



ODPP v Adaga (Criminal Case 73 of 2019) [2024] KEHC 6212 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA**

CRIMINAL CASE 73 OF 2019

PJO OTIENO, J

MAY 22, 2024

BETWEEN

ODPP PROSECUTOR

AND

SANFORD ALI ADAGA ACCUSED

RULING

1. The Prosecution called a total of five witnesses before announcing the closure of its case. The summary of the evidence by the five connects not the Accused to the offence.
2. PW2, the widow to the deceased said he was in the house when he received information from one Shaban to the effect that the deceased had been assaulted and killed by the Accused. She went to the scene but did not see anybody hit the deceased using the metal bar that was lying next to him. She said there were many people at the scene but made no reference to the Accused as having been present. She however identified the Accused as a neighbour to the deceased with whom the deceased always quarreled and that the two did not live peacefully.
3. PW2, was the arresting officer in the matter who received the report, visited the scene and found the Accused who had been arrested and surrounded by a crowd of people who alleged the Accused had assaulted the deceased who had died while undergoing treatment. He recovered what was identified to him as the murder weapon and re-arrested the Accused who was then placed in custody at the police station while the body of the deceased was taken to the mortuary.
4. PW3, Dr. Dixon Mchana, attended Court and with the consent of the defence Counsel, produced the autopsy report prepared upon examination of the body, by Dr. Juma Ayombe, who had left employment with St. Mary's Hospital upon retirement. The conclusion of the report was that the death was due to penetrating injury to the skull (head) secondary to assault.
5. For PW4, the evidence was limited to him having attended the post mortem examination in the company of the relatives who identified the body to the Pathologist. He said he was unable to trace the



two witnesses who were thus not called to testify. He, however, with the concurrence of the defence counsel produced the witness statements by the two identifying witnesses. The evidence in the witness statement is limited to the fact that the two identified the body to the Pathologist for purposes of autopsy. They had nothing to connect the Accused with the death.

6. The last witness, No. 78788 PC. John Kulecho, was the Investigating Officer. He gave evidence of having received a complaint from PW1, alleging that the deceased had been killed by the Accused. He told the Court that the Accused had attacked the deceased while at a chang'a den and the disagreement was over payment of the brew the Accused had taken.
7. He recounted having visited the scene; recorded witness statements and took possession of the murder weapon, which he produced as P.Exh. 1. He concluded by saying he was unable to trace all the witnesses from whom he had recorded statements.
8. On cross-examination, he said that he visited the scene the following day at about noon and spoke to four (4) witnesses. That was after the Accused had been arrested the previous day. He then sketch a plan of the scene which showed that the distance between the house of the deceased and that of the Accused was about 20 metres apart.
9. After the prosecution closed its case parties sought to and were directed to file written submissions but as the court prepares this Ruling none was in the court file.
10. At this juncture the Court's mandate and obligation is to determine if a prima facie has been established to merit the Accused being put on his defence. In meeting that obligation, the Court reminds itself that a *prima facie* case is that case that would entitle the Court to enter a conviction even if no evidence was called like where the Accused elects to remain quiet. Put the other way, the prosecution must be established to have led evidence that connects the Accused to the offence in a manner that proves the ingredients of the offence and necessitating the Accused to state his side of the story by way of rebutting the case so established¹.
11. Being a charge for murder, therefore, a prima facie case must be the kind that establishes all the ingredients of the offence under section 203 of the *Penal Code*; the evidence must prove the death of the deceased, that such death was a consequence of unlawful acts or omissions by the Accused and that in so committing such acts or omissions, the Accused was accentuated by malice aforethought². The three ingredients must all be proved *prima facie*. Where a single remains not proved, there is no *prima facie* case and the Accused must get the benefit of that failure and be acquitted.
12. In this matter, while the death has been sufficiently proved, there has not been proved the participation of the Accused in assaulting the deceased.
13. The Court take the view that a diligent investigation and prosecution ought to have availed at least one of the persons said to have been at the scene when PW2 arrived to shed light on what happened and if indeed the Accused had acted in any culpable manner against the deceased. The evidence of one Mr. Shaban, the person PW1 alleged to have informed her about the Accused having assaulted the deceased was all the prosecution needed to avail but was never availed.

¹ In **Ronald Nyaga Kiura -vs- Republic [2018]** the court said:

“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.”

² (content missing)



14. To this Court there being no other evidence connecting the Accused to the assault and therefore to death of the deceased, the prosecution has failed to established the connection between the Accused and the death and therefore no *prima facie* case has been made out. Without a *prima facie* case made out, it would be futile if not unlawfully unjust to place the Accused on his defence to help fill in the gaps left by the Prosecution.
15. It thus follows that the Accused is determined not guilty and is acquitted under Section 306 of the [Criminal Procedure Code](#). Let him be forthwith set free and at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Ms. Olucheli for the Accused

Court Assistant: Polycap

HC. Criminal Case No. 73/2019 - Ruling Page 2 of 2

