Republic v Chemwobo (Criminal Case 69 of 2017)
[2024] KEHC 1899 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 1899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 69 OF 2017

JRA WANANDA, J

MARCH 1, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

CATHERINE JEBIWOT CHEMWOBO ..... ACCUSED

RULING

1. This is case in which a 75-years old woman (Accused person) was charged with the offence of killing her own 25 years old son, one Mark Kiptum Kiplomo (deceased).

2. The Accused was 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 he murdered his said son on 1/12/2017 at Mosop village in Eldoret East Sub County within Uasin Gishu County.

3. The Accused is represented by Mr. Chepkwony, Advocate and pleaded not guilty. The matter then proceeded to trial in which the prosecution called 3 witnesses before closing it on 28/07/2022.

4. PW1 was Dr. Wekesa Nalianya, a Pathologist at Moi Teaching & Refferal Hospital (MTRH) Eldoret who performed a post-mortem on the body of the deceased on 11/12/2007. His evidence was that upon examination of the body, externally, he found that there was an abrasion of about 27cm long and 1.5 cm wide on the left side of the chest body, and that upon dissection, there was a strong smell of alcohol in the stomach. In his opinion, the cause of death was sudden cardiac arrest. In cross-examination, he confirmed that the cause of death was cardiac arrest and not anything else.

5. When prodded further by the Court, PW1 reiterated and maintained that the chest injury was not sufficient to cause cardiac arrest which was the cause of death, that all bodily systems were normal and that it was a sudden cardiac arrest.

6. PW2 was one Jairus Kipkemboi who stated that he knew both the Accused Person and the deceased as they live in the same village as he. He testified that on 01/12/2017 the Accused Person passed by his home around 8pm and told him that she had killed the deceased, he thought that the Accused was joking and left her to go, that he later received a call from one Mzee Toroitich who told him that there was an incident at the Accused's home and asked him to go there, he went there and found the deceased lying down, and that blood was oozing from the deceased's left side. In cross-examination, he stated that he was a village elder, that he used to receive several reports about the deceased causing problems to his mother, that he used to attack his mother and used to sexually harass her, that the deceased had a wound on the side and that the deceased was a bad boy.

7. PW3 was Corporal Gabriel Wanyama, the investigating officer in the matter. His testimony was that he received a report that there was a murder within his area, that when he went to the scene he found the deceased lying dead inside the house, the deceased had an injury cut on the left side of his chest, he was informed that the mother of the deceased had killed the deceased, that he recovered a blood stained panga in the sitting room next to the body of the deceased, that the Accused was not at the scene and that his investigations revealed that the Accused killed the deceased due to a dispute over maize which the deceased sold without his mother's consent as was his habit. In cross examination, he testified that the deceased and the Accused lived in the same house but in separate rooms, and that the deceased had the habit of drinking and also selling his mother's items including maize. He conceded that he did not take the panga to the government chemist for analysis, and that he did not know the owner of the panga. In conclusion, he stated that the deceased had panga cuts on the chest which was enough to cause death.

8. Under Section 306 of the *Criminal Procedure Code*, this Court has a duty, upon close of the prosecution's case, to make a Ruling on whether the Accused Person has a case to answer. Section 306(1) and (2) provide as follows;

> "(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 recording 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 ....."

9. At this juncture, what this Court is called upon is to determine whether, at this stage, based on the evidence adduced by the 3 witnesses, the Prosecution has established a prima facie case to warrant the Accused to be placed on his defence to answer to the charge of murder.

10. Needless to state, the burden of proof to establish the case against the Accused lies on the Prosecution throughout the trial. At no point does that burden shift to the Accused reason being that the Accused Person's constitutionally guaranteed rights include the right to remain silent, the right to adduce and challenge evidence and the right not to give any incriminating evidence. However, at this stage, the prosecution is not expected to have proved the case beyond reasonable doubt. The measure is for a prima facie case to be established.

11. A prima facie case is 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. In *Republic vs Abdi Ibrahim Owi* [2013] eKLR, the Court defined a prima facie case as follows:

> " 'Prima facie' is a Latin word defined by Black's Law Dictionary 8th Edition as, "sufficient to establish a fact or raise presumption unless disapproved or rebutted". 'Prima facie' is defined by the same dictionary as "the establishment of a legally required rebuttable presumption."

12. "Prima facie" therefore means the establishment of a rebuttable presumption that an Accused Person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt vs R* [1957] E.A 332 at 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 final determination can only properly be made when the case for the defence has been heard. 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."

13. It follows that at this juncture, what is pending for determination is whether this Court, on the basis of the evidence so far tendered by the Prosecution, and properly directing itself to the law and evidence, can convict the Accused if he chooses not to give any evidence.

