REPUBLIC OF KENYA

IN THE HIG COURT OF KENYA TA NAKURU

CRIMINAL CASE NO. E011 OF 2023

REPUBLIC……..PROSECUTION

VERSUS

VIOLA CHELANGAT KEMBOI……..ACCUSED

RULING ON CASE TO ANSWER

1. The accused herein, **Viola Chelangat Kemboi** stands charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on the 31st January 2023 at Mangu Area in Rongai Sub County within Nakuru County murdered **Charity Chepkoech Kangongo.**

2. The Accused pleaded not guilty to the offence and the prosecution called nine (9) witnesses in support of its case.

3. The issue before this Court at this stage is whether the prosecution has established a *prima facie* case sufficient to warrant placing the accused on his defence as provided under **Section 306** of the **Criminal Procedure Code.**

4. In ***Republic v Abdi Ibrahim Owl*** **[2013] KEHC 2122 (KLR)** as follows:-_

> ***"Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In <u>Ramanlal Trambaklal Bhatt v. R [</u>1957] E.A 332 at 334 and 335, the court stated as follows:***
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> > ***"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 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."***

5. The test is therefore settled in law that a *prima facie* case is one in which if the accused elected to remain silent, the Court could convict on the evidence presented. It is not proof beyond reasonable doubt but rather whether there is evidence upon which a reasonable Court properly directing itself would ideally base it to convict.

6. In ***Republic v Alex Musau Jimmy*** **[2022] KEHC (KLR)** where the Court stated as follows:-

> ***"…However, this is not the stage at which the court minutely examines evidence and makes a conclusive determination as to whether the accused stands convicted or not. In my view, though at the end of the trial, the evidence as presented by the prosecution may fall short of convicting the accused with the offence charged, where the same may warrant a conviction on a lesser offence, the Court ought not to acquit the accused or proceed to convict him of a lesser offence without hearing him. The evidence of the accused may well exonerate him even from the conviction on the lesser offence hence it would be prudent to hear the accused before making a conclusive determination."***

7. A prima facie case therefore is essentially not made out of proof beyond reasonable doubt, but on rebuttable presumption that, the accused person is guilty of the offence he is being accused of.

8. Courts are required to carefully examine identification evidence, especially when it comes from a single witness, and should only accept it if satisfied that it is accurate and free from the possibility of mistake. **R Vs Turnbull {1977}.**

9. Evidence from eyewitnesses plays an important role in all contested cases. However, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices.

10. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

11. As was held in **Charles O. Maitanyi v Republic**;

> ***" it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care".***

12. In **Kariuki Njiru & 7 others v Republic 2017 eKLR** the court held that; ***evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.***

13. In the case of **Wamunga v Republic (1989) KLR 424** the Court of Appeal stated as follows regarding the evidence of identification generally:

> ***"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

14. I have considered the evidence adduced by the prosecution and note that, the prosecution was unable to adduce identification evidence. Prosecution did not adduce evidence of an unlawful act or omission remotely linked to the accused resulting in the death of the deceased.

No circumstantial evidence has been offered to provide a linkage of the alleged crime to the accused.

15. In order for the accused to be put on their defence, there should be *prima facie* case established by the Prosecution. None of the witnesses called could place the accused at the scene save the faulty identification conducted.

16. Under **Article 50 (2) (a)** of the Constitution, the accused is presumed innocent until proven otherwise. This case is however marred with gaps and the same can only be interpreted to the benefit of the accused person. See **Republic vs Martin Thinguku [2021] KEHC 955 (KLR)**.

17. In **Republic v Patrick Mutisya Mutinda [2022] KEHC 1622 (KLR)**

> ***"In my view, where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognized and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an***

otherwise hopeless case or a case that is dead on arrival. Defence case is not meant to fill in the gaping gaps in the prosecution case."

18. By the evidentiary material placed before me and testimonies by prosecution witnesses, I am not convinced that, the evidence before Court by the prosecution is sufficient to sustain a conviction even if the accused person remained silent. It is an unfortunate incident and a great injustice to the deceased person streaming from the laxity of the investigators and the prosecution. The DNA forensic examination of the murder weapon and blood samples obtained at the scene is exculpatory and absolve the accused.

19. It remains a mystery as to why **Charity Chepkoech Kangongo** was murdered in such a brutal fashion, the failure to undertake an identification parade was fatal to the extent that the witnesses purporting to identify the accused on the dock had no prior familiarity with her and no identification parade was conducted to assist PW1 and PW2.

20. The evidence of PW1 alleges it was the accused with an injured hand while PW4 the deceased's father testified that the deceased was partially paralyzed on the hand in 2015 following an accident, PW2 on his part testified that it was the accused with an injured hand she was not intoxicated and helped the deceased who was intoxicated.

21. While it remains a fact that the accused was the deceased employer and that the deceased was murdered outside the accused house no

evidence direct or circumstantial, primary or secondary has been laid to form a *prima facie* basis.

22. The upshot of the foregoing is that the prosecution has not met the test of a *prima facie* case to warrant the accused persons to be called upon to answer. The accused is hereby acquitted of the offence of murder under **Section 306(1)** of the **Criminal Procedure Code.**

23. She shall be forthwith released, unless otherwise lawfully held.

It is so ordered.

Delivered virtual in Nakuru on this 22nd day of April, 2026

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Mohochi S. M.

JUDGE