



**Republic v Akoyo & another (Criminal Case 51 of 2016)
[2024] KEHC 1991 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 1991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 51 OF 2016
JRA WANANDA, J
MARCH 1, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHNSTONE AKOYO 1ST ACCUSED

DANIEL KIPRUTO KIRWA 2ND ACCUSED

RULING

1. The accused persons have been charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 3/7/2016, at Mafuta farm in Eldoret West Sub-County in Uasin Gishu County, jointly murdered Naomi Muthoni Kamau.
2. The accused persons were initially represented by Ms. Cherono Advocate. The accused took plea on 26/7/2016 and pleaded not guilty. Subsequently, Mr. Henry Kenei took over representation of the accused persons. The case then proceeded to trial wherein the prosecution called 6 witnesses after which it closed its case. PW1 to PW4 testified before Omondi J (as she then was) upon whose elevation to the Court of Appeal, the matter was taken over by Ogola J who then took the evidence of PW5. Upon Ogola J’s transfer, I took over the case and PW 6 testified before myself.
3. PW1, one Janet Chepkorir Kemei testified that she knew the deceased as a neighbour and a friend, that on 5/7/2016 at about 6:00 am, she prepared her children for school and left to go to the shops but just before reaching the shops, she passed by the deceased’s door as her house was just near the road and noticed that the clothes that the deceased had washed on Sunday were still hanging out, that she met her other neighbour one Robert and asked him whether he had seen the deceased but he told her that he had not seen her, that after making her purchases, she returned home then took her goats to graze on the deceased’s compound, she met one Ruth a neighbour and again asked her whether she had seen the deceased but she said that the deceased had not been home, that PW1 then noticed that



the door was open, she entered the kitchen which was detached from the main house and noticed that there was cooked githeri and the utensils were strewn all over. She stated further that she tried to enter the main house and noticed that it was locked from inside using a nail, she then forced the door open while calling out the deceased's name, she then sensed a rotting smell so she called one Mama Joseph, that she saw someone lying on the bed in the bedroom and when she checked she noted that the person was dead, she called other female neighbours, then called Daniel also a neighbour who then called the deceased's children. She stated further that the body was covered with a blanket and that she did not see any injuries.

4. PW2 was one Benard Mburu. he testified that he is a maize trader, that the deceased was his neighbour, that on 4/7/2016, he received a call from the 2nd accused that the latter had 50 kgs of maize for sale, he went to the 2nd accused's house where he purchased the maize and paid the 2nd accused Kshs1,200/-, that the 2nd accused was in the company of 1st accused during the transaction, he asked the 2nd accused where he got the maize and the 2nd accused told him that it was his, on the next day he heard that a woman had been killed and some of her property including 50 kgs maize bag and mattress were stolen, he went to the scene and heard people stating the same, he told them that the 2nd accused had sold him 50 kgs maize, the police were informed and they arrested the 2nd accused, that the 2nd accused led the police to the 1st accused.. He told the Court that he knew the accused persons very well since the 2nd accused was his neighbour and maize supplier while the 1st accused was the 2nd accused's friend, and that it was not his first time to buy maize from the 2nd accused.
5. PW3, James Kimani Alexander testified that the deceased is his mother, that on 5/7/2016 at about 10:30-11:00 am, a neighbour telephoned him and told him that his mother was very sick, that PW3 called his brother and his and they proceeded to the home, on arrival, they found a huge group outside their compound, he rushed to his mother's bedroom and found that she was covered in her bed, he noticed that her legs faced the upper side of the bed and the head faced the lower part, her body was cold and she did not respond to touch or sound and he realized that she was dead, when he turned her head, blood oozed from the nose and mouth, he also noted the presence of some mud on her head and realized that their mother had been killed. He stated that they noticed that bedsheets, radar, 50 kg maize and a thermos were missing, the post-mortem was later conducted and they were told that their mother died as a result of strangulation, that the 2nd accused was arrested after his brother stated that the 2nd accused had told him that he had killed deceased, that the 1st accused disappeared and was eventually arrested elsewhere, the accused persons were children whom he saw growing up in the neighbourhood, that his mother used to feed them and had even given them casual jobs and that at the time of her death, their mother was living alone. In cross-examination, he stated that when they arrested the 2nd accused, he confessed to the offence, and that the recovery of his mother's property from the accused persons is evidence that they killed the deceased.
6. PW4 was Dr. David Chumba. He told the Court that he is a Pathologist, that he performed a post-mortem on the body of the deceased on 8/7/2016, that the deceased was about 67 years and had features of decomposition around the mouth and neck, there was oedema on the mouth (acute inflammatory process) and also on the neck and bruises on the right side of the cheek, that the lungs were dilated and part of the trachea was broken, and that there was a fracture of the vertebral bone C3 and C4 (bones on the neck). He stated that he formed the opinion that cause of death was asphyxia by manual strangulation.
7. PW 5 was Constable Bethwel Kiprotich Tanui. He told the Court that he was stationed at Ziwa police station, that on 8/7/2016 at around 1400hrs he was instructed by his in-charge to accompany (with other officers) the 1st accused who had been arrested by members of the public, they accompanied the