Submissions

14. After close of the Prosecution case, the parties were given liberty to file Submissions on the issue of "case to answer". State Counsel Ms Okok informed the Court that she would not be filing any Submissions. On his part, the Defence Counsel filed his Submissions on 30/08/20222.

15. In his Submissions, Counsel for the Accused cited Section 109 of the *Evidence Act* and submitted that the prosecution has failed to prove beyond reasonable doubt that the offence was committed by the Accused. He cited the case of *Emanuel Mwadio Munyasya v Republic* and also the South African case of *Shabeer Naicker vs The State* and urged that the evidence tendered is a mere denial and a make-up story that the Accused is the one who injured the complainant, and that the evidence that the Accused assaulted and caused actual bodily harm or injury to the deceased has not been supported. He urged that the evidence by PW1 confirmed that the deceased had left chest wound but died of cardiac arrest,

that the heart and lungs of the deceased were normal but when asked how the heart and cardiac arrest were related, he could not clearly tell, that PW1 only told the Court that he picked on the same since the lungs were normal. Counsel cited the case of *R vs Cheshire* [1991] 1 WLR 844. According to him, the State was not able to establish the chain of causation between the injured chest and cardiac arrest which was stated to be the cause of death.

16. On the meaning of "prima facie case", he cited the case of *Bhatt v R* [1957] EA and submitted that the evidence on record is not sufficient to sustain a conviction as it has failed to prove the elements of murder. He also cited Section 203 of the *Penal Code* on the definition of "murder" and also Section 206 on the definition of "malice afterthought" and stated that there is no evidence to support the ingredients for a charge of murder. He added that there is no direct evidence to connect the Accused to the offence as there was no eye-witness, that there was no circumstantial evidence placed before the Court, that the Accused was not at home when the deceased was taken to the mortuary, and that the State has presented suspicion based on what was alleged to be a confession by the Accused Person. Counsel submitted further that the prosecution seemed to have charged the Accused based on the evidence of PW2 and PW3 who stated that the Accused confessed to them having killed the deceased, that there was a panga that was produced but it was never subjected to any forensic examination and that therefore, there was nothing to connect the panga to the alleged murder. He added that what was alleged to be a confession cannot stand the weight of scrutiny under Section 25(l)(a) of the *Evidence Act*. He therefore urged the Court to find that the Accused Person had no case to answer.

Analysis & Determination

17. For the offence of murder to be proved, the prosecution is under the obligation to establish the following key ingredients:

    a. Proof of death of the deceased, and the cause.

    b. Proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased.

    c. Malice aforethought on the part of the accused.

18. In this particular case, from the evidence of the doctor who conducted the post mortem, the death of the deceased was caused by cardiac arrest. Upon further enquiry by the court, the doctor maintained that the chest injuries inflicted were not sufficient to cause cardiac arrest. This therefore settled the issue of cause of death.

19. I note that PW2 testified that the Accused told him that she had killed the deceased. However, without corroboration confirming the cause of death, this alleged statement made by the Accused is not and cannot be sufficient to establish guilt. The Accused may have indeed inflicted the injury on the deceased and further, she may have honestly believed that it is that injury that killed the deceased. However, the moment the medical evidence ruled out the said injury as the cause of death, a Court of law cannot insist on imposing culpability on the Accused for the offence of murder.

20. Further, there was no eye-witness to the alleged incident and the alleged murder weapon found at the scene was also never subjected to forensic examination to establish whether the blood on the panga matched that of the deceased. No evidence also placed the Accused at the scene of crime.

21. The absence of certainty on the cause of the death of the deceased therefore raises substantial doubts in the prosecution's case and leaves much room for speculation on what exactly happened and how it happened. This benefit of doubt must inevitably be given to the Accused Person.

22. Article 50(2) (a) of the *Constitution* case provides that-

> " Every Accused Person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved."

23. A right to fair trial cannot be limited. In my view, the evidence tendered fell short and failed to establish sufficient prima facie evidence of culpability on the part of the Accused to the required standard. My finding is that therefore the prosecution failed to discharge the burden of proof.

24. Considering the entirety of the evidence on record, I am of the view that the Accused Person has no case to answer as none of the witnesses tendered sufficient evidence to implicate her in the unfortunate death of the deceased.

Final Orders

25. In the end, I find that the Accused Person has no case to answer and has no reason to be called upon to defend herself. I therefore enter a finding of not guilty and accordingly acquit her at this stage under Section 306(1) of the *Criminal Procedure Code*.

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

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WANANDA J.R. ANURO

JUDGE