

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT VIHIGA**  
**CRIMINAL CASE NO. E005 OF 2024**

**REPUBLIC**

.....**PROSECUTION**

**VERSUS**

**NEWTON JJO.....**

.....**ACCUSED**

**Coram: Before Justice R. Nyakundi**  
**M/s Leina for the state**  
**Mr. Edaki Advocate for the Accused**

**RULING**

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on 14<sup>th</sup> March 2023 at Gamoi Village, Galona Sub-location, Gisambai Location in Hamisi Sub-county within Vihiga County jointly with others not before this Court murdered Victor Mugimi.
2. The lead prosecution counsel in these proceedings was Mrs. Leina for the state whereas the Accused person was under the retainer of Learned counsel Mr. Edaki.
3. The prosecution marshalled 6 witnesses who gave evidence to establish the ingredients of the offence of murder contrary to section 203 as read with section 204 of the Penal code.

**Summary for the Prosecution case.**

4. **PW1 - Jotham Okumu Ongogo** testified that he is a farmer/businessman at Komogoy village, married with two children. He stated that on 14<sup>th</sup> March 2023 at around 1300hrs, while in his shamba, a

group of more than ten boda boda operators entered his house and started beating his son Victor Mugimi using rungas, stones and some with pangas. His son ran towards the main road pursued by the group calling him “MWIZI”, where they cornered and continued beating him until he fell unconscious. He was told the issue was theft of a cock, but the cock was not present. The attackers later carried Victor on a motorcycle towards Kimogoy dispensary where they killed him. He reported at Gisambai Police Post and on return found his son dead on the road. He identified several attackers including Kiptum, Iravuna, Navy, Newton and Bidali.

5. **PW2 - Rose Musimbi Nake** testified that on 10<sup>th</sup> March 2023 at around 1830hrs, she discovered her black cock missing. On 13<sup>th</sup> March 2023, she recovered it from Onamu who stated it had been sold to him by Brighton. On 14<sup>th</sup> March 2023 at around 1130hrs, boda boda riders arrested Brighton and the deceased demanding the cock, and beat them using sticks and rungas. She identified Kiptum and Eravona among those who assaulted them. She reported the incident to Gisambai Police Post, and upon return found the deceased dead and Brighton critically injured.
6. **PW3 - Stephen Ambehe Badi** testified that on 14<sup>th</sup> March 2023 at around 1200hrs, he witnessed discussions about the stolen cock, after which Kiptum mobilized boda boda riders who arrested Brighton and the deceased. They were taken to Kapchepkwong junction and beaten with sticks by several individuals including Kiptum, Newton, Iravuna and others. He observed the deceased being transported on a motorcycle already dead and later police removed the body.
7. **PW4 - Dr. Collins Masika** was summoned by the prosecution for the purpose of proving the element of death that the deceased died. This was by way of a Post Mortem Examination Report dated 21<sup>st</sup> March 2023 in which he made the following findings that this is collapsed lungs and blood in the chest cavity. The other positive element was an injury to the head comprising of a wound on the left tempo parietal region extending

to the intracranial area. As a result of the examination, PW4 who is a pathologist formed the opinion that the cause of death was intracranial haemorrhage due to trauma caused by a blunt object. The Post Mortem Report was admitted as documentary evidence as PEXH-1 in support of the prosecution case.

8. **PW5 - Brighton Kipkemboi** testified that on 10<sup>th</sup> March 2023, the deceased gave him a cock to sell which they sold for Kshs. 800, and he received Kshs. 300. On 14<sup>th</sup> March 2023, he was arrested by boda boda riders who also brought the deceased, and both were beaten using sticks and stones. He witnessed Newton hitting the deceased with a stone causing him to collapse and foam from the mouth. The deceased died during the ordeal and he was later taken to hospital.
9. **PW6 - CPL Nicholas Kirongo** testified that on 14<sup>th</sup> March 2023, he visited the scene and confirmed that the deceased and Brighton had been subjected to mob injustice after stealing a cock. Investigations revealed that the deceased had stolen the cock, sold it through Brighton and both were later assaulted by boda boda riders leading to the death of the deceased. He identified suspects including Kiptum, Newton Jijo and others and confirmed that Newton Jijo was charged with murder.

