



**Republic v Ndegwa (Criminal Case E010 of 2021)
[2023] KEHC 26843 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL CASE E010 OF 2021
WA OKWANY, J
DECEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD OMARA NDEGWA ACCUSED

RULING

1. The accused herein, Benard Omara Ndegwa, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on the 18th day of May 2022 at Mokomoni village in Manga Sub-Location within Nyamira County, murdered Millicent Nyamboga Mochumbe (hereinafter referred to as the deceased).
2. The Prosecution called a total of 7 witnesses in support of its case as follows: -
3. PW7, PC Charlton Onyango, the investigating officer. PW7 testified that following allegations that that the deceased's mother in law, one Pamela Nyanchoka Ndegwa, lost tea bonus money in the sum of Kshs. 5000, her sons, who are also the deceased's brothers in law, namely; Evans Ndegwa, Peter Ndegwa, Haron Ndegwa, Giriama Ndegwa and the accused herein Benard Ndegwa engaged the services of a witch doctor to reveal the person who had stolen the money. It was alleged that the witch doctor informed them that the deceased had taken the money. The brothers then confronted the deceased by ejecting her from her house before leading her towards the river where they assaulted her. The deceased was thereafter found lying dead about 700 meters from her home. All the suspects in the case subsequently disappeared from their home and have not been traced to date except the accused herein who was arrested in Nairobi on 21st February 2021, about 3 months after the incident.
4. Both the prosecution and the defence did not present any submissions on a case to answer. They stated that they will rely on the evidence on record.



5. The court is at this point called upon to determine if the prosecution has made out a prima facie case against the accused person that would warrant his being placed on his defence.

6. In *Republic v Abdi Ibrahim Owl* [2013] eKLR a prima facie case was defined 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”. “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 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 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.”

7. Similarly, in *Anthony Njue Njeru v Republic* [2006] eKLR the Court of Appeal held 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 on record. It seems the Appellant was required to fill in the gaps in the Prosecution case.”

8. The question that this court has to deal with at this stage is therefore, whether, based on the evidence before this Court, a Court properly directing its mind to the law and the evidence may convict if the accused opt to give no evidence. In *Ronald Nyaga Kiura v Republic* [2018] eKLR it was held: -

“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.”

9. *Oxford Companion of Law* defines “prima facie” in the following terms:

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.

10. Courts have taken the position that there is a danger in making conclusive findings at this stage, especially where the Court finds that there is a case to answer. The reasons for this position was explained in *Festo Wandera Mukando v The Republic* [1980] KLR 103 as follows:-

“...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.”

11. In instances where the prosecution’s case, as presented, even if it were to be taken to be true, would still not lead to a conviction such as where, for example, an accused has not been mentioned as having been involved in the offence in question and there is absolutely no evidence whether direct or circumstantial linking him to the offence, it would be foolhardy to put him on his defence. This is to say that a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. In other words, an accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. Indeed, the defence case is not meant to fill in gaping gaps in the prosecution case.

12. In *Republic v Prazad* [1979] 2A Crim R 45, King CJ it was held: -

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

13. In the instant case, I note that the prosecution tendered evidence linking the accused to the death of the deceased but as I have already stated hereinabove, this is not the stage to critically examine the said evidence and make a conclusive determination as to whether the accused stands guilty or not. I find that it will, in the circumstances of this case, be prudent to hear from the accused before making a conclusive determination.

14. Accordingly, I will not delve into the merits of the prosecution’s case further. Suffice is to say that, based on the evidence so far presented before this court, I am satisfied that the prosecution has established a prima facie case for the purposes of a finding that the accused has a case to answer. Whether or not



the said evidence meets the threshold for a conviction is a matter that will be considered at the end of the trial.

15. I accordingly place the accused on his defence.

16. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
21ST DAY OF DECEMBER, 2023.**

W. A. OKWANY

JUDGE

