



**Republic v Eliakim alias Mzito (Criminal Case E036 of 2021)  
[2023] KEHC 360 (KLR) (Crim) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 360 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E036 OF 2021  
JM BWONWONG'A, J  
JANUARY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**PHILIP MAKAYA ELIAKIM ALIAS MZITO ..... ACCUSED**

**RULING**

1. 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 his defence in terms of section 306 (2) of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya.
2. The answer to the issue lies in the analysis of the prosecution evidence in light of the applicable law. It should be borne in mind that the accused is charged with murder contrary to section 203 as read with 204 of the [Penal Code](#) (cap 63) Laws of Kenya, in respect of the deceased Anna Atieno Omungo *alias* Flora *alias* Mama Diana.
3. He pleaded not guilty to the charge. The prosecution called six (6) witnesses in support of their case.
4. Diana Achieng Makaya (Pw 1) testified that she is the daughter of the deceased and the accused. She recalled that on March 6, 2021, she received a phone call from a neighbour who informed her that her mother had been injured. She proceeded to where her mother was and found that she was lying down. Her body was covered with blood. At the scene, there were broken soda and beer bottles. In the company of the accused, they took the deceased to the hospital. The deceased had cuts on her body and her eye was swollen. On March 8, 2021, the deceased was taken to Mbagathi hospital, where she was discharged. On returning home, she was in great pain and went to Kenyatta National Hospital, where she was admitted until her death on March 10, 2021. It was her testimony that the accused used to beat the deceased.



5. George Odhiambo (Pw 2) testified that the deceased was her sister. He told the court that the deceased had told her that the accused had assaulted him using an axe after a domestic quarrel had ensued. The accused had also taken her to hospital. He visited the hospital where the deceased was admitted. She had cut injuries all over her body and her eyes. After he left the hospital, he received a call in the night and was informed that the deceased had died.
6. He visited the mortuary together with Maureen Onyango (Pw 3) and Veronica Omunga (Pw 4) and identified the body of the deceased to the doctor who performed a postmortem examination on the body of the deceased. They also went and reported the death at Kilimani police station.
7. Dr Midia (Pw 5) performed an autopsy on the body of the deceased. The finding was that the deceased died as a result of multiple injuries on the head and neck due to blunt force trauma.
8. No 93385 CPL Philip Kipkirui Bett (Pw 6), the investigating officer told the court that during his investigation, he established that the deceased had been assaulted by her husband. He was unable to trace him for three months as he was on the run. He later surrendered to the police. He proceeded to charge the accused after the conclusion of his investigations.

The written submissions of the accused

9. Counsel for the accused (Mr R T Aswani) submitted that his relationship with that the deceased was vindicated by the testimony of Pw 2. The accused was very concerned about the welfare of the deceased and took her to the hospital, when she was injured. He also catered for her medical expenses. He further submitted that from the evidence of Pw 1 he loved his wife and the scenario presented therein does not show the accused to be a hostile person, who was quietly planning and scheming to kill his wife.

#### **The Written Submissions Of The Prosecution**

10. Ms Peris Maina, learned prosecution counsel submitted that the circumstantial evidence pointed to the accused as having killed his wife. That this was further strengthened by the testimony of Pw 1 their daughter. It was her submission that the prosecution had made out a sufficient case to warrant the court to put him on his defence.

#### **Analysis And Determination.**

11. Section 306 (1) (2) of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya 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.”



12. What amounts to a *prima facie* case was explained in the case of *Bhatt v R* [1957] EA 332 by the Court of Appeal, which expressed itself on the issue 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 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 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 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.”

13. At this stage of the proceedings, the standard applicable on whether a *prima facie* case has been made out is lower than the standard on beyond reasonable doubt, which applies 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 does not offer any explanation.
14. The evidence presented by the prosecution implicates the accused in the death of the deceased. I find that at this stage I am not required to give reasons for my ruling, because I am not required to finally determine the credibility of the prosecution witnesses. This will be done after the close of the evidentiary hearings for both parties. The test of a *prima facie* case, in terms expressed in *Bhatt vs R* supra, has been met by the prosecution to warrant the accused person to be called upon to defend himself.

I hereby put the accused to his defence.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant

Ms Peris Maina for the Republic.

The accused in person.

Mr. R.T. Aswani for the accused

