



**Republic v Daniel & another (Criminal Case E057 of 2021)
[2023] KEHC 22730 (KLR) (Crim) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E057 OF 2021
DR KAVEDZA, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MUSAU DANIEL 1ST ACCUSED

ROBERT MWANGI KIBORORO 2ND ACCUSED

RULING

1. The issue for determination before me is whether or not a prima facie case has been made out by the prosecution to require the 1st and 2nd accused be put on his defence in terms of Section 306 (2) of the *Criminal Procedure Code* (Cap. 75) Laws of Kenya. The answer to the issue lies in the analysis of the prosecution's evidence in light of the applicable law. It should be borne in mind that the 1st and 2nd accused are charged with murder contrary to section 203 as read with 204 of the *Penal Code* (Cap 63) Laws of Kenya, in respect of the deceased Vitalis Owino Ochillo alias Baba Anita alias Waingo alias Madaraka. They pleaded not guilty to the charge. The prosecution called eleven (11) witnesses in support of their case.
2. Jackton Ouma Ochillo (PW 1) testified that he is the brother of the deceased. He told the court that he identified the body of the deceased and reported his death at Jonsaga Police Station. There he was referred to Muthaiga Police station. He was also present during the post-mortem. He stated that the deceased had an injury on the back of his head and lower chest.
3. John Ihugo (PW 2) the OCS Muthaiga Police station told the court that on May 3, 2020, he assigned several officers for the night patrol. The team was patrolling the Mathare Area under the command of the 1st accused, 2nd accused, Corporal Mutisya, Corporal Mwangi, Sergeant Fanando, and PC Munga. He testified that during the night patrol, they saw a crowd gathered. The mob refused them access to



- the scene as there was a dead body. They retreated to the station. The body was brought to the station in a hand cart.
4. Everlyn Ochweda (PW 3) the widow of the deceased told the court that on the night of 3rd May 2020, the deceased went out to get vegetables for the family but he never came back. She came to learn of his demise the next morning. She identified his body during the post-mortem.
 5. Ochieng Ochalo (PW 4) told the court that on the day, he saw police officers beating the deceased while he was hiding nearby. When the deceased tried to flee, one of the officers tripped him and he fell. He identified the 2nd accused as one of the officers involved.
 6. Willis Omondi Barasa (PW 5) testified that on May 3, 2020, he was in the company of his friends having a chat after work. He noticed a police land cruiser from Muthaiga Police station arrive. Due to the fear of being arrested, he fled to a nearby hideout. He told the court that from the hideout, he could see two police officers beating a man with a 'rungu' and rubber whip. They left their victim lying there. The man was identified as Waingo. He told the court that the body of the deceased was taken to the police station in a hand cart the next morning. He identified the 2nd accused as one of the officers involved.
 7. Beatrice Adhiambo (PW 6) told the court that she met the deceased on the evening of May 3, 2020. She saw two police officers alight from a land cruiser. The two caught up with the deceased and started beating him. She could witness the violence from where she was hiding. The officers left the scene in motorbikes.
 8. No. 61519 Japheth Mutisya (PW 7), No. 89092 Reagan Munga Ndune (PW 8), and Sergeant Samuel Fanando (PW 9) confirmed to the court that they were on patrol on the material night in the company of the accused persons. They told the court the routes they used during the patrol within the Mathare area.
 9. Dr. Peter Ndegwa (PW 10) the government pathologist produced the post-mortem report of the deceased. On examination, the deceased had broken ribs and a hemorrhage in the lungs. The cause of death was head injuries due to blunt force trauma.
 10. Benedict Otieno (PW 11) the investigating officer testified with respect to the steps he took during the investigations.
 11. PC Kariuki Mwangi (PW 12) told the court that he was not present at the time the incident occurred. In addition, he reported for duty on May 4, 2020 taking over from Corporal Omwoyo.

Written submissions for the 1st and 2nd accused.

12. Mr. Ogada, learned counsel for the 1st accused submitted that the prosecution did not lead any evidence that his client caused the death of the deceased with malice aforethought. In addition, there were contradictions in the witness statements specifically, PW 4, PW 5, and PW 6. It was further submitted that the prosecution failed to link the 1st accused to any unlawful act that caused the death of the deceased.
13. Mr. Wandugi, learned counsel for the 2nd accused submitted that the prosecution failed to call crucial witnesses as their testimony would be adverse to the prosecution's case. It was also submitted that the prosecution's witnesses were not credible. It was argued that the totality of the prosecution's evidence does not justify placing the 2nd accused in his defence.

Analysis and determination.

14. Section 306 of the [*Criminal Procedure Code*](#) (Cap 75) Laws of Kenya provides as follows:



- (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 recording a finding of not guilty.
 - (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 on his own behalf or make unsworn statement and to call witnesses in his defence.
15. A definition as to what amounts to a prima facie case was given in the case of *Bhatt –vs- R* [1957] EA 332. In that case the Court of Appeal expressed itself on this issue:

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. 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 defence.”

16. At this stage of the proceedings, the standards applicable on whether a prima facie case has been made out is lower than the standard on beyond reasonable doubt, which applies at the conclusion of the full trial after the accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the court could convict if the defence says nothing to rebut such evidence.
17. The evidence presented by the prosecution implicates the 1st and 2nd accused in the death of the deceased. I find that at this stage I am not required to give reasons for my ruling because I am not required to finally determine the credibility of the prosecution witnesses. This will be done after the close of the evidentiary hearing for both parties. The test of a prima facie case, in terms expressed in *Bhatt vs R* case has been met by the prosecution to warrant the accused persons to be called upon to defend themselves.
18. I hereby put the 1st and 2nd accused to their defence.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr Mulama for the State.



Mr Ogado for the 1st Accused.

Mr Raingo for the 2nd Accused.

Ms Mbugua watching brief for IPOA.

Ms Muchemi for the victims.

Habiba C/A.

