



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 27 OF 2013

REPUBLIC..... PROSECUTOR

VERSUS

NICHOLAS MUASYA BERNARD

SERA MWENDE

MULI NGINA

PATRICK MUIA..... ACCUSED

RULING

1. The accused herein are charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused on the 6th Day of June, 2013 at Mlolongo Township in Athi River District within Machakos County, jointly murdered **James Amwaki Nathan Alias Moki** (the deceased).

2. PW1, **Davis Kilungu Malonza**, Volunteer Children's Officer, Athi River was, on 16th March, 2013, called called by the Director of Mlolongo Inclusive Academy, **Evelyne Skola**, and informed that some parents in the said institution had removed their children therefrom while still being indebted to the institution. Some of the said parents were disclosed as **Joshua Muoki** and **Sera Mwende** (the 2nd accused herein). He then called the father, **Joshua** who went to their office on 17th March, 2013 and informed him that following a domestic disagreement with the 2nd accused, his three children were removed from the school by the mother, the 2nd accused. According to **Joshua**, he owed the school Kshs 4,000/-. According to PW1, **Joshua** informed him that the disagreement resulted from a close association between the 2nd accused and an employee of theirs at the hotel and that as a result of the said disagreement the couple had separated and that he had reported the matter to the police.

3. According to PW1, he gave the said **Joshua** summons to take to the 2nd accused for 18th March, 2013 after which the said **Joshua** left but never returned. Three months later, he saw two ladies **Catherine Manyiva** and **Katuu**, family members of **Joshua**, who were following up on the welfare of the said children, went to his office on 3rd June, 2013 and informed him that the said children had not returned to the school. They further informed him that on 2nd June, 2013 when they went to the 2nd accused's house to take the children, the 2nd accused declined to release their clothes.

4. PW1 then issued another summons to **Sera** for 4th June, 2013 and the two later reported to him that they had delivered the same and that they had further reported the incident to the police. The two also reported that before 4th June, 2013 on 3rd June, 2013 when they took the summons, there was another disagreement between the said **Joshua** and the 2nd accused that led to **Joshua** sustaining injuries and was admitted at Kenyatta National Hospital. PW1 then sent them to Mlolongo Police Station. He also confirmed that **Joshua** passed away at Kenyatta National Hospital.

5. According to PW1, when he called **Joshua**, he confirmed that he was the father to the children while the 2nd accused was the mother of the children who was 13 years, 7 years and 3 years respectively. After the death of **Joshua**, PW1 left the matter in the hands of the police. It was his evidence that the first time he saw the 2nd accused was at Mlolongo Police Station when she was in the cells and he had been called to record his statement. PW1 however did not know the other accused persons.

6. In cross-examination he stated that he got information from **Joshua** that the 2nd accused was staying with the said employee and the children at Mlolongo Township. It was his evidence that the said **Catherine** and **Katuu** informed him that they had taken the children from

the 2nd accused at night with the help of the father. He was however not present when the summons were taken to the 2nd accused. According to him he was only concerned about the non-payment of fees and the education of the children and was not aware if the children had been taken to another school.

7. PW2, **Justus Muteti Mbuya**, a casual labourer at Kapa Oil testified that on 3rd June, 2013 at about 10.00pm he was in their room together with a roommate, **Hilary Madoya**. They then heard noise from a woman seeking help and upon coming out, they found a stranger who had been tied and was being beaten by a mob. According to him among those he saw were one **Kaindi** (the 4th accused) and one **Muli** (the 3rd accused) who were staying in the same plot as them. These were amongst the people who were beating the said person outside the gate. It was his evidence that the gate was a *mabati* gate. After beating the person, the mob ordered him to get up and go away but they still followed him and continued beating him. It was his evidence that the said 3rd and 4th accused, who were staying with them in the same plot, had clubs. However, both of them had not stayed at the plot for more than 2 months. As for the 1st accused, he just used to see him at the plot entering the 2nd accused's house who was also staying in the said plot as the 3rd accused's neighbour and had not talked to him. According to him the 2nd accused started staying in the plot in May of that year. On the date of the incident, he did not however see the 1st and 2nd accused and did not know the person who was being beaten. While there were other people carrying clubs, he only recognised the two. It was his evidence that there was no electric light and he was using light from his phone. He then returned to the house and slept. The following day on 6th June, 2013 he went to work and upon his return in the evening he noticed blood on the road while entering their compound. He was arrested and taken to Mlolongo Police Station just like most people in their plot. However, after recording his statement he was released.

