



**Republic v Juma (Criminal Case E002 of 2022)  
[2024] KEHC 816 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E002 OF 2022**

**JN NJAGI, J**

**JANUARY 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JUMA WARJO JUMA ..... ACCUSED**

**RULING**

1. The accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 23<sup>rd</sup> January 2023 at Manyatta Otte in Nagayo location in Marsabit Central Sub-County he murdered one Galgallo Adano Harbu (herein referred to as the deceased).
2. The case for the prosecution is that on the material day at 0821:29, the deceased was shot in a street in Marsabit town. Some incidents surrounding the shooting were captured by CCTV footages mounted at a nearby KUB construction site, another at Maafaz Energy petrol station and a third one at Total Petrol station. After the shooting the assailant and an accomplice are seen in the CCTV footages running away.
3. The evidence adduced before the court is the CCTV footage at Maafaz Energy petrol station captured a black saloon car driving past the petrol station on the road at 0817:52. At 0819:02 the car was captured by the same footage heading towards the petrol station and branched off into a road before reaching the petrol station.
4. That at 0819:54 the same car was captured by CCTV footage at KUB construction site as it parked beside the road. At 0820:29 two men are captured coming out of the car. One of them was dressed in a brownish top and the other in a white top. The people surveyed outside the car and went back into the car. They came out of the car again and the car was driven off. The people are seen walking along the street. There were other people in the street among them a person on a wheel chair. There was a



person standing beside the person on the wheel chair. The man wearing the brownish top appeared to talk to the man on the wheel chair and the person who was standing by. At 0821:29 the man who was standing beside the man on the wheel chair is seen collapsing to the ground while the man in brownish top and the one in the whitish top were captured running away from the scene and scattered in different directions. After the incident, the vehicle was captured by the CCTV at Total Petrol station joining the Isiolo/Marsabit highway and driving towards Marsabit town. After that members of the public were seen carrying the victim, the deceased, from the scene. He had been shot. The deceased was taken to Marsabit County Referral Hospital but he was declared dead on arrival.

5. The report of the shooting was made at Marsabit police station. The case was investigated by PC Duncan Wachira PW5 of Marsabit Central DCI office. He visited the scene of the shooting and recovered three spent cartridges.
6. A post mortem was on the same day conducted at Marsabit County Referral Hospital by Dr. Tume PW2 who found the body with multiple bullet wounds on the head and on the abdomen. She opined the cause of death was as a result of brain injury due to gun-shot wounds.
7. In the subsequent days, PC Wachira extracted CCTV footages from Maafaz petrol station, KUB construction site and from Total petrol station. They showed the suspect motor vehicle but the registration number was not visible from the CCTV footages.
8. It was the evidence of PC Wachira that on the 7/2/2022, he was on routine patrol in Marsabit town when he came across motor vehicle registration No. xxxx. It bore the characteristics of the motor vehicle captured in the CCTV footages. He wrote to the National Transport Safety Authority requesting for particulars of the registered owner of the said vehicle. He received a search certificate indicating that the registered owner was one Diba Gabre Galacha. On 14/2/2022 he located the said vehicle in a homestead in Marsabit town. Diba Gabre admitted that he was the owner of the vehicle. He was questioned on his whereabouts on the 23/1/2023 and he said that he was in Moyale on a business trip. He said that the motor vehicle was at the time with his brother in law, Ali Jatani.
9. PC Wachira questioned the said Ali Jatani who said that his brother-in-law, Juma Wario, the accused herein, had taken possession of the vehicle on 19/1/2022 and returned to him on 8/2/2022 through one Adan Guyo. The officer summoned Adan Guyo to the DCI Office who said that the accused had called him and told him to collect the vehicle from Frontline area in Marsabit town and take it to Ali Jatani which he did on 7/2/2022.
10. Wachira further testified that Diba Gabre called the accused and requested him to join him at the police station. The accused went to the police station. He - PC Wachira, questioned him on his whereabouts on 23/1/2022. He admitted that he was in possession of the subject vehicle on the material day but did not give satisfactory answers to his questions. He placed him in custody and subsequently charged him with the offence.
11. PC Wachira stated that he prepared an exhibit memo and sent the recovered cartridge cases to the forensics department, DCI headquarters, Nairobi for examination. He also sent the CCTV footages to the Acoustics and Images expert at DCI headquarters. The cartridges were examined by a forensic officer, Kenneth Chomba, PW3 who found them to be fired cartridge cases formerly component parts of rounds of ammunition in calibre 7.65 x 17mm and that they were fired by the same firearm. PW3 prepared a report to that effect. He produced it in court as exhibit, P.exh.4.
12. The CCTV footages were examined by CI Sawe, an Acoustics and Imaging officer at DCI headquarters who prepared the CCTV footage in a USB flash disk. The officer also prepared still photographs of the CCTV footages. He wrote a report to that end. The flash disc, the still photographs and the report



were produced in court on behalf of CI Sawe by IP Waluge Lugwe PW4, also an Acoustics and Imaging officer, as exhibits, P.Exhs.3, 4 (a) –(y) and 5 (a) respectively. The officer also produced CI Sawe’s certificate as exhibit, P.Exh.5 (b).

