 Cpl James Kimuku visited the scene and collected the body of the deceased which was later positively identified by PW4 and PW5. The postmortem was conducted by Dr. Omar and the report presented by Dr. Musita on his behalf under section 33 of the Evidence Act. On examination the report revealed that the deceased died due to cardiovascular arrest secondary to asphyxiation.

**b. The unlawful death of the deceased.**

There is evidence of PW1, PW2, PW3, PW6 and PW9 to the effect that the deceased death was unlawful.

**c. Malice aforethought.**

On the question of malice aforethought this court has analyzed the provisions of section 206 of the Penal Code and the circumstances surrounding the death of the deceased as presented in evidence by PW1, PW2, PW3, PW6 and PW8. The evidence in absence of any rebuttal at this stage points to the existence of malice aforethought on the part of the perpetrator. The evidence implicating the accused with the offence is that of PW1, PW2, PW3 and PW8. As far as the case is concerned the accused was arrested by PW7 following the report made to the police and investigations findings by PW8.

I have considered the charge and the evidence adduced by the prosecution at the closure of their case. The legal principles in the persuasive authorities on the test of what constitutes a prima facie case, the decision of the Court of Appeal of Eastern Africa in the case of *R.T. Bhatt v Republic [1957] EA 332 – 334* which held inter alia:

**“That a prima facie is 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. Secondly a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless discredited prosecution evidence.”**

Accordingly, I am satisfied that there is evidence placed before me by the prosecution to warrant the case

to proceed further under section 306 (2) of the Criminal Procedure Code by calling upon the accused to offer his defence. The provisions of section 306 (2) duly explained to the accused to enable him exercise his right under the said provisions of the law. It is so ordered.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAJIADO ON 10/1/2017.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Ms Mageto for the accused present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli – Court Assistant present

Accused - present