



**Republic v Owino (Criminal Case E024 of 2022)  
[2024] KEHC 13193 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E024 OF 2022  
RE ABURILI, J  
OCTOBER 29, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN ONYANGO OWINO ..... ACCUSED**

**RULING**

**Ruling On a Case To Answer**

1. The accused person herein John Onyango Owino is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. Particulars of the information dated 27<sup>th</sup> September 2022 are that on the 1<sup>st</sup> day of September 2022 at Songhor Sub-location in Muhoroni Sub-county within Kisumu County, he murdered Charles Mudho Milanya.
3. The accused was mentally examined on 4<sup>th</sup> October 2022 and found to be unfit to plead due to mild mental retardation. He was then taken for second mental assessment on 25<sup>th</sup> October 2022 and was found to be unfit to plead. He was taken to Mathare Hospital where he was treated until 13<sup>th</sup> December 2023 when he was examined and found fit to stand trial.
4. Plea was taken on 23<sup>rd</sup> April 2024. He pleaded not guilty to the charge of murder. Hearing commenced on 4<sup>th</sup> June 2024 and the prosecution called 8 witnesses.
5. PW 1 Judith Akinyi Obiero was informed by Brian that he had seen that accused lying in water with his head up and that Brian had returned from the river panting, opened the door by force and told her that Auma had killed Mudho.
6. PW 2 Dr. Sylas Owiti testified that he performed an autopsy on the body of the deceased Charles Mudho Milanya and found, on examination, that the deceased had a deep cut of 8cm around the right



- ear. At the back of the head, he found a deep cut of 4cm. While the face was eaten off by animals. He established the cause of death to be severe head injury intracerebral and subdural haematoma secondary to blunt trauma to the head secondary to assault. A nail from the right thumb was collected for further forensic analysis. He produced the autopsy report as P. Exhibit 1.
7. PW 3 Timothy Miruka Ojwang a friend to the deceased testified that he knew the accused and how on 2<sup>nd</sup> September 2022 at 5.00pm he received a phone call from PW 1 that the deceased had been killed at the farm and placed besides the water. He stated that PW 1 told him that she had seen the accused with the deceased. In cross-examination, he denied ever seeing the accused and the deceased feuding.
  8. PW 4 whom the deceased worked for received a call from Timothy who told her to go pick the deceased's wife and take her to the scene where the deceased was found dead. She proceeded as directed and at the scene, they found a jericin and spray for vegetables, a shoe, gunny bag with vegetables inside and a phone identified as that of the deceased then the body of the deceased beside the river.
  9. She saw 2 cuts on the deceased's head. That it had rained so the river water was passing over the deceased as he lay on his abdomen facing down. The place appeared disturbed as if people had fought from there.
  10. PW 5 Belinda Akoth the wife to the deceased identified his body to the doctor who performed an autopsy. She had been led to the river where she found her husband lying dead with cuts on the head and near the ear. In cross-examination, she stated that her husband had told her about a young man who had been stealing his vegetables and that he had told her that he had issues with the accused John Onyango Owino.
  11. PW 6 a minor was taken through voire dire examination. He was aged 14 years and in class 7. He testified not on oath and stated that on 1<sup>st</sup> September 2023 he was at the river when he heard the accused whom he knew as his friend who used to work on PW 6's grandma's land, talking so he went where the accused was and found him lying in the water where the deceased was also there lying beside the water but with cuts on the head which was up.
  12. That when the accused saw PW 6, the accused ran into the sugarcane plantation across the river. PW 6 ran home and informed PW 1 of what he had seen at the river.
  13. PW 7 was the Government Analyst Mr. Godwin Khamala Waliama who received items from the investigating officer and the nail sample from the deceased for DNA analysis. None of the items compared with the DNA of the accused and no DNA sample of the accused was submitted for comparison.
  14. PW 8 was the investigating officer who visited the scene and recovered some items for DNA sampling. He also witnessed an autopsy on the deceased's body.
  15. According to PW 8, PW 6 was an eye witness who saw the accused emerge from where the deceased lay. PW8 produced a panga as PExhibit 3, Shirt, PExhibit 4 and Exhibit Memo, PExhibit 5. That was all for the prosecution.
  16. From the above evidence, has a prima facie case been established to warrant the accused person being placed on his defence? What is a prima facie case? A prima facie case is established where the evidence tendered by the Prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused opts to remain silent.
  17. Under Section 306 (1) of the *Criminal Procedure Code*:  

“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 the several or any one



of the 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, record a finding of not guilty.”

18. In *Republic v Abdi Ibrahim Owi* [2013] eKLR, the court defined a prima facie case as follows:

“prima facie’ is a latin word defined by *Black’s Law Dictionary* 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”
19. Thus, prima facie means the establishment of a rebuttable 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 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’s case, the case is merely one in which on full consideration might possible 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 ...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 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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
20. From the above detained holding by the court, can this court on the basis of the evidence so far tendered by the Prosecution, and this court properly directing itself to the law and evidence convict if the accused chooses not to give any evidence?
21. PW 6 who is said to be an eye witness stated that he saw the accused lying next to the deceased and in water after hearing voices of the accused. When PW 6 went to the scene, the accused escaped into the sugarcane plantation. On being asked whether the accused had any weapon, he denied.
22. The panga and shoe and shirt recovered from the accused person were tested for DNA comparison with the deceased’s DNA but nothing matched the deceased’s DNA.
23. No other evidence linked the accused to the alleged murder. It had rained and the deceased’s body lay besides the river with water passing on his body.
24. The accused person was mentally examined. He was twice found to suffer from mild mental retardation and his demeanor in court shows that he still harbours those traits of a mental patient.
25. None of the witnesses saw the accused assault or fight with the deceased. The act of the accused who was mentally retarded lying in water with the deceased beside him cannot be construed to mean that he had anything to do with the deceased’s death. No DNA of the deceased was found on the items found on the accused. It could well be that this mad man was enjoying the company of the deceased in the waters when PW 6 found them but nothing links the accused to the death of the deceased.



26. Mere suspicion cannot be sufficient to cause this court find a prima facie case against the accused. I find that the suspicion, however strong, does not link the accused to the murder of the deceased and neither can it be a basis for a conviction. There must be much more in terms of either direct or circumstantial evidence linking the accused to the demise of the deceased.
27. I find that the prosecution have not established a prima facie case against the accused to warrant him to be placed on his defence.
28. Accordingly, I find the accused John Onyango Owino has no case to answer and I acquit him under Section 306 (1) of the *Criminal Procedure Code*.
29. Unless otherwise lawfully held, the accused John Onyango Owino is hereby set at liberty forthwith. Release order to issue.
30. Ms. Ochieng pauper brief advocate is hereby discharged from representing the accused. Her fees to be settled upon presentation of a fee note accompanied by relevant documentation.
31. This file is accordingly closed.
32. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024**

**R. E. ABURILI**

**JUDGE**

