



**Republic v Mulubi (Criminal Case E019 of 2022)
[2024] KEHC 289 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E019 OF 2022
KW KIARIE, J
JANUARY 23, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAPHET BURUDI MULUBI ACCUSED

RULING

1. Japhet Burudi Mulubi is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 7th day of June 2022, at Riat village, in Ndhiwa Sub County within Homa Bay County murdered Pamela Akinyi.
3. The evidence only evidence that implicated the accused in the offence is that of Caren Anyango Opiyo (PW2). Caren is the wife of the accused. The law in Kenya regarding the capacity of a spouse as a witness in criminal proceedings is stated in section 127(2) of the *Evidence Act*. It provides:
 - (2) In criminal proceedings, every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:
Provided that—
 - (i) the person charged shall not be called as a witness except upon his own application;
 - (ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;



- (iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

Subsection 3 provides:

In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—

- (a) with the offence of bigamy; or
(b) with offences under the *Sexual Offences Act* (No. 3 of 2006);
(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.

4. Subsection (3) of the same section is not applicable in this case. This is why the evidence of this witness was expunged on November 17th, 2022, upon realising the mistake of admitting it.

5. After considering the evidence on record, the question is whether the prosecution has established a prima facie case against the accused person. In the *Black's Law Dictionary*, 10th Edition, prima facie case is defined as follows:

Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption.
2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.

6. The Court of Appeal in the case of *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335 defined prima facie case as follows:

It 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.

7. Article 50 (2) (i) of the *Constitution* of Kenya provides:

- (2) Every accused person has the right to a fair trial, which includes the right—
(i) to remain silent, and not to testify during the proceedings;

If the accused chooses to exercise his constitutional right, as stated above, I cannot convict him based on the current evidence. Therefore, the prosecution has failed to establish a prima facie case against the accused. As a result, I acquit him of the murder charge, as per section 306(1) of the Criminal Procedure Code. He is free unless he is being held lawfully for some other reason.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JANUARY 2024

KIARIE WAWERU KIARIE

JUDGE

