Republic v Cheruiyot (Criminal Case 21 of 2023)
[2024] KEHC 16346 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16346 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL CASE 21 OF 2023

JRA WANANDA, J

DECEMBER 20, 2024

(FORMERLY ELDORET HIGH COURT CRIMINAL CASE NO. E031 OF 2022)

BETWEEN

REPUBLIC ..... PROSECUTION

AND

HOSEA KIPNG'ETICH CHERUIYOT ..... ACCUSED

RULING

1. As indicated above, this case was initially registered as Eldoret High Court Criminal Case No E031 of 2022 before it was transferred when a High Court sub-Registry was opened in Iten. The case has therefore been in Court for about 2 years so far.

2. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that on 24/09/2022 at Kapyoso Night Club at Kapsowar Township within Elgeyo Marakwet County, he murdered one Beatrice Jeruto Kimaiyo. The deceased was said to be the wife of the accused.

3. The accused is represented by Mr. Mathai Advocate. From the record, the accused took plea on 5/10/2022 before Hon. Nyakundi J. He denied the charge and a plea of not guilty was entered. He was then remanded in custody pending trial and has remained in custody ever since. The pre-bail Report presented to Court by the Probation Department and dated 4/01/2024, was also unfavourable as it did not recommend release of the accused on bail at that stage.

4. After pre-trial conference and other processes and upon the case also being transferred to Iten, on 25/04/2023, I eventually fixed the matter for hearing for 28/06/2023. On that date however, I was not sitting and the matter was placed before the Deputy Registrar who gave it a Mention date for 30/11/2023. On that date, Mr. Mathai Advocate was absent as he had been on all occasions since the taking of plea. In the absence of the Advocate, I fixed the hearing to 27/03/2024. On that date however,

I had proceeded on my annual leave and a new date for 3/07/2024 was then fixed. On that date, again Mr. Mathai was absent but Prosecution Counsel Mr. Kirui also informed me that the witnesses and the family members of the deceased had communicated that they are no longer interested in pursuing the case and that he had asked them to visit his office to agree on possible termination of the case. In the circumstances, and Mr. Mathai also being absent, I adjourned the hearing to 3/12/2024 to also give time to the State to follow-up the issue of the unwillingness of the family members of the deceased to co-operate. On 3/12/2024, Mr. Mathai, yet again, was absent. On his part, Mr. Kirui reiterated that he had no witnesses to present as they were unwilling to attend Court. He had also filed an Affidavit sworn by the Investigating Officer which confirmed that the matter had been settled between the concerned families. According to him, as a result of the resolution of the matter, the witnesses were not willing to attend Court. He stated that as a result of the above predicament, on the strength of the guidelines given in the case of R v Muneh Wanjiku Ikigu (2016) eKLR, the best option is to close the prosecution case by calling no witnesses and let the Court decide. He therefore then applied to formally close the Prosecution case.

5. On the part of the accused, his Counsel being absent, he confirmed that he indeed was aware of the family meetings and the settlement resolutions reached.

6. Before accepting the Prosecution's request to close its case, I directed that Mr. Mathai be contacted or traced and be asked to log-in virtually for the purposes of giving the Court his views on the matter. When he was eventually traced, Mr Mathai instructed one Ms. Kinyanjui to appear before the Court and hold his brief. Ms. Kinyanjui, when she appeared, told the Court that they had no objection to the closure of the Prosecution case.

Determination

7. What I now have to decide upon is whether I should accept the Prosecution's closure of its case and if so, whether the accused has a "case to answer".

8. The Affidavit referred to hereinabove is sworn by Police Constable Evans Kimutai Suter who deponed that he is a police officer attached to the Directorate of Criminal Investigations, Keiyo South, Elgeyo Marakwet County and whose Force number is 75478. He deponed that he took over this matter from the initial Investigating Officer in the year 2022 under Police Criminal Case No 861/86/2022 HCCR No 21/2023, and that since registration of the matter in Court, it has never proceeded for lack of witness. He deponed further that sometimes in March 2024, he received a bundle of documents from the family of the deceased titled "Minutes of a Reconciliation/Cleansing as per Marakwet Culture/ tradition held on 27/02/2024", that the documents included minutes of a meeting held between the family of the deceased and that of the accused, and that photographs of the meeting sessions were also attached. He deponed further that since the reconciliation meeting referred to above, the witnesses have been unwilling to attend Court to testify, and that they refused to sign bonds and unequivocally stated that they are no longer interested in the case. He urged further that on 19/06/2024, he visited the homes of the witnesses intending to bond them to come to Court to testify on 3/07/2024 but they became hostile and asked him to stop disturbing them as they had "solved" the matter. He deponed further that the deceased was the wife of the accused but that at the time of the incident they were separated, that the deceased was having an affair with a third party which led to confrontation with the accused at a bar and during which the deceased was stabbed by the accused and she later succumbed to the injuries. According to him, the witnesses are close family members of the deceased and the accused, who have reconciled and are no longer interested in the case, and that efforts to proceed with the case without the availability of witnesses is frustrating as their mobile phones are all switched off. For the said reasons, he prayed that the case be withdrawn.

