



**Republic v Barchiba (Criminal Case 63 of 2017)
[2023] KEHC 3189 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 63 OF 2017
TM MATHEKA, J
MARCH 28, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID KIPROTICH BARCHIBA ACCUSED

RULING

1. David Kiprotich Barchiba is charged with Murder Contrary to Section 203 as read with 204 of the *Penal Code*. It is alleged that on the night of August 21, and 22, 2015 at Olkokwe Village in Mogotio Sub County within Baringo County he murdered Samwel Kibiwott.
2. The accused was represented by Mr Kipkulei, the state by Mr Momanyi.
3. The case was heard by both Justice E Muriithi, and Justice Weldon Korir as he then was. I took over at the point where the prosecution had closed its case and the only issue for determination is whether the prosecution has established a prima facie case to warrant the accused be placed on the defence as per Section 306 (2) of the *Criminal Procedure Code*.
4. Both sides had filed Written Submissions.
5. I have perused the submissions on each side, and I find that the defence has summarized the evidence for the prosecution fairly accurately. I adopt the summary for this Ruling.
6. PW1 Alice Kenei, a farmer from Mogoto and neighbour to the deceased Samwel Kibiwott testified that on the 21st 2015 at about 7.00 p.m. she was home with her children when the deceased came and went around the neighbourhood looking for another person. She together with her children ate supper and slept. The following morning, she woke up early and went to fetch water. After a short distance, she met a child running and she asked him why he was running. He told her that there was a person who had been injured. She asked him who he was and he said did not know him.



7. She went with the child to the place where the person was. On examining the person who was lying on the ground facing up, she recognized him as Samuel Kibiwott, the same person she had met the previous night. He asked her to raise him up. She could not manage on her own so she went to get help. She noted that he had an injury on the head (pointed to the right temple) and had blood on the hand, the head and on the mouth. She called Samuel Tologoi, Margaret Cheruiyot and others who she could not recall. When they got back, they asked him who had injured him and he said it was the accused. He only said two words and he kept quiet.
8. PW2 Daniel Kipkaos, a resident of Olkokwe, Kisanani said he was in the business of buying and selling goats. He testified that on August 21, 2015 at 5.00 p.m. he was at home when he went to a lady by the name Margaret Cheruiyot to borrow empty granary bags of Charcoal. There were 3 people including the lady. They were drinking busaa (alcohol). David Barchiba (the accused) came in. PW2 knew him as they were neighbours. The accused asked for busaa and was told that it was finished. He stayed for some time before he left. PW2 stayed with Margaret at the kitchen and ate supper there. After supper, he went to one Stephen Cheruiyot's place to sleep. Stephen is an in-law to Margaret.
9. When PW2 woke up the following morning at 6.00 a.m., he heard people talking at Margaret's place. A lady by the name of Elis Tuitoek ran towards them and told them that there was a person who had been injured. She said it was Samwel Biwott. They called people who were at Margaret's place nearby and they went with Elis and Mwalimu Korios to where Biwott was. They saw that he had been injured and had blood oozing from a wound behind the right ear. He spoke a little. Mwalimu Korios asked him what had happened and he said he had been injured by Kipenge. It was said that Kipenge was the accused person's the nickname. They recovered 90 Kshs. in coins at the place where Biwott was.
10. They sent a boy called Ken, son of Alice to tell the family of Biwott to report that their brother had been injured. Ken ran and came back with Kipkurui who took his father Biwott to hospital with a motorcycle. PW2 later heard that the deceased had been taken to Olkokwe and then Ravine.
11. PW4 is Evan Chebii Kipkiyai from Olkokwe Location testified that he finished form 4 the previous year and was helping his parents. On August 22, 2015 at about 6.00 a.m. he was on his way home from a neighbour's home where he had spent the night. He was called by a person who was seated at the roadside. He was saying hei! hei! To draw his attention. When he looked he saw blood on his face. He did not go to him but ran away. He met Mama Chepkoech with whom they returned to the scene. Upon reaching the scene, Mama Chepkoech recognized the man and she requested PW4 to tell her son Chepkok to go and inform the family of the injured man. He went and told Chepkok. He went back and found that many people had come and also recognized the injured man as the father to Evans.
12. PW4 then went home and took cattle to the dip. In the evening, he was called to record a statement by a police officer from Olkokwe. PW4 knew the accused as "Kipenge" his nickname as he used to see him in the area. He said he did not know how the deceased got injured
13. PW5 Evan Kipkorir, a 19 year resident of Olkokwe and a form 3 student at Olkokwe Secondary School. He testified that on August 22, 2022, he was at home when one Ken Kemei came and told him that his father Samuel Biwott had been attacked. His mother told him to go with Kenei to see what the matter was. They found his father in a pathway beside a forest. He had blood over his head. PW5 spoke with his father when they were taking him to hospital. He asked him who had beaten him and he said it was Kipenge. They took him to Olkokwe hospital with one Douglas and teacher Chebo on Douglas Kibet's motorbike. He the injury was stitched and they were referred to Eldama Ravine Hospital. PW5 did not go to Eldama Ravine but went home. He later heard that his father died on the way to the hospital. He was then called by the police.



