Republic v Kibet (Criminal Case E068 of 2021)
[2023] KEHC 442 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 442 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL CASE E068 OF 2021

RN NYAKUNDI, J

JANUARY 25, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

COLLINS KIBET ..... ACCUSED

RULING

1. What is before this court is a ruling as to whether the accused person has a case to answer. 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 the December 25, 2018 at Kaptumek Sub-location within Nandi County, murdered James Kipkemboi Bor.

2. The accused pleaded not guilty to the charge. The prosecution called a total of six (6) witnesses to prove its case. At the close of the prosecution case learned counsel for the accused in compliance with section 306 (1) of the *Criminal Procedure Code* made a submission of a no case to answer in favour of the accused. The evidence adduced by the prosecution witnesses can be summarized as follows:

3. The deceased was found lying on the side of the road on December 25, 2018 by PW3, Hillary Kwambok. PW2, David Kipkoech Kemboi, a member of community policing testified that upon the demise of the deceased there was an inquiry held by the members of the local administration and it was established that the accused was among the six (6) young men who had attended an initiation ceremony and that he was the last person to be seen with the deceased. According to PW2, the matter was reported to the police and upon the arrest of the accused a blood-stained trouser Exhibit 2 was recovered from his house and that the accused led the police and the members of the local authority where PW2 was also present to where he had hidden the murder weapon which was recovered and produced as Exhibit 1. PW4- Dr. Evans Kibiwott, testified on behalf of Dr. Rutto who performed post-mortem on the deceased's body and confirmed that the deceased's death was caused by severe bleeding

following a severe head injury. PW5-PC Erastus Thuku, the Investigating Officer produced the blood stained trouser and wooden rungu as prosecution exhibits 1 and 2.

4. The prosecution argues that it has discharged its burden in establishing a prima facie case against the accused to warrant the accused to be put on his defence under Section 306(2) of the *Criminal Procedure Code*. All the ingredients of murder as provided for under Section 203 of the *Penal Code* have been met. The death of the deceased is not in dispute. Further, the prosecution case is pegged on circumstantial evidence. The post-mortem report produced as Exhibit 3 and the doctor's (PW4) evidence concluded that the cause of death was excessive bleeding due to head injury which corroborates the evidence of PW1 and PW3 on the visible head injury and the weapon indicated by PW2. The deceased died as a result of the head injury he sustained and the blood stained trouser and wooden rungu recovered from the accused place him at the scene of crime and as such as the perpetrator of the offence. Counsel contends that the question that now needs to be answered is whether the accused had malice aforethought.

5. Learned counsel for the accused submitted that the prosecution has failed to establish a prima facie case to warrant the accused to be placed on his defence. Being a charge of murder, the prosecution ought to have provided evidence that the accused acted in malice to cause the death of the deceased by an unlawful act or omission. The prosecution has not adduced a shred of evidence to support its charge against the accused person. Notably, the prosecution called 6 witnesses, none of whom saw the accused commit the alleged act, and none of whose testimony put the accused at the scene of the alleged offence. The accused is said to have hit the deceased with a wooden stick which was brought to court. According to the doctor who testified as PW5, the accused died as a result of head injuries caused by a sharp object. The wooden stick produced by PW6 does not in any way match the description by the doctor of the object likely to have inflicted harm on the deceased. In addition to this the evidence produced by PW6 was brought to them at the police station and no forensic examination was done to prove that the DNA on the blood stained trouser and the stick belonged to the accused.

6. He contended that in the present case, the circumstances that led to the death of the deceased remain unclear and uncertain. It is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. He submitted that the prosecution has not made a case against the accused sufficient enough to require him to be placed on his defence. He urged the court to invoke its powers under section 210 of the *Criminal Procedure Code* and acquit him

Analysis and determination

Whether the accused person has a case to answer

7. In order to determine whether the accused person has a case to answer, the court must determine whether there exists a *prima facie* case.

8. Oxford Companion of Law at pg. 907 defines "*prima facie*" in the following terms:

> " A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive."

9. 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.

10. The court must determine that whether based on the evidence before this court, after directing its mind to the law and the evidence, it may convict the accused if he chose not to give evidence.

11. The test in such matters was therefore laid down in *Republic vs. Galbraith* [1981] WLR 1039 in the following words:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:
>
> (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

12. The evidence before this court is circumstantial. The prosecution, relying on the doctrine of last seen and the fact that the accused was found in possession of blood-stained clothes and the alleged murder weapon, has established that there is a chance that the accused committed the offence. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the 'last seen alive with' doctrine held:

> " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

13. It should be noted that at the conclusion of the case, the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer.

14. Having considered the material placed before me I am unable to find, at this stage at least, that the accused has no case to answer. Based on the evidence of the witnesses and the doctrine of last seen, I am satisfied that the prosecution has laid the basis for a prima facie case.

I accordingly place the accused on his defence.

It is so ordered

DELIVERED, DATED AND SIGNED AT KAPSABET ON THIS 25TH DAY OF JANUARY 2023.

In the Presence of Accused Present

Mr Okumu for the Accused Present

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R. NYAKUNDI

JUDGE