



Republic v Too (Criminal Case E005 of 2021) [2024] KEHC 4539 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E005 OF 2021
RN NYAKUNDI, J
MAY 3, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

WILFRED KIBICHIY TOO RESPONDENT

RULING

1. The accused person, faces a charge of murder contrary to section 203 of the penal code. The brief facts of the case are that Wilfred Kibichiy Too on 12th of January 2021 at Kakong’u area, Kainuk division within Turkana south sub-county murdered Susan Nasiru Emure.
2. The accused person pleaded not guilty to the offence and particulars herein, necessitating the prosecution to summon 7 witnesses to prove the offence of murder beyond reasonable doubt.

What Are The Key Ingredients?

3. In essence, the prosecution must prove;
 1. The death of the deceased named in the charge sheet
 2. That her death was unlawfully caused
 3. That in causing death, the accused was motivated with malice aforethought.
 4. The accused person before court is the one culpable for the offence.
4. In our legal system, at the close of the prosecution case, section 306(1) and (2) of CPC, provides as follows,
 1. When the evidence of the witnesses of the prosecution has been concluded, the court if it considers that there is no evidence that the accused person or any one of several accused



committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defense may desire to submit, record a finding of not guilty.

2. When evidence of the witnesses of the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or several of the accused person committed the offence, shall inform each such accused person of his right to address court either personally or by his advocate(if any)to give evidence on his own behalf, or to make an unsworn statement and to call his witnesses in his defense and in all cases shall require him or his advocate(if any)to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
5. The brief summary of the case from the 7 witnesses, is consistent with the statement by the investigating officer which contained the following features;

That 12th day January 2021, at Lokichar township, the deceased Susan Nasiru Emuria, was murdered at Kakong'u trading Centre. The deceased apparently, operated a glorious bar within the trading Centre where customers will converge for a social evening. On the material day, the deceased came from Kaptir Secondary School where she also teaches learners and on arrival, at a bar, she found customers on a drinking spree. The persons in the bar, included PW1 Ekidor acknowledged as one of the workers of the deceased. In her testimony, PW1 gave chronology of events as they unfolded on the fateful day of 12th December 2021. The highlights of it being the arrival of the accused person, who joined other customers and ordered for alcoholic drinks. The deceased also came and sat at the bar at around 10 pm. It emerged that a scuffle ensued as between the customers necessitating the deceased to push out one by the name TOO out of the compound. This is because, TOO had become unruly causing disturbance within the bar as against other customers. The conflict escalated to a level where Too Left the bar for the police post premises to harm himself with a firearm. On his return, gunshots were heard and in PW1 testimony, the victim of the shooting was the deceased and owner of glorious bar.

6. The next witness to adduce evidence on behalf of the prosecution was PW2 Nelly Amoit. This witness identify herself as a niece to the deceased and whom they lived together at Kakong'u Centre. In her narration of the chain of events, PW2 stated that the accused clearly known to her as a police officer used to visit the deceased in their residence. PW2 further recalled that on 12th January 2021, when she came back from school, she witnessed a fight between the accused, the deceased and Naomi apparently she is also her aunt. According to PW2, she happened to witness Naomi picking stones and targeting one Too the accused in this case against his head this resulted in physical injuries to the said accused. This fight occasioned the deceased to order TOO out of the premises as she retreated to her house. In PW2's testimony, that was not the end of the conflict as the accused came back armed with a rifle. The people around the premises cautioned the deceased that the accused person was armed with a rifle and it was necessary to take safety measures. That made her to close the door to her house but did not stop the accused to gain entry to the room where they were while carrying the gun. In the testimony of PW2 that when the accused pulled the deceased by her hand using the same rifle he shot at her on the head. That was followed with streams of blood from the deceased body parts.
7. PW3 CPL Domiano Lotian in the same vein told the court that on 12th February 2021, he left the camp to go and buy some foodstuffs. On his way back to the police post he met the accused who was in the bar operated by the deceased taking alcohol. In a little while PW3 concluded his conversation with the accused, living for his residence to take a nap. It did not take long, before the accused's wife went to his house conveying the message that her husband has been injured on the head. As PW3 was



internalizing the information, he saw the accused person in a hurry armed with a G3 rifle and at the spur of the moment, gunshot was emanating from the bar. The creating disturbance of the accused and the gunshots demanded that persons around the scene seek for safety of their lives. The mean time according to PW3 the head of Anti-Stock-Theft unit and other police officers disarmed the accused person but not after he had shot at the deceased.

