



**Republic v Mwaura (Criminal Case 38 of 2017)
[2022] KEHC 16798 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 38 OF 2017
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MWAURA ACCUSED

RULING

1. Daniel Mbugua Mwaura hereinafter referred as the accused is charged before this court wit 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 17th June, 2016 at Race Course Centre, Show Park area in Kapseret sub-county, within Uasin Gishu County, murdered Rodgers Kipngetich Too (hereinafter referred to as the deceased) He pleaded not guilty. The prosecution called (6) witnesses before closing its case.
2. In this ruling, 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 call upon him to give his defence. It is worth noting that the prosecution carries the burden or onus to establish the guilty of the accused person beyond reasonable doubt. However, at this stage, they are not expected to establish the guilt of the accused person beyond reasonable doubt. What is expected of the Prosecution is to establish a prima facie case against the accused person. However, a prima facie case is not necessarily one that must succeed.
3. Section 306 of the *Criminal Procedure Code* requires the court, after closure of the prosecution's case, to make a considered determination on whether an accused person has a case to answer. The section provides:

“36(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 record 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...”

4. On what constitutes a prima facie case, in *Republic vs. Abdi Ibrahim Owl* [2013] eKLR a prima facie case was defined as follows: -

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 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, the case is merely one “which on full consideration might possibly 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 question whether there 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 is true, as Wilson, J said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that determination can only properly be made when the case for the defence has been heard. It is 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 tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

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 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.

6. In *Ronald Nyaga Kiura Vs. Republic* (2018) eKLR at paragraph 22 the Court stated: -

“It is important to note that at the close of 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. A prima facie case is established where the evidence



tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhatt vs. Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

7. In making a finding on a prima facie case one 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 Pardon 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 Shadrack Kipchumba Bett, testified that the deceased was his uncle. He told Court that on 16/6/2017 he left his place of work and on arriving home he asked his wife why the deceased had not returned home as they used to live together. He further told the Court that the following day he went to work and was later called by the police at Langas police station and was informed that the deceased’s body had been preserved at the Moi Teaching and Referral Hospital. He further testified that on 21/6/2017 he went to view the body and was informed that the deceased had been beaten.

11. PW2 Bilson Kiprop Chumba, told the Court that the deceased was his cousin and that they used to live with him. He testified that the deceased was a student at Moi Teaching and Referral Hospital. He told the Court that on 16/7/2017 at about 2:00pm he was with the deceased and they went to take chang’aa and went back home but later to Riverside Bar. He told the Court that they were four at the time and said in the said bar until 9:30 pm. He told the Court that the deceased in company of others went to Amigos Bar and Restaurant to attend a party but he went home. He told the Court that the deceased never returned and upon inquiring of his whereabouts he was advised to look for him. PW2 told the Court that he went to Central Police Station but he was not there. He inquired from his friends but they did not his whereabouts. He then proceeded to Amigos Bar where he was informed that there was a student who had been beaten and taken to Race Course Hospital. He went to the said hospital and on inquiring about the deceased he was informed that he had died and had been taken to Moi Teaching and Referral Hospital. He then went to Moi Teaching and Referral Hospital where he was able to identify the deceased’s body. He told the Court that the deceased’s head had blood stains. He told the Court that he does not know the accused as he never saw him on the material date.



12. PW3 Enock Kiplimo Biwott, testified that he is a receptionist at Racecourse Hospital in Eldoret and that on the material date he was at his place of work when at around 5:30pm a group of people, about six brought in a patient. He told the Court that the patient had a cut wound on the head and there was blood. He testified that upon being examined by a doctor, the doctor stated that the patient had passed on. He further testified that he did not know those who brought in the patient. He told the Court that the group that brought in the patient went outside and left the body there. He told the Court that the facility had CCTV cameras but the same were not clear. He told the Court that he then called his boss who reported the matter at Langas Police Station and later made a statement with the police.
13. PW4 Dennis Yidah, testified that he is a gym instructor and also provides security services. He told the Court that he does not know the deceased. and that on 15/6/2017 he was at Amigos Hotel in Langas when his friend called Evans called him and informed him that he needed security. He told the Court that he got there at 8:00 pm and begun working. He told the Court that the event being held at the said premises was a dancing competition. He told the court that the event was to be held on 16/6/2017 and his duty was to ensure that the event was peaceful. He told the Court that the event was peaceful and went on until 5:00 am on 17/6/2017. He told the Court that people at the event left at 5:00 am and while they remained at the hall to ensure that everyone had left, one man came and told them that he had met an injured person outside the gate of the said premises and he needed assistance taking him to hospital. He told the Court that those present at the time went to assist but he did not, but later heard that he was taken to hospital. He told the Court that the following day his supervisor called him and told him that the injured person had died and that he needed to record a statement at Langas Police Station.
14. PW6 No. 88263 PC Geoffrey Kinambuga generally gave the outline on the nature of investigations carried out in regard to the allegations of murder against accused person. According to PW 6 on the evidence collected he came to a conclusion that the accused ought to be charged in reference to the provisions of section 203 of the penal code. That formed the basis of initiating the proceedings by the DPP subject matter of this trial.
15. PW 7 Dr. Macharia Benson testified on oath with respect to the post-mortem examination conducted upon the body of the deceased. It emerged on examination that the deceased suffered multiple injuries to the head, nervous system, spinal column and the spinal cord. At the end of it all he formed an opinion that the cause of death was severe head injury due to blunt force trauma. With this there is no doubt the deceased Rodgers Kipngetich Too is dead. He presented to court the post-mortem report as exhibit No.1

Determination

16. I have considered the evidence so far from the prosecution's side, the submissions made and the authorities cited. As I have stated above the issue before me at this stage is whether the evidence so far adduced warrants calling upon the accused to defend himself. The burden of proof of beyond reasonable doubt to prove the ingredients of the offence which comprise of the following rests with the prosecution throughout the trial.
 - a) That the deceased is dead.
 - b) That his death was due to an unlawful act by the accused
 - c) That in killing the deceased accused had malice aforethought
 - d) That it is beyond per adventure the deceased death was caused by the accused.



17. 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 expressed under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities.

18. In the premises, the accused person is hereby called upon to answer the charge as per the steps outlined under section 306(2) as read together with section 307 of the Criminal Procedure Code.

Defence hearing scheduled 15/2/2023.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022

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R. NYAKUNDI

JUDGE

