REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL CASE NO. 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

NAKADI MORU LOMONG.....ACCUSED

R U L I N G

1. The accused person was charged with the offence of murder contrary to section 203 of the penal code the particulars of which were that on 21/2/2017 at Kotela village in Loima sub-county within Turkana County jointly with others not before the court murdered Lokori Ngoriachana alias Lokeel Ngikurichana.

2. He pleaded not guilty to the charges and to prove its case the prosecution called and examined a total of eight (8) witnesses, at the close of which both the prosecution and the defence opted not to make any submissions as to whether the prosecution had established a prima facie case to enable the court place the accused persons on his defence

3. To sustain a conviction on a charge of murder, the prosecution is under both legal and evidential obligation to prove the following elements of the offence:-

a. The fact and the cause of death

b. That the said death was unnatural

c. That it was carried by an act of omission and commission on the part of the accused person

d. That it was caused with malice aforethought as defined under section 206 of the penal code.

4. At this stage of the proceedings what the court is required to do is to establish whether a prima facie case has been established under the principles set out in the case of RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 as follows:-

i. *"Remembering that the legal onus is always on the* ***prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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."***

ii. 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 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)

5. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR it was**

held as follows:-

"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 borderline 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 conviction."

(Emphasis added)

6. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v KARANJA KIRIA CR.CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on prima facie case:-

"The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted."

(Emphasis added).

7. The facts and the cause of death of the deceased was proved through the evidence of PW3 Dr. WAYA JONATHAN who stated in his evidence that the cause of death was traumatic brain injury secondary to gunshot wound. PW1 NAPERIT BUUTANA, and PW2 NANYUDUK ADSOTIE, through their evidence placed the accused person at the scene.

8. Based upon the evidence tendered by the prosecution and without saying too much thereon so as to not to compromise the defence the accused is likely to offer, should he decide to do so, being alive he has his right under Article 50 of the constitution and section 306 (3) of the criminal procedure code, I am satisfied that the prosecution has placed enough evidence to enable me put the accused on his defence which I hereby do.

9. The accused through his advocate on record is now called upon to decide how he wishes to defend himself.

Dated, Signed and Delivered at Lodwar this 4th day of March, 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Tanui for the State

Mr. Pukah for the accused person

Accused present

Court Assistant: Biwott