Republic v Noor (Criminal Appeal E028 of 2023)
[2024] KEHC 4404 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4404 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E028 OF 2023

JN ONYIEGO, J

APRIL 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

HASSAN DAHIR NOOR ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. J Omwange delivered on 8-06.2023 in Garissa CM's court criminal case number E004 of 2022)

JUDGMENT

1. The matter before the court is an appeal filed by the state having been dissatisfied by the finding of the trial court in acquitting the respondent under Section 2010 of the *CPC*.

2. The respondent herein was charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. Particulars were that on 09.08.2022 at around 1115hrs at Afweni Primary School stream number one, a polling station in Lagdera Sub County within Garissa County jointly with others not before court assaulted Shal Mohamed Abdi Bulle thereby occasioning him actual bodily harm.

3. The respondent pleaded not guilty and the matter proceeded to hearing consequences whereof the prosecution lined up a total of six witnesses in support of its case.

4. The trial magistrate upon hearing the matter, delivered his ruling on 08.06.2023 noting that the prosecution fell short of demonstrating a *prima facie case* against the respondent. The same resulted to the respondent being acquitted under section 210 of the *Criminal Procedure Act*.

5. The state(appellant) being aggrieved by the finding of the trial court, filed a petition of appeal dated 22.06.2023 citing the following grounds:

i. That in the making of the impugned ruling, the learned trial magistrate erred in fact and law when he held that the evidence by the prosecution failed to demonstrate a *prima facie case* against the respondent while it was clear from the evidence on record that the respondent assaulted the victim and occasioned injuries classified as harm by the medical officer.

ii. That the trial magistrate erred in fact and law by failing to appreciate that the threshold for a *prima facie case* had been met and demonstrated by the appellant as the evidence on record is clearly sufficient on its own for the court to return a guilty verdict in absence of a rebuttal by the respondent in tandem with the holding in the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR at para 22 and in *Republic v Alex Musau Jimmy* [2022] eKLR.

iii. That the learned magistrate erred in law and in fact by disregarding the evidence of PW2, PW4 and PW5 that were uncontroverted and corroborated to prove the case against the respondent.

iv. That the learned trial magistrate erred in law and in fact by failing to appreciate that the evidence provided by PW2, PW4 and PW5 were uncontroverted by the defence and that consequently the accused ought to have been put on his defence.

v. That the learned trial magistrate erred in law and fact by failing to make a finding that the appellant had established a *prima facie case* against the respondent and that the respondent ought to have been put on his defence

vi. That the decision of the learned trial magistrate together with the consequential orders are bad in law and should not be allowed to stand.

6. Reasons wherefore, the appellant sought for orders that:

i. The appeal be allowed.

ii. The impugned ruling of the magistrate court be set aside and the same be substituted with an order of this court that the prosecution did establish a *prima facie case* and consequently proceed to place the respondent on his defence forthwith.

iii. An order of this court for trial of the Criminal Case No e004 of 2022 to proceed before another magistrate.

7. The court directed that the appeal be canvassed by way of written submissions and both parties complied with the said directions.

8. Mr Kihara for the appellant relied on his written submissions dated 01.082023 urging that the evidence on record proved that the respondent ought to have been called upon to rebut the overwhelming evidence tendered by the prosecution. That the same was overwhelming to the extent that even in the absence of the respondent controverting the evidence adduced, the same was enough to return a guilty verdict.

9. It was contended that the said evidence was consistent, cogent, reliable and admissible and clearly demonstrated that the respondent committed the offence as charged. Reliance was thus placed on the case of *Ramanlal Trambaklal Bhatt v Republic* (1957) EA 332 to buttress the fact that the appellant discharged its duty in proving that a *prima facie case* had been established. Further reliance was placed on the cases of *Republic v Karanja Kiria* Criminal Appeal No. 13 of 2004 Nairobi [2009] eKLR and the Court of Appeal decision in Criminal Appeal No. 77 of 2006 where the court stated that 'too detailed analysis of evidence at no case to answer stage is undesirable if the court is going to put the accused on his defence.

10. Additionally, that the question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection. The appellant urged this Honourable Court to allow this appeal, set aside the impugned ruling and replace the same with one placing the respondent on his defence and further, the file be placed before a different magistrate for hearing.

11. The respondent on the other hand, represented by the firm of Ndegwa & Ndegwa Advocates relied on submissions dated 21.08.2023 wherein it was argued that the learned magistrate correctly analysed the evidence tendered before him to arrive at a decision that the evidence was not sufficient to warrant the respondent being placed on his defence. The respondent relied on the case of *Ronald Nyaga Kiura v Republic* (2018) eKLR to buttress the fact that;

> "...a *prima facie case* is established where the evidence tendered by 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".

12. Further, reliance was placed on the case of *Bhat v Republic* (1957) EA. 332 in which the trial court stated that after close of the prosecution's case, the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt but rather the weight of the evidence sufficient enough to put accused on his defence.

