Republic v Keino (Criminal Case E008 of 2016)
[2024] KEHC 7164 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E008 OF 2016

RN NYAKUNDI, J

JUNE 19, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ERICK TANUI KEINO ..... ACCUSED

RULING

1. The accused person 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 are that on the 3rd January, 2016 at Mokoywa village, Kapkessum Sub-Location in Keiyo North Sub-County within Elgeyo Marakwet County, murdered Beatrice Cherop Tanui

2. The accused persons pleaded not guilty to the offence as stipulated under section 203 of the *Penal Code*. The lead prosecution counsel in these proceedings was Mr. Mark Mugun for the state whereas the Accused person was under the retainer of Learned counsel Mr. Oyaro.

3. The prosecution called 3 witnesses who gave evidence to establish the ingredients of the offence of murder

Prosecution's Case summary

4. PW1 Mercy Kimaiyo on oath gave evidence that on 3rd January, 2016 at around 6:30PM while at home, the deceased went to her house seeking for a portion of flour and vegetables. On her way out she fell down while also carrying a baby. PW1 stepped out to go and assist and rescue her form the ground as she appeared intoxicated, she decided to escort her to her house. It did not take long before again she fell down for the third time. The following day PW1 told the court that she received the sad news that the deceased had passed away.

5. The second witness summoned by the prosecution was David Keino who apparently works as a mechanic with Mololine. He narrated the events to the effect that on 3rd January, 2015, he woke up at around 11:00AM when he came into contact with the body of the deceased on the roadside, a short distance from his house. That is when he decided to inform the parents, thereafter the clan elder and finally his own brother about the incident.

6. The third witness in this respect was Robert Kutto who also doubles up as a village elder of the area. It was the testimony of PW3 that on 3rd January, 2016 at around 10:00PM he was asleep in his house when he was woken up by the brother to the accused and explained on the issues to do with the deceased, who left behind a young child. According to PW3, he did not make much out of the information but the following day he was informed that the deceased's body had been recovered in a nearby farm. The body was later to be taken out of that scene to a destination not explained not explained by any of the prosecution witnesses. That is th extent of the prosecution case.

Analysis and determination.

7. The question for this court to answer is whether under Section 306 of the *Criminal Procedure Code*, the prosecution has discharged the burden of proof to meet the threshold of a *prima facie* case for the accused person to be place on his defence.

8. First and foremost, Article 50(2)(a) states as follows:

> " Every accused person has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved."

9. The *prima facie* obligation is vested with the prosecution. The success or failure of it depends wholly on the evidence presented to prove existence or non-existence of a fact or facts in issue as derived in Section 107(1), 108 and 109 of the *Evidence Act*. The term *Prima facie* is note defined under Section 306 of the *Criminal Procedure Code* but the concept appears both in criminal and civil law. It is therefore a concept used in the law both as an adjective and as an adverb. There is a close knitted correlation between the term *prima facie* as commonly used and *prima facie* evidence. In so far as the definition is concerned, as deducible in Sectio 306 of the *CPC*, the use of *prima facie case* means the prosecution having presented enough evidence to proof the elements of the offence in question. That the prosecution is entitled to prevail in its case against the accused person. Speaking plainly, there are two senses in which courts use the concept of *prima facie*. The first in the sense of the prosecution producing sufficient evidence to render a reasonable conclusion in favour of the allegation asserted in the indictment or the charge sheet. That this what gives the trial court the power to exercise discretion to allows the criminal case to proceed to the next stage which is the defence offering an explanation or an answer to the charge.

10. In the second sense of the concept however, courts use *prima facie* case to mean not only that the prosecution evidence will reasonably allow an independent court or tribunal properly constituted to conclude that the evidence compels the accused [person to produce evidence to rebut it. However, in the event the accused person elects to keep silent or offers no evidence in rebuttal, the blend of that sufficient evidence by the prosecution, will satisfy the court to find the accused guilty and convict him as per law established. The accused person in a *prima facie* case is not required as a matter of the Constitution, PW or the law to offer evidence in reply. This is what Art 50(2)(f) says: that the accused has a right to remain silent and not to testify during the proceedings and he has also a right in Art5(2)(i), a right to refuse to give self-incriminating evidence. If he elects any of these options, provided under out *Constitution*, the accused takes a risk of an adverse verdict if he fails to do so. It is trite that when the

prosecution has made a *prima facie* case in criminal proceedings, the burden of evidence then shifts to the accused person. However, there is one critical element in this realm of law. The necessity of offering evidence by the accused person to offset the prosecution's *prima facie* case, in no way does it shift the burden of proof which continues to rest on the prosecution at all material times as stipulated in Art 50(2)(a), the accused is presumed innocent until the contrary is proved. I presume that is what the drafters of the *Constitution* had in mind when the rights centred around Art 50(2)(a),(j) and (i) of the same *constitution*.