1st accused to Sogomo area at Itiko and upon arrival, the 1st accused led them to a rental house from where they recovered a number of items, that the house belonged to the 1st accused's friend who was away at that time and there was nobody in the house when they reached, and that PW3 - son to the deceased - confirmed that the items belonged to his mother.

8. PW 6 was one Corporal Nyangeri. He testified that was earlier stationed at Ziwa Police Station, that on 5/7/2016, he was called and informed that there was a body at Mafuta farm, that the report came at around 10:00 am and he, together with fellow officers proceeded to the scene and found the deceased lying on the bed, that the deceased was on the bed and there was blood from her mouth and she had a swollen face, that he took particulars, photographs and a sketch plan and they then took the body to hospital, when he went back to the station he found that the 1st accused had been arrested and some items recovered, that he was later informed by members of the public that they knew the suspects (the accused persons) and that there was a 50 kg sack of maize that had been stolen from the house of the deceased and was recovered from a businessman (PW2) who stated that the same had been sold to him by the 2nd accused, PW2 took the sack to the police station. He told the Court that the deceased and the accused persons were neighbours and he established that on the previous day there was bad blood between the deceased and the accused persons, that when they met, the deceased called the 1st accused a "thief" and alleged that the 1st accused had stolen somebody's wife and that he was also an AIDS patient.

Submissions

9. The parties were then given liberty to file written Submissions on case to answer. Pursuant thereto, the Prosecution filed its Submissions on 7/07/2023 while the Defence filed on 10/07/2023.
10. In her Submissions, Senior Prosecution Counsel Ms. Emma Okok submitted that the prosecution case is largely premised on circumstantial evidence as there is nobody who saw the accused persons kill the deceased as the deceased was last heard on 3/7/2016 and her body was found on 5/7/2016. With regard to proof of the offence of murder, she cited Section 203 of the [Penal Code](#) and submitted that the following ingredients must be met;
 - (a) death of the deceased occurred and the cause of that death,
 - (b) the accused committed the unlawful act which caused the death of the deceased: and
 - (c) accused had malice aforethought.

With regard to death of the deceased and cause of death, she submitted that the death of the deceased is not disputed in this particular case, that PW1, PW2, PW3, PW4 and PW6 saw the deceased's body, that the cause of death was also proved beyond reasonable doubt by way of medical evidence adduced by PW 4. With regard to the allegation that the accused committed the unlawful act which caused the death of the deceased, she submitted that as earlier stated, there is no direct evidence linking the accused person to the murder of the deceased but that the accused persons are linked to the offence by the doctrine of recent possession, that the accused persons sold maize to PW2, which was suspected to have been stolen from the deceased's house on 4/07/2016, that according to PW3, he last spoke to his mother on 3/07/2016 at night, that on 8/07/2016, the 1st accused led police officers to the house where he had stored the deceased's properties, that this was 3 days after the discovery of the deceased's body, that the recovered items were positively identified by PW3 who is the deceased's son, that PW2 was clear that it was the 2nd accused who sold him the maize while accompanied by the 1st accused, that the accused persons were well known to him and that he had even done business with the 2nd accused at some point.