13. The respondent urged that the evidence herein was not only contradictory but also inconsistent to enable the respondent be put on his defence. That PW6, the investigation officer could not confirm the injuries that the complainant suffered. It was his case that the shirt which the complainant had on that day was not only clean but also did not have any blood stains. It was contended that the evidence by the prosecution was very weak such that even if the trial court were to put the respondent on his defence, and the respondent chooses to keep quiet, the trial court would not have convicted. This court was urged therefore to dismiss the appeal herein for the same was in want of merit.

14. This being a first appellate court, it is thus expected to review afresh the evidence before the lower court and come up with its own determination. See *Okeno vs republic* (1972) EA 32.

15. Briefly, PW1, Amos Omar Nyabuto testified that on 09.08.2022, he was deployed at Afweni Centre during the election as a Police Officer responsible for security. That there were three stations in Afweni polling centre. He stated that the respondent herein went to the polling centre where the exercise was being conducted and ordered observers and agents out. That the respondent argued that his agents had been chased out of the polling centre. He testified that the man thereafter walked out and the election proceeded without further hitch.

16. It was his evidence that he did not witness the alleged offence herein being committed but only learnt of the same at the station. On cross examination, he stated that he was manning station 2 and that he did not see Ali Ahmed or Selah Mohamed Bule. According to him, he interacted with the respondent on the very day and further learnt of the alleged violence while at the police station. It was his case that he did not witness any incident in the room as there was calmness and that no assault took place in the polling station.

17. PW2, Salah Mohamed Abdi Bule testified that on 09.08.2022 at around 9.30 hrs, he was an agent at Afweni Centre in Afweni Baraki Ward when some commotion took place outside. That stones were being thrown to the building prompting them to close the doors. He stated that when everything settled, the respondent made his way to the room and held him at the collar and started raining blows on his face and his upper body.

18. That the respondent assaulted him and the attempts made by the security officers to separate them was in vain as the respondent was accompanied by a group of over thirty people. That a good Samaritan rescued him prompting him to go report the incident at the police station and further seek for medical attention. He referred to a shirt (PMFI – 2) that allegedly he was wearing when the incident occurred and that the same had blood stains.

19. He stated that the incident lasted for a period of one hour after which calmness was restored. On cross examination, he stated that the stone throwing started from 9.30 am but he did not see the respondent throw stones. That the stone throwers were the respondent's agents. He added that he sustained injuries on the face, neck, chest and shoulders. He proceeded that one of the police officers present at the station was PW1 and that he witnessed the incident. It was his evidence that the respondent went to the polling station twice and that he got assaulted during the first visit.

20. PW3, 107563 PC Salim Mwangolo Kakala testified that on 09.08.2022, he was at Afweni Centre when the voting process started. That he received a call that agents were being assaulted at the back and that the commotions started outside the polling station. It was his case that they solved the issue. He continued to state that there was no commotion inside the centre and that he was the only police officer in the Centre. It was his testimony that he neither knew the respondent nor the complainant and that he did not see the respondent at the polling station. On cross examination, he reiterated that he did not witness any incident of assault in polling station one (1) nor did he see the respondent in the very place.

21. PW4, Arun Abdullahi stated that on 09.08.2022 at 930 a.m., he heard some commotion in stream 1 which was 10 meters apart from the other streams. That upon leaving for stream 1, he found the respondent holding the complainant by his collar. He went further to state that respondent was saying that he did not want to get the Afwah clan and so, upon leaving the complainant, he got hold of him too by the collar thus pushing him on the ground leading to him sustaining an injury on the finger.

22. He stated that he did not see much apart from the fact that he saw the respondent holding the complainant's collar and thereafter hitting him. It was his evidence that voting was stopped for about ten minutes when he saw the injuries on the neck and hand of the complainant. He stated that the police attempted to separate the respondent and the complainant but they were overpowered.

23. On cross examination, he stated that the violence happened in streams one and two and his attempts to rescue the complainant from the wrath of the assailants, resulted to him sustain injuries.

24. PW5, Hassan Rage, the medical officer testified that he examined Salah Mohamed and noticed scanty blood stains in the collar but there were no tears. He continued to state that there were scratches in the neck with little blood stain on shirt and swelling in the left eye with the approximate age of the injuries being two days. The degree of injury was assessed as harm. On cross examination, he stated that the complainant reported at the medical facility on 11.08.2022 and not 09.08. 2022.

25. On further cross examination, he stated that there were no injuries on the face or any other part of the body save for the neck. It was his case that the injuries were caused by nails and blows owing to what the patient stated. On re-examination, he confirmed that the patient went to the facility wherein he treated him and filled the P3 form on 11.08.2023 and that the injuries were inflicted by nails, which is a sharp object.

26. PW6, Ezekiel Talam testified that he was instructed to investigate the matter having picked up the same from PC Cheruiyot who was previously handling the matter. That he took over recorded statements by witnesses, P3 form had already been filled and later preferred charges against the respondent. He stated that he could not confirm whether the complainant had injuries at the time of making the report as he was only handed over the file.

27. It was his evidence that the shirt was clean and that he could not see blood on the same save for some dirt. He further testified that at the time he saw the complainant, there were marks on his neck which were almost healing. On cross examination, he stated that there was no handover inventory. Additionally, that he saw the complainant about 3-4 days later. He confirmed that there was need to take a swab for DNA matching but the same was not done.

