Republic v Saka (Criminal Case 20 of 2016) [2022] KEHC 10607 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10607 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 20 OF 2016

EKO OGOLA, J

MAY 26, 2022

BETWEEN

REPUBLIC ..... PROSECUTION

AND

MUSA SAKA ..... ACCUSED

RULING

1. Musa Saka hereinafter referred as the accused is charged before this court with two counts of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63 of the Laws of Kenya). The particulars of the charge brought against the accused provide as follows: that the accused on the February 27, 2016 at Chepkemei village, Chepsaita Location in Eldoret West District within Uasin Gishu County, murdered Mary Kadesa Musa and Fefa Musasia Musa hereinafter referred to as the deceased persons.

2. The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Miyienda, Learned Counsel and the prosecution was conducted by Ms Okok, a Senior Prosecution Counsel. The prosecution called a total of six (6) witnesses to prove the ingredients of the offence.

3. At the close of the prosecution case the defence counsel Mr. Miyienda in compliance with section 306 (1) of the *Criminal Procedure Code* made a submission of a no case to answer.

4. I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where the court is being called upon to decide whether or not the prosecution has made out a prima facie case against the accused that would warrant this court to put the accused on his defence. In other words, does the accused have a case to answer? The question on the prima facie case has been

extensively considered by the courts and other legal texts by scholars. The Oxford Companion of Law at pg 907 gives the definition as:

> " 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."

5. The procedure in determination whether indeed, the accused has a case to answer was discussed in the case R*epublic v Stephen Chomba Kamau* (2021) eKLR thus:-

> " Republic v Samuel Karanja Kiria (2009) eKLR Justice J.B Ojwang (as he then was) stated:-
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> 'The question at this stage is not whether or not the accused is guilty as charged but whether there is cogent evidence of his connection with the circumstances in which killing of deceased occurred. That the concept of prima facie case dictates as a matter of law that an opportunity created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled ... The Court of Appeal is Criminal Appeal No. 77/2006 expressed that too detailed analysis of evidence stage at no case to answer stage is undesirable it the court is going to put accused on his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted."

6. The question that this court has to deal with and answer at this stage is therefore whether based on the evidence before this court, the court after properly directing its mind to the law and the evidence may, as opposed to will, convict if the accused chose to give no evidence.

7. In making a finding on a prima facie case, thecourt should bear in mind the cardinal principle on the burden of proof that it is the duty of the prosecution to establish the guilt of the accused for the offence charged beyond reasonable doubt. See *Woolmington v DPP* [1935] EA 462 at 481.

8. Section 107 (1) of the *Evidence Act* Cap 80 of the Laws of Kenya provides that:

> " Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."

9. In criminal trials that burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exist a case discharging that burden of proof. In discussing the issue further Lord Parder C.J in the case of *Sanjil Chattai v The State* [1985] 39 WLR 925 stated thus:

> " A submission that there is no case to answer may properly be made and upheld:
>
> (a) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.
>
> (b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."

10. In the present case, PW1 testified that he is a neighbor to the accused person and that on 28/2/2016 he woke up at around 6:30am and found PW4 lying on the footpath near his home. PW4 told him that the accused who is her father had beaten her and given her poison. PW1 stated that PW4 was in a critical condition and appeared very weak. PW1 testified that he called his wife who took PW4 to their house. PW1 told court that he then called other neighbours and together they proceeded to the

accused house and on arrival they could smell poison as it was the same smell that had been detected on PW4. PW1 told court that on entering the accused person's house they found him lying on his bed with his two other children and were all in a critical condition. PW1 told court that in another room, another child also lay in bed in critical condition. He further stated that all the children were unconscious. They decided to take the children to Lumakanda Hospital for treatment but two of the children (the deceased persons) herein, died on their way to hospital. PW4 and other sibling were later taken to Moi Teaching and Referral Hospital for further medical attention. PW1 told court that the accused's wife one Jacinta Sakwa was not home when they found the children. He also told court that the previous night they had heard a lot of commotion from the accused person's home and they could hear the children screaming and yelling.

11. PW2 and PW3 testified that they were neighbours with accused person and had accompanied PW1 to the accused's home where they had found the accused person's children had vomited and soiled themselves because of diarrhea. They testified that all the three children were unconscious and the accused was also unconscious. They then rushed the children to hospital but two of them died on the way to hospital and the other two were rushed to Moi Teaching and Referral Hospital for further treatment.