13. Dr. Tume PW2 produced the post mortem report as exhibit, P.Exh.1.
14. It was further evidence of PC Wachira that a material witness who witnessed the execution declined to be witness in the case. That the owner of the suspect motor vehicle, Diba Gabre and his relatives who implicated the accused to have been in possession of the suspect motor vehicle at the time the crime was committed also declined to testify in the case.

### **Submissions**

15. At the close of the prosecution case, the defence counsel, Mr. Behailu, submitted that the accused had no case to answer. He submitted that the prosecution did not present any witness who identified the accused to have been involved with the murder. That the accused was not placed to have been at the scene of the crime.
16. Counsel submitted that the CCTV footages that were produced in the case do not identify the vehicle that was used in the commission of the offence nor are the individuals seen in the video identifiable.
17. The defence submitted that the Investigating Officer PW5 claimed in his evidence that he received information from witnesses that the accused was using the subject motor vehicle on the day of the murder yet not a single witness was called to establish that position.
18. It was submitted that malice aforethought was not established in the case. That there was no witness called to establish the relation between the deceased and the accused. That there was no evidence that they knew each other or that the accused held any grudge against him. It was submitted that the accused had no case to answer. The defence counsel urged the court to acquit the accused under the provisions of section 306 (1) of the *Criminal Procedure Code*.
19. The prosecution did not make any submissions in the case.

### **Determination**

20. In every criminal case, the prosecution is required to establish a prima facie case before an accused person can be called upon to defend himself/herself. Where the prosecution has not established a *prima facie* case, the accused is liable to be acquitted at that stage of the proceedings. This is encapsulated by Section 306 (1) of the *Criminal Procedure Code* that provides as follows:

“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.”

21. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 335, the court defined a *prima facie* case 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’s case, the case is merely one in which on full consideration might possible 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 .....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 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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

22. In *Republic v 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, 8<sup>th</sup> 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.

24. It was therefore held in *Ronald Nyaga Kiura v 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.

24. A *prima facie* case is therefore established where the evidence tendered by the prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused opts to remain silent.

25. In this case, all what the prosecution managed to establish is that the deceased was killed by two people who alighted from a black/green car. The people who executed the crime were not identifiable from the CCTV footages. The registration number of the motor vehicle was not captured in the CCTV footages. The material witness for the prosecution who tended to implicate the accused with the shooting declined to be a witness in the case. The accused’s relatives who implicated him to have been in possession of the suspect motor vehicle at the time of the shooting declined to testify in the case.

26. The total sum of the evidence adduced before the court is that there was no evidence that the motor vehicle that was implicated in the shooting was registration No. xxxx, as the same was not captured in the CCTV footage and no witness implicated it in the shooting. The evidence of PC Wachira that it is that motor vehicle that was implicated in the shooting remained mere suspicion as there was no evidence to corroborate it. No witness placed the accused at the scene of the crime and the evidence adduced against him remained mere suspicion. It is trite law that suspicion cannot form a basis of a case against an accused person. The Court of Appeal in *Sawe v Rep* [2003] KLR 364 held that:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”



27. Similarly, in *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, as cited in [Kevin Kiswiki Kyongi v Republic](#) [2018] eKLR, the same court held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”

28. In this case there is no evidence pointing to the guilt of the accused. The evidence is barely sufficient to convict the accused of the offence if he opted to remain silent in his defence. It is therefore pointless to place the accused on his defence.

29. In view of the foregoing, it is my finding that the prosecution has not established a prima facie case against the accused person. Consequently, the accused has no case to answer and is acquitted of the charge under section 306 (1) of the [Criminal Procedure Code](#).

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 19<sup>TH</sup> DAY OF JANUARY 2024**

**J. N. NJAGI**

**JUDGE**

**In the presence of the Accused and:**

**Mr. Otieno for Republic**

**N/A for Accused**

**Court Assistant – Mr. Jarso**

**14 days right of appeal.**

