Republic v Kioko (Criminal Case 55 of 2023) [2024] KEHC 9896 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL CASE 55 OF 2023

DR KAVEDZA, J

JULY 31, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

VICTORIA MUENI KIOKO ..... ACCUSED

RULING

1. The accused person herein, Victoria Mueni Kioko, was charged with the offence of murder, contrary to Section 203 as read with Section 204 of the *Penal Code* Cap.63 Laws of Kenya. Particulars of the offence were that on 9th to 10th June 2019 at the Round Table bar in Kawangware, Coast Area, in Dagoretti Sub County within Nairobi County, she murdered Mohamed Ibrahim (hereinafter the 'deceased'). The accused pleaded not guilty to the charge and the matter proceeded to hearing.

2. The issue for determination before me is whether or not a prima facie case has been made out by the prosecution to require the accused to be put on her defence in terms of section 306 (2) of the *Criminal Procedure Code*. The answer to the issue lies in the analysis of the prosecution evidence in light of the applicable law.

3. The prosecution closed their case on 25/06/2024 after calling nine (9) witnesses in support of the case against the accused person. The summary of the prosecution case is that on 10/06/2019, at around 8.00 am, PW1 went to collect plastic jerrycans' at Round Table Club but upon knocking at the door, there was no response. He went to inform the manager (PW8) at his house, and together they proceeded to the club. When they went in, they found the deceased's lifeless body in a squatting position with blood all over the floor. PW8 called the club's owner (PW5) and informed him about the incident. He also called the police, among them PW6, who went and processed the scene.

4. PW6 testified that at the scene, he found the deceased in a squatting position with blood on the floor. He further added that there were broken pieces of beer bottles on the floor. Both the accused and the bar owner (PW5) were present at the scene and upon interrogation, the accused stated that she closed

the bar at around 11.00 pm and left the deceased asleep on the couch. PW6 added that the accused stated that after closing the door while outside, she threw the keys to the counter and left.

5. PW2, who was at the club on the fateful night, testified that on 09/06/2024, he was at the bar with his friends when one of them received a call from the sister to go pick her up. All the friends left the club and left him alone. He stayed at the bar up until around 10.45 pm when the accused informed him that the bar was about to be closed. The deceased was asleep on the couch when PW2 left the bar. He confirmed leaving both the accused and the deceased at the premises.

6. PW3, a brother to the deceased, testified that on 10/06/2019, upon being informed of the death of his brother, he rushed to the scene. He stated that while at the scene, the accused, who was standing next to him, uttered, 'Moha alitaka kufa', which this court understands to mean that the Moha, the deceased, wanted to die. He went ahead to testify that people at the scene questioned the accused why she said that the deceased wanted to die. The AP Police then got hold of the accused and pulled her inside the bar when the crowds were advancing upon her asking why the deceased wanted to die. PW3 further told the court that two months before the incident, the deceased had introduced the accused to him, saying that should anything happen to him, the accused would be responsible. The reason given by the deceased, according to PW3, was that the accused was jealous of the deceased since their boss, PW5, trusted the deceased more than the accused. He also alleged that the accused claimed to have wiped some blood on the floor to prevent it from flowing out of the bar.

7. PW4, another brother to the deceased, also testified that he visited the crime scene and further witnessed the post-mortem. According to the pathologist report produced in evidence by PW7, a sharp object had lacerated the neck of the deceased. While it was difficult to ascertain the type of weapon used, PW7 stated that but possibly a broken bottle.

Analysis and determination

8. I have considered the totality of the prosecution evidence in light of the applicable law. I find the following to be the issue for determination.

    1. Whether the prosecution has made out a case to warrant the accused to be put on his defence in terms of section 306 (1) and (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.

9. The Section 306 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya (hereinafter referred to as the *CPC*) provides as follows:

    (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.

    (2) When the evidence of the witnesses for the prosecution has been concluded the court if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....

10. A definition as to what amounts to a prima facie case was given in the case of *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 334 and 335 In that case the Court of Appeal expressed itself on this issue:

> "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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 of 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 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 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."

11. Based on the foregoing, 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.

12. However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See *Festo Wandera Mukando v Republic* [1980] KLR 103).

13. For the offence of murder to be proved, the prosecution is under the obligation to establish the following key ingredients:

    a. Proof of death of the deceased, and the cause,

    b. Proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased,

    c. Malice aforethought on the part of the accused.

14. At this stage of the proceedings, the standards applicable on whether a prima facie case has been made out is lower than the standard of beyond reasonable doubt, which applies at the conclusion of the full trial after the accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the court could convict if the defence says nothing to rebut such evidence.

15. In this case, it is not in dispute that indeed, the deceased died as a result of an unlawful act. The main question here, in my view, is whether the accused person is the one to be held culpable of the death of the deceased.

