Republic v Khalumi & another (Criminal Case E002 of 2024)
[2024] KEHC 7163 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E002 OF 2024

RN NYAKUNDI, J

JUNE 19, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

PETER USHURU KHALUMI ..... 1ST ACCUSED

DAVID EKHAI LOKERE ..... 2ND ACCUSED

RULING

Coram: Before Justice R. Nyakundi

Mr. Mark Mugun for the state

1. The accused persons were 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 31st day of December, 2023 at Kimumu village in Moiben Sub-County within Uasin Gishu County, in the Republic of Kenya murdered Edward Kiplagat Chemweno Alias Benjamin Kiplagat

2. The accused persons each 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 persons were under the retainer of Learned counsel Mr. Sonkule for the 1st accused person and Mr. Mathai for the 2nd accused.

3. The prosecution called 9 witnesses who gave evidence to establish the ingredients of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. In addition, the following physical and documentary evidence was presented before this court to buttress the oral testimony of the eye witnesses and circumstantial evidence. This was all aimed at to discharge the burden of proof beyond reasonable doubt.

Analysis and determination.

4. 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.

5. 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."

6. 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.

7. 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 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*.

8. 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] EA 332 at 334 and 335, the court stated as follows:-

> " 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."

9. 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."

10. 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.

11. 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: -

> "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.'"

12. In the instant case, the defence never filed submissions for a motion of no case to answer or to have the prima facie case dismissed. 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 Constitution 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.

13. 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 –
>
> 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.
>
> 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)."

14. In the analysis of the evidence, I bear in mind that at halftime submissions, the court is not required to go into the merits of the testimonies offered by the witness for the prosecution. It must also not make any findings likely to prejudice the defence case. The evidence offered by the prosecution has to prove essential ingredients of the offence of murder as defined in the case of *Anthony Ndegwa Ngari v Republic* (*supra*). If 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 not safely convict on it, a motion of no case to answer carries the day. In the case under consideration, there is no dispute as tot the death of the deceased following to a post mortem conducted on 4th January, 2024. The post mortem report is produced as exhibit 4 also alludes to multiple injuries suffered by the deceased which subsequently in the opinion of the pathologist the cause of death of the deceased was Hypovolaemic shock due to excessive bleeding into the chest cavity due to penetrated stab wound. There is also a forensic imaging report dated 8th January, 2024 which has a bearing to some of the ingredients the prosecution is tasked by law to prove beyond reasonable doubt against the accused persons.

15. I therefore find that a prima facie case has been made out requiring the accused persons to be put on their defence in terms of section 306 as read with section 307 of the *Criminal Procedure Code*.

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

R. NYAKUNDI

JUDGE