Republic v Bargoiyet & 3 others (Criminal Case E038 of 2019)
[2024] KEHC 9090 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E038 OF 2019

RN NYAKUNDI, J

JULY 22, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JORAM BARGOIYET ..... 1ST ACCUSED

WILSON BETT ..... 2ND ACCUSED

NICHOLAS MUTAI ..... 3RD ACCUSED

FREDRICK KIPKOGEI ..... 4TH ACCUSED

RULING

Representations:

Mr. Mark Mugun for ODPP

Mr. Oduor Advocate

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 were that 22nd May, 2019 at Ziwa Centre within Uasin Gishu County, the accused persons murdered Fred Kemboi Tanui.

2. The accused persons in this case were arraigned before this court, pleaded not guilty placing the prosecution to disapprove their innocence as provided for in Art 50(2)(a) of the *Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun whereas Learned Counsel Mr. Evans Oduor was retained under the Probono scheme to represent the accused persons.

3. The prosecution summoned 1 witness to discharge the burden of proof beyond reasonable doubt. In 1876 Thomas Starkie in "*A Practical Treatise of the Law of Evidence*" observed.

> "What circumstanced will amount to proof can never be matter of generation definition; ..... On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; ... On the other hand, a juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest....." (See as quoted to in R v Compton (2013) 237 A Crim R 177 at (36)

4. These principles will mirror in evaluation and assessment of the case for the prosecution at half time submissions which incorporates the following evidential material from the one witness.

5. PW1 Truphena Rotich on oath gave evidence that on the 20th May, 2019 at about 5:00PM while at Kapcherop she received a telephone call that her son was at Ziwa allegedly being held as a suspect of theft of iron sheets. The same caller further informed PW1 that her son was under imminent danger facing a risk of being burnt down as punishment of his blameworthiness. That information prompted PW1 to hire a motorcycle which drove her to the scene. On arrival she unfortunately found that her son had passed on and the body taken to the mortuary. She was however capable to observe the body at the mortuary which had evidence of sustained multiple injuries. The trial was adjourned to give the state an opportunity to summon more witnesses under a direction of this court of a last adjournment in view of the fact that since the arraignment of the accused persons in court on 11th June, 2019 the attempt to secure other witnesses had proven unsuccessful. The prosecution henceforth closed their case necessitating the interpretation of Section 306 of the *Criminal Procedure Code* on the two parameters of whether a *prima facie* case has been established by this single witness or on the other hand it fell short of the threshold to give way to a motion of no case to answer. The court also had the advantage of the brief submissions from the defense on the issues to be determined under Section 306 of the *Criminal Procedure Code*.

Determination

6. The accused persons before court were jointly charged with the offence of murder contrary with Section 203 as read with 204 of the *Penal Code*. The law is that for a prosecution of the offence of murder, the prosecution is bound are bound to prove the following elements:

    a. The death of the deceased

    b. Whether his death was unlawfully caused

    c. Whether the death was actuated by malice aforethought

    d. Whether the accused persons before court were positively identified and placed at the scene of the crime.

7. In Article 50 (2) (a) of the *constitution* it expressly provide as follows: "Every accused person has a right to a fair trial which includes the presumption of innocence stipulating that anyone who has been charged with a criminal offence must be presumed innocent until proved guilty according to law. The presumption of innocence is an evidentially standard which must be presented by the prosecution to ensure that the offence so alleged is proved beyond a reasonable doubt to sustain a conviction. The philosophy behind this presumption was brilliantly but succinctly captured by a learned author as

follows: " No man can be called guilty before a judge has sentenced him, nor can society deprive him of public protection before it has been decided that he has in fact violated the conditions under which such protection has accorded him. (See the *Becaria on Crime and punishments* (1963) New York, Chapter XII). This means every doubt in a criminal case must be resolved in favour of the accused person either at the half time stage of the proceedings or at the conclusion of both the prosecution and defence case. The court is under obligation to acquit or discharge the accused persons of any culpability. The position of the law is that no matter the seriousness of gravity of the offence alleged to have been committed by the accused person or persons, the charge or information against him or them before a competent court as defined in Article 50(1) of the *constitution* remains a mere allegation until the contrary is proven by the prosecution.

8. In the case of *Ahmed v The State* (1999) 7 NWLR (part 612 & 673) the supreme court of Nigeria held that: " It is a cardinal principle in criminal proceedings that the burden of proving a fact which is proved would lead to the conviction of the accused is on the prosecution who should prove such fact beyond reasonable doubt. In criminal case, any doubt, as to the guilty of the accused, arising from the contradictions in the prosecution's evidence of vital issues must be resolved in favour of the accused person. (See *Republic v Nyambura and four others* (2001) KLR 355 (Etyang J) and *Ali Ahmed Sale Angara V Republic* (1959) E.A 654 (Forbes VP. Could and Windham JJA).