9. The documents exhibited to the Affidavit are copies of the minutes of the meeting which indicates that in attendance were the Chief, Kapsumai location, one Sammy K. Rotich, two Assistant Chiefs, a representative from a church (catechist), "Arbitrators" drawn from both subject clans, members of the two concerned families, and members of the public. I also note according to the minutes, the accused's clan agreed to compensate for the death by "paying" 80 goats which translated to Kshs 80,000/-, together with an additional sum of Kshs 10,000/- being payment to the "Arbitrators" as their fee. Photographs of the meeting session was also exhibited. Also exhibited is a handwritten letter dated 27/02/2024, indicated to be from the said Chief, and addressed to "Whom It May Concern" confirming the resolution and/or settlement of the matter as aforesaid.

10. It is therefore apparent that the community opted to settle the matter by way of alternative dispute resolution. Alternative forms of dispute resolution are indeed recognized under Article 159(2)(c) of the *Constitution* which provides as follows:

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> .....
>
> (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

11. Article 159(3) then places the proviso that:

> " Traditional dispute resolution mechanisms shall not be used in a way that:
>
> (a) contravenes the Bill of Rights;
>
> (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
>
> (c) is inconsistent with this Constitution or any written law.

12. There is also the Section 3(2) of the *Judicature Act* which provides as follows:

> " The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

13. Further, Section 176 of the *Criminal Procedure Code* provides as follows:

> " In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated."

14. Despite the express provisos stipulated in Section 3(2) of the *Judicature Act* and in Section 176 of the *Criminal Procedure Code*, as set out above, there is still a raging debate on whether alternative dispute

resolution mechanisms such as reconciliation and compensation should be embraced by the Courts when dealing with such serious offences as murder as in this case, and not just in misdemeanours.

15. For instance, while Maraga J (as he then was), in the case of *Juma Faraji Serenge alias Juma Hamisi v Republic* [2007] eKLR, declined to accept such amicable settlement arrangement as a basis for an Application by the Prosecution to terminate or withdraw a murder case, Korir-Lagat J in the case of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, readily accepted such settlement and allowed the termination of a murder case. Similarly, while Lesiit J (as she then was) in the case of *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR, declined such settlement, Dulu J, in the case of *Republic v Ishad Abdi Abdullahi* [2016] eKLR accepted the same in allowing withdrawal of a murder charge.

16. In this case however, the situation is slightly different. I have not been asked to accept a termination or withdrawal of the murder charge but rather, the Prosecution is asking to be allowed to close its case without calling any evidence or witness and then let the Court make a determination on "case to answer".

17. In this case, although the commission of crimes, particularly serious felonies such as murder, cannot be tolerated in our society or dealt with by way of "kid gloves", and although a precious human life was lost in this case, more than 2 years have already lapsed since the deceased died, and with the intervention of the clan and community elders, including the local Administration (Chiefs) the two families are said to have long reconciled, forgiven each other and moved on after conducting cleansing ceremonies and rites under the Marakwet culture and/or customs under the watch of the clan elders and also the local administration. Compensation is also said to have been given and accepted. As a result, no witnesses are willing to testify. Meanwhile, the accused continues to languish in remand custody indefinitely. Without witnesses, no matter how long the file is kept open, the case will collapse

18. In view of the above scenario, I shall consider the Prosecution as having been compelled by the circumstances set out above, and beyond its control, to call no witnesses. I therefore, in the circumstances, accept the Prosecution request to close its case without presenting any evidence.

19. On the issue of "case to answer", Section 306(1) and (2) of the *Criminal Procedure Code* requires the Court, after closure of the prosecution's case, to make a considered determination on whether an accused person has a case to answer. The provisions are premised 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 record 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 ....."

20. At this stage therefore, the Court is only considering whether the accused has "a case to answer" and which was described by Dulu J in the case of *Republic v Joseph Shitandi & another* [2014] eKLR as follows:

> " A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result."

21. The procedure in determining whether an accused has a case to answer was discussed in the case of *Republic v Samuel Karanja Kiria* [2009] eKLR where J.B Ojwang J (as he then was) stated the following:

> " The question at this stage is not whether or not the accused is guilty as charged but whether there is cogent evidence of his connection with the circumstances in which killing of deceased occurred. That the concept of prima facie case dictates as a matter of law that an opportunity 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 in Criminal Appeal No 77/2006 expressed that too detailed analysis of evidence stage at no case to answer stage is undesirable in the court is going to put accused on his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted."

