Republic v Wafula (Criminal Case E070 of 2019)
[2024] KEHC 10019 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E070 OF 2019

RN NYAKUNDI, J

AUGUST 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

RICHARD SITUMA WAFULA ..... 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 on the 20th October, 2019 at Nyortis farm, in Likuyani Sub-County within Kakamega County, jointly with another not before court murdered Shadrack Wekesa Shikono.

2. The accused person was arrested and arraigned before this court for plea taking. He pleaded not guilty, giving room for the prosecution to discharge their burden of proof beyond reasonable doubt and disprove the innocence of the accused person pursuant to the provisions of Art. 50(2)(a) of the *Constitution*. At all material times, the prosecution's case was done by Senior Prosecution Counsel, Mr. Mark Mugun whereas the accused person was represented by Learned Counsel Mr. Oburu.

3. In support of the prosecution case was the evidence of PW1 David Wanyama. His evidence was to the effect that on 20th October, 2019, he was at home at Kona Mbaya market when he received a telephone call that someone he knew very well had been beaten and is lying unconscious at the scene. On arrival, he found the victim having sustained some physical injuries. He took to him to his residence at Matunda. According to PW1, he left him in company of his wife and the following day, he made arrangements to have him taken to Moi's Bridge Hospital. His condition worsened necessitating them to transfer them to cherangany nursing home. However, in the evidence of PW1, he passed on before he could receive adequate medical treatment. Thereafter the body was transferred to the mortuary and investigations commenced as to the cause of death. That is all that there was in so far as the evidence

to discharge the burden of proof of beyond reasonable doubt. The prosecution nevertheless closed its case giving way to the determination of the issues under Section 306 of the *Criminal Procedure Code*

Determination

4. The evidential relevance vested with the prosecution is to prove the following elements for the offence of murder beyond reasonable doubt:

    a. That the deceased has died

    b. That his death was unlawfully caused.

    c. That it was actuated by malice aforethought contrary to section 26 of the *Penal Code*.

    d. That the accused person before court was placed at the scene of the homicide which resulted in the death of the deceased.

5. It is therefore the duty of this court at the close of the evidence in support of the charge to consider whether or not a sufficient case is made out against an accused to require him to make a defence. In this sense, if the court considers that such a case is not made out in so far as the ingredients of the offence of murder is concerned, it shall be moved to dismiss the charge and have the accused acquitted forthwith.

6. The phrase of no case to answer and what the court should look for in exercising discretion was well articulated by the Learned authors of Blackstone's Criminal Practice 2010 at D15.56 thus;

> "(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the court has shown to be of doubtful value.
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> (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey (1988) Crim LR 767) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."

7. The provisions of Section 306 of the *Criminal Procedure Code* require that at the close of the prosecution case, the court is required to consider whether there is evidence sufficient enough for the court to make a finding of a prima facie case. If at the close of the prosecution case there is no evidence to link the accused person to the offence charged or any other offence of which he might not be convicted, the court is then at liberty to find a no case to answer and have the accused person discharged of his/her culpability.

8. The test to be applied is in the case of In *Republic v 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, 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 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."

9. At this point in time, the court is only concerned with the question as to whether on a balance of probability the essential elements constituting the offence charge or any other offence has been proved and not whether there is proof beyond reasonable doubt.

10. In my judgment, I have evaluated the evidence of PW1 in consonant with the provisions of Section 203 of the *Penal Code*. As to the satisfying of the criteria on the salient features of the offence, it is crystal clear that the witness never witnessed the offence to give an account of how the deceased met his death. The best of his recollection was a telephone call received with regard to the beatings and physical injuries inflicted against the deceased. His evidence is very categorical on this aspect when he got involved to see to it that the deceased receives the best medical attention to facilitate restoration of his health. The reasonable inference I draw from the evidence of PW1, is that he had no idea as to who inflicted the fatal injuries which ultimately caused the death of the deceased. The issue of the charge of murder requires specific intent commonly referred to as Malice Aforethought. This court was therefore bound to establish the inflicted harm on the deceased which caused his death and as to whether whoever intentionally or by unlawful act, committed the heinous crime did so with malice aforethought. The facts of the case fall within the ampit of circumstantial evidence. The renowned principles on circumstantial evidence are now well settled as acknowledged in the case of R v Taylor Weaver & Donovan (1928) 21 CR App R20 where the principles of circumstantial evidence were enunciated as follows;

> " Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination is capable of providing a proposition with the accuracy if mathematics, it is no derogation of evidence to say that it is circumstantial".

11. Such a context of interpretation as to what is the role of a judge in considering whether the prosecution has produced sufficient evidence of a prima facie case to warrant the accused on his defence or on the other hand the goal was partly attainable or lost is profoundly stated by Lord Devlin in Trial bt Jury, The Hamlyn Lectures (1956, republished in 1988) he stated:

> " There is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope would bear a certain weight or take a certain strain is a question that practical men often have to determine by using their judgment based on their

experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has not concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary before he sends out to see what it has to see that it has no flaw, that is a job for an expert. It is the business of the judge as the expert who has mind trained to make examination of the sort to test the chain of evidence for the weak links before he sends to the jury. The trained mind is the better instrument of detecting flaws in reasoning to ascertain whether the case has any reliable strength at all."

12. I remind myself that in approaching the evidence before me, I find no strands of evidence that the crime of murder as alleged by the prosecution was committed by the accused person. In keeping with the approach and guidance from the dicta in Shippey (1988) Crim LR 767, *Republic v Abdi Ibrahim Owl* [2013] eKLR and *R v Taylor Weaver & Donovan* (1928) 21 CR App R20 the question of law whether the accused would lawfully be convicted on the evidence as it stands should he elect to keep silent remains in the realm of unknown as at the close of the prosecution case. That is to say, none of the elements for the offence of murder save for the fact of the deceased Shadrack Wekesa Shikono having died directly or circumstantially. At this interlocutory stage, the facts proved by the prosecution are not capable of discharging the burden of proof in *Woolmington v DPP* {1935} AC and *Miller v Minister of Pensions* {1942} 3 ALL ER.

13. In the Kenyan Criminal Justice System, when the case for the prosecution is closed, it is the duty of the trial court to determine as of necessity the evidence in support of the accusation that will suffice to establish the elements of the offence. In the event the prosecution fails to proof existence or non-existence of facts in issue as contemplated in Section 107(1), 108 and 109 of the *Evidence Act*, conclusively a motion of no case to answer becomes the determining factor on the right of presumption of innocence which shall be ruled in favor of the accused. My overall understanding of the case leads me to sustain a no case to answer motion by having the accused acquitted with offence of murder contrary to Section 203 of the *Penal Code*, for the evidence is manifestly unreliable and no reasonable tribunal could convict on it. The accused person is free indeed unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST 2024.

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R. NYAKUNDI

JUDGE