



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Ogira & 2 others (Criminal Case 48 of 2019)
[2023] KEHC 27067 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 48 OF 2019
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

VITALIS OWUOR OGIRA 1ST ACCUSED

GABRIEL OMOLO OBATI 2ND ACCUSED

MIKE OTIENO OCHINDO 3RD ACCUSED

RULING

1. The accused persons namely Vitalis Owuor Ogira, Gabriel Omolo Obati, and Mike Otieno Ochindo are jointly charged with the offence of murder. Whereas the particulars of the offence are that: On the 31st day of July 2019 at Pioneer Estate, Pioneer Location, within Uasin Gishu County, jointly with others not before court murdered Vincent Juma Oboo. Each of the accused pleaded not guilty with the offence. The prosecution was led by Senior Prosecution Counsel Mr. Mugun while Mr. Oduor Advocate represented the 1st and 2nd accused and Mr. Nyambara appeared for the 3rd Accused. In this respect 7 witnesses were summoned to establish the following ingredients of murder beyond reasonable doubt as a constitutional imperative under Art. 50(2) (a) of the *constitution*. The provision underscores the primacy of the accused persons being presumed innocent unless the contrary is proved by the state. Section 203 of the *Penal Code* envisages these key ingredients as being the core to be proven for the prosecution to secure a conviction against the accused person.
 - a. The death of the decease
 - b. That her death was through unlawful acts or omission of the accused
 - c. That the accused had malice aforethought
 - d. As such, the quality of the evidence placed the accused person at the scene of the murder.



The Prosecution Case Summary

2. The prosecution as stated earlier is mandated under Section 107(1) 108 & 109 of the *Evidence Act* discharged the burden of proving each and every element of the offence beyond reasonable doubt. At the close of the prosecution case a decision must be made by a trial court as to whether a *prima facie* case in favour of the prosecution has been established to necessitate an accused person to be called upon to state his defence. In this instance PW1 Chief Inspector Abel Wanyapidi told this court on oath that on the 1.8.2019 in company of other police officers they visited the scene of a reported murder incident at Pioneer area in Eldoret. On arrival, they found a dead body in an ironsheet built home. From a quick inquiry at the scene they were informed that the deceased was beaten to death by a group of persons. The said scene was next to a garage indicative of the suspects being within that neighborhood. In PW1's testimony he proceeded to document the scene by taking a set of 28 photographs which he produced as exhibit.
3. Next was PW2 Joan Cheruto a resident of Pioneer garage who also happened to be the widow to the deceased Vincent Juma. It was further the evidence of PW2 that while at the garage the accused persons in the dock with others not before court came their house armed with metal rods, clubs and a tire in such of the deceased. They alleged that some tools had gone missing from the garage. It did not take long before arrival of the deceased who happened to have sustained some injuries in the lower limbs. Thereafter, it was the testimony of PW2 that the accused persons emerged and surrounded the deceased whom they assaulted while seated on a tyre. Sensing danger and in fear of her life PW2 took flight from the scene leaving behind the deceased and his assailants who continued inflicting bodily harm. The deceased was later to succumb to the injuries sustained on the 1.8.2019. It was also the narrative of PW3 Dickson Nyongesa whose evidence was to the effect that he works as a caretaker at a property located at Pioneer which is also used as a garage. PW3 also confirmed that the deceased lived with his wife and child in the same property. According to PW3 the police visited the property where he was shown the body of the deceased on a chair and covered with a blanket. He could notice blood flowing down from the body as a result of the injuries sustained. He was later asked to record the statement. The other witness summoned on behalf of the prosecution case was that of PW4 Stephen Oboo who identified the body of the deceased to the pathologist on 9.8.2019. In addition, PW5 one Dennis Oboo adduced evidence to the effect that at the material time he was staying with his father the deceased and PW2 in the same compound where the murder incident took place. In the recollection of PW2 events of the material day on 31.7.2019 there were eight people who visited the property with the sole aim of killing the deceased. These people were well known to PW5 as they occupy it the neighboring garage. The motive of the attack according to PW5 was the loss of their working tools which they suspected had been stolen by the deceased. In a little while they left the compound but when the deceased came in at around 7.00 pm he showed signs of having been assaulted with severe injuries to the left leg. The same assailants came knocking with metal rods, whips and clubs which they used to inflict further injuries upon the deceased. Given the occurrence of the death of the deceased, PW5 was asked by the police to record the witness statement on what he was able to see on the material day when the deceased was assaulted by the accused persons. PW7 P/c John Okachi told the court that he conducted necessary investigations and at the conclusion of it all he recommended that the accused persons be charged with the murder of the deceased.
4. The prosecution having closed its case the duty of this court is to establish whether the accused persons have a case to answer or on the other hand the threshold of a *prima facie* case remains in the realm of suspicion. This is a legal requirement under section 306 of the *Criminal Procedure Code*. In any criminal trial at the closure of the prosecution case the trial court is required to consider the evidence and make a finding as to whether the prosecution has sufficiently made out the case against the accused



persons to require him or her to state his or her defence. If a *prima facie* case is not made out the accused persons is considered not guilty and therefore a motion of no case to answer carries the day. The case of *DPP v Morgan Maliki and Nyaisa Makori*, criminal Appeal No 133 of 2013, the court of appeal held *inter alia* that.

