



**Republic v Maina (Criminal Case E029 of 2022)
[2023] KEHC 27066 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E029 OF 2022
RN NYAKUNDI, J
DECEMBER 18, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

WINNINE WANGARI MAINA ACCUSED

RULING

1. The accused person namely Winnie Wangeri Maina is charged with the offence of murder. Whereas the particulars of the offence are that: On the 21st August 2022 at Elgon View in Kapseret sub-county within Uasin Gishu County village in Eldoret West sub-county within Uasin Gishu county murdered Wyclife Murithi Miruti on arraignment the accused pleaded not guilty to the offence. She was represented at a trial by legal counsel Mr. Miyienda while the family retained the legal services of Mr. Mwenda. On the other hand Mr. Mugun the Senior Prosecution counsel prosecuted the accused person on behalf of the state. 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 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.
2. The case summary from the seven prosecution witnesses can be deduced as follows: That on the 22.8.2022 the accused and the deceased who are tenants at the property owned by one Charles Kariuki



PW3 left their house and made it back at around 4.00am. It was at that moment when PW1 Evans Ombok opened the gate for them and the two drove safely inside the compound parking their car appropriately. They both proceeded to their house but in a short while PW1 heard some voice calling Kariuki, Kariuki, followed also the name calling of PW1 that is Evans, Evans. That is when PW1 in response to the scene saw the deceased on the ground and the accused seating on top of him while armed with a knife. Further PW1 told the court that she managed to disarm the accused of the weapon in her possession as other neighbours responded to the conflict. It was the testimony of PW2 who told the court that on 21.8.2022 at 4.00am he received a telephone call from PW3 demanding of them to rush to his property in order to establish the veracity of the commotion which might have escalated into a commission of a crime between the tenants. According to PW2 on arrival at the premises it was observed that a vehicle was parked nearby and its full lights on and the security guard corroborated the information by PW3 that there was a fight and one of the persons has been injured. The victim according to PW2 had been rushed to the hospital. The prosecution further adduced the evidence of PW4 one Dr.Isac Milisoy of Uasin Gishu Hospital. His evidence was to the effect that he did examine one Wangari the accused herein who had come with a history of having been injured during the fight with her husband. On examination the positive findings were recorded in the P3 produced as exhibit 5 in support of the prosecution case. As for PW5 Antony Egesa his evidence was on the circumstances surrounding the investigations carried out on the murder incident which had been reported on 21.8.2022. He visited the scene where he found out that the victim had already been taken to the hospital to undergo treatment from the injuries sustained. On his follow up PW5 confirmed that the victim passed on while undergoing treatment. The issue was therefore escalated further for a postmortem examination to be conducted to establish the cause of death. That postmortem conducted by Dr. Malianya PW6 came out with the following findings on the nature of Internal and External injuries as per the history given by the investigating officer to the offence: Five stab wounds:

1. Sternal- 2x1 cm
 2. Left Side of Ternum-3rd ICS
 3. Apex – 3x2cm- 5th ICS
 4. Left Knee- Lateral Aspect -2x1cm
 5. Left Glutal-1x1 c.m
3. As a result of the examination PW6 opined that the cause of death was Sudden Cardiac death due to stab wound. The prosecution having closed its case the duty of this court is to establish whether the accused person has 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 person to require him or her to state his or her defence. If a *prima facie* case is not made out the accused 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 given 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."

4. The administration of criminal justice in Kenya is to strike a balance between the search for truth and the fairness of the process. These competing interests sometimes causes friction between the states and the accused person underpinned in one key doctrinal 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 is the defence pursuit of the due process model founded on the presumption of innocence until the contrary is proved. 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.
5. 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.
6. 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 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.

7. 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](#).
8. 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.
9. 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 [Mbutia 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).
10. 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.
11. 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.”
12. 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 person to be called upon to contest it by way of a defence. 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 opined that the cause of death was Sudden Cardiac Death Due to Stab Wound. In essence the deceased Wycliffe Murithi deprivation of his right to life in Art. 26 of the *constitution* is not disputed. The prosecution witness testimonies of PW1 –PW6 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 her defence is governed by Article 50 (2) (i) (L) of the *constitution* as read with Section 306 (2) and 307 of the *CPC*.
13. For those reasons the accused person 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 on 30.1.2024
14. It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON 18 DAY OF DECEMBER 2023

In the presence of

Mr. Miyenda Advocates

Mr. Mugun for the State

.....

R. NYAKUNDI

JUDGE