16. None of the prosecution witnesses who testified before the court witnessed the events leading to the deceased's death. What is presented before this court is all circumstantial evidence, which I have carefully analysed.

17. In this case, there were glaring gaps, which I shall point out. PW3 alleged in his testimony that while at the crime scene, the accused claimed that the deceased wanted to die and that the crowd was about to descend on her before an officer pulled her into the bar to prevent her from being beaten. However, all the other witnesses who were at the scene, including PW4, PW5, PW6, and PW8, denied neither hearing anyone saying that the deceased wanted to die, nor that the accused was about to be attacked on suspicion of killing the deceased. This testimony by PW3 was therefore not sufficiently corroborated.

18. Further, in a bid to establish malice aforethought on the part of the accused, PW3 told the court that about two months before the incident, the deceased had introduced the accused to her and said that should anything happen to him, the deceased would be culpable. The reason given by the deceased, according to PW3, was that the accused was jealous since their boss, PW5, trusted the deceased more than the accused. However, PW5 confirmed during cross-examination by Mr. Omollo that while there were little issues relating to being sent, there was no open hostility between the accused and deceased. PW3's evidence was also not corroborated and as it stands, it is only hearsay evidence.

19. The prosecution further sought to rely on the doctrine of last seen alive and sought to prove that the accused was the last person seen with the deceased. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Before doing so, the court must ask the following questions: -

    i. Are the facts of this case compatible with the innocence of the accused?

    ii. Are the facts capable of explanation upon other reasonable hypothesis than the guilt of appearance?

20. In the Indian case of *Deepack Sauna v State of Delhi*, the court in developing the doctrine of last seen stated: -

> " In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish a prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt."

21. In this case, it is not in doubt that indeed, the accused was the last person to be seen with the deceased at the bar, a fact that was confirmed by PW2. Besides, the totality of the prosecution witness testimonies points to the fact that the accused was the last person to close the door to the bar, leaving the deceased behind.

22. However, no other circumstantial evidence has been tendered before this court to prove the accused person's culpability. The assumption that the prosecution seeks to rely on, in my view, is that the accused person killed the deceased, left him for dead in the club, and closed the doors as she normally would.

23. Suffice to note however that it was not only the accused person who had a copy of the keys to the bar, the manager (PW8) and the owner (PW5), also had copies of the keys. The prosecution has not adduced evidence to isolate the two from the crime. Over and above, while there were no signs of a break-in, it is possible that someone else could open the padlock using other means other than the keys.

24. The prosecution witnesses who visited the crime scene the morning after the body was discovered reported seeing broken bottle pieces on the floor, suggesting a possible commotion or struggle before the deceased was killed. The broken glasses, which can also be seen in the photo exhibits, could be the murder weapon. The pathologist, PW7, already testified that it was possible that a broken bottle may have caused that type of wound on the deceased's neck. No samples of the broken glasses were collected from the scene for either DNA analysis of dusting for fingerprints. PW9, the investigating

officer, confirmed that indeed, the previous investigating officer, Frankline, did not collect the broken bottles at the scene. This, in my view, was a drawback on the prosecutions since the broken bottles could have been the murder weapon and their analysis was important to clear the gaps

25. In view of the foregoing, the circumstantial evidence sought to be relied on by the prosecution is in my opinion insufficient to hold the accused person culpable at this stage as the evidence does not conclusively point to her as the perpetrator. Besides, the glaring gaps in the prosecution's case, which could have been sufficiently filled with thorough investigations, leaves this court with more questions than answers regarding what transpired that resulted in the death of the deceased.

26. The accused may not be called upon to fill the gaps. In the case of *Edwin Wafula Keya v Republic*, Court of Appeal [2005] eKLR, the court stated that;

> " In our view failure to call all or any of the three police officers who arrested the appellant some two months after the offence left an unbridgeable gap in the prosecution's case and the appellant must have the benefit of that gap."

27. It follows that gaps in the prosecution's case raise doubts and the benefit of the doubts must be given to the accused.

28. Article 50(2) (a) of the *Constitution* case provides that-

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

29. This is a right to a fair trial, which cannot be limited. It is my view that the evidence tendered fell short and failed to prove the guilt of the accused to the required standard, that is beyond any reasonable doubt. The prosecution failed to discharge the burden of proof.

30. Considering the entirety of the evidence on record as highlighted herein above, I am of the view that the accused person has no case to answer as none of the witnesses tendered sufficient evidence to implicate the accused person herein in the unfortunate murder of the deceased. Suspicion cannot form a basis for a conviction, no matter how strong.

31. In conclusion, I find that the accused has no case to answer and may not be called upon to defend herself. She is entitled to an acquittal. I therefore acquit her at this stage under Section 306(1) of the *Criminal Procedure Code*.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2024.

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Paclea for the State

Omollo for the Accused

Nelson Court Assistant