Republic v Rotich (Criminal Case 62 of 2015) [2023] KEHC 20874 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20874 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 62 OF 2015

RN NYAKUNDI, J

JULY 27, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MOSES KIPROP ROTICH ..... ACCUSED

RULING

1 The accused person namely Moses Kiprop Rotich is charged with the offence of murder whereas the particulars of the offence are that: On the night of 22nd and September 23, 2015 at Norama Village in Keiyo North Sub county within Elgeyo Marakwet County murdered, murdered Hezron Kiptui Mulwo. The accused pleaded not guilty to the charge compelling the prosecution to summon 4 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 Hezron Kiptui Mulwo. (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 its 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 case is the 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 conclusion of the prosecution case a case is made out with sufficient evidence to establish all the elements of the offence charged in the information accused person shall be called to state his defence. 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

4. 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.

5 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*.

6 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 of 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. 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.

7 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.

8 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.

9 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.
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> (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.'

10 For this accused person to be convicted of the offence of murder the prosecution has 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 made by the witnesses for the accused person to be called upon to contrast it by way of a defense. In reference 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 Hezron Kiptui Mulwo.is not in dispute.

11 The prosecution witness testimonies of PW1 –PW4 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 203 as read with 206 of the Penal Code are matters to be conclusively to be proved by the prosecution as the burden bearer in criminal cases. It is only after that stage that the court would have the opportunity of deciding whether the prosecution has proved its case beyond reasonable doubt.

12 However, first and foremost the concept of a prima facie case and that of no case to answer must be considered at the interim before any decision is made to place the accused persons on his or her defence. The meaning of no case to answer implicit under Section 306 (1) of the CPC is that there is no case for an accused person to be asked to defend himself or herself on the basis that there is no evidence on which if he or she elects to keep silent an independent tribunal directing its mind to the evidence would convict the accused person. In addition, that whatever evidence on record which might have been laid down by the prosecution to link the accused person with the alleged offence has been so discredited particularly under cross examination by the defence but no independent and /impartial court can be called upon to act on such evidence to place the accused on his defence or make a finding of guilt in absence of evidence in rebuttal.

13 The above guidelines when tested against each of the four witnesses testimonies it appears that the case is made of suspicions, innuendos and material evidence making no credible reference to the accused person. The only essential ingredient being alluded to by the four witnesses is the fact that the deceased is dead. The other remnants of the ingredients i.e whether the death was unlawfully caused, whether the assailant was actuated with malice aforethought expressly defined in Section 206 of the Penal Code and finally whether the accused person was or is sufficiently identified positively by any of the four witnesses is not even in the scope of suspicion but fabrication.

14 An examination of the totality of the evidence by the four witnesses as presented by the prosecution is purely circumstantial. The issue of propensity of circumstantial evidence was considered by learned author Starkie on evidence 3rd Edition where he stated as follows: " it is essential tht the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved: hence results the rule in criminal case tht the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established. Also in Martin v Osborne Dixon J said: if an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. this means that according to the common course of human affairs, the degree of probability that the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.

15 This is the same rational emphasis in the dictum stated in *Simon Musoke v R(1958) EA 715*, and *Rex v Kipkering Arap Koshe (1949) 16 EACA 135*. The predominant principle that in a case exclusively upon circumstantial evidence, the court must before be deciding upon a conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable facts are incompatible with the with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

16 Given the applicable principles and the evidence essentially relied upon by the prosecution I find no iota or link to connect the accused person to the charge of killing the deceased contrary to Section 203 of the Penal Code as alleged by the prosecution. This is a true case for the maxim that it is better if ten guilty persons go scot free than if one innocent person is convicted.

17 In conclusion I urge the prosecution to accept their shortcomings in making a decision to charge the accused person on October 2, 2015 of an offence which had no legs to stand on save that it was built on sinking sand. It had no solid rock as required by the spirit of the *constitution* in Article 157 (11) which roars as follows: ' In exercising the power conferred by this Article the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.'

18 Considered in context here the nature of the rights and fundamental freedoms protected and guaranteed by the *constitution* were and are violated under the guise of the DPP exercising the constitutional mandate to initiate a prosecution against accused person. The question of who bears the onus when considering the appropriate relief for the conduct actionable as a constitutional tort is more complicated as for that relief was not part of the discourse of this proceedings.

19 The effect of all these, the prosecution has failed to discharge the burden of proof of a prima facie case to call upon the accused person to state his defence. One of the consequence provided for under the criminal procedure code is to acquit the accused person and as a must he is free indeed unless otherwise lawfully held.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON 27TH DAY OF JULY 2023

In the Presence of

Mr. Mathai holding brief for Kigamwa

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE

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