9. From the record, this was a purely a circumstantial evidence based case. The integrated principles are as articulated in the case of *Abanga alias Onyango v. Republic* Cr. App No. 32 of 1990(UR) in which this court held as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."
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> And in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:
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> > "In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

10. It is trite that a fact in issue can be proved by the evidence of a single witness. The question then to be answered in the instant case is whether the standard and burden of proof vested with the prosecution to disapprove the presumption of innocence against the accused person has been discharged by the very single testimony of PW1. What then does the law stipulate are the elements of a *prima facie* case to call upon the accused person to state his defense? There is no entirely no straightforward way of defining the principles of a *prima facie* case. It is a composite doctrine with legal characteristics which establish what the law now settles with certainty on how to manifest a *prima facie* case in favor of the prosecution. This is strand is more profound as can demonstrated from the import of case law. The

better application of the test is more precise in the case of *Public Prosecutor v Dato Seri Bin Ibrahim* (No 3) (1999) 2 MLJ 1 at P 63, where Augustine Paul J. made the following observations:

> " A *Prima facie* case arises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence."

11. The Court of Appeal of Eastern Africa reinforced the position in the celebrated case of *R.T. Bhatt v Republic* (1957) EA 332-334 & 335 to define what constitutes a prima facie case at the close of the prosecution case.

> " 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 case, the case is merely one which on fully 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."

12. Better still, the learned authors *Blackstone's Criminal Practice* 2002 at Section D14, 27 advanced and strongly urged upon the trier of the case to keep and check over the following in respect.

    i. If there is no evidence to prove an essential element of the offence a submission must obviously succeed.

    ii. If there is some evidence which taken at face value – establishes each essential element, the case should normally be left to the jury or in our case the trial judge.

    iii. The judge does however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable tribunal or jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness saying from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.

    iv. The question of whether a witness is lying is nearly always one for the jury as this case for the judge.

13. At this stage, the court is not concerned with the test of beyond reasonable doubt, but whether there exists some prima facie evidence capable of calling the accused persons to state their defense.

14. The *Criminal Procedure Code* under Section 306 provides as follows:

> "(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.
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> (2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether is intended to call any witness as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."

15. As guided by the law in relation to the parameters set out in Section 306 of the *CPC*, it is incumbent for the trial court to bear in mind the following guiding principles. In the case of *May v O'Sullivan* (1955) 92 CLR 654 the court remarked that:

> "When, at the close of the case of the prosecution, a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted. This is really a question of law."
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> Moreover the "question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, whether that is to say, there is with respect to every element of the offence some evidence, which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely every element of the offence is established to the satisfaction of the tribunal of fact beyond reasonable doubt."
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> Simply stated the test is whether there is evidence capable of proving each of the elements of the offence beyond reasonable doubt."

16. What the law requires at this stage is to determine whether the prosecution had made out a prima facie case. It is not to evaluate evidence or consider the credibility of witnesses. For clarity purposes, a prima facie case is not the same as prove which comes later when the court is to make a finding of guilt of the accused. It is evidence on the face of it which can demonstrate that the elements of the offence as framed in the charge sheet indicates some sufficiency to prove that the accused persons ought to answer or give evidence in rebuttal.

17. The instant case has encountered challenges which have resulted to an unsatisfactory outcome for both the victim and the accused persons. The thread that runs through in the present case is the culture of complacency on the part of the prosecution to zealously prosecute the accused persons within a reasonable time as provided by under Art 50(e) of the *constitution*. Everyone not just the prosecution was mandated with trying this matter within a reasonable time for reasons that delay has become the norm in our criminal justice system. Lengthy delays are very hard on those involved in a criminal trial. The long wait for the accused persons and the victim for the court to reach a final resolution on a

matter of this nature can be very stressful. It is even made worse by the various adjournments for one reason or another, which in a way has an impact on the quality and liability of evidence adduced by witnesses for the state as memories became less clear overtime. In the case of *R. v Rahey* (1987) SCR 588, the court remarked as follows:

> " That if an accused person has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried on violation of that right. After the passage of an unreasonable period of time, not trial, not even the fairest possible trial is permissible."