22. The trial Court is cautioned that, at this stage, it should not make definitive findings should it conclude that the accused has a case to answer. In this regard, in *Festo Wandera Mukando v Republic* [1980] KLR 103, E. Trevelyan J stated as follows:

> " ...we draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, and an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of "no case" to answer is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned." [Emphasis mine]

23. As regards Section 210 of the *Criminal Procedure Code*, it provides as follows:

> " If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him."

24. What amounts to a "prima facie" case under the equivalent of the provisions of Section 210 was considered by the Court of Appeal in *Ramanlal Bhatt v R* (1957) EA 332 thus:

> " It is true that the Court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed is weighty enough to prove conclusively, that final determination can only be properly made when the case for defence has been heard. It may not be easy to define what is meant by prima-facie case but it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation was offered by the defence."

25. Regarding ingredients of the charge of murder, Section 203 of the *Penal Code* provides that:

> " Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

26. It is therefore clear that for the charge of "murder" to be sustained, there are two ingredients that have to be proved. These are the "Acteus Rea" and the "Mens Rea". In this case, no witnesses testified. In the absence of any witness testifying, there is obviously no evidence on record to disclose or sustain any prima facie foundation for establishment of the two ingredients. It is clear that in the event that the accused opts to keep quiet in his defence, no properly constituted tribunal directing its mind judiciously can, under the circumstances herein, convict him for the offence of murder.

27. Faced with a similar situation, Prof. J. Ngugi J (as he then was), in the case of *Republic v Muneh Wanjiku Ikigu* [2016] eKLR held as follows:

> " 19. In cases, such as the present one, where there is no reasonable likelihood of re-commencing proceedings or of tracing witnesses or where there is no reasonable likelihood of obtaining a conviction due to lack of available evidence (for example where a crucial piece of evidence the State hoped to rely on is ruled inadmissible in a motion in limine), then the correct procedure is the one to proceed with the case, call no witnesses and request an acquittal or let the Court reach a directed verdict of acquittal. This may also be the appropriate thing to do where there has been a significant adverse ruling against the State or the evidence available has been become so manifestly unreliable that there is no reasonable likelihood that the Accused could be convicted.
>
> 20. In the present case, as catalogued above, the Prosecution requested no less than seven hearing dates spread over a four-year period. At each of those hearing dates, despite reasonable efforts reported by the Prosecution during those hearing dates and now detailed in the Affidavit of Cpl Esther Kombo, no witnesses were available. The circumstances are that the alleged murder happened at an informal settlement called Kiandutu in Thika where both the Accused Person and the deceased used to live. The family of the deceased, members of which were the key witnesses in the case, also lived in the same settlement. Soon after the case was recorded and plea taken, the Investigating Officer was unable to trace the witnesses any more. She tried to contact them through the mobile phone numbers they had recorded with her to no avail. She visited where they used to live in Kiandutu and even enlisted the help of the area Chief and elders in a bid to locate them. All these efforts were fruitless. The witnesses seem to have disappeared into thin area. The importance of the address of the intended witnesses is that many people tend to live in informal settlements only ephemerally. Many times, also, the neighbours would not have any contacts of each other beyond the physical contacts they have each day. As was the case here, therefore, once the deceased's family relocated, it became impossible to trace them.
>
> 21. It has now been four years and ten months since the incident took place and since the Accused Person took plea. She has been in custody since then. Four years and ten months is a long time to be in custody awaiting trial.

> Four years and ten months is a long time to attempt to trace witnesses. Indeed, it would seem that the chances of locating the witnesses diminish with the passage of time. In the circumstances, the Prosecutor is right in not seeking to continue with the criminal trial. Four years and ten months is a long time set against the fair trial rights guaranteed in Article 50(2)(e) of the *Constitution*. Four years and ten months are an especially long time to spend in custody if there is no timeline for trial because there is no indication of if and when the witnesses might be located. Four years and ten months is enough time for the Prosecution – and the Court -- to conclude that there is no reasonable likelihood that the prosecution will ever be able to trace the witnesses or present any evidence in the case which could lead reasonably lead to a conviction.

28. The situation in the said case is very similar to the one herein and I fully associate myself with the above sentiments. In the circumstances, I find and hold that no case has been made out against the accused person warranting this Court to put him on his defence. Consequently, I dismiss the murder charge and the entire case facing the accused and acquit him under the provisions of Section 210 of the *Criminal Procedure Code*. Consequently, it is hereby directed that the accused person be released forthwith from custody unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Angwenyi h/b for Mr. Mathai for Accused

N/A for the State

Court Assistant: Brian Kimathi