



**Republic v Kiplimo (Criminal Case E023 of 2018)
[2024] KEHC 7212 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E023 OF 2018
RN NYAKUNDI, J
JUNE 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

STANLEY KIPLIMO 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 20th day of February, 2018 at Biretwo trading centre, Chepsigot sub location, Epke location within Elgeyo Marakwet County, the accused murdered Joseph Kipkemboi Alias Cheptugen.
2. The accused person 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. Oduor.
3. The prosecution called 7 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*.

Brief summary for the Prosecution case.

4. The first witness to take the stand was PW1 Alex Kosgei who testified that on 20th February, 2019, at around 2:30PM he was seated with others outside his hotel and one Joseph Kemboi who happened to be his uncle, It was at that moment PW1 recalled that a quarrel arose between Joseph Kipkemboi now deceased and Stanley Kiplimo the accused person disputing over a tree. The subject cause of the quarrel being the tree which the deceased told the accused that he had cut his tree and this intensely angered the accused who apparently is also a son to the deceased. In a short while, the deceased stepped out of the scene but came back while armed with a stone which he used to hit the accused at the back as a revenge for cutting the trees into pieces. He was unhappy that the accused was destroying the trees



- which caters for his source of timber. That is when the accused reiterated and cut the deceased with a power saw that he was using to cut the trees to prepare timber. This power saw used by the accused inflicted injuries to neck, right hand and elbow. According to PW1 by the time the deceased was rushed to the hospital, he had suffered heavy bleeding and eventually succumbing to death.
5. Further in the quest by the prosecution to prove the ingredients of the offence PW2 Shadrack Kiprop told the court that on 9th March, 2018 he was called to Iten County Referral Hospital to witness the post mortem that was conducted upon the deceased who also happens to be his father.
 6. Next in this discourse was PW3 John Kemboi Simiyu who told the court that on 20th February 2018, while at home, the accused went to his house to borrow a power saw which he readily handed over but accompanied him at the same time to Biretwo centre where the activity of cutting trees was to take place. He however left after a short while for his home. In the testimony of PW3 it was while on his way he heard some screams from the direction of the centre and on arrival he met the brother to the accused who handed him over the power saw for safe custody. After some time PW3 heard that the deceased died from the injuries he had sustained from the power saw which was in possession of the accused and did use it to inflict the injuries which became the cause of the death of the deceased.
 7. Next was PW4 Daniel Kosgei who also told the court that on 9th March, 2018 he was part of the family members invited to attend the post mortem examination of the deceased body who had suffered cut wounds following an attack by the accused person using a power saw.
 8. Next witness was PW5 Dr. Andrew Kosgei, a medical doctor attached to Iten referral Hospital who performed the post mortem examination on 9th March, 2018 on the body of the deceased. On further examination, PW5 prepared the post mortem report dated the same date which showed the deceased having suffered multiple injuries to the sides of the abdomen both upper and lower limbs, some fractures, injuries to the digestive system. As a result of the examination PW5 formed the opinion that the cause of death was heart failure, lung failure and renal failure. He produced the post mortem report as exhibit 2 to confirm the death of the deceased and the nature of the injuries sustained.
 9. The last witness was PW7, Kenneth Kemboi who in his testimony told the court that the accused happened to be his brother whereas the deceased was his biological father. He recalled the events of 20th February, 2019 while at his place of work loading sand, he heard some noise and on responding to the scene at Biretwo centre he met the accused with a power saw which he handed to him without any resistance. He was later to hand over the power saw to the owner without any knowledge that it had been used to inflict serious injuries to his father now the deceased in this case. PW 7 when confronted or shown the power saw which was handed over to him by the accused, he did positively identify it. This power saw became the exhibit and the murder weapon in so far as the prosecution case is concerned.

Analysis and determination.

10. 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 placed on his defence.
11. 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.”
12. 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 not 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 Section 306 of the CPC, the use of *prima facie* case means the prosecution having presented enough evidence to prove 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 allow the criminal case to proceed to the next stage which is the defence offering an explanation or an answer to the charge.

13. 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 Art 5(2)(i), a right to refuse to give self-incriminating evidence. If he elects any of these options, provided under our 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.

14. In Republic vs. 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:

“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.”

15. Similarly, in *Ronald Nyaga Kiura vs. 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 -VS- 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.”

16. 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.

17. 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.’”

18. 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 of the *Constitution* 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.

19. In the case of *R vs. 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).”

20. In the analysis of the evidence, there 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 tendered both in examination in chief and at cross examination is therefore manifestly reliable that this court or other reasonable court could safely convict on it if no evidence is forthcoming from the defence. How does the court make a finding on a prima facie case. It is to look at the proofs of evidence attached to the seven witnesses and the information as drafted by the prosecution in totality as against the accused person. In this context, I have reviewed pieces of evidence and statements from the seven witnesses and perhaps whether there are any serious criminal defences from the accused person challenging the evidence by the prosecution to a threshold level of scintilla of evidence. It is trite that suspicion however well placed does not amount to a prima facie case. In my considered view the evidence made available points to and attaches some nexus to all the ingredients of the offence alleged against the accused person.

21. I therefore find that a prima facie case has been made out requiring the accused to be put on his defence under section 306 as read with section 307 of the Penal Code

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

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R. NYAKUNDI

JUDGE

