Republic v Jaoko (Criminal Case 31 of 2019) [2024] KEHC 7190 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7190 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE 31 OF 2019

RE ABURILI, J

JUNE 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

DANIEL YONA JAOKO ..... ACCUSED

RULING

1. The accused person herein Daniel Yona Jaoko is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. Particulars of the offence are as per the information dated 26th August 2019 that on the 17th day of August, 2019, at around 0500hrs at Poly View estate Shauri Moyo location, Kisumu Central Sub-county within Kisumu County, he murdered Peter Otieno Agola.

3. The accused denied committing the offence and the prosecution called Nine (9) witnesses who have testified in support of its case.

4. The question is whether a *prima facie* case has been established to warrant the accused to be placed on his defence.

5. The defence counsel, Mr. Nyamweya submitted that it is not in dispute that the accused shot the deceased using a ceska pistol and that the accused never knew the victim and that the victim died as a result of the shooting.

6. Counsel submitted that only 2 witnesses saw what transpired, and that these witnesses were the wife and son of the deceased, whose evidence, counsel questioned whether it captured the events as they unfolded on the ground.

7. Counsel submitted that from the evidence on record, the accused never intended to kill the deceased otherwise he would have shot him at the residence where the Motor Vehicle was parked and escaped in the Motor Vehicle.

8. It was submitted that the accused was running away from the dangerous crowd which had charged at him armed with crude weapons and that he only shot in self defence from a distance of about 100 metres where he had run to escape from the mob and 1.5m between him and the deceased.

9. That the accused's conduct after the incident, where he voluntarily surrendered to the police showed that he had no intention of killing anyone.

10. That the filling of ammunition on his way to the police was in apprehension of the danger he was facing.

11. That he was acquitted of the offence of possessing a firearm which was unlicensed meaning he had no ulterior motive.

12. That the accused even sought to plea bargain because he did not intend to kill hence the charge of murder has not been proved against him beyond reasonable doubt.

13. I have considered the evidence adduced by the prosecution witnesses and submissions by the defence counsel of self defence.

14. The burden of proof lies on the prosecution at all times throughout the trial to prove its case against the accused person. The standard of proof in criminal cases is that of beyond reasonable doubt. However, at this stage, the court cannot determine the question of whether the prosecution has proved its case beyond reasonable doubt, but to establish a *prima facie* case.

15. 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:
>
> > "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."

16. The Court of Appeal similarly held in *Anthony Njue Njeru v Republic* [2006] eKLR that:

> " Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a *Prima facie* Case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle

of law that, the *onus* is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if at the close of the Prosecution case, the case is merely one, 'Which on full consideration might possibly be thought sufficient to sustain a conviction'

Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a *Prima facie* Case as settled in *Bhatt's Case*(supra), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case."

17. The question that I must deal with and answer at this stage is therefore, whether based on the evidence before this Court, the Court after properly directing its mind to the law and the evidence may, as opposed to will, convict if the accused chose to give no evidence. It was therefore held 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 a *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."

18. The *Oxford Companion of Law at pg 907* defines "*prima facie*" in the following terms:

> " A case which is sufficient to all an answer while *prima facie* evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive."

19. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not farfetched and the reasons for not doing so are obvious. As was appreciated by Trevelyan and Chesoni, JJ in *Festo Wandera Mukando v The Republic* [1980] KLR 103:

> " ...we once more 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, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of "no case" 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."

20. In his submissions on no case to answer, the defence counsel has submitted that his client shot the deceased in self defence. That defence can only be considered if the accused is placed on his defence to raise that defence at the hearing. To find otherwise would be premature.

21. A *prima facie* case is not necessarily a finding of guilt. It is giving the accused person at this stage the opportunity to exercise his rights under the *Constitution* to adduce and challenge evidence adduced by the prosecution. There are many elements of the offence of murder and all those elements must be proved beyond reasonable doubt. At this stage, before giving the accused an opportunity to adduce and

challenge that evidence, it will not be possible to determine that he acted in self defence as submissions made by counsel does not amount to evidence.

22. The accused remains innocent until proven guilty and he can opt to remain silent for the court to decide on the basis of the evidence adduced on record.

23. Having considered all the evidence on record and submissions by counsel for the accused, I find that a *prima facie* case has been established to warrant the accused to be placed on his defence.

24. The provisions of Section 306(2) of the *Criminal Procedure Code* as read with Article 50(2) (i) (k) (l) of the *Constitution* are hereby explained to the accused person in the presence of his advocate.

25. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF JUNE, 2024

R. E. ABURILI

JUDGE