### **Prosecution Submissions Summary**

10. The Prosecution filed submissions on case to answer dated 6<sup>th</sup> May 2026 through the Learned Counsel Mrs. Leina Davies. The learned prosecution counsel submitted that the accused person, Newton Jijo was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, following an incident on 14<sup>th</sup> March 2023 where the deceased, Victor Mugimi, was beaten to death by a gang of boda boda riders. It was submitted that the prosecution bore the burden of proof under the Evidence Act to establish the essential elements of murder beyond a reasonable doubt.

11. Regarding the first ingredient, the learned counsel submitted that the death of the deceased was proved through a post-mortem report and testimony from PW4, which indicated the cause of death was intracranial hemorrhage caused by a blunt object. The learned prosecution counsel further submitted that the unlawful act of the accused was established through the testimony of PW1 and PW5, who identified the accused as part of the group that assaulted the deceased with crude weapons.
12. On the issue of malice aforethought, the learned counsel submitted that the mens rea of the offence could be inferred from the brutal manner of the assault, the nature of the injuries inflicted and the conduct of the accused. Counsel relied on the following authorities: **Rex Vs Govan Pazi s/o Mukurisho (1943) 1o EACA; Ernest Asami Bwire Abang alias Onyango Vs R (Criminal Appeal No 32 of 1990** and **Chesakit Vs Uganda (Criminal Appeal No. 95 of 2004)** to support the proposition that a positive intention to kill or cause grievous harm was evident.
13. Furthermore, the learned counsel submitted that the doctrine of common intention under section 21 of the Penal Code applied, as the accused was identified as a participant in the mob injustice and shared a common purpose with the other assailants. It was submitted that in such circumstances, it is immaterial who actually caused the death. In conclusion, the learned prosecution counsel submitted that the case was based on direct evidence and common intention, and therefore prayed that the accused be put on his defence pursuant to section 211(1) of the Criminal Procedure Code.

### **Analysis and Determination**

14. The question for this court to answer is whether under Section 306 of the Criminal Procedure Code, the prosecution has discharged the burden of proof to meet the threshold of a prima facie case for the accused person

to be placed on his defence. First and foremost, **Article 50(2)(a)** states as follows: -

*“Every accused person has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved.”*

15. The prima facie obligation is vested with the prosecution. The success or failure of it depends wholly on the evidence presented to prove existence or non-existence of a fact or facts in issue as derived in Section 107(1), 108 and 109 of the Evidence Act. The term Prima facie is not defined under Section 306 of the Criminal Procedure Code but the concept appears both in criminal and civil law. There is a close knitted correlation between the term prima facie as commonly used and prima facie evidence. In so far as the definition is concerned, as deducible in Section 306 of the CPC, the use of prima facie case means the prosecution having presented enough evidence to prove the elements of the offence in question. That the prosecution is entitled to prevail in its case against the accused person. Speaking plainly, there are two senses in which courts use the concept of prima facie. The first in the sense of the prosecution producing sufficient evidence to render a reasonable conclusion in favour of the allegation asserted in the indictment or the charge sheet. That this what gives the trial court the power to exercise discretion to allow the criminal case to proceed to the next stage which is the defence offering an explanation or an answer to the charge.
16. In the second sense of the concept however, courts use prima facie case to mean not only that the prosecution evidence will reasonably allow an independent court or tribunal properly constituted to conclude that the evidence compels the accused person to produce evidence to rebut it. However, in the event the accused person elects to keep silent or offers no evidence in rebuttal, the blend of that sufficient evidence by the prosecution, will satisfy the court to find the accused guilty and convict him as per law established. The accused person in a prima facie case is

not required as a matter of the Constitution or the law to offer evidence in reply. This is what Article 50(2)(f) says; that the accused has a right to remain silent and not to testify during the proceedings and he has also a right in Art50(2)(i), a right to refuse to give self-incriminating evidence. If he elects any of these options, provided under our Constitution, the accused takes a risk of an adverse verdict if he fails to do so.