8. The prosecution in pursuit to discharge the burden of proof, also sought the evidence of PW4 PC Moses Wafula. In brief, pw4 told the court that on 12th January 2021, he left the police camp for glorious bar owned by the deceased. Thereafter PW4 was joined by the accused and one by the name Cheby sharing drinks in that social moments. They were also joined by the deceased and sergeant Amalema continuing with the same activity of enjoying their alcoholic drinks at glorious bar. According to pw4, it did not take long for the accused and the deceased started quarrelling on grounds that the accused was exposing the deceased to the rest of the world that he had sexual relationship with her. That was not the end of the heated conversation as the accused ordered for drinks worth 550 and the deceased demanded to be paid to settle the bill. In addition, PW4 stated that it appeared the accused did not have the money to settle the bill he made a request for him to settle on his behalf which he did with civility but the accused later never refunded the debt. In the same reflection of events, pw4 testified that on or about 1pm, he received information from Cpl. Lotia that the deceased as been shot dead by the accused. As police officers of the area where the murdered had taken place, they all rushed to the deceased house, opened it only to confirm her body lying in the bedroom with fatal injuries on the arm and head.
9. PW5 Chief Inspector Alfred Mbalani a forensic ballistic expert testified on the following exhibit marked as;
 - a) One G3rifle S/no/KP-006622 marked Exhibit (A1)
 - b) One magazine marked Exhibit (B1)
 - C) Ten rounds of ammunition marked exhibit (C1-C10)
 - d) Three spent cartridge cases marked Exhibit (D1-D3)
 - e) Two bullets marked Exhibit. (E1-E2)
10. On examination of the exhibits in the ballistic laboratory, pw5 arrived at the following findings;

Comparative microscopic examination of exhibits IPOA (A1-A4) in conjunction with each other revealed sufficient matching ejector, firing pin and breech face markings which enabled me to form the opinion that they were all fired in one gun.

Exhibit (A1) is a g3 rifle S/no.006622 designed to be chambered with caliber 7.62*51mm ammunition such as exhibits (C1-C10). It is in good general condition and complete in all its components parts including its 20-round detachable box magazine marked exhibit (B1). It is capable of being fired as it was successfully test fired using three rounds of ammunition picked at random from the lot of exhibits (C1-C10).

Exhibit(C1-C10) are ten rounds in caliber 7.62*51mm.Each one of them is live as three rounds were picked at random and successfully test fired in exhibit(A1). The test cartridge cases and test bullets were recovered and marked (TC1-TC3) and (TB1-TB3) and retained for comparison purposes.



From the above examination, I formed the pinion that exhibit A (1) and (C1-C10) are capable of being fired and that they are firearm and ammunition respectively as defined under the firearms' Act, Chapter 114, Laws of Kenya.

Exhibit (D1-D3) are three fired cartridge cases. Each one of them is formerly a component part of a round of ammunition in caliber 7.62*51mm.

Exhibit (E1-E2) are two fired bullets. Exhibit (e1) weighs 8.54grams while exhibit (E2) weighs 7.65 grams. Each is formerly a component part of a round of ammunition in caliber 7.62*51mm. The bullets are damaged as a result of hitting a hard surface thus have lost ballistic forensic data.

