

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CRIMINAL CASE NO. 5 OF 2018**

**REPUBLIC.....PROSECUTOR**

**R**

**-VERSUS-**

**JOSEPH NYAMU NJOGU.....ACCUSED**

**RULING**

1. The accused **JOSEPH NYAMU NJOGU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that

**“On the night of 3<sup>rd</sup> and 4<sup>th</sup> of April 2018 at Kibatha Village in Kihatha Sub-location in Mukaro Location of Nyeri Central Sub-county in Nyeri County within the Republic of Kenya murdered JASAN KIMARU NJOGU”**

2. The prosecution called nine (9) witnesses in support of their case.

3. This trial has gone through several judges. The matter commenced before **Hon. Lady Justice Mshilla** on **3<sup>rd</sup> March 2020** and two (2) witnesses were heard. Following her transfer **Hon. Justice Martin Muya** took over the case and heard the remaining **seven (7)** prosecution witnesses. Thereafter **Justice Muya** was also transferred and this court took over the case.
4. **PW1 GLADYS WANGUI NJOGU** told the court that both the Accused and Deceased were her sons. **PW1** stated that on **4<sup>th</sup> April 2018** she woke up early at **6.00am** and went to the tank outside to collect water. She noticed a body lying on the ground outside the house of the Deceased.
5. **PW1** moved closer to check and saw that the body was that of her son '**Kimaru**' (the Deceased). She called out to the Deceased but he did not respond. **PW1** noted that there was blood around the body and saw blunt injuries on the head of Deceased. A wooden plank which was blood-stained was also found lying near the body.
6. **PW3 DAVID GACHAGUA** was the father of both the Deceased and the Accused. **PW2 JOHN NGUNJIRI NJOGU** and **PW6**

**MONICA MUMBI NJOGU** were both siblings of the Deceased and the Accused. **PW4 JAMES GICHUKI NYAMU** was a cousin of the Deceased.

7. All the above witnesses who were family members of both the Deceased and the Accused told the court that on the morning of **4<sup>th</sup> April 2018** they heard **PW1** screaming. They all rushed to the scene and found the Deceased lying dead outside his house. The witnesses all stated that the accused and the Deceased each had their own house and the houses of the two were about 7 meters apart. They also state that a blood-stained plank of wood was recovered at the scene.
8. The family members told the court that the accused had last been seen the previous night when he came and collected food from his mother's kitchen and then went back to his house. On the other hand the family members state that on the date in night the Deceased had gone out to work as a mason and returned home late thus none of them saw him the evening before the incident.
9. The incident was reported to police who came and removed the body

to the mortuary. **PW5 PC STANLEY WACHIRA** told the court that on **4<sup>th</sup> April 2018**, he was on patrol along the **Nyeri-Nyahururu road**. Upon getting to the '**Ngamune area**' he came across a crowd who had apprehended the Accused claiming that the accused had killed his brother. **PW5** re-arrested the accused and took him to the police station.

10. **PW7 PC VINCENT ODHIAMBO** was the investigating officer who stated that he visited the scene of the accident and recovered the body of the Deceased. **PW7** also recovered a blood-stained wooden plank at the scene which he produced as an exhibit **Pexb 1**.

11. Upon the close of the prosecution case it is now the duty of this court to analyse the evidence on record in order to determine whether a prima facie case has been established to warrant placing the accused on his defence.

12. The fact of the death of the Deceased is not in any doubt. Several of the witnesses called by the prosecution testified that they saw the body of the deceased lying on the ground next to his house with blunt wounds to the head.

13. **PW8 DR JOHN MUTHURI** was the pathologist who conducted the post-mortem on the body of the Deceased. The doctor filled and signed the post mortem report which he produced as an exhibit. **PW8** stated that he did observe fractures to the skull and noted extensive sub-dural haemorrhage to the head of the Deceased. He concluded that the cause of death was **'Head injury due to blunt force trauma'**

14. Having established the death of the Deceased and its cause the prosecution were required to adduce sufficient to establish a **'prima facie case'** to warrant placing the Accused on his defence.

15. In the case of **RAMANLAL T BHATT -VS- REPUBLIC [1957]**

**E.A 332** the Court stated as follows:-

**"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 a WILSON J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether it believes 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 best it least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.” [Own emphasis]

16. In the case of **REPUBLIC -VS- ABDI IBRAHIM OWL [2011]** eKLR Hon. Lady Justice Mutuku gave the definition prima facie case as follows

**“Prima facie” is a latin word defined by Black’s Law Dictionary 8<sup>th</sup> Edition as “Sufficient to establish a fact or to raise a presumption unless disproved or rebutted”. “Prima facie case is defined by the same dictionary as “The**

**establishment of a legally required rebuttal presumption. To digest this further and in simple terms, it means the establishment of a legally required rebuttal presumption that an accused person is guilty of the offence he or she is charged with.** [Own emphasis]

