



**Republic v Kipchumba & another (Criminal Case
E058 of 2020) [2024] KEHC 8184 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E058 OF 2020
RN NYAKUNDI, J
JULY 9, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

CLEOPHAS CHIRCHIR KIPCHUMBA 1ST ACCUSED

VERONICA JEROP KIPCHUMBA 2ND ACCUSED

RULING

Representation:-

Mr. Mark Mugun for ODPP

M/s Kaira Nabasenge & Co. Advocates

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 on the 19th day of June at Cheburbur village, Moiben Sub-County within Uasin Gishu County murdered Sammy Chirchir Keter.
2. The Accused person in this case was arraigned before this court, pleaded not guilty placing the prosecution to disprove his innocence as provided for in Art 50(2)(a) of the *Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused persons were initially represented by Learned Counsel Mr. Momanyi who thereafter sought leave to cease acting and, in his place, Mr. Nabasenge was appointed for the accused persons.



3. The prosecution summoned five witnesses 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 five witnesses.
5. PW1 Mary Kiprono recalled and testified that on 19th June 2020 while at home on or about 2100 hours she heard screams form the neighborhood. She took a step to step out of the home to the scene to check on home apparently which belongs to his brother by the name Robert. On arrival, the door was locked from inside and that prompted her to go back to her home to seek for more support from Salome and Edna. Further in her testimony PW1 told the court that in company of Salome and Edna they went back to the same house, made attempts to push the same door but it was still locked from inside. However, through the window of the house they managed to see one Cleophas who is the 1st accused person assaulting the deceased using an electric wire. The second peep revealed to them one Veronica, Victor Kiptoo and Valentine standing up at the same scene and as the deceased was lying on the floor. The incident attracted members of the neighborhood who were curious to find out what was the source of the conflict and the injuries which had been inflicted against the deceased. The door was finally opened and on observation, the deceased had suffered injuries to the head and chest. He was taken to Chebarbar dispensary and alter referred to Iten Hospital for further management but he passed on while undergoing treatment. The police were called in to carry out investigations and finally effected an arrest against the accused persons before court.
6. PW2 – Edna Chepkosgei on oath told this court that on 19th June 2020 while she was at her house, she responded to some screams from the home of one Robert. According to PW2, there were many other people who heard the screams leaving their houses towards the scene and on arrival found the door was locked from inside but through the window she was able to see the deceased lying down seeking help. This caused them to continue raising an alarm for more support from the members of the neighborhood. It was in PW2’s testimony that he was able to see the 1st and 2nd accused assaulting the deceased while the 1st accused was armed with an electric wire. This is how the deceased suffered injuries to the head, back, chest and the mouth. He was finally to be taken to Iten Hospital where he succumbed to injuries while undergoing treatment.
7. PW3 Salome Changichi also a witness for the state told the court that on 19th June 2020, she was asked by Edna and Nelly to go and rescue Sammy the deceased who was being assaulted at Robert’s homestead. On arrival, at the said homestead PW3 testified that he could hear the screams of the deceased calling for help and saying “*mniokoe msiniue*”. In addition, PW3 testified that he saw the 1st accused with an electric wire hitting at the deceased and in his presence was veronica, victor, Ian, Valentine and Godfrey. They were inside the house where the assault of the deceased was taking place as he lay down on the floor of that house. it was the 1st accused who finally opened the door and asked them to take away their person who in this case happened to be the deceased. In the house, PW3 could



see streams of blood which he presumed were as a result of the beatings and injuries suffered by the deceased.

8. PW4 Ian Kiptoo also a witness summoned by the state told the court that on 19th June, 2020, he went to the home of Robert to spend a night. In the course of the night PW4 was called by one Victor who informed him that there was someone in the house as he stepped out to answer a call of nature. That is when he saw Victor entering the house armed with a knife but with the minimum source of light from the solar, he was able to make observations as to the surroundings. That is how he happened to see the 1st accused Cleophas whom he identified as his cousin taking away a knife from Victor demanding valentine to open the door to the main house. This incident occasioned fear on PW4 and as he was standing outside the house, he saw the 1st accused pushing the door and finally have it locked from inside. He then saw Cleophas assaulting the deceased while armed with an electric wire. He also used the same knife he had taken away from Victor to inflict more bodily harm. He was later to learn that the deceased had been escorted to the hospital but succumbed to the fatal injuries inflicted by the assailants.
9. Finally, was the evidence of PW5 – PC Mwaniki whose role in this case was the instructions received to investigate the cause of death of the deceased by the name Samuel Keter. In this assignment, PW5 visited the hospital where he found the deceased in serious health condition, which made him not to record a witness statement at that time. He was able to go through the medical records like the P3 which indicated that he had suffered grievous harm. The victim according to PW5 died soon thereafter and a post mortem was conducted at Moi Teaching and Referral Hospital. The pathologist established that the cause of death was from the stab wounds inflicted on the head back and chest. The Post mortem report and the P3 were produced as evidence in support of the prosecution case.

Determination

10. As observed above, Section 306 of the *Criminal Procedure Code* requires of this court upon reflection and evaluation of evidence to establish whether a prima facie case as against the accused person has been made on 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.
11. The Oxford English dictionary, 2010 defined *prima facie* as at first site, on the face of it, as appears at first without investigations arising at first site, based or founded on first impression. In law it is used both as an adjective and as an adverb. As an adjective, as in the term ‘prima facie evidence’ it means sufficient to establish a fact or raise a presumption unless disapproved or rebutted. As an adverb, as in the term prima facie it means on first appearance but subject to further evidence or information.
12. 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.”

13. The other persuasive case which is relevant to our discussion is *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.”

14. 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.”



15. 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 to state his defence
16. 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.
- (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.”

17. 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.”

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.”

Simply stated the test is whether there is evidence capable of proving each of the elements of the offence beyond reasonable doubt.”

18. 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 ought to answer or give evidence in rebuttal. The reason why commenting on the evidence is restricted is mainly because at this stage of the proceedings is only one side which has made attempts to present evidence in support of their position in the proceedings. It will be more prejudicial if the court was to import a language to the decision which is likely to be prejudicial to the defence case in the final analysis. The court must be as brief as it can and leave the rest for a full hearing on both sides without making a conclusive observation of the facts.



19. Having set out the evidence and the guiding principles in *R.T. Bhatt v Republic (supra)* the evidence available led by the prosecution on the offence charged, the prosecution has made out a prima facie case against the accused persons which requires them to enter their defence in terms of Section 306 as read with Section 307 of the *CPC*. Prior to making their defence it is imperative to explain the accused persons their constitutional rights on electing to remain silent or not to give incriminating evidence remains protected and guaranteed throughout the trial. A full criminal trial encompasses examination of the evidence led on behalf of the state and any other defence as referenced by the accused persons in answer to the charge. The doctrine of the burden of proof of beyond reasonable doubt never shifts from the state to the accused persons even at the stage of evolving the proceedings by inviting the defence to give evidence in rebuttal to a *prima facie* case. Status Conference on 18/72024 to fix defence hearing date.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF JULY 2024.

In the presence of:-

Mr.Mugun for the DPP

Accused Persons

.....

R. NYAKUNDI

JUDGE