14. PW5 testified that apart from him and Kenei, there was Patrick, Teacher Chebon, Kulei and Chebii. PW5 reported the matter at Olkokwe Police Station. He saw the police going to the scene. He knew the accused as David Kiprotich Barchiba nickname Kipenge as they are neighbours. He did not see him at the scene.
15. On cross examination he said that he did not know whether the other persons who were with him on the m/bike with his father heard him say that it Kipenge who had killed him.
16. PW6 Lina Biwott, a house wife and a resident of Olkokwe. testified that on August 22, 2015 at 6.45 a.m. a young man called Ken came to her house and told her that he had been sent by his mother to inform her that Kilonzo had been injured. Kilonzo was a nickname for her husband, Samuel Biwott. Her son Evans Korir was at the time taking cattle to the dip and when he came back, she asked him to go and find out the matter. PW6 did not go to the scene. When her son arrived at the scene, he looked for a Boda Boda and took him to hospital.
17. PW6 met her husband at the hospital in Olkokwe. He had injuries on his forehead, on the mouth and on the side of the head. The doctor asked them to get a vehicle and take him to Eldama Ravine. They got a vehicle belonging to one Koima and on the way, the deceased rose and started vomiting blood from the mouth. Upon reaching Mogotio, they went into the hospital and on being examined while still in the car, the doctor certified him dead. PW6 was with Koima, Luke Chemoywo and Kemoi in the vehicle. The vehicle took the body to Nakuru Municipality hospital. On August 28, 2015, PW6 went for the post mortem. She was with Aaron Biwott, the deceased's brother. PW6 knew the accused as Kipenge as he had been a neighbour for a long time.
18. PW7 Dr. Anthony Wainaina, a psychiatrist at Nakuru Level 5 Hospital. He finished his undergraduate in 2009 from the University of Nairobi and a masters in international medicine 2019 from the University of Edinburgh in Scotland. He knew Dr. Daniel Wainaina, the Chief Officer of Health Nakuru County having worked with him from 2012. He had a post mortem report for the deceased. He testified that the body was identified by two relatives namely Linah Boiwo and Harun Biwott. The post mortem was conducted on August 28, 2015 at the Nakuru County Public Mortuary.
19. The general observation of the body was that of a male adult of African descent aged 38 years of age in good nutrition and lean physique with a height of 5.7 feet. The body had been embalmed. The post mortem changes at the time of the report is that the body had rigor mortis. The external appearance of the body was that there were three structured facial cuts on the frontal region upper lip with bruising and marked swelling. There was also marked scalp swelling with multiple bruises. There were pressure signs over the upper neck.
20. There were multiple minor bruises because over the left arm elbow and hand. These had been marked as defensive marks. The internal inspection of the body showed a large extensive scalp hematoma extending from the frontal over the entire calvarium to the occipital region and upper posterior neck. There was also a hairline fracture on that left temporal region of the skull. As a result of the examination it was concluded that the cause of the death was severe head injury with skull fracture following multiple blows by blunt object or objects in keeping with homicide. The post mortem report was signed by Dr. Daniel Wainaina at that time the Ministry of Health I produce the postmortem as exhibit (exhibit P1).
21. PW8 Samuel Kiplang'at Kapeto from the Olkokwe location Kisanana Division was the retired Senior Chief Olkokwe Location. On August 22, 2015, he was at a CDF meeting from 10:50 a.m. When in meeting he was called by Charles Koech, a resident of his area, who told him that the deceased Samuel Biwott had been found injured in the bush. He was alive and when asked who beat him, the deceased



