State v Omondi (Criminal Case E003 of 2022)
[2023] KEHC 221 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEHC 221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL CASE E003 OF 2022

RE ABURILI, J

JANUARY 24, 2023

BETWEEN

STATE ..... PROSECUTION

AND

KELLY BRIAN OMONDI ..... ACCUSED

RULING

1. The accused person herein is Kelly Brian Omondi. He is charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the offence as per the Information for Murder dated 24/1/2022 are that on the 15th day of January, 2022 at Mahaya Sub location, West Asembo Location, within Rarieda Sub County of Siaya County, jointly with others not before court, the accused person murdered one Nicholas Omondi Ojuodhi.

2. The accused person took plea on 25/1/2022 and pleaded Not guilty to the charge.

3. The Prosecution has called eight witnesses and closed its case on 18/1/2023 and the issue for determination at this stage is whether the Prosecution has established a prima facie case against the accused person to warrant him to be placed on his defence.

4. In his submissions dated 20/1/2023 on no case to answer, the accused person through his counsel Mr. Ochanyo raised the defence of negligence on the part of the deceased person's relatives failing to take him for urgent medical attention and relies on the testimony of PW8, Dr. Gabriel Wekesa Juma who testified that he conducted an autopsy on the body of the deceased and established the cause of death to be severe blunt head trauma.

5. According to the accused person, there was delay of over 16 hours to take the deceased to hospital and that a CT scan was not done in due time and that had the deceased been treated in time, he would have been saved. Counsel relied on this court's decision in *Stephen Mulamba Were v Republic* [2019] eKLR in my disposition in a charge of Manslaughter on appeal where the court found inter alia, that

the death of the deceased which was unfortunate was partially caused by the negligence on the part of her guardians who did not take her to hospital in good time or even report to the police for urgent action. However, the court also found that there was no eye witness to the defilement and that the investigations were shoddy.

6. In addition, I have perused this court's proceedings and evidence by PW8 and I find that he did say that he found that it was failure to take the deceased to hospital that caused his death. He stated as follows in cross examination:

> " .... I have treated such injuries before. This is considered as a high force injury causing a crack on the skull causing bleeding in the brain hence chances of survival depends on how fast the injury involves and how fast the treatment is administered. I cannot authoritatively say that the cause of death was a delay in receiving medication but I cannot rule out that delay contributes..."

7. In addition, the deceased was assaulted at night and away from his home and his assailants left him for dead, from around 9 pm, and from the testimony of PW1, her phone was taken away by the assailants hence she could not immediately call for help and she had to walk home the whole night until 6 am in the morning.

8. The deceased was only tried calling PW2 but he could not talk and PW2 only found him groaning that night but owing to the serious injuries, he could not talk. PW2 rushed, got a motorcycle and took him to Lwak Hospital where he was treated and returned him to his house (This was at midnight).

9. In the morning at 6 am, PW2 and his mother took the deceased to Bondo District Hospital after checking on him and finding him in bad state.

10. The failure to do a CT scan early enough was not the fault of his relatives who took him to Lwak Hospital for treatment.

11. At Bondo, the deceased was referred to Siaya Hospital for a CT Scan and the relatives raised Sh. 6500 for the CT scan but his condition never improved and as they were preparing to take him to Kisumu, his condition worsened and he died.

12. Briefly, that is the state of affairs in which the deceased found himself in.

13. I find no merit in the defence of negligence by his relatives to have him treated at the earliest opportunity upon discovery that he had been injured, hours later when they found him bleeding. The cited case is therefore distinguishable from this case.

14. On the second submission that no weapon was produced in court, counsel submitted relying on the cases of *James Mungu Karamba v Republic* [2016]eKLR and *Suleiman Kamau Nyambura v Republic* [2015]eKLR and submitted that the Judges were unanimous that a conviction should strictly be based on the evidence and not unsubstantiated theories and that it was necessary to support developed theories with evidence and that a theory must be canvased in evidence by parties. I find no material in the above decisions to suggest that failure to produce a murder weapon in a criminal trial is fatal to the prosecution's case.

15. According to the defence counsel, the 'blunt object' alleged Murder weapon was not produced and that neither did the prosecution make any effort to recover it. However, the law is now well established that failure to recover or produce a murder weapon is not fatal to the prosecution's case.

16. Furthermore, from the evidence of PW1 & PW2, considering the circumstances under which the deceased was attacked and injured, it is not possible that his assailants who had ample time to escape and even dispose of the alleged murder weapon could have been found in possession of the said Murder weapon which according to PW1, was a rungu. Furthermore, nobody was arrested at the scene of incident.

17. For the above reasons, I find no merit in the submissions placed before me.

18. I must therefore proceed and determine whether a prima facie case has been established to warrant the accused person to be placed on his defence. In so doing, I am alive to the fact that at this stage, the court is not expected to delve deep into the question of the accused person's alleged involvement in the murder of the deceased as that would prejudice him. The court is expected to examine the evidence on record and establish at this stage, whether the accused should be placed on his defence.

19. The burden of proof lies on the Prosecution throughout the trial and the standard of proof is beyond reasonable doubt. What that means is that the accused bears no burden to prove his innocence as he is presumed innocent until proven guilty and in addition, he enjoys constitutionally guaranteed rights among them, the right to remain silent, to adduce and challenge evidence and the right not to give any incriminating evidence.

20. However, at this stage, the Prosecution is not expected to have proved the case against the accused beyond reasonable doubt. The measure is a *prima facie* case.

21. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court of a law to return to guilty verdict even if the accused opts to remain silent.

22. 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."

23. A *prima facie* case has been defined in *Republic v Abdi Ibrahim Owi* [2013]eKLR as, "*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 disapproved or rebutted." Prima facie case is defined by the same dictionary as "the establishment of a legally required rebuttable presumption."

24. Thus, a *prima facie* case means the establishment of a rebuttable presumption that an accused person is guilty of the offences he/she is charged with. In *Rawanlal Trambaklal Bhatt v Republic* [1957]EA 332 at 335, the court stated that:

> "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 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.

> ...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 on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

25. The question I must pose in this case is whether this court can, on the basis of the evidence so far tendered by the prosecution, and properly directing itself to the law and evidence, convict if the accused chooses not to give any evidence.

26. In *Ronald Nyaga Kiuira v Republic*, it was held that:

> " It is important to note that at the close of the prosecution case, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person, sufficient enough to put him on his defence pursuant to the provisions of section 211 of the *Criminal Procedure Code*..."

27. I however caution myself that at this stage, I should not make definitive findings should I conclude that the accused has a case to answer.

28. In *Festo Wandera Mukando v Republic* [1980]KLR 103, it was stated that:

> " ...we draw attention to the inadvisability of giving reasons for holding that an accused person has a case to answer. It can prove embarrassing to the court and, an extreme case may require an appellate court to set aside an otherwise sound judgment, whereas a submission if 'no case to answer' is rejected, the court should say no more than it is. It is 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."

29. In the instant case, having considered the detailed testimony of PW1, I am satisfied that a prima facie case has been made out against the accused person herein Kelly Brian Omondi.

30. Accordingly, I find and hold that Brian Kelly Omondi has a case to answer and he is hereby placed on his defence.

31. The provisions of section 306(2) of the *Criminal Procedure Code* and articles 50(2)(i)(j) and (k) of the *Constitution* are hereby complied with and read out to the accused person in the presence of his advocate Mr. Ochanyo.

32. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF JANUARY, 2023.

R.E. ABURILI

JUDGE