Republic v Musalia (Criminal Case 6 of 2016)
[2025] KEHC 2297 (KLR) (10 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2297 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 6 OF 2016

SM MOHOCHI, J

FEBRUARY 10, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SIMON OKINDA MUSALIA ..... ACCUSED

RULING

1. The accused Simon Okinda was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are, that on the 1st day of February, 2016 at Sidai area in Subukia Sub-County within Nakuru County, murdered Peris Wairimu.

2. The accused person pleaded not guilty to the offence preferred against him. The prosecution presented Five (5) Witnesses and five exhibits comprising of Exhibits 1, 2, 3, 4, and 5, in support of its case.

3. When a Court following the material placed before it finds that the accused person should be put on their defence, the Court ideally would not give a detailed ruling as the same can be addressed in the final decision. On the other hand, if the Court was of the considered view that an accused person has no case to answer, it would be imperative to give detailed reasons.

4. Section 306 of the *Criminal Procedure Code* calls upon this Court to make a Ruling on whether the prosecution had established a prima facie on case to answer warranting the accused person to be put on his defence or otherwise.

5. At this stage of the proceedings what the Court is required to do is to establish whether a prima facie case has been established and not proof beyond reasonable doubt. A prima facie case was defined in *Republic v Abdi Ibrahim Owl* [2013] KEHC 2122 (KLR) 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."

6. A *prima facie* case therefore is essentially not made out of proof beyond reasonable doubt, but on rebuttable presumption that, the accused person is guilty of the offence he is being accused of.

7. Courts are required to carefully examine identification evidence, especially when it comes from a single witness, and should only accept it if satisfied that it is accurate and free from the possibility of mistake. *R Vs Turnbull* {1977}.

8. Evidence from eyewitnesses plays an important role in all contested cases. However, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices.

9. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a Court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the Court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

10. As was held in *Charles O. Maitanyi v Republic*;

> " 16 it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care".

11. In *Kariuki Njiru & 7 others v Republic* 2017 eKLR the court held that; evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

12. In the case of *Wamunga v Republic* (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

13. PW1 the deceased mother left her at home and found her missing in the evening, she was informed by "Ndogo" that the deceased in the company of "Ndogo" had gone fetching firewood in the forest and they were accosted by three men, he ran and they all three chased the deceased and upon her return they embarked on a search where they found the body. According to her Ndogo told the police that, he could identify the person who chased them.

14. That when the accused was arrested by members of the public "Ndogo" was called from the school and came and identified the accused.

15. PW2 the deceased brother testified that Ndogo told them that three men accosted them and ordered them to collect branches for them. That Ndogo told them after the accused had been arrested that the accused had chased him before and he gave a name of a man "Desmond" who has not been arrested to date and in cross examination said it was Desmond and two others that used to chase them.

16. PW4 Solomon Ndogo Neri testified when he was 17 years stating that, he never knew the accused but rather knew him by appearance. he stated that, he had been chased from the forest severally while fetching fire wood, that he and the deceased were chased by three men of which he could only recognize the accused. That he was chased by a fat man and the accused and the other man chased the deceased.

17. The witness narrated how, he finished fetching firewood asked for the deceased panga to go get a rope to tie the firewood the point where they were accosted running to different directions.

18. That later during the search they recovered the body of the deceased next to the body was the panga, firewood and her cloths. One wonders if the deceased ran carrying the panga, the rope and the firewood that was eventually found beside her or were the said exhibits placed beside her after her brutal murder?

19. I am of the view that Identification of the accused by PW3 was not only casual but was dubious. PW3 was a school going child at the time of the offence and on the day the deceased went missing the report made to the police never had any description of any suspect. The prosecution's evidence is not bolstered by any previous recognition of the suspect and the alleged identification at the scene by a child who was presented a few kilometers from his school on a school day would lead a rational mind to conclude that it was a choreographed exercise.

20. There was no identification parade undertaken.

21. The other flimsy factual evidence was the underpinning allegation that the accused had previously chassed PW3 away as the underpinning for previous recognition but nobody got killed. And in any case there will be no rational or logical conclusion that the act of chasing would lead to death. Secondly, I sadly note the casual manner in which exhibits at the scene were handled. No DNA profiling was conducted and no explanation was made as to why the investigators deemed it unnecessary.

22. I have considered the evidence adduced by the prosecution which revolves on the Identification of the accused and find that where a complainant in the first information to the police indicates his familiarity

and capability to identify the suspect then upon arrest of such a suspect a proper identification parade shall be undertaken in tandem with the judge's rules on identification and the police standing orders.

23. I note that, the prosecution was able to adduce evidence on the fact of death. prosecution did not adduce evidence of an unlawful act or omission remotely linked to the accused resulting in the death of the deceased. No Circumstantial evidence has been offered to provide a linkage of the alleged crime to the accused.

24. In order for the accused to be put on his defence, there should be *prima facie* case established by the Prosecution. None of the witnesses called could place the accused at the scene save the faulty identification conducted.

25. Under Article 50 (2) (a) of the *Constitution*, the accused is presumed innocent until proven otherwise. This case is however marred with gaps and the same can only be interpreted to the benefit of the accused person. See *Republic vs Martin Thinguku* [2021] KEHC 955 (KLR).

26. In *Republic v Patrick Mutisya Mutinda* [2022] KEHC 1622 (KLR)

> " 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 recognized 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. Defence case is not meant to fill in the gaping gaps in the prosecution case."

27. By the material placed before me I am not convinced that, the evidence before Court by the prosecution would be sufficient to sustain a conviction even if the accused person remained silent. It is an unfortunate incident and a great injustice to the deceased person streaming from the laxity of the investigators and the prosecution.

28. The upshot of the foregoing is that the prosecution has not met the test of a *prima facie* case to warrant the accused person to be called upon to answer. The accused is hereby acquitted of the offence of murder under Section 306(1) of the *Criminal Procedure Code*.

It is so ordered.

DATED SIGNED AND DELIVERED ON THIS 10TH DAY OF FEBRUARY 2025

MOHOCHI S.M

JUDGE