18. According to Art 50 of the *Constitution* there are enunciated rights which are distinct but stem from the basic idea and which taken together make up a single right commonly referred to as a right to a fair hearing. One of the guarantees concerns compliance by the state with the reasonable time requirement of initiating and concluding a trial. It is the constitutional dictate that the state must mobilize resources in support of the entire legal system so as to enable the courts to guarantee the right to obtain a final decision within a reasonable time. In fact, the reasonable time requirement of the proceedings in our *constitution* under Art 50 is one of the most important procedural guarantees of the right to a fair trial. Reflecting on the circumstances of this case, the accused persons were arraigned in court on 11th June 2019 and since then, the first witness for the state testified on 10th April, 2024. There is no evidence that on the complexity of the case, just the conduct of the prosecution and the actions of the courts in question involved in the proceedings to apply the case management profiles on account of the relevant legal framework guaranteed by Art 50(2)(e) which provides that every accused person a right to a fair trial within a reasonable time in order to protect his/her constitutional rights. This norm should be read in conjunction with Article 24 of the *Constitution* which states that the fundamental rights and freedoms guaranteed by the *constitution* can only be limited in exceptional case, proportionate and that such limitations may in no event exceed the limitations provided in the *constitution*.

19. The scope of presumption of innocence is guaranteed under Art 50(2)(a) of the *Constitution*. Therefore, the right to a fair trial safeguard the Human Rights guarantees to ensure that everyone charged with a crime is presumed innocent until proven guilty. Therefore, the presumption of innocence safeguarded by Art 50(2)(a) prevents the prosecution from initiating a trial and have it drag on in any courts of law for a long period of time, occasioning prejudice and an injustice. Therefore, the purpose of the right to a fair trial is defeated which is also a requirement of the principles of the rule of law. The *Constitution* of Kenya itself declares in in Art 159(2)(b) that justice delayed is justice denied. Justice has a significant importance in the life of an individual and also is an essence of the civilized society particularly in a constitutional democracy like ours, the Republic of Kenya. But unfortunately, justice in Kenya has become a myth and an unachievable tool hence the maxim of the concept that delayed justice is actually a denied justice. Delayed justice infringes the right to life under Art 26 of the *Constitution*, right to human dignity under Art 28 and right to liberty in Art 29 that are all guaranteed by the *constitution* of Kenya. It cannot be neglected that in our criminal justice system, accused persons suffer prolonged detention before trial which sets in anxiety, hopelessness, stigma due to the allegations made by the public which take long periods of time to be tested in a court of law in a fair and expeditious manner. In the case of *MFMY Industries Ltd V. Federation of Pakistan* (2015) SCMR 1549, the court affirmed that:

> " Court is not a mere mixture of construction material but in its literal sense is a 'hope' where complainant or Plaintiff (as the case may be) comes with a hope of justice. Court must always act in such a manner so that every single decision thereof should satisfy its literal meaning

i.e. 'a place where justice is done/dispensed'. Litigants should never be given a 'disposal of their approaches' but a 'decision by a court of law."

20. The accused persons waited for his trial to begin and be concluded within a reasonable time but due to the multi-agency organizational challenges, the constitutional guarantees of fair trial continue to remain a mirage.

21. On the real question to be decided by this court under Section 306 of the *Criminal Procedure Code*, the conditions for a no case to answer submission is of a formidable recourse in comparison with the test of a *prima facie* case. This is what Lord Parker, CJ said in "Practice Directions (A Submission of No case):

> " A submission that there is no case to answer may properly be made and upheld:
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> a. When there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
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> Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

22. From the above analysis it is clear that the anchor of a prima facie case is lost as the prosecution has failed to establish culpability of the accused persons for the offence of murder contrary to Section 203 of the *Penal Code*. As a consequence, a no case to answer has merit taken at his highest or lowest to render the evidence of PW1 insufficient to warrant this court to exercise discretion to call for further evidence from the defense in answer to the charge. The grant or refusal of extension of time by any court presiding over a criminal case is a matter of judicial discretion to be exercised not subjectively or at whim or by rigid rules of thumb but in a principled manner in accordance with reason and justice. (see *United Arab Emirates versus Abdelghafar* (1995) IRLR 243). The principles in *Salat versus Independent Electroral & boundaries commission & 7 other* (2014) eKLR also derive these key principles which when weighed against the prosecution to extend time to secure witnesses plainly and clearly, the court became convinced that there were no grounds to exercise discretion to extend time given the many years it has taken the state to initiate a trial and have it concluded within a reasonable time. This court therefore in declining to grant the state a further adjournment was bound by the following principles to exercise discretion in favor of the accused person:

