



Director of Public Prosecution v Kurulishi & another (Criminal Case 60 of 2019) [2025] KEHC 9821 (KLR) (8 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 60 OF 2019
S MBUNGI, J
JULY 8, 2025**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

ANTONY MUKABWA KURULISHI 1ST ACCUSED

NATHAN MUTEKWA MUKABWA 2ND ACCUSED

RULING

1. The accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on the 13th day of September 2019, at Bukhaywa Village in Sisembe Sub-location, Murhanda Location, within Kakamega East Sub- County of Kakamega County, the accused persons jointly murdered one Julius Litunda Mukabwa.
2. Upon arraignment, both accused persons pleaded not guilty to the charge, thereby prompting the commencement of trial. The prosecution, in support of its case, called a total of seven witnesses whose testimonies were placed on the record.
3. At this stage of the proceedings, the Court is called upon to determine whether the prosecution has established a prima facie case sufficient to warrant placing the accused persons on their defence, pursuant to section 306(2) of the *Criminal Procedure Code*.
4. It is a settled principle of criminal law that the burden of proof lies squarely on the prosecution and remains so throughout the trial. This fundamental right is anchored in Article 50(2)(a) of the *Constitution* of Kenya, which guarantees every accused person the right to be presumed innocent until the contrary is proved. In line with this constitutional requirement, the Court must not at any stage shift the burden to the accused to establish their innocence.



5. The term “prima facie case” has been defined in various legal authorities. In the often-cited decision of *R.T. Bhatt v Republic* [1957] EA 332, the Court held that:

“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. This principle has been consistently applied in our jurisdiction, including in *Ronald Nyaga Kiura v Republic* [2018] eKLR and *Republic v Abdi Ibrahim Owl* [2013] eKLR, where the courts underscored that the test for a prima facie case is not whether the accused is guilty beyond reasonable doubt, but whether there is a case sufficient to call upon the accused to make their defence.

7. The statutory basis for a submission of no case to answer is to be found under section 306(1) of the *Criminal Procedure Code*. It provides that:

“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 the several or any one of the 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.”

8. It is worth reiterating the guidance provided by the Court of Appeal in *Festo Wandera Mukando v Republic* [1980] KLR 103. The court therein cautioned trial courts against giving detailed reasons or analysis when ruling that an accused has a case to answer. The rationale behind this caution is that offering reasons at this stage may prematurely evaluate the credibility of witnesses or weigh the evidence in a manner that prejudices the fair trial rights of the accused, and may in some cases result in an appellate court having to set aside an otherwise sound judgment. The appropriate course when rejecting a submission of no case to answer is for the trial court to simply state that the accused has a case to answer and leave detailed reasoning for the final judgment. On the other hand, if the court finds that there is no case to answer and proceeds to acquit the accused, it must provide reasons because that marks the end of the matter for that count or charge.

9. Having carefully considered the evidence on record, including the testimonies of all seven prosecution witnesses, and without making any definitive conclusions on the strength or credibility of that evidence, I am satisfied that the prosecution has established a prima facie case against both accused persons. The evidence presented, if left unchallenged, could lead a reasonable tribunal properly directing itself on the law and the facts to return a verdict of guilty. Accordingly, I find that each accused has a case to answer.

10. In compliance with Article 50(2)(i), (k), and (l) of the *Constitution*, as read together with section 306(2) of the *Criminal Procedure Code*, the accused persons shall be informed of their right to address the



court either by giving sworn or unsworn testimony and their right to call witnesses in support of their defence, or to remain silent without any adverse inference being drawn therefrom.

11. It is so ordered.
12. Right of appeal 14 days.
13. Hearing 7.10.2025

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF JULY, 2025.

S.N. MBUNGI

JUDGE

In the presence of:

Ms. Chala for the Director of Public Prosecution

Court Assistant – Elizabeth Agong'a

Accused, absent.

