Republic v Odongo (Criminal Case E034 of 2022)
[2024] KEHC 2684 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE E034 OF 2022

RE ABURILI, J

MARCH 11, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

CALEB OGUTO ODONGO ..... ACCUSED

RULING

1. The accused person Caleb Oguto Odongo is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. Particulars of the offence as per the Information dated 19th December 2022 are that on the 6th day of December, 2022 at around 1900 hours in Manyatta 'B' within Kisumu East Sub-county within Kisumu County, the accused person murdered Eden Michael Otieno.

3. The accused person took plea on 4th May 2023 in the presence of his advocate, Mr. Bagada. The accused denied committing the offence.

4. The prosecution called eight witnesses in support of its case. The question now, at this stage, is whether a prima facie case has been established against the accused person to warrant him to be placed on his defence.

5. A prima facie case is not necessarily one that must succeed. This prima facie case has been defined in the cases cited below.

6. Section 306 (1) and (2) of the *Criminal Procedure Code* provides inter alia that:

> " When the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds

that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal."

7. In the alternative, from the evidence of witnesses for the prosecution, should the court conclude that there is evidence to support the charge against the accused, it shall invite him to tender evidence personally or call witnesses in his defence. The court is obligated to exercise discretion under section 306 (1) of the *Criminal Procedure Code* to determine the evidence of a prima facie case at the half time trial of the accused person in a criminal case.

8. As to constitutes a prima facie case, nowhere is it found in the Criminal Procedure Code. Fortunately, judicial precedents have developing the judicial meaning of the phrase prima facie case as articulated in the following cases.

9. In the English Court in *May v O'Sullivan* [1955] 92 CLR 654 the Court stated as follows:

> "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."

10. In *Republic v Prazad* [1979] 2A CRIM R 45, King CJ stated on a prima facie case as follows:

> "I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it."

11. Thus, the English courts have made it clear that prima facie case is distinguishable with presumption. The most important aspect of prima facie case is a finding whether the prosecution has in fact made out a case to warrant the accused person to proceed in tendering his defence in any of the options provided for under section 306 (2) of the *Criminal Procedure Code*. Under section 306 (1) of the *Penal Code* what the courts look for is prima facie evidence for the prosecution which unless controverted, would be sufficient to establish the elements of the offence.

12. In the case of *Republic v Galbraith* [1981] WLR 1039 it was stated as follows:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:
>
> (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within

> the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

13. Applying the above principles to this case, Iam alive to the fact that that Kenya does not operate a jury system. However, taking into account the provisions of section 306 of the *Criminal Procedure Code* and the principles espoused in the above cited cases, and bearing in mind the presumption of innocence doctrine under Article 50 of the *Constitution*, 2010 and the universal right to a fair hearing and the holding in the case of *R.T. Bhatt v Republic* [1957] EA 332 – 335 where the Eastern Court of Appeal stated 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 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 may not be easy to define what is meant by a prima facie, 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."

14. This Court is alive to the fact that albeit the burden of proof lies on the prosecution throughout the trial to prove its case against the accused person beyond reasonable doubt. However, at this stage, the Court ought not to satisfy itself that the prosecution has proved its case beyond reasonable doubt but that the evidence adduced establishes a prima facie case against the accused person.

15. In addition, should the court, from the evidence available, be of the view that the evidence establishes a prima facie case, then it should not delve deep into the merits of that evidence as that may prejudice the accused person whose right to remain innocent until proven guilty is unlimited.

16. Having said that, and from my perusal and appreciation of the evidence of the eight prosecution witnesses cumulatively, I am satisfied that a prima facie case has been made out by the prosecution against the accused person to warrant placing him on his defence.

17. Accordingly, I find that the accused person herein Caleb Oguto Odongo has a case to answer and he is hereby placed on his defence.

18. The provisions of Section 306(2) of the *Criminal Procedure Code* as read with Article 50(2) (i), (k) and (l) of the *Constitution* are read out and explained to the accused person in the Dholuo language which he understands best in the presence of his advocate Mr. Bagada.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2024.

R. E. ABURILI

JUDGE