Republic v Zembe & another (Criminal Case E008 of 2024) [2025] KEHC 13104 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL CASE E008 OF 2024

M THANDE, J

SEPTEMBER 19, 2025

BETWEEN

REPUBLIC .... PROSECUTION

AND

ABEDI BADI ZEMBE .... 1ST ACCUSED

SAIDI ZEMBE BADI .... 2ND ACCUSED

RULING

1. The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 23.8.15 at Weighbridge area, Mariakani location, Kaloleni subcounty within Kilifi county, jointly with others not before court, the accused murdered Ndurya Mgandi Ndurya. The accused denied committing the offence.
2. The prosecution closed its case after calling 5 witnesses. The Court is now called upon to determine whether a prima facie case has been established to warrant the accused person to be placed on his defence to answer to the charge of murder.
3. The prosecution submitted that it had discharged the legal and evidentiary burden placed upon it by providing sufficient evidence before the Court. They submitted that they were able to prove all the elements of murder, namely the death of the deceased, that the Accused committed the unlawful act that caused the death of the deceased and that there was malice aforethought. It was further submitted that the offence took place in the daytime and that the Accused were properly identified by the 3 prosecution witnesses and placed at the scene. The prosecution thus urged the Court to place the Accused on their defence as a prima facie case had been established and that both have a case to answer.
4. It was submitted for the Accused that there was an inquest which did not determine the cause of the deceased's death and that no further investigations were conducted by the police to warrant the arrest and prosecution of the Accused persons. Further, that the decision of Githinji, J. directing the Director

of Public Prosecutions (DPP) to charge the Accused persons was in violation of Article 157(10) of *the Constitution*. Additionally, that the decision to charge the Accused 8 years after the alleged offence violated their right to a fair trial and prejudiced their defence. The Accused further submitted that the murder weapon was not produced in evidence in Court and that the prosecution case was riddled with numerous holes and unexplained loopholes and falls short of sustaining a charge of murder. Additionally, that the charge sheet and particulars as drawn are fatally defective and do not disclose any known offence to warrant the Accused to be placed on their defence.

5. The complaint by the Accused that the Court violated the provisions of Article 157(10) of *the Constitution* by directing the DPP to charge them cannot be raised before this Court and certainly not in submissions on whether they have a case to answer. By dint of Article 165(6) of *the Constitution*, this Court does not have the jurisdiction to entertain a challenge to the decision made Githinji, J. It ought to have been raised in an appeal against the decision. On the information, the Accused have not stated in what manner the same is defective.

6. The Accused's right to a fair trial is guaranteed under Article 50(2) of *the Constitution*, and this is not disputed. They have not however stated how the institution of the charges against them 8 years after the alleged crime was committed violates this right or how their defence will be prejudiced. Additionally, the fact of the charges being instituted 8 years after the alleged offence took place does not in itself constitute a violation of the Accused right to a fair trial or prejudice their defence. It is trite that criminal cases are not subject to limitation of time. In this regard, the Court is guided by the decision in Stanley Munga Githunguri v Republic [1986] KEHC 44 (KLR) where the Court of Appeal stated:

> There is no time limit to the prosecution of serious offences except where a limitation is imposed by statute.

7. The offence with which the Accused are charged is a serious offence and there is no limitation of time imposed by the Penal Code nor any other statute. Accordingly, this challenge by the Accused, fails.

8. Section 306(1) of the Criminal Procedure Code stipulates the procedure to be followed at the close of the prosecution case as follows:

    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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

    3. If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

9. At this stage, after hearing the testimony of the prosecution witnesses, the Court is required to determine whether a prima facie case has been established.

10. A prima facie case was defined in the case of Republic vs. Abdi Ibrahim Owl [2013] eKLR by Mutuku, J. 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:
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> "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." (Underlining is mine).

11. And in Anthony Njue Njeru vs. Republic [2006] eKLR, the Court of Appeal held as follows:

> Having expressed himself so conclusively, we find it difficult to understand why the learned Judge found it necessary to put the appellant on his defence. Was there a prima facie case to warrant the trial court to call upon the appellant to defend himself? It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction".

12. As I consider the evidence adduced by the prosecution, I am keenly aware that at this stage, the issue before me is whether a prima facie case has been established, warranting the Accused to defend themselves. From the evidence adduced it is clear that there was a fight pitting the Accused and others on one side and the deceased, PW1, PW2, and others on the other side. The fight related to a piece of land and ownership thereof.

13. PW1 David Munyika Dalu stated that he was with the deceased on the material date and witnessed Accused 1 cut the deceased with a panga while Accused 2 threw a stone at the deceased which hit him on the head. The police came and shot in the air. By this time the deceased had died. PW2 Marcos Ndurya Mlai stated that the Accused attacked the deceased with a panga. Both these witnesses gave an eye witness account of what transpired on the material date, thus connecting the Accused with the death of the deceased.

14. It is well settled that it is undesirable to give a reasoned ruling at the close of the prosecution case. Having considered the material placed before me and without delving further into the evidence

adduced, I am satisfied that the prosecution has established a prima facie case. The Accused have a case to answer and are accordingly placed on their defence.

DATED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE