Republic v Kendagor (Criminal Case 78 of 2013)
[2023] KEHC 20873 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20873 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 78 OF 2013

RN NYAKUNDI, J

JULY 28, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

BENJAMIN KENDAGOR ..... ACCUSED

RULING

1. The accused person namely Benjamin Kendagor is charged with the offence of murder whereas the particulars of the offence are that: On night 29th /September 30, 2013 at Matete trading centre in Matete District within Kakamega county, murdered Vincent Kiptabut. The accused pleaded not guilty to the charge compelling the prosecution to summon 9 witnesses to disapprove the presumption to the right of innocence as provided for in article 50(2) (a) of the *Constitution*.

2. At the close of the prosecution case it was submitted that the evidence clearly fell under the limb of a *prima facie* case whereas on the other hand learned counsel for the accused person submitted that from evaluation of the evidence the fundamental principles of a *prima facie* case on the part of the prosecution were far from being discharged by the prosecution.

3. In the charge facing the accused person there are four critical elements to be proved by the prosecution within the ambit of section 203 of the *Penal Code*. Thus: (a) the death of the deceased Vincent Kiptabut (b) that his death was unlawfully caused (c) That the accused in causing the death of the deceased was actuated with malice aforethought manifestation contrary to section 206 of the *Penal Code* (d) That the perpetrator was none other than the accused person. This process of evaluating halftime evidence by the court is stipulated in section 306 (1) & (2) of the *CPC*. The submission under this section for the threshold of motion of no case to answer or a prima facie case does not delve into the merits of any evidence by the witnesses summoned by the prosecution.

Resolution

4. The aspects of the *prima facie* relevance of the evidence admitted and which may be deemed necessary to establish the test in section 306 (1) & (2) of the *CPC* has found its way in the overall case law. It is along this line of jurisprudence trial courts have to find the trajectory to rule in favour or against the prosecution. If at the close of the prosecution case the threshold has been demonstrated by the prosecution on all the elements of the offence charged in the information accused person shall be called upon to state his defence.

5. Similarly, after careful attention to detail the evidence adduced is not sufficient to proof any of the elements that may result in a conviction a motion of no case to answer is distinguishable from a *prima facie* case. The value of that ultimate refinement is truly obvious from the comparative case in *R v Galbraith* [1981] 1 WLR 1039 where he said:

    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 nature for example because of inherent 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.

    3. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which ae generally speaking within the province of the jury and where on one possible view of the fact there is evidence upon which a jury could properly come to conclusion that the defendant is guilty then the judge should allow the matter to be tried by jury. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion to the judge.

6. The test of rational connection in testing a prima facie proof of a case by the prosecution is to be evaluated from the evidence of one witness after another which may constitute the elements of the offence. It is therefore, only essential that in making a finding of existence of a prima facie case by the trial court there be some rational connection between the fact proved and the fact presumed as stipulated in section 107 (1) 108 & 109 of *Evidence Act*.

7. Ordinarily a presumption of fact cannot operate against whom as neither possession nor control of the facts presumed. In a searching analysis of the trial court the basis a rational inference as to whether a *prima facie* case or a no case to answer has been experienced and accomplished by either the prosecution or the defence is a matter purely of evidence.

8. In *Republic v Abdi Ibrahim OWL* [2013] eKLR "a *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. In *Ramanla, Trambakla Bhatt v R* [1957] EA 332 AT 334 and 335, the court stated as follows: "Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree tht 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 property directing its mind to the law and the evidence could convict a *prima facie* case as stated in *Bhatt's case*....we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gap in the prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned judge did here, unless the court concerned is acquitting the accused

9. There should be no gamble to permit a trial court to place an accused person on his or her defence whereas the essential typologies of a *prima facie* case remain in the realm of suspicion. There are two senses in which courts ought to construe and use the concept of *prima facie* case in rendering a decision at the conclusion of the prosecution case. The first is in the sense of the prosecution having produced evidence sufficient to render an independent tribunal properly constituted to make a determination on the elements of the offence in question in its favour. In the second sense, it means the prosecution evidence is sufficient to allow the accused person to be placed on his or her defence to answer the charge. In this respect the prosecution evidence on a finding of a *prima facie* case compels the accused to produce evidence in rebuttal and if in default a conviction may issue.

10. As a matter of law a prima facie case does not shift the burden of proof vested with the prosecution to shift to the accused person at any one time (See *Republic v Subordinate Court of the First Class Magistrate at City Hall, Nairobi and another, ex parte Youginda Pall Sennik and another Retread Limited* [2006] *Republic v Nyambura and four others* [2001] KLR 355 (Etyang J) and *Ali Ahmed Saleh Amgara v R* [1959] EA 654 , *Semfukwe and Others v Republic* [1976-1985] EA 536 (Wambuzi Mtafa and Musoke JJA)., Chunga CJ Lakha and Keiwua JJA *Mbuthia v Republic* [2010] 2 EA 311 (Tunoi Waki and Nyamu JJA. *Dhalay v Republic* [1995-1998]. EA 29. Omollo Tunoi JJA and Bosire Ag. Ramamlai Tambakla Bhatt v R[1957] EA 332 (Sir Newnham Worley P Sir Ronald Siiclair VP and Bocon JA) and Obar s/o Nyrongo v Reginam [1955] 22 EACA 422 (Sir Barclay Nilhii P. Sir Newham Worley VP and Briggs JA.

11. However, the prima facie case is distinguishable from that of a no case to answer. The real issue in this case is whether one party being the prosecution has discharged the half time burden of proof of a *prima facie* case to be granted leave to proceed to the next stage. On the other hand, any meaning that does not fit the definition of a prima facie case is such that it raises a no case to answer verdict. The authors of *Blacksone's Criminal Practice 2010* at D15.56 favored the following approach as meeting the critical threshold of a no case to answer.

    (c) if, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from it being of a type which the accumulated experience of the court has shown to be of doubtful value.

    (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippery [1988] Crim LR 767 where the inconsistencies ae so great that any reasonable tribunals would be forced to the conclusion, that the witness is untruthful, and tht it would not be proper for the case to proceed on tht evidence alone."

12. For this accused person to be convicted of the offence of murder the prosecution has to proof all the elements beyond reasonable doubt. That is not the degree of proof expected of the court at this stage

but is a matter of scrutiny of the evidence on the face of it given by the witnesses for the accused person to be called upon to contrast it by way of a defense.

13. To the instant case this far from the documentary evidence of a post mortem report the deceased is stated to have suffered multiple injuries to the various parts of his physical body. The pathologist opined that the cause of death was severe head injury. In essence proof of death of the deceased Vincent Kiptabut is not in dispute. The prosecution witness testimonies of PW1 –PW9 substantially hinges on circumstantial evidence. The residual ingredients of the offence on how the deceased died, the identification of the perpetrator and whether the unlawful act was motivated with malice aforethought under section 206 of the Penal Code are matters to be conclusively determined upon this court giving an opportunity to the accused to state his case. The legal architecture for the accused to state his defence is governed by article 50 (2) (i) (L) of the *constitution* as read with section 306 (2) and 307 of the *CPC*.

14. For those reasons the accused be and is hereby called upon to offer an answer to the *prima facie* case on the charge of murder contrary to section 203 of the *Penal Code*. Defence hearing scheduled on the August 28, 2023.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON 28TH DAY OF JULY 2023

In the Presence of

Mr. Rioba Omboto

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE