



**Republic v Cheruiyot (Criminal Case E069 of 2021)  
[2024] KEHC 5150 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E069 OF 2021  
RN NYAKUNDI, J  
MAY 16, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ELIUD KIPKOSGEI CHERUIYOT ..... 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 19<sup>th</sup> day of November, 2021 at Kokwobarar trading Centre in Marakwet West Sub- County, within Elgeyo Marakwet County, murdered Julius Kipserem mengich.
2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disapprove his innocence as provided for in Art 50(2)(a) of the *Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused person was represented by Legal Counsel Ms. Kinyua.
3. The prosecution summoned four witnesses to discharge the burden of proof beyond reasonable doubt. Their summary of evidence is as follows:
4. PW1 Catechist Wesley Kibiwott testified to the effect that on 19<sup>th</sup> November, 2021 while he was at his farm to plant tomatoes, he was telephoned by his wife that one Adams was harvesting his maize. He decided to report the matter to the area chief and the police. He also left for the scene and on arrival found out that the alleged maize had been harvested. The police officer heeding the call to visit the scene discovered that the deceased Julius Mengich was on the ground with his head facing down while armed with his riffle. That is when PW1 and the members of the public together with police officers hired a motorcycle to take the victim to the hospital. He was able to identify the murder weapon being an arrow which was used by the accused person to inflict the injuries.



5. PW2 Betty Chebor also told the court that on 19<sup>th</sup> November, 2021 at about 2:00PM he saw PC Mengich seeking assistance seeking assistance. According to PW2 she also heard screams from the accused and being a villager he was able to recognize his voice. At the same time she saw an arrow stuck on the head of PC Mengich. The incident happened on broad day light.
6. PW3 No. 97423 PC David Nzoka who told the court that he is attached to Marakwet West sub-county and on the material day he visited the scene of murder where the police officer was attacked while on duty. He recovered an arrow which was the murder weapon and the accused was arrested following that incident as the victim herein the deceased was escorted to the hospital while the accused was taken to Kapsowar police station for further investigation. PW3 further told this court that he participated in the post mortem examination of the deceased conducted on 29<sup>th</sup> November, 2021 by Dr. Keitany. The Post mortem was produced by consent without calling the maker as there was no dispute on the fact of death.
7. PW4 was Benard Kipkorir Cheserek also a farmer in the area. His evidence was to the effect that on 19<sup>th</sup> November, 2021 he was shelling his beans when he saw police officers and at the same time he told Wesley to come and assist him in preparing the beans. PW4 alluded to a conflict between the police officers but was not aware of its source or reasons for it. He therefore called one Welsey to come and help the police officer as he continued with his duties of bean shelling but that police officer was holding his head. The person who had a scuffle with the police officer is the accused person in the dock.
8. At the close of the prosecution case the court is mandated under Section 306 of CPC to determine whether a prima facie case has been established to warrant the accused being put on his defence

### **The decision**

9. The Criminal Procedure Code under Section 306 provides 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, and in all cases shall require him or his advocate (if any) to state whether is intended to call any witness as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”
10. As guided by the law in relation to the parameters set out in Section 306 of the CPC, it is incumbent for the trial court to bear in mind the following guiding principles. In the case of May v O’Sullivan (1955) 92 CLR 654 the court remarked that:

“When, at the close of the case of the prosecution, a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted. This is really a question of law.”



Moreover the “question whether there is a case to answer, arising as it does at the end of the prosecution’s evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, whether that is to say, there is with respect to every element of the offence some evidence, which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely every element of the offence is established to the satisfaction of the tribunal of fact beyond reasonable doubt.”

Simply stated the test is whether there is evidence capable of proving each of the elements of the offence beyond reasonable doubt.”

11. The Court of Appeal of Eastern Africa reinforced the position in the celebrated case of *R.T. Bhatt v Republic* (1957) EA 332-334 & 335 to define 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.”

12. 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 of 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.
13. Having set out the evidence and the guiding in *R.T. Bhatt v Republic* (Supra) the evidence available led by the prosecution on the offence charged, the prosecution has made out a case against the accused person which requires him to enter a defence.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF MAY 2024.**

In the Presence of

M/s Kinywa Advocate

Accused

.....

**R. NYAKUNDI**

**JUDGE**