11. Counsel added that although nobody saw the accused persons commit the murder, it is clear that the accused persons murdered the deceased and stole her properties, that PW3 stated that the accused persons were well known to him and the deceased and that the deceased even offered them casual jobs at times and it is evident that the accused persons knew the deceased's home well enough to plot her murder. She argued that according to PW5, the deceased died of asphyxia by manual strangulation and that it is this unlawful act of assault that caused the death. On whether the accused had malice aforethought, Counsel cited Section 206 of the [Penal Code](#) and argued that PW4's evidence on the cause of death shows that the accused persons had an intention of causing the death of the deceased, that the manner in which the death was executed left little or no room for survival at all and that the evidence on malice aforethought is therefore solid. She argued that the prosecution evidence, though largely circumstantial, is water tight, well corroborated, credible and consistent thus pointing to the guilt of the accused persons.
12. On his part, Counsel for the accused persons submitted that none of the 6 prosecution witnesses either directly or indirectly witnessed the alleged killing, that all the 6 relied or testified on the foundation of either hearsay or circumstantial evidence. On whether the deceased's death was caused by the accused persons, Counsel too cited Section 203 of the [Penal Code](#) and the 3 ingredients listed therein as required to be proved and added that there is no eye witness who saw the accused person murder the deceased, that the only reason the accused persons were arrested by the police is because of the allegation by PW2 that he had bought a bag of maize from the 2nd accused who was with the 1st accused, that the other reason that was peddled by the prosecution was that the 1st accused led PW5 (Police Officer Bethuel Tanui) to a house in Sogomo area where they recovered some stolen items, that this cannot be a good basis to charge someone for an offence of murder, that the police who presented the case to the prosecution did not provide a basis for charging the accused persons other than the circumstantial evidence based on the allegation that PW2 bought maize from the 2nd accused and the 1st accused led the police to Sogomo area where some stolen items were recovered. Counsel further argued that the charges seemed to have been preferred whimsically, arbitrarily and without any proper investigations as there is no evidence to show that the maize allegedly sold to PW2 belonged to the deceased or that PW2 bought it from the 2nd accused person in the presence of the 1st accused.
13. Counsel submitted further that PW5 (Officer Bethuel Tanui) who accompanied the 1st accused failed to prove that indeed he had instructions from his superior to accompany the 1st accused person to Sogomo or that the accused person actually led them to the alleged house, that the police were not keen to look for the owner of the house from where they recovered the stolen items for questioning, that PW5 testified that he accompanied the accused persons together with other officers and the driver but none of them were called as a witness to corroborate the testimony, that one is left to wonder; why the prosecution would leave out such crucial witnesses? He stated further that PW5 testified that he was not present when the items were stolen and could not tell that the same belonged to the deceased as there was no evidence proving that they belonged to him, that that the evidence does not link the accused persons to the death of the deceased, no evidence placed the accused persons at the scene of the crime either before, during or after the death of the deceased, that there was no witness/neighbour who saw them at the scene or witnessed them killing, it is only PW2 who tried to create a link by saying that he bought a bag of maize from the 2nd accused in the presence of the 1st accused but he failed to tender any evidence to prove his assertions, that he in fact poked holes on his own evidence by confirming that it was not his first time buying maize from the 2nd accused. Counsel cited the case of *Abdala bin Wendo and Another v R* (1953) 20 EACA166 in regard to placing reliance on the evidence of a single eye-witness. Counsel argued further that the other witness who attempted to put the 1st accused at the scene is PW5 who was however not able to corroborate his evidence with photographs or testimonies



of other witnesses noting that he alleges that they were 5 people who were led by the 1st accused to Sogomo area. He cited the case of *Sawe v. Republic* (2003) KLR 364

