



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 24 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELLY WAGA OMONDI.....ACCUSED**

**RULING**

Elly Waga Omondi, the accused, is charged with the murder of Edinah Nyanchama Mogambi, the deceased, contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence allege that the murder was committed on 25<sup>th</sup> March 2012 in House No. 11 Block F at Mbotela Teleposta Staff Quarters in Nairobi within Nairobi County. The accused has denied committing this offence. He is represented by Mr. R. P. Onyango, advocate instructed by M/s Rachuonyo & Rachuonyo Advocates. The prosecution was led by Ms Magoma, prosecution counsel.

At the close of the prosecution case after presenting evidence of 13 witnesses Ms Macharia on behalf of Ms Magoma submitted that the prosecution through circumstantial evidence has established a prima facie case against the accused. She submitted that the phone the deceased had been using and that PW4 had given her was recovered in accused's house; that it was the accused who inflicted fatal wounds on the deceased and concealed the murder weapon, a piece of wood, under the seat in deceased's house where the accused led police to recover the same; that the accused led police to recover the SIM card from deceased's phone from where the accused had thrown it. Ms Macharia urged the court to place the accused on his defence.

Mr. Onyango for the accused held a different view that the prosecution has failed to prove a prima facie case against the accused. He submitted that the evidence of all the 13 prosecution witnesses lacks corroboration; that the case was poorly investigated and that the accused was brought to court in the hope that his alleged confession would be accepted in evidence. Counsel submitted that PW13 contradicted himself during trial within trial by stating that he was tipped off about this case by one Tarus Kiprof Kennedy while in the main trial PW13 told the court that one Denis had tipped him off; that both Denis and Kennedy testified in court and stated that they did not know who killed the deceased.

Further submissions by Mr. Onyango are that there is no proof of motive of the killing; that the photographs being relied on by the prosecution were carelessly handled by PW13 without protective gloves and that the scene of crime was not sealed off; that PW13 did not eliminate suspects in this case; that although evidence of the pathologist proves death occurred, there is no evidence to show who caused that death and the accused person is not linked to the death of the deceased; that the clothes collected as exhibits and the samples of the discharge collected from the deceased were not subjected to forensic examination; that the accused has no legal duty to assist the police in investigations nor to give incriminating evidence and that the alleged murder weapon was not subjected to forensic examination. Mr. Onyango urged the court to acquit the accused at this stage of the trial for lack of proof that he was

involved in killing the deceased.

In determining this matter I have considered what constitutes a prima facie case as discussed by the East African Court of Appeal in the case of **Ramanlal Trambklal Bhatt V. R. (1957) EA 332 (E.A.)** where the court stated as follows at pages 334 and 335:

**“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” (emphasis added).**

I have considered the evidence of the 13 prosecution witnesses, the opposing submissions and the law as laid down in the above case. I agree with Mr. Onyango that the accused has no duty to fill the gaps left by the prosecution case. I also agree with the above case that the court is not required at this stage of the trial to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively because that final determination can only properly be made when the case for the defence has been heard. It is my finding therefore that at this stage of the trial this court has evidence to go by and which this court, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence. I will, and do hereby find that the prosecution has established a prima facie case against the accused and therefore put him to his defence. The evidence so far adduced implicates him and therefore the accused has a case to answer.

This court, in compliance with section 306 (2) of the Criminal Procedure Code inform the accused person of his right to address the court in the manner in which he wishes to defend himself: whether by taking the oath or testifying without taking the oath and whether he wishes to call any witnesses to his defence. It is so ordered.

**Dated, signed and delivered this 2<sup>nd</sup> February 2016.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Macharia, the prosecution counsel

Mr. R. P. Onyango, advocate for the accused

Mr. Elly Waga Omondi, the accused person

Mr. Daniel Ngumbi, court clerk