11. Further comparative microscopic examination of the exhibits IPOA(A1-A4) in conjunction with the test cartridge cases fired in the G3 rifle exhibit(A) and exhibit(D1-D3) submitted by DCI Turkana South, our laboratory reference number 285/2021 revealed sufficient matching ejector, breech face, firing pin indentation markings which enabled me form the following opinions.
 1. That the exhibits IPOA (A1-A4) and exhibits (D1-D3) were fired in the same firearm.
 2. That the exhibits IPOA (A1-A4) and exhibits (D1-D3) were fired in the G3rifle S/NO.006622 marked exhibit (A1).
12. In closing the evidence for the prosecution, it was the of inspector Meshack Ombongi who testified as PW7 to walk the court through the chain of events from the investigations on the murder of the deceased which led him to conclude that the crime falls within the scope of section of 203 of the penal code. His evidence involved visiting the scene of the homicide, recording witness statements who have since testified in this trial, recovery of exhibits i.e. arms movement register, documenting the scene by way of photographic impressions which were admitted in evidence as exhibit 11, 12 a and b this is the evidence clustered together for this court to consider as to whether it meets the threshold of prima facie case. If the prosecution fails to establish a prima facie case, it will be reasonably probable to acquit the accused person without calling him to state his defense.

Dertermination

The Law

13. There are two perspectives to be answered by the trial court at the close of the prosecution case as mandated under section 306 of the CPC. First, is the issue on a motion of a prima facie case to be ruled in favor or against the burden of proof bearer in criminal cases being the state. Second is the motion for acquittal test based on the legal sufficiency of the prosecution's evidence to sustain a verdict. That is it asks the question whether a reasonable independent tribunal or a reasonable judge for that matter tasked with the duties of adjudication in Article 50 (1) of *the constitution* crediting the prosecution's testimony and drawing all rational inferences in the prosecution's favor could find every element of the charge proved beyond a reasonable doubt. It is trite that the reviewing trial court considers only the legal question whether after viewing the evidence in the light most favorable to the prosecution any tribunal or session judge has a trier of facts could have found that the essential elements of the crime exist beyond reasonable doubt. Indeed in this circumstances that is the threshold I will test the prosecution case to establish whether the evidence is sufficient for their case to proceed to trial with the accused fully in participation with a legitimate expectation to offer his defence.
14. A combined reading of section 107(1),108 and 109 of the *evidence Act* vests the standard and burden of proof in criminal cases on the state which is actually linked to the presumption of innocence in



Article 50(2) (a) of *the constitution*. The extent of that burden of proof is that of beyond reasonable doubt. In distilling the issues, under section 306 of CPC key principles have been articulated over time by the superior courts from within and outside this jurisdiction. The comparative case law though of persuasive nature they lay down the law as it is in our legal system without any contradiction to the decisions developed locally.

15. In *R. v Gaibraith* 73 Cr.pp. R 12A CA, the earlier authorities were reviewed and guidance given as to the proper approach.
 1. If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty –the judge will stop the case.
 2. The difficult arises where there is some evidence but it is of tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution’s evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on 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 witness’s reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the fact there is evidence on which the 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’s(per lord lane C.J at p. 127).The lord chief justice then observed that borderline case could be left to the discretion of the judge.
16. These are the same principles illuminated in the case of *Ramanlal Trambaklal Bhatt V Republic* (1957) EA 332 as follows: -
 - i. “Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be taught sufficient to sustain conviction. This is perilously near suggesting that the court could not be prepared to convict if no defense is made, but rather hopes the defense will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is evidence irrespective of its credibility or weight sufficient to put the accused on his defense”
 - ii. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence...it may not be easy to define what is meant by 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 defense”
 - iii. (Emphasis added)
17. Given the background evidential material from the prosecution, in the domain of the elements of a prima facie case which is strong enough to discharge the burden of proof requiring the accused person to rebut it by raising a reasonable doubt an order is hereby made to call upon the defense to offer any evidence or exercise his rights under Article 50 (2) (c) (i) (k) (l) of *the constitution* as read with section 306(3) and 307 of the criminal procedure code.

SIGNED DATED AND DELIVERED THIS 3RD DAY OF MAY, 2024

R. NYAKUNDI

JUDGE



In the presence of;

Mr. Ondabu advocate for the accused

Mr Kakoi Lead counsel for the state

Accused present in person

