REPUBLIC OF KENYA

IN THE HIGH COURT OFV KENYA AT NYERI

CRIMINAL CASE NUMBER 22 OF 2013

REPUBLIC ………………...………..…...............….PROSECUTOR

VERSUS

GEOFFREY MAINA MUMBI.......................……..1ST ACCUSSED

PAUL KINYUA NGUMO...2ND ACCUSED

RULING

On 20th July 2016 this case came for further hearing, but counsel for the DPP asked for an adjournment on grounds that she did not have her witnesses and the court after evaluating the reasons offered in support of the application for adjournment and the objections raised by the defense counsels and the history of the case declined to allow the adjournment.

I find it necessary to give a brief history of this case. The accused persons were charged with the offence of murder contrary to Section **203** as read with Section **204** of the Penal Code[1] in October 2013. It is alleged that on the night of 21st and 22nd September 2013 at Naro Moru in Kieni East District within Nyeri County with others not before the court the accused persons murdered a one Domiciano Rukunga Maranya alias Mapenzi.

The record shows that the first hearing date was on 25th November 2014, one year and one month after the plea was taken. On the said date the prosecution had no witnesses and successfully applied for an adjournment which was not opposed by the defense. Hearing commenced before me two years after the plea, that is on 13th October 2015, and on the said date two witnesses gave evidence and the prosecution asked for an adjournment on the grounds that the said two witnesses were the only ones who were available on the said date. The said application was vehemently opposed by the defence on the grounds that no reasons were offered as to why the witnesses were absent. The court allowed the adjournment but made an order that no further adjournment will be entertained on the same grounds.

On 30th November 2015 the case came up before me for further hearing and on the said date three more witnesses testified and counsel for DPP asked for an adjournment which was not opposed. On 10th February 2016, counsel for the DPP had one witness in court but stated that she did not have the police file and exhibits and asked for the file to be placed aside. At 11.10 am counsel for the DPP informed the court that the police file had been brought but the exhibit had not been availed. The court observed *inter alia* that "failure to avail exhibits in court suggested that someone was not taking his work seriously and this translated to wasting valuable courts time and was a punishment to the accused persons who are in custody." The court reluctantly allowed the adjournment and ordered the prosecution to avail the remaining witnesses and exhibits at the next hearing date.

On 20th July 2016 the matter came up for further hearing and counsel for the DPP informed the court that she was not ready and stated that the police officer who was bonded was unwell and that the other witness had not been traced. Both defense counsels vehemently opposed the application for adjournment citing lack of evidence to support the alleged sickness and that there was no sufficient explanation as to why the other witness was not available and pleaded that their clients have been in custody since they were arrested and cited the order on record referred to above whereby the court granted the prosecution a last adjournment.

After evaluating the above reasons, the history of the case, the law and in particular the constitutional provisions that an accused person is entitled to have his trial determined without delay, the court declined to grant the adjournment. The court also noted that unlike the previous adjournment referred to above, this time there was no mention of exhibits. After the ruling, counsel for the DPP asked for the file to be placed aside and when the matter was revisited again at 11.55 am, counsel for the DPP again prayed for an adjournment. Though no one suggested to counsel for the DPP on what course of action to take, counsel for the DPP stated that she would not withdraw the case or close the prosecution case and asked the court to vacate or vary its earlier orders. As expected, counsel for the accused persons opposed the application and maintained that the only avenue available to the prosecution was to appeal against the orders in question since the court could not revisit the issue again on grounds that the court was now *functus officio*.

The court ruled that it found no basis to vary, rescind or review its earlier order and ruled that the court could not sit on appeal against its decisions and that it was *functus officio*. The court found no basis in law or otherwise to interfere with the said order. After the aforesaid ruling, counsel for the DPP again stated that she had no intention to close her case and in response counsel for the accused called upon the court to make a ruling whether or not the prosecution had established a *prima facie* case on the basis of the evidence adduced by the prosecution a position the court agreed with, hence this ruling and added that there are legal channels for an aggrieved party to challenge a court decision and certainly the position taken by counsel for the DPP was not one of the options provided under the law.

