



**Republic v Tubei (Criminal Case 78 of 2012)
[2024] KEHC 1693 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 78 OF 2012
HM NYAGA, J
FEBRUARY 22, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

COLLINS KIPROP TUBEI ACCUSED

RULING

1. The accused Collins Kiprop Tubei, was charged with the offence of Murder contrary to section 203 as read section 204 of the *Penal Code*. The Particulars of the offence were that on the 12th October, 2012 at Naiswet village in Rongai District within Nakuru County jointly with others not before court he murdered Joseph Mongare Nyamboga.
2. On 6th October, 2016, the charge was read to the accused and he pleaded not guilty and thereafter the trial ensued with prosecution calling a total of twelve (12) witnesses in support of its case.
3. The Prosecution closed its case after PW12 had testified. Upon the close of the prosecution case, parties took directions to file written submissions on no case to answer. Only the Prosecution’s submissions are on record.
4. The prosecution made reference to the case of *Republic v Mohammed Dadi Kokane & 7 others* [2014] eKLR that discussed the ingredients of the offence of murder as follows:

“The offence of murder is defined as follows by section 203 of the penal code:

“any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”



This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

1. The fact of the death of the deceased.
 2. The cause of such death.
 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
 4. Proof that said unlawful act or omission was committed with malice aforethought.
5. On the fact of death, the prosecution submitted based on the evidence tendered by the prosecution witnesses, there is no dispute of the deceased's death.
 6. On whether the death was unlawful, the prosecution argued that the legal position is that every homicide is presumed to be unlawful unless circumstances make it excusable. In support of this position reliance was placed on the case of *Uganda v Lydia Draru alias Atim* HCT-00-CR-SC-0404.
 7. It was submitted that PW4 who conducted autopsy on the body of the deceased formed an opinion that the cause of death was severe head and chest injuries accompanied by extensive skull fracture brain laceration and rib fracture and lung collapse due to trauma and as such it is evident that the deceased died out of an unlawful act.
 8. In regards to participation of the accused and malice aforethought, the prosecution cited the case of *Republic v Mohammed Dadi Kokane & 7 others* (*supra*) for the proposition that it is under a duty to prove that the accused persons before court are criminally culpable for the act leading to the death of the deceased.
 9. The prosecution then submitted that none of the witnesses saw the accused kill the deceased and therefore the evidence is based solely on circumstantial evidence. It was argued that proof of participation of the suspect is crucial as it enables one to determine who to attach criminal responsibility to. The prosecution cited the case of *Abmad Abolfadhi Mohammed & Another* [2018] eKLR that defined what constitutes a circumstantial evidence.
 10. The prosecution argued that the doctrine of last seen is based on circumstantial evidence and the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. To buttress this position, reliance was placed on the case of *State v F.O.O* [2021] eKLR.
 11. The prosecution submitted that from the evidence adduced by the PW1, PW3, PW5, PW7 & PW8 it is clear the accused was the last person seen with the deceased, was the only person who had land issue with the deceased, was the one who said he had killed an ex- soldier and the deceased was an ex-soldier, was seen with a vest full of blood, he left with the body in his vehicle and later the deceased was recovered on the road.
 12. On whether there was malice aforethought, the prosecution cited the case of *Joseph Kimani Njau v Republic* [2014] eKLR and argued that from the evidence of the pathologist, it is clear the accused must have intended to kill or cause grievous harm to the deceased.
 13. The prosecution contended that accused made serious preparation to have the deceased killed as he tricked and picked him from his place of work and took him to a private place in order to kill him.



14. The prosecution posited that it has established a prima facie case sufficient to place the accused on his defence.

Analysis & Determination

15. At this stage the court's duty is to determine whether the prosecution has made out a *prima facie* case to require the accused to be put on his defence.
16. Under section 306(1) of the [Criminal Procedure Code](#) Cap 75 Laws of Kenya, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused person committed the offence the court should, 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.
17. Under section 306(2) on the other hand, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person committed the offence, the court should proceed to put the accused to his defence and inform him of his right to call evidence in support of his case.
18. What then is a prima facie case? The test of this was settled in the case of *Ramanlal T. Bhatt v Republic* [1957] EA 332 where the court expressed itself 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.”

19. 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, 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.”

20. The court should therefore determine whether based on the evidence placed before it can convict if the accused chose not to give any evidence. It is imperative to note that the proof beyond reasonable doubt is not the standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer. In *May v O'Sullivan* [1955] 92 CLR 654 it was therefore held that:

“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the



defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”

21. There is a danger in making definitive findings at this stage, especially where the Court is of the view that there is a case to answer, as was appreciated by Trevelyan and Chesoni, JJ in *Festo Wandera Mukando v The Republic* [1980] KLR 103:

“...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”

22. From the foregoing and without delving into the merits of the prosecution’s case, it suffices to state that after considering the evidence adduced and the addresses by the state and the defence, it is my opinion that the prosecution has established a prima facie case to warrant the accused being put on the defence in terms of Section 306 (2) of the *Criminal Procedure Code*. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF FEBRUARY, 2024.

**H. M. NYAGA,
JUDGE.**

In the presence of;

C/A Oleperon

State counsel Okok

Accused present