said Kipenga had beaten him. Kipenga was the nickname of the accused. The deceased was taken to Eldama Ravine Hospital but died on the way. The meeting ended at 2:00pm and went back to his location.

22. He mobilized people and at around 5:00pm they reached the home of the accused but did not find him there. On August 23, 2015, he received information from Mochongoi that David Barchiba had been drinking tea early in the morning. He went to the centre and was told that the accused had gone to another Centre called Muthengera/Kipangange bordering Laikipia and Baringo. He was with some people including the Assistant Chief of that area. On August 24, 2015, someone from Keneroi Centre called and told them that the accused had been seen there. They however did not find him. The accused was then seen at a centre called Muthitu/Olrapet. They did not find him on August 26, 2015 the Assistant Chief of Muthitu called him and told him that the accused had been arrested at a centre called Ngenyilel. They were told that the people wanted to kill him but the forest guards had taken him into hiding. He was re-arrested by the Police from the forest guards and escorted to Muchongoi Police Station waiting for Mogotio Police Station officers to come and take him away.
23. The prosecution on its part chose to rely only the evidence it deemed supportive of its position and relied on *Republic vs Patrick Mutisya Mutinda alias Kyeni* [2022] eKLR.
24. Both sides relied on the definition of prima facie case as set out in *Republic vs Abdi Ibrahim Owi* [2013] eKLR, *Bhat vs Republic* [1957] EA 332, *Festo Wandera Mukando vs Republic* [1980] KLR 103, and the Oxford Companion of Law at 907.
25. I quote here the words of the court in *Republic vs Abdi Ibrahim Owi*

“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.” 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. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 334 and 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 prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to fill the gaps in the prosecution case. Nor can we agree that the question is whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, or sufficient to put the accused on his defense.” 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 tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense.”

23. Taking into account the evidence on record, I must apply to it the test set out *Republic vs Galbraith* [1981] WLR relied on in *Republic vs Patrick Mutisya Mutinda*.

“The test is such matters were therefore laid down in *Republic vs Galbraith* [1981] WLR 1039 in the following words:



1. “If there is no evidence that the crime is alleged had been committed by the defendant, there is no difficulty. The judge will of course stop the case.
 - a. Where the judge comes to a conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon 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.”

23. Warning myself as guided by the Judges in Festo Wandera Mukando above;

“... we once more draw attention to the inadvisability of giving reasons for holding that the accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the court should say no more than 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.”

23. I find it is only necessary to say here that having considered the evidence on record, and taking into account the words of Odunga J as he then was.

“Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has been made out. As has been said time and again a prima facie case does not necessarily mean a case that must succeed. In other words, despite finding that a prima facie case can be made out, the court is not necessarily bound to convict the accused if the accused decided to maintain his silence. At the conclusion 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 the case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of prima facie case for the purpose of a case to answer.”

23. I accordingly order that the accused be placed on his defence pursuant to section 306(2) of the CPC.

24. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH, 2023.

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MUMBUA T. MATHEKA,

JUDGE.

C/A Kemboi

For state Ms. Ratemo

For accused Mr. Kipkulei

Accused Present at Nakuru Main Prison