a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

23. The essence of the above principles is to buttress the constitutional right for the accused persons to be tried within a reasonable time. The rationale behind it is that time is of importance both to the individuals suspected of crime and society as a whole. This reasonable time to initiate and conclude a criminal trial within a reasonable time following the promulgation of the *constitution* 2010 is an essential part of our Criminal justice systems' commitment to treating presumptively innocent accused persons in a manner that secures their fair trial rights in Art. 50 of the *Constitution*. This constitutional dictate of a suspect to be tried within a reasonable time is at the core of Art. 29 on the right to freedom and security of the person. This includes the right not to be deprived of freedom arbitrarily or without just cause. The right to liberty is applicable here on this cannon of a right of a trial to be commenced and concluded within a reasonable time because a timely trial means an accused person will spend as little time as possible in pre-trial detention or living within the community having been released under Art. 49(1)(h) but still the charge hoovering over his head with indeterminable period when the trial will be fully heard and determined on merits. It is of importance to recognize that timely trials of criminal cases allow victims and witnesses to make the best possible contribution to the trials in order to achieve and protect the rights under the Bill of Rights in our *Constitution*. In the instant case, the right to a trial within a reasonable time was never achieved. The system failed the accused person for the right was breached when it took four years and nine months to bring them to trial from the appraisal and assessment of the record, both the prosecution and the defense operated within a culture of complacency towards inordinate delay that pervaded the criminal trial of the accused persons. There is simply no sufficient cause or justification why the matter took as long as it did.

24. The court in *R v Beason* (1983) 36 CR (3d) (Ont. C.A.) stated that trials held within a reasonable time have an intrinsic value. The constitutional guarantee endures to the benefit of society as a whole and indeed to the ultimate benefit of the accused. In *R v. Morin* 1992 1 R.C.S, the court in dealing with the issue made the following observations: "that the general approach to a determination of whether the right to be tried within a reasonable time has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the provision is designed to protect against the factors which inevitably lead to delay. The factors to be considered are: the length of the delay, waiver of time period, the reasons for the delay including inherent time requirements of the case, actions of the accused during the pendency of the trial, actions of state of crown, limits on institutional resources in the criminal justice sector, other reasons for the delay, prejudiced to the accused and the victims to the offence."

25. The primary purpose of Art. 50(2)(e) is for the protection of the individual rights of the accused persons which include but not limited to the right to the security of the person, the right to liberty and the right to a fair trial. In this case, both the threshold of a *prima facie* case and that of a closer consideration of the accused's trial to commence and be concluded within a reasonable time was never achieved by the state. There are sufficient grounds to demonstrate that the accused persons were prejudiced and their rights violated, which admittedly outweighs any public interest, which usually is at the core of our Criminal Justice system. In the absence of any other evidence to establish a prima

facie case, I am of the considered view that this prosecution was initiated as against the accused persons in contravention of Art. 157(11) of the *constitution* which reads as follows:

> " That in exercising the powers conferred by this article the DPP shall have regard to the public interest, the interests of the administration of justice on the need to prevent and avoid abuse of the legal process."

26. In Art 159(2)(b) of the *Constitution*, justice shall not be delayed. In *R v. Rahey*, (1987) 1 S.C.R. 588, the court remarked that if an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of unreasonable passage of time, not trial not even the fairest possible trial is permissible. Unfortunately, the Kenyan system is clogged with backlog of criminal cases and is difficult to predict the processing of cases as prescribed in Art 50(2)(e) of the *Constitution*. In reflecting on the issues surrounding, the constitutional imperatives. There is no one single cause which can be pin pointed as the one suffocating the criminal justice system to contribute immensely to the delay in the disposal of cases within a reasonable time. The data from the performance management and measurement understanding, tells an unsettled story as to the threats and infringement of Art. 50(2)(e) of the *Constitution*. By dint of this provision it was foreseen that whoever wished to raise charges had to have evidence against the accuser. Otherwise regardless of whether the accused was silent or denied the allegations raised the burden of proof lie squarely with the prosecution.

27. Taking the above matters into consideration, it is imperative at this point for the court to dismiss the charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* as constituting a charge not proven within the provisions of Section 306 of the *Criminal procedure code* to warrant the accused persons to place on their defence. The submissions of no case to answer is an entitled measure for the accused person which I hereby grant founded on the underlying principles of the *Constitution*. Each accused person be and is hereby set free unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF JULY 2024.

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mugun for the State

Mr. Oduor Advocate

Accused Persons.

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