11. In *Republic v Abdi Ibrahim Owl* [2013] eKLR a *prima facie* case was defined as follows: -

> " *Prima facie*" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "*Prima facie case*" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:
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> "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, the case is merely one "which on full 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...It is may not be easy to define what is meant by a "*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 defence."

12. Similarly, in *Ronald Nyaga Kiura v Republic* [2018] eKLR wherein paragraph 22 it is stated as follows:

> " It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that *prima facie* has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. 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. This is well illustrated in the cited Court of Appeal case of Ramanlal Bhat v Republic [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

13. At the close of the prosecution case, the dicta in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR for the case of murder, the republic is supposed to prove each of the following ingredients beyond reasonable doubt:

    i. The fact of death

    ii. The fact that the deceased's death was caused by an unlawful act or omission.

iii. That the accused committed the unlawful act which caused the death of the deceased; and

iv. That the accused had malice aforethought.

14. This was a case which one can describe as purely based on circumstantial evidence as stated in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

15. In the instant case, the defence counsel moved a motion to dismiss any purported *prima facie* case. In law, the motion of no case to answer tests the legal sufficiency of the prosecution evidence to sustain a verdict for instance in this case, would be on whether the elements of murder have been proved beyond reasonable doubt. At a *prima facie* stage, the court asks the question whether a reasonable tribunal or judge in a bench trial crediting the prosecution testimony and drawing all rational inference in the prosecution's favour could find every element of the offence of murder proved beyond reasonable doubt. The court has to test the sufficiency of the evidence by reviewing it and this is essentially to address the issue whether the prosecution's case is that which has met the threshold of a *prima facie* case or is one which is so lacking that it should not be allowed to proceed to the defence stage the requires proof of guilty beyond reasonable doubt. As a consequence, the constitutionally required standard is founded under the right of presumption of innocence until the contrary is proved. The due process clauses in Art 50 requires that each element of a crime be proved beyond reasonable doubt. It is a requirement of the law for the court not to reserve a ruling of a *prima facie* case at the close of the prosecution case. The judge must make a judicial determination of the legal sufficiency of the prosecution's case before asking the accused to put in a defence.

16. In the case of *R v Galbraith* [1981] 1 WLR 1039, the court laid down the test which must apply in answering the issues around prima facie case and a submission of no case to answer thus: -

> " The difficulty (for the court) arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness, or because it is inconsistent with other evidence –
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> a. Where the judge comes to the conclusion that the prosecution's evidence taken at its height, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
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> b. Where however the prosecution evidence is such that its strengths or weaknesses depend on the view to be taken of a witness' reliability, or other matters which are generally within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly

> come to the conclusion that the defendant is guilty, the then judges should allow the matter to be tried by the jury but for our case, is for the case to proceed further to the defence to offer evidence in rebuttal or elect to keep quiet. (emphasis mine)."

17. In the analysis of the evidence, the has been no evidence offered by the prosecution to prove essential ingredients of the offence of murder as defined in the case of *Anthony Ndegwa Ngari V Republic* (Supra). The evidence is so discredited both in examination in chief and at cross examination and is therefore manifestly unreliable that this court or other reasonable court could safely convict on it. In the instant case, although the witness talked of the death of the deceased, there is no further evidence on the nature of the injuries sustained and if they were, whether they were unlawfully caused by the accused person. The manifestation of malice aforethought was also never proved to bring the case within the threshold outlined in the law to call upon th accused to give his defence in this matter. If this court by any chance decides in favour of the prosecution, on a *prima facie* case, in the event the accused chooses to remain silent, this court would not have evidence sufficient enough to hold him responsible or culpable for the unlawful act of murder against the deceased.

18. I therefore find that no *prima facie* case has been made out requiring the accused to be put on his defence. I accordingly find the accused not guilty and thereby acquit him under Section 306 of the *Criminal Procedure Code* for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He should be set free unless and otherwise lawfully held.

DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JUNE, 2024

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R. NYAKUNDI

JUDGE