“We think that a *prima facie* case is made out if, , unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one which means that at this stage the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond reasonable doubt. If there is any gap it is wrong to call upon the accused to give his defense so as to fill it in as this would amount to shifting the burden of proof. See also *Sewe vs Republic* (2003) KLR 364, *Mary Wanjiku Gichira vs Republic* (Criminal Appeal No. 17 of 1998, *Mohammed & 3 others v Republic* (2005) 1 KLR 722, *Libambula v Republic* (2003) KLR 863, *Ramanlal Tambaklal Bhati vs Republic* (1957) E.A 332., *Republic vs Charles Kimani Mbugua* eKLR.

5. The administration of criminal justice in Kenya strikes a balance between the search for truth and the fairness of the process. These competing interests sometimes causes friction between the state and the accused person underpinned in one key doctrine the principle of the presumption of innocence until proven guilty. This being a constitutional principle in our criminal law the bar is set so high for the state to ensure that flimsy grounds or suspicious complaints should not find their way to the criminal jurisdiction of our courts. It is that allocation of the burden of proof vested with the state which this court must make a finding on the basis that the evidence so far admitted by the court is capable of establishing a prima facie case as against the accused person. (See *Republic vs Abdi Ibrahim OWL* (2013) eKLR , *Ramanlal Trambaklal Bhatt v. R* (1957) E.A 332 at 334. The criminal process of trying an accused person in Kenya is tuned at a particular point in the continuum of two extremes. On the one hand it pursues the protocol of a prima facie case by the state furiously and vigorously. This is to achieve the objectives of detection, apprehension, prosecution, conviction and punishment of the offenders for the common good of society. On the other endeavor it is the defence pursuit of the due process model founded on the presumption of innocence until the contrary is proved by the state beyond reasonable doubt. These scales of justice informs the express provision of Section 306 (1) &(2) of the *CPC*. It is part of the means to achieve the ends of substantive justice for the court to acquit an accused person at the close of the prosecution case if no credible evidence is worthy the exercise of the courts adjudicatory powers and to protect the fundamental Rights and Freedoms of the citizens of Kenya.
6. 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 on credibility or otherwise of the witnesses summoned by the prosecution.
7. 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 conclusion of the prosecution proof of the case is based on assumptions a motion of no case to answer carries the day and the accused person shall be acquitted of any wrong doing. The criminal procedure on the other hand states that if a case for the prosecution is made out with substantial evidence to establish all the elements of the offence charged in the information accused person shall be called upon to state her 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.W.L R. 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 are 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.
8. 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 connecting factor for 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*.
9. Ordinarily a presumption of fact cannot operate against whom has 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 or fabrication. 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 ensue.
10. As a matter of law a *prima facie* case does not shift the burden of proof vested with the prosecution at all times to shift to the accused person at any one occasion in a Criminal Proceedings. Even the rationalistic approach in Section 111 of the *Evidence Act* never militates the elements of the doctrine of proof beyond reasonable doubt. (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 Siicclair 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. The Criminal Procedure Code in Section 306 provisions as well as the various provisions reflect the epistemological aspect of adjudication with the due process value to determine at half time whether an accused person has a case to answer.
12. 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 Blackstone's Criminal Practice 2010 at D15.56 favored the following approach as a criteria on a motion of 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 are so great that any reasonable tribunals would be forced to the conclusion, that the witness is untruthful, and that it would not be proper for the case to proceed on the evidence alone.”
13. For these accused person to be convicted of the offence of murder the prosecution has to prove 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 discharged by the witnesses against the accused persons to be called upon to contrast it by way of a defense. In reference to the instant case this far from the evidence of the six (6) witnesses and a 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 from the postmortem examination formed the opinion that the deceased cause of death was Head injury secondary to blunt force trauma, severe hemorrhage secondary to multiple wounds. The prosecution witness testimonies of PW1 –PW7 substantially hinges on a mixed grill of direct and 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 person to state her case. The legal architecture for the accused person to state their 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 person be and are 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.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON 20TH DAY OF DECEMBER 2023

In the Presence of

Mr. Mugun for the State

Accused

.....

R. NYAKUNDI

JUDGE

