



REPUBLIC OF KENYA



**Ekiru & another (Criminal Case E010 of 2019)  
[2024] KEHC 9989 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE E010 OF 2019  
RN NYAKUNDI, J  
AUGUST 8, 2024**

**IN THE MATTER OF**

**JULIUS EKIRU ..... 1<sup>ST</sup> ACCUSED  
SAMWEL EJIKON ..... 2<sup>ND</sup> ACCUSED**

**RULING**

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 6<sup>th</sup> June, 2019, at Napuu village in Lodwar Turkana Central Sub-County, the accused persons murdered John Esinyen.
2. The Accused persons were arraigned before this court, pleaded not guilty, calling upon the prosecution to discharge its burden of proof and disapprove their innocence as provided for in Art. 50(2)(a) of *the Constitution*. The prosecution discharging its duty was led by Senior Assistant Director Prosecution Counsel Mr. Kakoi whereas the accused persons
3. The brief summary of the circumstances of the case are as captured by PC Elvince Obute. He testified that on 7<sup>th</sup> June, 2019, he was at Lodwar Police Station when he received a report of serious assault vide OB 43/7/6/2019. In the report was that the victim of that assault was mercilessly cut with a Panga later rushed to Lodwar County and Referral Hospital where he was undergoing treatment. That the perpetrators of the act fled. On 8<sup>th</sup> June, 2019 at around 1030hrs he went back to Lodwar County and Referral Hospital where he visited the victim with an intention to record statement but could not even speak, the doctor attending to his said that he was in a serious condition and the statement could not be recorded. On 9<sup>th</sup> June 2019 he proceeded to the scene within Napuu village. At the scene, he established that the victim who is the motorcycle repairer was at the place of work when the perpetrators who were numbering two approached while riding on a motorcycle which had a puncture while carrying a goat when they asked him for repair.
4. Upon being served, the rider who was identified as Ekiru and the passenger had a confrontation concerning the goat. The rider then drew a panga from his waist and cut the victim on the head and



hand before handing over the panga to his colleague eventually cut the victim in the head again until he fell on the ground. At this time the blood got spilled on the white striped, T-shirt the rider wore. Alarm was raised by the eye witness as members of the public started after the duo. They fled in two different directions on with the said motorcycle Reg. No. KMEG 892W make TVS and another on foot while carrying the said goat.

5. On 10<sup>th</sup> June, 2019, the 1<sup>st</sup> accused person was arrested with the help of members of the public and taken to Lodwar Police Station and put in police cells. On 17<sup>th</sup> June, 2019, the 2<sup>nd</sup> accused was arrested. Later on one T-shirt and a panga were recovered and all kept as exhibits.

### **Determination**

6. 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 persons 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.
7. 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, 8<sup>th</sup> 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.”



8. 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.”

9. 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

10. 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.”

11. 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.”



12. 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.
13. Having said that, I find that 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 important to explain to 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.
14. For those reasons, the accused persons are hereby called upon to answer to the prima facie case on the charge of murder contrary to section 203 of the Penal code. Defence hearing virtually on 17.9.2024
15. It is so ordered.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2024.**

In the Presence of

Mr. Kakoi for the State

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**R. NYAKUNDI**

**JUDGE**

