REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL CASE NO.41 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

STEPHEN MBUGUA NJAMBI.....ACCUSED

RULING

1. Stephen Mbugua Njambi ("Accused Person") is charged with the offence of murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully, and with malice aforethought, killing Zachariah Wanyoike on 02/08/2014 at Gitambaya village in Ruiri in Kiambu County jointly with others not before the Court.

2. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

> **Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

3. To successfully end up with a verdict of guilty in murder charge, the prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

That death of the victim occurred (*actus reus*)

That the death was caused by an unlawful act or omission by the Accused Person; and

The unlawful act or omission was actuated by malice aforethought.

4. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died on not.

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.

c. Intent to commit a felony.

d. Intention by the act or omission to facilitate the flight or escape from custody of any person who

has committed or attempted to commit a felony.

5. At this point in the proceedings, I am required to make a determination whether the Accused Person should be put on his defence. The test to be used at this point in the trial is the test for *prima facie* case long ago established in the celebrated case, ***Bhatt –vs- R [1957] EA 332***. It was held in that case that a prima facie case is not 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.

6. In the judgment read by SIR NEWNHAM WORLEY, President of the Court of Appeal, the learned JJA expressed themselves thus on what constitutes a prima facie case:-

> 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.
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> 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.
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> A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence.
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> 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.

7. And in ***R -vs- Jagjivan M. Patel and Others 1, TLR, 85***, in another famous restatement of the meaning of *prima facie* case, the Learned Judge phrased it thus:

> All the court has to decide at the close of evidence 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 it may be 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 conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.

8. So, to paraphrase these authorities, a *prima facie* case is defined in the negative: A *prima facie* case is not established if at the end of the Prosecution case there is no evidence upon which, if the evidence, taken at its highest, is accepted, a reasonable court could convict. (See ***R v Galbraith 73 Cr. App. R. 124***).

9. Here, the Prosecution theory of the case is a straightforward one: The Accused Person was one of several others who went to the home of the deceased, persuaded that the deceased was responsible for stealing the Accused Person's window grills. While it was in the night, and, therefore, reasonably dark, the Accused Person was well known to the witnesses who saw him – including the wife of the deceased. The group dragged the deceased from his house and were heard saying that he was being taken to the "Base" to answer for his transgressions. At least one of the Prosecution witnesses testified to seeing the

Accused Person dragging and beating the Deceased. The Deceased was later found badly injured, left for the dead and did, eventually, succumb to his injuries.

10. Mr. Amutallah, for the Accused Person, gallantly argued that the Prosecution has not established a case requiring the Court to put the Accused Person on his defence. Arguing under four headings, Mr. Amutallah contends that:

a. The Prosecution failed to prove its case beyond reasonable doubt;

b. There were no eye witness to the alleged murder;

c. The ingredients of murder were not proved. In particular, Mr. Amutallah argued that the second element linking the actus reus to the mens rea which shows that the Accused Person committed an unlawful act that led to the death was missing as was the malice aforethought; and

d. The Prosecution did not establish a common intention between the Accused Person and the other unknown suspects not before the Court.

11. All of the arguments raised by Mr. Amutallah rest on the ultimate weight and credibility to be placed on the Prosecution witnesses regarding what they saw and heard. In particular, Mr. Amutallah's arguments rise and fall on whether certain Prosecution witnesses positively identified the Accused Person taking the Deceased from his house and assaulting him outside his house. At this point in the case, it would be improper to assess the strength or weakness of the prosecution evidence by taking a view of the witness reliability unless I came to the conclusion that the state of the evidence called by the Prosecution, taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable that no court, properly directing its mind, could properly convict on the evidence. In my view, this forbiddingly high threshold is not satisfied here, since there is some evidence which, if accepted and "taken at its highest", would entitle the Court to convict. At this point, the less I say, the better.

12. The Accused Person is, consequently, found to have a case to answer and is put on his defence.

Dated and delivered at Kiambu this 3rd day of October, 2016.

JOEL NGUGI

JUDGE