Republic v Kipchirchir (Criminal Case E070 of 2016)
[2024] KEHC 5160 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E070 OF 2016

RN NYAKUNDI, J

MAY 16, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

KIPKETER KIPCHIRCHIR ..... 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 5th October, 2016 at Kameza area Keiyo North Sub-County within Elgeyo Marakwet County, Murdered Sammy Kimutai.

2. The accused person subsequently entered a plea of not guilty and as a result, the prosecution was left with the burden of proving the case beyond reasonable doubt. The lead counsel for the prosecution was Mr. mark Mugun while Mr. Ogongo learned counsel represented the accused person.

The case for the prosecution

3. In consonant with the provisions of section 107 (1), (2), 108 and 109

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   (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

   (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

   108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

4. The entire case facing the accused person involves the following ingredients:

   a. The death of the deceased.

   b. The unlawful cause of the deceased

   c. That the death was actuated by malice aforethought

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

5. It is important to note that the burden of proof rests on the prosecution throughout the entire case and in this regard the court in the case of *Mbugwa Kariuki v The Republic* [1976-80] 1 KLR 1085 spoke as follows:

> " That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defense, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence."

Given the background of the law as cited above, I am primarily concerned with the threshold issue of whether a prima facie case does exist to move these proceedings to decide the issues on the merits after hearing the defence narrative of the charge.

In the first instance, the prosecution adduced the evidence of PW1 Phylis Kimutai. Essentially a witness called to identify the body of the deceased during the post mortem examination.

PW2 Edwin Kandie a driver by occupation and a resident of Elgeyo Marakwet testified that on 5th October, 2016 while at his house he received a telephone call from Kimutai with a message to assist in transporting some firewood from the forest to his home. He was to use the means of a tractor registration No. KAM 168X to undertake that activity. In collecting the firewood PW2 told the court that Saleh Kimutai was accompanied by forest guards whose names he doesn't remember. On arrival at the forest, they were shown the trees to cut the firewood with a power saw and have the firewood loaded to the tractor. There was a problem in navigating the motorable road and PW2 asked the hirer to have the firewood offloaded outside his homestead. Before that could be done PW2 had a puncture near the forest but the owner of the tractor insisted that he drives out of the forest and that is when he was stopped by the forest guards in their institutional vehicle. That was followed by gunshots in which the deceased was fatally injured. According to PW2 there was now a commotion as between his team and the forest guards but also at the same time arrangements were made to take the deceased to the hospital.

PW4 Vincent Kiprop on the other hand told the court that on 5th October, 2016 he was asked to assist to load the firewood cut inside the forest to the tractor which was being driven by PW2. In executing this role, PW4 confirmed that they arrived safely at the forest where they found other forest guards who showed them the kind of trees to be cut for purposes of meeting the firewood needs. The tractor was loaded with the firewood, drove outside the forest leaving the others to cut the firewood for a second lot. In the course of all those movements the tractor had a tyre burst which required to be repaired and, on the way, they were stopped by some forest guards complaining that they had no permission to enter into the forest reserve to cut any of the trees. The deceased came from behind being the owner of

the tractor, took control of the machine from the original driver and started to drive backwards to the position of the GK vehicle being occupied by the forest guards. In circumstances not very clear from PW4, a struggle between the team desirous of fetching firewood from the forest and the team led by the forest guards as to the legality of cutting the forest trees which were loaded into the tractor. What followed were gun shots which eventually resulted in the death of the deceased, Sammy Kimutai

The decision

6. The question I am called to determine at this stage is whether the adduced evidence by the prosecution so far warrants the accused person to be put on his defence. Does the accused person have a case to answer? The measure is for a prima facie case to be established.

7. 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."

8. 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."

9. In determining whether the prosecution has established a prima facie case, I am mindful of the fact that I ought not make definitive findings at this stage. In *Festo Wandera Mukando v Republic* [1980] KLR 103, the court held:

> "...we draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, and an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of "no case" to answer is rejected, the court should say no more than that it is. It is otherwise where

the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned."

10. 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.

11. Having gone through the testimonies of the prosecution witnesses and without digging deep into them, I am persuaded that the prosecution has established a *prima facie* case against the accused person to warrant him to be placed on his defence. Kipketer Kipchirchir is accordingly placed on his defence.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 16TH DAY OF MAY 2024.

In the Presence of:-

Mr. Kebenei Advocate

Mr. Mugun for the State

Accused

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R. NYAKUNDI

JUDGE