



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Rono & 2 others (Criminal Case 27 of 2018)
[2023] KEHC 19198 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 27 OF 2018
RE ABURILI, J
JUNE 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ISAAC KIPTOO RONO ALIAS MALAKWEN 1ST ACCUSED

PIUS KIPKORIR MOSONIK 2ND ACCUSED

JULIUS KIPYEGON MENGICH 3RD ACCUSED

RULING

1. The three accused persons herein Isaac Kiptoo Rono alias Malakwen, Pius Kipkorir Mosonic and Julius Kipyegon Mengich are jointly 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 dated March 12, 2019 following a consolidation with other Informations which were filed earlier in 2018 against several other suspects, are that on the 17th Day of November, 2018 at Jepkechei village, Nyangore Location, Muhoroni Subcounty within Kisumu County, jointly with others not before court, they murdered George Anyango Obala alias Bengo.
2. The accused persons denied the charge and the hearing commenced in 2020 before Justice Cherere who heard four witnesses before she was subsequently transferred from the station. No other hearing took place and on 20/7/2022, directions were taken before Justice Kamau to have the hearing proceed from where Justice Cherere had left the matter.
3. On 14/6/2023, hearing continued before me and I took the evidence from nine more witnesses and on 15//2023, the prosecution closed its case. No submissions on case to answer were made.
4. The question now is whether on the basis of the evidence adduced by the prosecution, a prima facie case has been established to warrant the accused or any one of them to be placed on their defence.



5. A *prima facie* case is not a case that must necessarily succeed. The court in the case of *Republic v Abdi Ibrahim Owl* [2013] eKLR defined a *prima facie* case 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”.

1. The same *Black’s Law Dictionary* defines “Prima facie case” as “The establishment of a legally required rebuttable presumption.”
2. Further in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 334 and 335, it was 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 the 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 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 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.”

3. In *Anthony Njue Njeru v Republic* [2006] eKLR, the Court of Appeal stated that:

“Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a *Prima facie* Case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if at the close of the Prosecution case, the case is merely one, ‘Which on full consideration might possibly be thought sufficient to sustain a conviction’ Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a *prima facie* Case as settled in *Bhatt’s Case(supra)*, we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case.”

4. Therefore, based on the evidence before this court, the question is whether, after properly directing its mind to the law and the evidence, may, as opposed



to, will convict if the accused chose to give no evidence, bearing in mind the legal principle that accused persons are innocent until proven guilty and that they enjoy their constitutional rights to remain silent, to adduce or challenge evidence and not to give any self-incriminating evidence. In *Ronald Nyaga Kiura v Republic* [2018] eKLR the court stated that:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie 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. A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat v Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

5. “*Prima facie* is further defined by *The Oxford Companion of Law* at pg 907 as follows:

“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.”

6. There is indeed a danger in making definitive findings at this stage, especially where the court finds that there is a case to answer and therefore the reasons for not delving deed into the merits of the case are apparent. As appreciated by Trevelyan and Chesoni, JJ in *Festo Wandera Mukando v The Republic* [1980] KLR 103:

“...we once more 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, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” 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.”

7. I have perused the proceedings herein and the evidence adduced by the prosecution witnesses. Without probing deeper into the merits thereof, I observe that the offence took place in broad daylight and that there are witnesses who gave evidence on oath stating what they saw and heard. I am satisfied that the prosecution has made out a *prima facie* case against the 1st



and 3rd accused persons to warrant them to be placed on their defence for the alleged murder of the deceased.

8. As against the 2nd accused, the only evidence on record is that he owned some tractors which were found to be ploughing the land which was being managed by the deceased. The fact that the 2nd accused person leased out his tractor to the 1st accused to plough for the latter the land wherein the deceased was hacked to death when taking photographs of the ploughing that was taking place to get evidence of trespass by the 1st accused is not in itself evidence of common intention with any other suspect to commit an offence of this nature. No witness mentioned the 2nd accused as having been at the scene or having hired any of the deceased's assailants.
9. I find the evidence linking the 2nd accused to the alleged murder of the deceased to be insufficient to warrant the court to place the 2nd accused on his defence to answer the murder charge.
10. I find the evidence against the second accused too feeble to warrant the 2nd accused to be placed on his defence. Accordingly, I find and hold that the 2nd accused herein Pius Kipkorir Mosonik has no case to answer and therefore I return the verdict of NOT GUILTY and he is hereby acquitted of the charge of murder under section 306 (1) of the *Criminal Procedure Code* which provides that:

“ 306. Close of case for prosecution

(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.”

11. Therefore, unless otherwise lawfully held, the 2nd accused herein Pius Kipkorir Mosonik is hereby set at liberty and his surety is hereby discharged.
12. As against the 1st and 3rd accused persons, this court finds and holds that the two accused persons Isaac Kiptoo Rono alaias Malakwen and Julius Kipyegon Mengich have a case to answer for the murder of George Anyango Obala alias Bengo and they are hereby placed on their defence as stipulated in section 306(2) of the *Criminal Procedure Code* which stipulates that:

“(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, either



personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

13. The provisions of Section 306 (2) of the Criminal Procedure Code as read with Article 50(2) (i), (j) and (l) of *the Constitution* are hereby explained to the 1st and 3rd accused persons who are given the opportunity to consult their counsel Mr. Maua before deciding what mode of defence they intend to tender.
14. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE

