**REPUBLIC OF KENYA**

**IN THE HIGH COURT OFV KENYA AT NYERI**

**CRIMINAL CASE NUMBER 33 OF 2011**

**Republic ……..…….Prosecutor**

**VERSUS**

**Solomon Kirigi Manyeki.....…...……Accused**

**RULING**

At the close of the prosecution case on 20th May 2016 the prosecution had called eight witness in support of its case. This followed the ruling by this court denying the prosecution a further adjournment to call three other witnesses because of the reasons given in the ruling of this court delivered on the said date. The court is called upon to determine at this stage whether a *prima facie* case has been made out against the accused person so as to put the accused person on his defense.

In his written submissions, **Mr. Gori**, counsel for the accused urged the court to acquit the accused person under Section 210 of the Criminal Procedure Code[1] while **Hilda Chebet** for the Director of Public Prosecutions submitted that a *prima facie* case has been established against the accused and urged the court to put the accused on his defense.

What constitutes a *prima facie* case was ably stated in the frequently cited case of *Ramanlal T. Bhatt v. R***,** **[2]** as follows:-

> *"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 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)*

Even though the above decision still remains good law on what constitutes a *prima facie* case, and the decision has been cited with approval in numerous court decisions in this country to the extent that it has in my view acquired the singular distinction of law, 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. For this reason I find it appropriate to spare some ink, space and time to explain the meaning of the said Latin term and lay down the steps that should guide a court in arriving at such a

decision.

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.

Modern English tends to use the term to mean *"on face of it,"* in conversational English, academic philosophy, and the Law. *Prima facie* implies that evidence exists which, unless disproven, is sufficient to prove a certain fact or circumstance. Evidence that may be accepted as *prima facie* is any evidence which, if accepted at face value, supports the case, or a necessary element of the case.

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.[3]

There is no statutory definition of what is a *prima facie* case. Oxford Companion of Law[4] gives the definition as:-

> *"A case which is sufficient to call an answer while prima facie 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*,[5] 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.

There is no denying that in a criminal case, unless the guilt of the accused is established by proof beyond reasonable doubt, he is entitled to an acquittal. But when the trial court rules that the prosecution has established a *prima facie* case against an accused person, the accused person assumes a definite burden. It becomes incumbent upon accused to adduce evidence to meet and nullify, if not overthrow, the *prima facie* case against him.[6] This is due to the shift in the burden of evidence, and not of the burden of proof.

When a *prima facie* case is established by the prosecution in a criminal case, the burden of proof does not shift to the defense. It remains throughout the trial with the party upon whom it is imposed—the prosecution. It is the burden of evidence which shifts from party to party depending upon the exigencies of the case in the course of the trial.[7]

A *prima facie* case need not be countered by a preponderance of evidence nor by evidence of greater weight. Defendant's evidence which equalizes the weight of accuser's evidence or puts the case in equipoise is sufficient. **9**

A *prima facie* case is an early screen for a court to determine whether the prosecution can go forward to try the defendant fully for the crime. As such, the standard of proof that the prosecution must satisfy at the *prima facie* case stage is lower than that for proof that the defendant is guilty. In order to establish a *prima facie* case, a prosecutor needs only to offer credible evidence in support of each element of a crime. By contrast, a prosecutor must prove defendant's guilt as to each element beyond a reasonable doubt to win a conviction. So, even if a prosecutor can present enough evidence to establish a *prima facie* case as to all elements of a crime, the prosecution must nevertheless still prove defendant's guilt beyond a reasonable doubt. This is a constitutional requirement.

The High Court of New South Wales in *May v O'Sullivan**[8]* relating to the burden and onus of proof on the prosecution in criminal proceedings had the following to say:-

> *"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)*

More recently the New South Wales Supreme Court relied on *May v O'Sullivan* in holding that "[t]here is no necessary inconsistency between a Court deciding that the defendant has a case to answer, and then proceeding to hold, in the absence of any further evidence, that the case for the prosecution does not warrant a conviction."[9]

I find useful guidance by the following steps laid down by the High court of Malaysia which should guide a trial court at the close of the prosecution's case. These are:-[10]

> *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;*
>
> *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.**[11]***

The correct law for the courts to apply is as follows. If the court accepts the explanation given by or on behalf of the accused, it must of course acquit. But this does not entitle a court to convict if the court does not believe the explanation, for the accused is still entitled to an acquittal if it raises in the mind of the court a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

Turning to the present case, the accused faces the offence of Murder contrary to Section **203** as read with Section **204** of the Penal Code.[12] It is alleged that on 26th October 2011 at Mutonga Village in

Mukurweini District within Nyeri County, he murdered a one Beth Njeri Kirigi.

**PW1** testified that on the material day at around 11.29 PM, she was asleep in her house with her child aged 6 years, that she heard someone touch her window, she went out, found that a bucket she had put outside to collect rain water had been shifted and she decided to go and alert her mother who in turn called her brother and sister and they all went back to her house only to find that the door had been broken and her six year old child was missing. After a search the child was found dead in a well. The accused is her husband, but not the biological father of the child. The accused was subsequently arrested and on 4th November 2011 he came in the company of police men and he led the police to the spot where they recovered an axe, the suspected murder weapon which was the same spot where the body was recovered.

Her evidence was supported by **PW2, PW4 & PW5. PW3**. The area chief's evidence is that the accused in a remorseful manner disclosed to him that he was the one who killed the child. He accompanied the accused to the D.C's office where they met the D.O.1 and the accused repeated the same information. The D.O.1 informed the D.C. who informed the Sub-County Security Committee. The accused narrated to sub-county security committee the same information on his own accord and without coercion. Subsequently, the accused accompanied the police to his home whereby they recovered the axe. PW6 produced the post mortem report while PW7 a police officer received the report at the police station and conducted the initial investigations before she was transferred while PW8 also investigated the case and confirmed that during the investigations the accused led them to the place where they recovered the axe.

I have carefully evaluated the above evidence and following the steps enumerated above and the above authorities, I am persuaded that the prosecution has established a *pima face* case to warrant this court to place the accused person on his defence.

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

**John M. Mativo**

**Judge**

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[1] Cap 75, Laws of Kenya

[2] {1957} E.A 332 at 334 and 335

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

[4] Page 907

[5] 11th Ed

[6] Moran Rules of Court, Vol. III, pp. 542-543; People vs. Upao Moro 101 Phil. 1226.

[7] Florenz D. Regalado, Remedial Law Compendium, 1970 ED; p. 795

[8] {1955} HCA 38; (1955) 92 CLR 654

[9] Director of Public Prosecutions (NSW) v Elskaf [2012] NSWSC 21.

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

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

[12] Cap 63, Laws of Kenya