17. It is trite that when the prosecution has made a prima facie case in criminal proceedings, the burden of evidence then shifts to the accused person. However, there is one critical element in this realm of law. The necessity of offering evidence by the accused person to offset the prosecution's prima facie case, in no way does it shift the burden of proof which continues to rest on the prosecution at all material times as stipulated in Art 50(2)(a), the accused is presumed innocent until the contrary is proved. I presume that is what the drafters of the constitution had in mind when the rights centred around Art 50(2)(a), (j) and (i) of the same constitution. In **Republic Vs Abdi Ibrahim Owl [2013] eKLR** a prima facie case was defined 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 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 **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, the court stated 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 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.”*

18. Similarly, in **Ronald Nyaga Kiura Vs Republic [2018] eKLR** the Court stated as follows in paragraph 22: -

*“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that prima facie 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 in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”*

19. At the close of the prosecution case, the dicta in the case of **Anthony Ndegwa Ngari Vs Republic (2014) eKLR** for the case of murder, the republic is supposed to prove each of the following ingredients beyond reasonable doubt:
- a. *The fact of death*
  - b. *The fact that the deceased's death was caused by an unlawful act or omission.*
  - c. *That the accused committed the unlawful act which caused the death of the deceased; and*
  - d. *That the accused had malice aforethought.*
20. At a prima facie stage, the court asks the question whether a reasonable tribunal or judge in a bench trial crediting the prosecution testimony and drawing all rational inference in the prosecution's favour could find every element of the offence of murder proved beyond reasonable doubt. The court has to test the sufficiency of the evidence by reviewing it and this is essentially to address the issue whether the prosecution's case is that which has met the threshold of a prima facie case or is one which is so lacking that it should not be allowed to proceed to the defence stage. The Constitution requires proof of guilty beyond reasonable doubt. As a consequence, the constitutionally required standard is founded under the right of presumption of innocence until the contrary is proved. The due process clauses in Article 50 of the constitution requires that each element of a crime be proved beyond reasonable doubt. It is a requirement of the law for the court not to reserve a ruling of a prima facie case at the close of the prosecution case. The judge must make a judicial determination of the legal sufficiency of the prosecution's case before asking the accused to put in a defence.
21. In the case of **R Vs Galbraith (1981) 1 WLR 1039**, the court laid down the test which must apply in answering the issues around prima facie case and a submission of no case to answer thus: -

*“The difficulty (for the court) arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness, or because it is inconsistent with other evidence -*

- a. Where the judge comes to the conclusion that the prosecution’s evidence taken at its height, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
- b. Where however the prosecution evidence is such that its strengths or weaknesses depend on the view to be taken of a witness’ reliability, or other matters which are generally within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, the then judges should allow the matter to be tried by the jury but for our case, is for the case to proceed further to the defence to offer evidence in rebuttal or elect to keep quiet. (emphasis mine).”*

22. How does the court make a finding on a prima facie case? It is to look at the proofs of evidence attached to the six (6) witnesses and the information as drafted by the prosecution in totality as against the accused person. In this context, I have reviewed the evidential material and statements from the six (6) witnesses and perhaps whether there are any serious criminal defences from the accused person challenging the evidence by the prosecution to a threshold level of scintilla of evidence. It is trite that suspicion however well placed does not amount to a prima facie case. In my considered view the evidence made available points to and attaches some nexus to all the ingredients of the offence alleged against the accused person.

23. I therefore find that a prima facie case has been made out requiring the accused to be put on his defence under section 306 as read with section 307 of the Penal Code.

24. The defence hearing shall be on **18<sup>th</sup> May 2026**.

25. It is so ordered.

**DATED, SIGNED AND DELIVERED AT VIHIGA THIS 11<sup>TH</sup> DAY OF MAY  
2026**

.....  
**R. NYAKUNDI  
JUDGE**