At this juncture I find it useful to recall the words of Justice S. N. Mutuku while addressing a similar situation in *Republic v Abdi Ibrahim Owl***[2]**

> *"Unfortunately, trials involve rights of individuals. This court has been lenient enough and had to step in and stop this endless game. The court is placed in a difficult situation where it has to balance the rights of the victim and that of an accused person. To ensure justice for all, every player in the administration of justice needs to take up their roles and play them professionally. I wish to give a word of unsolicited advice to the learned state counsel and his colleagues………, sometimes withdrawing a case might be a better idea where difficulties of the nature portrayed in this case exist. This gives them a chance to re-arrest and charge a suspect afresh once witnesses are traced and evidence gathered…."*

The court is now called upon to determine at this stage whether a *prima facie* case has been made out against the accused persons. A *prima facie* case was ably defined in the case of *Ramanlal T. Bhatt v. R*.**[3]**

Even though the above decision still remains good law on what constitutes a *prima facie* case, there has been little attempt to define the term *"prima facie"* and what steps should guide the court in arriving at the conclusion that indeed a *prima facie* case has been established.

The Latin term *prima facie* means *"at first glance,"* or *"at first appearance,"* and it is generally used to describe a situation on initial observation. In the legal system, *prima facie* is commonly used to refer to either a piece of evidence which is presumed to be true when first viewed, or a legal claim in which enough evidence is presented to support the validity of the claim.

Thus a *prima facie* case is that amount of evidence which would be sufficient to counter-balance the general presumption of innocence and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove other facts inconsistent with it, and

the establishment of a *prima facie* case does not take away the presumption of innocence which may in the opinion of the court be such as to rebut and control it.[4]

There is no statutory definition of what is a *prima facie* case. Oxford Companion of Law[5] gives the definition as:-

> *"A case which is sufficient to call an answer while prima facie evidence is evidence which is sufficient to establish a case in the absence of any evidence to the contrary but is not conclusive"*.

Mozley and Whiteley's Law Dictionary,[6] defines *prima facie* case as:-

> *"A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."*

A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence. It must be such that, if un rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts

existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

The following excerpt from a decision by the High Court of New South Wales in *May v O'Sullivan*[7] relating to the burden and onus of proof on the prosecution in criminal proceedings is highly illuminating on the subject:-

> *"When, at the close of the case for the prosecution, a submission is made that there is "no case to answer," the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a "case to answer" has no effect whatever on the onus of proof, which rests upon the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it , it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact." (Emphasis added)*

The High court of Malaysia enumerated the following steps that should be followed by a trial court at the close of the prosecution's case:-[8]

> *a. at the close of the prosecution's case, the court should subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence, then draw the inference that is most favourable to the accused;*
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> *b. the presiding judge or Magistrate should ask himself/herself the question "If I now call upon the accused to make his defense and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;*
>
> *c. If after the defence is called, the accused elects to remain silent, then convict;*

*d. If after defence is called, the accused elects to give evidence, then if you accept the explanation given by the accused, then you must acquit.**[9]***

Turning to the present case, five witnesses testified for the prosecution. These are:-

PW1 testified that she only learnt from the police that someone had died and that she was not at the scene at the material time. **PW2** a brother to the deceased testified that he was called and informed that his brother, the deceased had been beaten at Naro Moru and died at the Nyeri Provincial Genersa Hospital.

PW3'S evidence was that he did not know what happened on the material day and that he only learnt the incident the next day. PW4 testified that he received a telephone call and on arrival he found the deceased at Naro Moru Health Centre and they were referred to Nyeri Provincial General Hospital where he was admitted but died the following day. He was categorical that he did not know what had happened to the deceased. **PW5** was woken up by screams and found a person being beaten but he does not know the two people who were beating him.

I have carefully evaluated the above evidence and following the steps enumerated above and the above authorities, I am persuaded that the prosecution has not established a *pima face* case to warrant this court to place the accused person on his defence.

This court has no alternative but to make a finding that the prosecution has not established a *prima facie* case against the accused persons and therefore this court has no basis to call upon the accused persons to defend themselves. I therefore dismiss the charges of murder against the two accused persons namely **Geoffrey Maina Mumbi and Paul Kinyua Ngumo** and acquit the two accused persons of the said charges under section 210 of the Criminal Procedure Code.[10]

Accordingly, I order that the two accused persons, namely **Geoffrey Maina Mumbi** and **Paul Kinyua Ngumo** to be released forthwith unless otherwise lawfully held.

Signed, Delivered and Dated at Nyeri this **13th** day of **September** 2016.

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya.

[2]{2013} eKLR

[3] {1957} E.A 332 at 334 and 335

[4] Words & Phrases Permanent Edition 33, p. 545.

[5] Page 907

[6] 11th Ed

[7] {1955} HCA 38; (1955) 92 CLR 654

[8] See Phiri Mailesi vs Public Prosecutor, Court of Appeal of Malaysia, Criminal Appeal No: p-05-311-11/2011

[9] Mat v Public Prosecutor [1963] MLJ 263.

[10] Supra