12. PW4, the daughter of the accused testified that on the material night she was at home in the company of her siblings Mary Kadesa (deceased), Fefa Musai (deceased) and Ivy Kamonyi. They had prepared ugali and sukuma wiki for supper and that the accused person had joined them later and together they ate the meal. Before they retired to bed, the deceased children began complaining of stomach pains. PW4 told court that their mother was not at home as she had hone to her ancestral home to visit her parents. PW4 further testified that they drank water and retired to bed and that at that time the deceased children were still complaining of stomach pains and that they had complained of stomach pains throughout the night. PW4 told court that apart from ugali and sukuma wiki she did not see the deceased children eat anything else. PW4 testified that the deceased children started vomiting prompting her to alert the accused person who came and took the deceased children to his bedroom saying that he was going to look for medicine for them. PW4 also begun experiencing some stomach pains. PW4 testified that the deceased children had spent the entire night in pain and that in the morning the accused person went to look for medicine for them. In the morning PW4 went to PW1's house and told him that they had, had a restless night due to stomach pains. PW4 when she referred to her statement denied it contents stating that she never told the police officers that the accused administered poison on them. PW4 also denied that she had told PW1 that the accused had beaten them up before administering poison on them. It was PW4's testimony that her parents had a good relationship and did not argue or quarrel.

13. PW5 a doctor told court that he had performed post-mortem on the bodies of the deceased children and on Fefa Musasia, he noted that there was presence of organo phosphate (triatix) and there was also a pungent smell coming from the stomach. PW5 clarified that organo phosphate was the chemical name for triatix which is used for tick control. The witness testified that he established that the cause of death was cardiopulmonary arrest due to organo phosphate poisoning. He told court that he had taken samples from the deceased's body for further analysis at the government chemist. PW5 further testified that he also had performed post-mortem on Mary Kadesa and he noted that the deceased had a blood clot in her vagina and a broken hymen. He also noted the presence of organo phosphate and a pungent smell coming from the stomach. He established the cause of death was cardiopulmonary arrest due to organo phosphate poisoning. He told court that he had taken samples from the deceased's body for further analysis at the government chemist.

14. PW6 the investigating officer testified that on 28/2/2016 he received a call from the assistant Chief of Chepsaita location, who informed him that there was a person in his locality who had poisoned his

four children and they had been rushed to Lumakanda Hospital for treatment. PW6 told court that he then proceeded to Lumakanda hospital where he found two of the children had already died and two including PW4 had been transferred to Moi Teaching and Referral Hospital for further treatment. He further testified that the accused was being treated in the same hospital. PW6 testified that he together with other officers then proceeded to the accused's home, that is the scene of the crime where they collected samples and poison in two bottles used as pesticides and in the children's bedroom they collected vomit. He also testified that PW4 had stated that it was the accused who had forced them to take poison and had used cups to administer the poison.

15. Mr. Miyienda for the accused person submitted that the evidence of the prosecution witnesses was largely circumstantial. Counsel submitted that PW4 being the daughter of the accused was expected to shed light as to what really happened but she did not do so. Counsel contended that on cross-examination PW4 denied that her father had administered the poison to her and her siblings. Counsel further submitted that PW4 had told court that her statement had been taken from her (4) days later while in hospital and confused. Counsel also submitted that PW4 had confirmed in court that the contents of her statement were not true.

16. Mr. Miyienda submitted that the evidence of PW5 simply narrates the evidence surrounding the incident but has nothing tangible in relation to the case. Counsel submitted that by the time the prosecution was closing its case, the Government analyst had not been called to produce any report to confirm the results of the samples that had been sent for analysis.

17. Counsel submitted that the circumstantial evidence as set out above, does not paint directly to the accused person, as the person who may have administered the poison which caused the death of the deceased persons. Counsel argued that the prosecution evidence as it stands cannot sustain a conviction to warrant accused to be put on his defence. Counsel submitted that accused person should not be put on his defence in order to fill the gaps for the prosecution. Counsel maintained that the accused person has no case to answer.

18. In this particular case it is not in dispute that there is contradicting evidence on record from PW4 as to what actually transpired on the fateful night that led to the untimely death of the deceased person herein. There is also no doubt that deceased persons herein died as a result of the events that transpired on the night of 27/2/2016. There is also evidence from PW1, PW2, and PW3 placing the accused person at the scene of the crime.

19. Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has not been made out. As has been said time and again a prima facie case does not necessarily mean a case which must succeed. In other words, despite finding that a prima facie case has been made out, the court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion of trial, the court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer.

20. From the evidence placed before me, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to answer. The test to be applied here is as elucidated under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities. As to whether the said evidence meet the threshold for convicting an accused based on circumstantial evidence is a matter that will have to be considered at the end of the trial.

21. Accordingly, the accused person Musa Saka is hereby found with a case to answer and is placed on his defence.

DATED, SIGNED AND DELIVERED THIS 26TH OF MAY 2022.

E. K. OGOLA

JUDGE