Republic v Ekitela (Criminal Case E013 of 2023)
[2024] KEHC 5876 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5876 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL CASE E013 OF 2023

RN NYAKUNDI, J

MAY 22, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ERII EKITELA ..... ACCUSED

RULING

1. 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 were that on the 13th day of May, 2023, at Pokotom village in Turkana West-Sub County within Turkana County murdered Irian Ewoi Ngimare.

2. The accused person pleaded not guilty placing the burden of proof on the prosecution to proof their case beyond reasonable doubt on the following elements:

    a. Death of the deceased

    b. The unlawful cause of the deceased's death

    c. That the death was actuated with malice aforethought

    d. That there is positive identification evidence pointing at the accused person as the perpetrator of the offence

3. In discharging this burden, the prosecution called four witnesses whose evidence can be summarized as follows:

4. PW1 Alimlim Lugera on oath told the court that the deceased was her daughter and the accused was her son-in-law. That on 13th may, 2023 while in church for prayers he received information that her daughter has been hacked to death following a domestic quarrel with the accused. she rushed to the

scene, picked the body and took it to the mortuary as the investigation to trace and apprehend the accused person by the police were commenced.

5. Next was the evidence of PW2 Selina Apoo who testified that she is usually a charcoal dealer and on 13th may, 2023 while at her residence she heard the accused having a conflict with the deceased. The deceased happened to be her younger sister and the geographical difference of their homesteads is only by separation of a fence. It did not take long before receiving second credible information that the quarrel between the accused and the deceased had been escalated to a scale in which her sister suffered fatal injuries. The police came in the morning and collected the body which was escorted to Lodwar Referral Hospital for a post mortem examination.

6. In the same case PW3 Akamu Ekitela was also summoned as a witness when he told this court that on 13th May, 2021 that he had visited the home of the accused seeking a refund of the money borrowed out of the purchased goat from him but not yet fully settled. On arrival PW3 found the accused person quarrelling with his wife about a torch where he was demanding his phone with a torch. The wife left the accused and went to the house to make the bed. She however later came back and another fight ensued and the accused took a pair of shoes and used it to assault the deceased. In retaliation, the deceased took a bucket of Kasuku and threw it at the accused person and full-blown exchanges of punches and fists rend the air. From that fight the wife seemed to have suffered injuries as she started crying immediately. PW3 tried to administer first aid and at the same time informed the neighbors and the church congregation that the deceased unfortunately succumbed to death from the injuries inflicted by the accused person.

7. Last was the testimony of PC Eliakim Njeiha a police officer attached to DCI Kinangop but formerly of Lodwar at Turkana West. In the testimony of the police detective, he recalled having visited the scene of murder on 5th May, 2023 in which the accused and the deceased being man and wife had a scuffle which resulted in her death. In the course of the investigation, PW4 made arrangements for the body to be taken to Turkana Mortuary hospital for a post mortem examination. Thereafter, on appreciating the evidence, he recommended for an accused person to be charged with the offence of murder contrary to section 203 of the *Penal Code*.

8. With the close of the prosecution case, the learned counsel for the accused person and the lead prosecution counsel for the prosecution elected to mane no submissions and invited the court to make a finding on a *prima facie* case or a motion of no case to answer. I have carefully considered the evidence of the prosecution witnesses who have testified alongside the documentary evidence. It appears to me that the sole issue to be solved is whether the prosecution has made out a *prima facie* case against the accused person sufficient to call upon him to enter his defence. As rightly stated in Section 306 of the *CPC* the court is empowered having heard the evidence for the prosecution to evaluate it with a view to make a determination whether the accused person is entitled to a motion of no case to answer or the evidence adduced by the prosecution is sufficient to warrant the accused person to enter his defence.

9. In determining the existence of a *prima facie* case, the persuasive case in *Tongo v C.O.P* (2007) 12 N.W.L.R (pt. 1049)523 the Supreme Court stated as follows:

> " Therefore, when a submission of no *prima facie* is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. If the submission is based on discredited

evidence, such discredit must be apparent on the face of the record. If such is not the case, then the submission is bound to fail."

10. The above clarification was readily appreciated in the case of *R.T. Bhatt v Republic* (1957) EA 332-334 & 335 in defining what constitutes a *prima facie* case at the close of the prosecution case.

> "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 case, the case is merely one which on fully 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."

11. What the law requires at this stage is to determine whether the prosecution had made out a *prima facie* case. It is not to evaluate evidence or consider the credibility of witnesses. For the sake of clarity, a *prima facie* case is not the same as prove which comes later when the court is to make a finding of guilt of the accused. it is evidence on the face it which can demonstrate that the elements of the offence as framed in the charge sheet indicates some sufficiency to prove that the accused ought to answer or give evidence in rebuttal. The reason why commenting on the evidence is restricted is mainly because at this stage of the proceedings is only one side which has made attempts to present evidence in support of their position in the proceedings. It will be more prejudicial if the court was to import a language to the decision which is likely to be prejudicial to the defence case in the final analysis. The court must be as brief as it can and leave the rest for a full hearing on both sides without making a conclusive observation of the facts. To establish a *prima facie* case, even at halftime submissions the prosecution should offer credible evidence in support of each element of the crime as defined in section 203 of the *Penal Code*.

12. The learned authors In *Blackstone's Criminal Practice* 2010 at D15.56 proposed as follows on this dichotomy:

> "(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the court has shown to be of doubtful value.
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> (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases 9such as Shippey (1988) Crim LR 767) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."

13. The evidence contained in the four witnesses and the exhibits together forms the basis in which this court finds existence of a *prima facie* case on the death of the deceased, that her death arose out of a fight with the accused person. It seems to the court that the whole statements by the prosecution witnesses render some appropriate weight in favor of the prosecution of a *prima facie* case to warrant the accused person to be called upon to have an answer in rebuttal. In other words, the accused is made

aware of the provisions of Art 50 on the right to a fair hearing and also the express provisions of section 306 and 307 of the *Penal Code* in electing to state his defence.

SIGNED, DATE AND DELIVERED AT LODWAR THIS 22ND DAY OF MAY 2024.

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R. NYAKUNDI

JUDGE

In the presence of

Mr. Otieno for the State

Appellant