17. In **RONALD NYAGA KIURA -VS- REPUBLIC [2018] eKLR**

the Court stated that

**“It is important to note that at the close of the prosecution case, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation rebuttal is offered by an accused person.** This is well illustrated in the oft

**cited Court of Appeal case of RAMANLAL BHATT - VS- REPUBLIC [1957] E. A 332. At that stage of the proceedings the trial court does not concern itself with the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that is sufficient for the trial court to place the accused on his defence.” [Own emphasis]**

18.It is pertinent to note that none of the witnesses called by the prosecution actually saw the Accused strike and fatally injure the Deceased. Indeed none of the witnesses saw the accused and the Deceased together on the night in question. There was no allegation of any quarrel or fight between the two that night.

19.The witnesses who were family members all state that they suspected accused basically because he is the **black sheep** of the family. They all state that the accused has been quarrelsome and violent to his family members. That the accused was fond of terrorizing family members and was

generally belligerent and uncooperative. That he at one time assaulted his father and his sister (**PW6**) which assaults were reported to the local administration. The witnesses went on to state that the accused was arrested for these assaults but that the family later decided to bail him out as he was their brother. They state that the accused had threatened that he would kill one of them, therefore in their view death of the Deceased cannot have been a mere coincidence.

20. The prosecution are therefore seeking to rely on circumstantial evidence to implicate the accused. Circumstantial evidence is indirect evidence which invites the court to draw an inference of guilt from a proven set of facts.

21. **Blacks Law Dictionary Tenth Edition** defines circumstantial evidence as

**“Evidence based on inference and not on personal knowledge or observation.”**

22. In **R -VS- TAYLOR, WEAVER and DONOVAN [1928] Cr App**

**21, Lord Heward CJ** stated as follows:-

**“It has been said that the evidence against the applicant is circumstantial. So it is but**

**circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”**

23. In the case of **AHAMAD ABOLFATHI MOHAMED & Another -vs- REPUBLIC [2018] eKLR**, the Court of Appeal stated that:-

**“However it is a truism that the guilt of an accused person can be proved either by direct or circumstantial evidence, circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances of facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.**

24. In **SAWE -VS- REPUBLIC [2003] eKLR** the Court of Appeal reiterated that **in order to justify a conviction on circumstantial evidence,**

**“.....the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of Circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the accused.” [Own emphasis]**

25. The parameters under which an inference of guilt can be made from circumstantial evidence was set out in the case of **ABANGA alias ONYANGO -VS- REPUBLIC Cr App No. 32 of 1990** as follows:-

**“It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests**

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.**
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.**
- (iii) the circumstances taken cummulative should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was so committed by the accused and no one else.”**

26. An examination of the evidence on record against the above parameters leads to the conclusion that said evidence does not pass muster.

27. As stated earlier nobody saw the accused with the Deceased on the material day. There was no evidence that the two had quarreled or had been involved in any altercation. The evidence of the witnesses was that on the night of **3<sup>rd</sup> April 2018**, the accused went to his mother's

kitchen served himself his dinner and went to his house. On that night

the Deceased was said to be away at his place of work.

28. The accused was arrested and charged on the basis of suspicion. It is trite that suspicion on its own no matter how strong cannot form the basis for a conviction.

29. Finally and most importantly the alleged murder weapon being a blood-stained wooden plank (**Pexhb 1**) was collected by police. This wooden plank was said to be similar to the wooden planks which had been used to construct the accused's house, thus it was the prosecution case that the accused took a piece of wood from his house and used it to batle his brother to death. The said wooden plank was taken to the government chemist for analysis.

30. **PW9** who was the Government chemist did conduct an analysis of the plank and did a comparison with the blood sample of the Deceased. **PW9** produced as an exhibit her report dated **27<sup>th</sup> January 2020 (Pexhb 3)**. **PW5** found that the wooden plank was stained with human blood. Upon

subjecting the samples to DNA testing **PW5** concluded as follows:-

**“The DNA profiles generated from the blood stains on the timber (item B) was of unknown male”**

31. In other words **PW9** found that the blood-stains on the wooden plank **did not** originate from the Deceased. Thus there is no way this wooden planks could be said to have been the murder weapon. Apparently no blood sample was taken from the accused for purposes of comparison with the blood stains on the wooden plank.

32. I find that the circumstantial evidence falls short. If the accused opted to keep silent in his defence no conviction could be forthcoming. Finally I find that no prima facie case has been established. Accordingly I do hereby acquit the accused of this charge of murder under **Section 306 (1)** of the **Criminal Procedure Code Cap 75, Laws of Kenya**. The accused is to be set free forthwith unless he is otherwise lawfully held.

**Dated in Nyeri this 21<sup>st</sup> day of November 2025.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL