



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL CASE NO. E002 OF 2021

CORAM: HON. R.E. ABURILL J

STATE.....PROSECUTION

VERSUS

KEVIN OWUOR ABITH ALIAS OPUDO.....ACCUSED

RULING ON CASE TO ANSWER

1. The accused person in this case is Kevin Owuor Abith alias Opudo. He is charged with the offence of Murder contrary to **Section 203 as read with Section 204 of the Penal Code**. Particulars of the information dated 20th January 2021 are that the accused on the 6th day of January 2021 at Uhwaya village, Got Agulu sub-location in West Yimbo location, in Bondo sub county within Siaya County, he murdered Wilklis Owuor Owuor.

2. The accused has denied committing the offence of Murder as charged and the prosecution has called 6 witnesses who have testified against him and closed its case on 30/3/2022.

3. The Defence counsel, Mr. Ooro did request for time to file written submissions on no case to answer. This court granted him ten (10) days to file the said submissions but as at today the 18/4/2022 when I am writing this ruling, no submissions have been filed.

4. This court is therefore called upon to determine whether, at this stage, based on the evidence adduced by the six prosecution witnesses, the prosecution have established a *prima facie* case to warrant the accused person to be placed on his defence to answer to the charge of Murder.

5. It is important to note that the burden of proof lies on the Prosecution throughout the trial to prove their case against the accused person. That burden does not shift to the accused person. This is so because the accused person's constitutionally guaranteed rights include the right to remain silent, the right to adduce and challenge evidence and the right not to give any incriminating evidence. However, at this stage, the prosecution is not expected to have proved their case against the accused person beyond reasonable doubt. The measure is for a *prima facie* case to be established.

6. A *prima facie* case is established where the evidence tendered by the Prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused opts to remain silent.

7. ***Under Section 306 (1) of the Criminal Procedure Code:***

“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 the several or any one of the 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, record a finding of not guilty.”

8. Having considered the testimonies of the six (6) prosecution witnesses, the question is whether the evidence tendered establishes a *prima facie* case against the accused, or whether the accused has a case to answer.

9. In ***Republic vs Abdi Ibrahim Owi [2013]eKLR***, the court defined a *prima facie* case as follows:

“Prima facie’ is a latin word defined by Black’s Law Dictionary 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”

10. In simple terms, *prima facie* means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In **Ramanlal Trambaklal Bhatt Vs R [1957] E.A 332** at 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’s case, the case is merely one in which on full consideration might possible 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 questionthere 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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

11. From the above detained holding by the court, can this court on the basis of the evidence so far tendered by the Prosecution, and this court properly directing itself to the law and evidence convict if the accused chooses not to give any evidence?

12. In **Ronald Nyaga Kiura Vs Republic**, the court held:

“It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case 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...”

13. The trial court is however cautioned that at this stage, it should not make definitive findings should it conclude that the accused has a case to answer.

14. In **Festo Wandera Mukando Vs Republic [1980] KLR 103**, the court held:

“...we 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, and an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” to answer 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.”

15. In this case, the incident which took place at night was witnessed by PW2 and PW3. Without delving into the depths of their testimonies, I am satisfied that the Prosecution have established a *prima facie* case against the accused person to warrant him to be placed on his defence. I therefore find that the accused herein Kevin Owuor Abith alias Opudo has a case to answer and he is therefore placed on his defence.

16. The provisions of **Section 306(2) of the Criminal Procedure Code and Article 50(2)(i)(j)(k) of the Constitution** are hereby explained to the accused person in the presence of his advocate Mr. Ooro.

17. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA IN OPEN COURT, THIS 25TH DAY OF APRIL 2022

R.E. ABURILI

JUDGE