



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO. 66 OF 2011

REPUBLICPROSECUTOR

VERSUS

SIMON MUELI MUNYASYAACCUSED

RULING

1. The accused **SIMON MULEI MUNYASYA** was 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 night of 11th August, 2011 at Mukuru Kwa Njenga in Embakasi Division within Nairobi County murdered **BERNARD MUNYAO KIOKO**.

2. He pleaded not guilty to the said charges and to prove its case the prosecution called a total of six (6) witnesses and at the close of the prosecution case both the prosecution and the defence made submissions on whether the prosecution had made up a case to enable the court place the accused on his defence.

SUBMISSIONS

3. On behalf of the defence it was submitted the none of the prosecution witnesses was truthful and that their testimonies cannot be used by the prosecution to establish a prima facie case against the accused person. It was submitted that the prosecution had failed to discharge its duty in establishing a prima facie case and reliance was placed on the following cases:-

(1) Eldoret Hccr No. 2 Of 2008

Republic Vs Cornelius Kipkoskei Kogo

(2) Meru Criminal Appeal No. 46 Of 2011

Solomon Kirimi Mrukaria Vs Republic

(3) Mombasa High Court Cr. Case No. 37 Of 2010

Republic Vs Rumba Nyawawi & Another

(4) Kakamega HCCR No 34 Of 2007

4. It was submitted further that the prosecution merely tendered evidence that raised suspicion but which was not adequate to establish that the accused committed the crime. It was further submitted that the prosecution failed to produce a credible medical report or call a doctor who performed a post mortem on the alleged body of the deceased which therefore amounted to failure to prove the death of the deceased and the case of **Republic Vs Mbaru Rai alias Chaka Rai Mombasa HCC CR. No. 22 of 2005** was relied upon

5. On behalf of the State it was submitted that the prosecution had made out a prima facie case against the accused and that death was proved beyond reasonable doubt through the post mortem report and that malice was proved through the evidence of PW1 Reuben Kilonzo.

ANALYSIS AND DETERMINATION

6. At this stage, the issue is not whether or not the prosecution has established a case against the accused person beyond reasonable doubt but whether a case has been made to justify calling upon the accused person to offer an explanation as was stated in the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

“All the court has to decide at the close of the evidence in support 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 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 border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

7. From the evidence tendered before court and the submissions herein and in particular the evidence of PW1 Reuben Kilonzo Musyoka, PW5 Samuel Macharia Kabangi and being alive to the accused person’s rights under **Article 50(2) (1)** the right to remain silent and not to testify during proceedings, I am satisfied and hold that the prosecution has proved a prima facie case to enable me which I hereby do put the accused on his defence. The accused is hereby advised of his rights under Section 306(2) of Criminal Procedure Code.

DATED, DELIVERED and SIGNED at Nairobi this **8th** day of **March 2017**

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J. WAKIAGA

JUDGE

In the presence of:-

No appearance for the State

Miss Kilonzo for Magero for the accused

Accused – present

Tabitha - court clerk