28. This court has been asked to reverse the trial court's decision of acquitting the respondent for lack of a primafacie case and instead direct that the respondent be put on his defence.

29. Under Article 50 (2) (a) of *the Constitution*, an accused person is presumed innocent until the contrary is proved. However, in a criminal case, it is the duty of the prosecution to prove their case to the required degree which is beyond reasonable doubt. The *evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus:

> " whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."

30. As to what constitutes the burden of proof beyond reasonable doubt, the court held in the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 as follows;

> " That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

31. It therefore follows that the prosecution had a responsibility to satisfy by way of the evidence adduced so far that a *prima facie case* existed to warrant the respondent being called upon to answer.

32. 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. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 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 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."

33. The Court of Appeal similarly held in *Anthony Njue Njeru v Republic* [2006] eKLR that:

> " Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a *prima facie case* to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie case* is not made out if at the close of the Prosecution case, the case is merely one,
>
> 'Which on full consideration might possibly be thought sufficient to sustain a conviction'
>
> Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a *prima facie case* as settled in *Bhatt's Case*(*supra*), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case."

34. The question therefore is whether the said evidence warranted the respondent to be placed on his defence?.PW1 who had been deployed at the very centre where the offence was allegedly committed testified that did not witness any form of violence and that he learnt about the incident at the police station. That he did not witness any incident in the room as there was calmness and that no assault took place in the polling station.

35. PW2, the complainant on the other hand stated that the respondent rained blows on his face and his upper body. He added that he sustained injuries on the face, neck, chest and shoulders. He proceeded to confirm that indeed one of the police officers present at the station was PW1. It is worrying that PW1 who testified that in as much as he was present at the polling centre, he did not witness any assault and/or any sort of confrontation. That he only learnt of the same at the Police Station.

36. PW3 who was at Afweni Centre during the voting process stated that he received a call that agents were being assaulted at the back and that the commotions started outside the polling station. According to him, there was no commotion inside the centre and that he did not witness any case of assault at the polling station. He further stated that he neither knew the respondent nor the complainant.

37. In the same breadth, he told the court that he did not see the respondent in the polling station. The evidence of PW3 seems to corroborate that of PW1 to the extent that there was no commotion and/or any assault at the polling station and also that neither the complainant nor the respondent were at the said polling station according to PW3.

38. In my view, having noted that streams 1,2 and 3 were reportedly 10 metres apart from each other, it could not have escaped the attention of PW1 and PW3 both security personnel manning the centre. Thus, the only question that begs for an answer is whether the prosecution witnesses were truthful? I say so for the reason that a 10 metre distance would have not been a distance far enough for a party not to see what was happening if at all any incident occurred or were to occur.

39. From the evidence of PW2 the complainant herein, he sustained injuries on the material day. This evidence was further corroborated by the evidence of PW4 and PW5 the medical personnel who filled the P3 form classifying the injuries as harm. I have no doubt that the complainant did sustain injuries on the material day. The critical question however is, who occasioned the injuries. Apart from the complainant PW2 and PW4, P1 and PW3 both police officers manning the polling station, they did not see the respondent assault the complainant.

40. The medical officer testified that the complainant reported at the medical facility on 11.08.2022 and not 09.08. 2022.That the complainant's shirt had blood stains. There were no injuries on the face or any other part of the body save for the neck. He stated that the injuries were caused by nails and blows owing to what the patient stated. The investigating officer did not help the case either as he stated that he could not confirm whether the complainant had injuries at the time of making the report as he was only handed over the file but with no inventory.

41. PW4 on his cross examination said that he rescued the complainant from a crowd of people in company of the respondent. Equally, PW2 the complainant stated that it was the respondent's supporters who threw stones at the agents him included. With these contradictions in place, the issue of identification or recognition on who actually assaulted the complaint is critical hence in this case doubtful. It is possible that the injuries sustained could as well have been occasioned by somebody else given the commotion and the act of throwing stones all over by the supporters of opposing parties.

42. In *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, Nyakundi J. was of the view that:

> " where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence'.
>
> There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed.
>
> An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival.
>
> Defence case is not meant to fill in the gaping gaps in the prosecution case".

43. Whether witnesses were compromised or not, the fact remains that, the evidence of PW1 and PW3 is contradictory in material facts to that of PW2 and PW4. In law, such material contradictions must be held to the benefit of an accused person.

44. From the above evidence, could a court properly directing its mind to the law and the evidence convict if no explanation was offered by the defence? In that regard I find guidance in the case of *Republic v Galbraith* [1981] WLR 1039 where the court expressed itself in the following words:

    (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."

45. It is my humble view that in the circumstances of this case, the prosecution fell short of the threshold on the sufficiency of the evidence to attach culpability at this stage of the trial against the accused. It will not make sense to put the respondent on his defence as a matter of course while fully aware that the prosecution evidence left alone cannot sustain a safe conviction at the end of the day. It is against that backdrop that I affirm the finding of the trial magistrate and thus dismiss the appeal herein in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF APRIL 2024

J.N. ONYIEGO

JUDGE