Republic v Kirui (Criminal Case 7 of 2019)
[2022] KEHC 15591 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 7 OF 2019

RL KORIR, J

NOVEMBER 23, 2022

BETWEEN

REPUBLIC ..... PROSECUTION

AND

BENARD KIPKEMOI KIRUI ..... ACCUSED

RULING

1. Bernard Kipkemoi Kirui (Accused) is charged with three counts of the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*, cap 63 Laws of Kenya. The particulars of the charge were that on the night of March 21, 2019, at an unknown time in Magutek village of Lelaitich sub-location in Sigor Division, Chepalungu Sub-County within Bomet County, murdered one Amos Kipng'etich, Vincent Kiprotich and Emmanuel Kiprono.

2. Plea was takenApril 25, 2019before Hon. Muya J. where the accused pleaded not guilty to all three counts of the charge of murder. The Prosecution called a total of eight (8) witnesses who testified, amongst them, the wife and the mother of the Accused person.

3. The prosecution's case was that the accused person had a quarrel with his wife PW1 Sharon Cherono Kirui which led to her leaving their matrimonial home with their youngest child. The Accused followed his wife to her brother's house, bringing their three sons Amos, Vincent and Emmanuel (the deceased persons). He later demanded that his children be returned to him and the following day, PW2, Amos Kiprono Korir, his wife's nephew, escorted the three victims back to their father. It was the evidence of the Prosecution that the three children were found dead and lying next to each other on the floor of their house the following day by their grandmother, PW3 Alice Kenduiwo.

4. At the close of the prosecution's case, the parties were directed to file submissions. The prosecution's submissions are dated and filed on October 18, 2022. They submitted from the evidence on Record

and Post mortem Reports, there was no dispute that the three minors, Amos Kipng'etich, Vincent Kiprotich and Emmanuel Kiprono died an unlawful death.

5. On identity of the accused, the prosecution submitted that it was not in doubt that the accused was the father of the three minors, that they were in his custody on the day they were alleged to have been murdered. They urged the court to find that the accused had a case to answer.

6. The defence submissions are dated and filed on October 18, 2022. Counsel for the accused submitted that the offence of murder had not been proven to the required standard because the Prosecution's evidence did not demonstrate malice aforethought since none of the witnesses testified that the accused had any issues with his children. Defence Counsel also submitted that none of the witnesses saw the accused at the scene of crime and thus, the evidence adduced by the Prosecution was circumstantial in nature and incapable of convicting the accused as it was too weak.

7. The English case of *May v O'Sullivan* [1955] 92 CLR 654 defined what a *prima facie* entails as follows: -

> "When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law."
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> (See also *Miller vs. Minister of Pensions* [1947] 2 ALL ER 372 – 373).

8. Section 306 of the *Criminal Procedure Code*, cap 75 states thus: -

> 1. 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 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 recording a finding of not guilty.
>
> 2. When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....

9. In the English Court case of *Galbraith-George-Charles-1981-1-W.L.R.-1039-1981-5-WLUK-173.pdf Republic v Galbraith* [1981] WLR 1039 where it was held thus: -

> "(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 character, for example because of interment 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.
>
> b. where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within

> the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury." (Emphasis mine.)

10. It cannot be gainsaid that at this point of the trial, the only duty of the court is to consider the evidence from the prosecution's side and establish whether the ingredients of the offence have been proven. The court is not expected to delve into a deep analysis of the evidence since this will be done in the judgement should the accused be placed on his defence. The Court of Appeal in *Anthony Njue Njeru v Republic*, Criminal Appeal No 77 of 2006 (2006) eKLR stated thus: -

> ".....We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the court concerned is acquitting the accused." (Emphasis mine.)

11. Thus, the task before thiscourt is to review the prosecution evidence and make a determination as to whether a rebuttable presumption exists pointing to the guilt of theaccused person. The question is whether the evidence tendered by the prosecutionat this stage would be enough to convict the Accused person should they opt not to tender their own evidence.

12. The offence of murder is premised on section 203 of the *Penal Code* cap 63 and for it to be established, three ingredients must be proven as follows: -

    i. The death of the deceased;

    ii. That the unlawful death of the deceased was caused by an act or omission of the Accused.

    iii. That the Accused acted with malice aforethought.

    (See also the Court of Appeal decision in *Johnson Njue Peter v Republic* [2015] eKLR).

13. I have considered the evidence now on record. It is my finding that the Prosecution has adequately established a prima facie case against the Accused. The evidence calls for rebuttal by the Accused. He has a case to answer and is called upon to elect the mode of his defence in accordance to Section 306 of the Criminal Code.

14. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 23RD DAY OF NOVEMBER, 2022

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused, Ms. Chemutai for the Accused, Mr. Waweru holding brief for Mr. Njeru for the State and Kiprotich (Court Assistant).