8. At the police station, he was informed that someone had been killed in the plot.

9. Following several adjournments granted to the state, the court declined to allow further adjournments after the testimonies by the two witnesses and the State closed its case.

10. 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 call upon them to give their defence. In other words, does the accused have a case to answer? 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 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.”

11. 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. It was therefore held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 it is stated as follows:

“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 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 BHAT -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.”**

12. In **Republic vs. Abdi Ibrahim Owl [2013] eKLR** a *prima facie* case was defined as follows:-

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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.”

13. Oxford Companion of Law at pg 907 defines “prima facie” in the following terms:

“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.”

14. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not farfetched and the reasons for not doing so are obvious. As was appreciated by **Trevelyan and Chesoni, JJ** in **Festo Wandera Mukando vs. The Republic [1980] KLR 103**:

“...we once more 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, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” 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 court or courts concerned.”

15. In my view, where clearly the prosecution’s case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. It was therefore held by the Court of Appeal decision in the case of **Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR** that:

“Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case...we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. 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.”

16. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution vs. Zainal Abidin B. Maidin & Another** that:

“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See Magendran a/ Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in

Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:

‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”

17. The court in **Republic vs. Prazad [1979] 2A CRIM R 45**, King CJ held the very same standard on a prima facie case in the following terms:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

18. In this case the only evidence on record is that it was reported to PW1 that the 2nd accused had removed the children from the school without paying for the fees and that there was fight between the deceased and the 2nd accused which led to the deceased being hospitalised. PW1 was however not present when the said fight took place and those who were allegedly present were never called to testify before this court.

19. As for the testimony of PW2, it was his evidence that he only saw the 3rd and 4th accused beating up someone he did not know. His source of light was a Samsung phone. While there were many people he only recognised the two accused persons.

20. At the close of the case, it is clear that there is no evidence that the deceased died and from what cause. PW1 was not present when the

deceased was being beaten while PW2 did not know the person who was being beaten. There was no evidence that any post mortem was carried out on the body of the deceased. In fact, from the evidence on record this court cannot state with certainty that the deceased herein actually died and if so what led to his death.

21. The general principle of law on homicide cases is that it is important that the prosecution proves death and also the cause of death. As held in the case of **Republic vs. Kimbugwe S/O Nyagoli & Others (1936) 3 EACA 129** it is cause of the death which often links the accused to the death. As regards proof of death it is usually through medical evidence as stated in the case of **Republic vs. Cheya & Another (1973) EA 500**. In this case, we do not even know if the matter was investigated, by who and what led to the decision to charge the accused persons with the offence. There was neither proof of mens rea nor actus reus in order for the commission of the offence to be proved.

22. In the premises, it would be hopeless and completely unnecessary to place the accused persons on their defence since the evidence before this court even if true cannot certainly lead to the accused persons being convicted even if they decide not to say anything.

23. It follows that at the close of the prosecution case no *prima facie* case has been made out to warrant placing the accused persons on their defence. Pursuant to section 306(1) of the **Criminal Procedure Code** I find all the accused persons not guilty of the offence with which they are charged. They are accordingly acquitted and I direct that they be released forthwith unless otherwise lawfully held.

24. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 27th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Hassan for Mr Muia for the 2nd accused

Mr Mutinda Kimeu for the 3rd and 4th accused and for Mr Mwangangi for the 1st accused

Miss Mogoi for the State

CA Geoffrey