14. He urged the Court to look at the doubts in the prosecution's evidence trying to link the accused person to the death of the deceased, that it is doubtful whether the accused persons killed the deceased and stole from him, that it is doubtful whether PW5 accompanied the 1st accused to Sogomo area, it is doubtful whether the exhibits now before the Court were actually recovered from the accused persons, and it is doubtful whether the items allegedly recovered belonged to the 1st accused noting that he is not the owner of the house, that no witness gave evidence to demonstrate that the accused persons were seen at the scene of crime, that it is doubtful whether PW2 who was found with the bag of maize was not involved in the death of the deceased together with the owner of the house where PW5 recovered some of the stolen items and that PW2 could have killed the deceased and created a red herring by accusing the 2nd accused. Counsel urged the Court to return a finding that there is no sufficient evidence to link the accused persons to the death of the deceased. He argued the prosecution's inference of the accused persons culpability is based on the circumstance that PW2 bought maize from the Accused Persons, that the fact that a bag of maize was missing in the house of the deceased cannot be conclusive to point to the guilt of the accused persons, that it is trite law that where a case rests entirely on circumstantial evidence, the evidence must be examined, and that the witnesses called by the prosecution testified purely based on circumstantial evidence. On what constitutes "circumstantial evidence", Counsel cited the case of *Musili Tulo v R* Criminal Appeal No. 30 of 2013, the case of *Abang alias Onyango v R* Criminal Appeal No. 32 of 1990 and also *Sawe v R* 2003 KLR 364.
15. On whether the evidence on record would be sufficient to convict the accused person if he does not proffer a defence, Counsel submitted that the prosecution had the burden of establishing a prima facie case against the accused persons for them to be called to their defence, that the prosecution failed to discharge this burden, the prosecution is expected to establish existence of the two elements of the crime of murder before the accused persons can be called to their defence, they must prove that indeed the accused persons killed the deceased (actus reus) and that they had malice aforethought at the time of the killing (mens rea), that the prosecution failed to lead any evidence to demonstrate that the accused persons are responsible for the death of the deceased in order to prove existence of actus reus, that there was no eye-witness yet the two elements must be demonstrated sequentially, there cannot be mens rea without the actus reus, that the prosecution having failed to demonstrate the act of killing, has further failed to lead any evidence to demonstrate that there was an intention (malice aforethought) on the part of the accused persons to kill the deceased. On the issue of mens rea and actus reus, he cited the case of *Ronald Nyaga Kiura v. Republic* [2018] eKLR and the case of *Joseph Kimani Njau v Republic* (2014) eKLR. He argued that the prosecution failed to prove any element as required by Section 203 on malice aforethought. He cited the case of *Libambula v Republic* [2003] KLR 683 and the case of *Republic v Tumbere S/O Ochen* (1945) 12 EACA 63. He maintained that the prosecution has inadvertently or otherwise failed to satisfy the above provisions and therefore, the accused persons have no case to answer from whatever pinnacle the facts are looked at. He cited the case of *Ramanlal Trambaklal Bhatt v. R* [1957] EA 332. According to Counsel, the case is founded on quicksand and it is apparent that a conviction would be untenable as there are many unanswered questions that would render a conviction untenable and that putting the accused persons to their defence would be unlawfully and unjustifiably shifting the burden of proof.

Determination

16. In this Ruling, the Court is being called upon to decide whether the prosecution has made out a prima facie case against the accused persons as would warrant this Court to call upon them to give their defence. Although the prosecution carries the burden to establish the guilt of the accused persons



beyond reasonable doubt, at this stage, the prosecution is not expected to establish the guilt of the accused persons beyond reasonable doubt. What is expected of the prosecution is simply to establish a prima facie case and a prima facie case is not necessarily one that must succeed. At this stage therefore, the Court is only considering whether the accused has “a case to answer” and which was described by G. Dulu J in the case of *Republic v Joseph Sbitandi & Another* (2014) eKLR as follows:

“A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result.”

17. Section 306 of the *Criminal Procedure Code* requires the Court, after closure of the prosecution’s case, to make a determination on whether an accused person has a case to answer. The section provides as follows:

“36.

- (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 on his own behalf or make unsworn statement and to call witnesses in his defence...”

18. On what constitutes a “prima facie” case, in the case of *Republic v. Abdi Ibrahim Owl* [2013] eKLR, Hon. Lady Justice S. Mutuku defined the time 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] EA 332 at 334 and 335, the Court 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 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 true, as Wilson, J said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that determination can only properly be made when the case for the defence has been heard. 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. The question that this Court has to deal with and answer at this stage is therefore, whether based on the evidence before it, the Court, after properly directing its mind to the law and evidence may, as opposed to will, convict if the accused persons chose to give no evidence. In the case of *Ronald Nyaga Kiura v. Republic* (2018) eKLR, Limo J 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* case 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. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhatt v. Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

20. In *Festo Wandera Mukando v Republic* [1980] KLR 103, the Court held:

“... we 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, and an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” to answer 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.”

21. I have considered the evidence on record, the testimonies of the witnesses as set out above and also the respective Submissions filed by the parties. Without delving into the merits thereof, I only state my finding to be that the prosecution has established a prima facie case. Accordingly, I find that the accused person has a case to answer.
22. Pursuant to my finding above, the accused persons are now informed of their rights under Article 50(2) (i) and (k) of the *Constitution* and also under Section 306(2) as read with Section 307 of the *Criminal Procedure Code* to address the Court. Accordingly, they are informed and it is explained to them, in the presence of their Advocate, that they have a right to address the Court either personally or their Advocate and to give evidence on their own behalf or to give unsworn statements, and to call witnesses in their defence.
23. The accused persons are therefore placed on their defence.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 1ST DAY OF MARCH 2024



WANANDA J.R. ANURO

JUDGE

