Republic v Kiprop & another (Criminal Case E005 of 2022)
[2024] KEHC 10130 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10130 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E005 OF 2022

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

OLIVER KIPROP ..... 1ST ACCUSED

BRIAN KIPRUTO ..... 2ND 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 are that on 6th January, 2022 at Emgoin village, Osorongai Location, Turbo Sub-County within Uasin Gishu County in the Republic of Kenya jointly with others not before court murdered Dennis Kiplimo.

2. The accused persons were arraigned before court and a plea of not guilty was entered, leaving the Prosecution to discharge its burden of proof beyond reasonable doubt. The Persecution was under the leadership of Senior Prosecution Counsel Mr. Mark Mugun whereas the 1st accused person was represented by Learned Counsel Mr. Oburu while the 2nd accused was represented by learned Counsel Mr. Ngala.

A summary of the Prosecution case.

3. The case for the prosecution was based on the five witness. PW1 Sally Busienei testified as the clinical officer at Turbo Hospital on having examined the deceased who was brought to the facility with a history of being assaulted by a gang of 8 people. In this respect PW1 confirmed that the victim had suffered injuries to the neck, face, abdomen, upper limbs and the right shoulder. The content of it was capture in the P3 admitted in evidence as Exh. 1.

4. PW2 Philmeon Chesang told the court that on 6th January, 2022 at 11:30Pm while in his house, 8 people entered his homestead and dragged his worker up to th road. The witness was able to see the gang armed with sticks a Panga. It was also the testimony of PW 2 that the victim had stolen a long trouser which became the source of the anger and subsequent.

5. The next witness was PW 3 Sarah Lelei who told the court on 7th January, 2022, she heard some screams and on responding to it, she recognized one Joseph assaulting Dennis while in company of seven other people. She also confirmed that the assailants were armed with sticks inflicting harm on the various parts of the deceased, she had no capacity to stop them from committing the unlawful act of assault. The next witness for the prosecution was Dr. Macharia PW 4 who carried out the post mortem examination dated 21st January, 2022. According to PW 4, the deceased suffered multiple injuries to the upper and lower limbs. As a consequence of the post mortem examination, PW 4 opined that the cause of death was acute respiratory distress syndrome due to extensive soft tissue injuries due to blunt force trauma. Finally, was the evidence of PW 5, PC David Melly whose role was to carry out the investigation, which ultimately recommended the indictment or the accused persons

Determination

6. The evidential relevance vested with the prosecution is to prove the following elements for the offence of murder beyond reasonable doubt:

    a. That the deceased has died

    b. That his death was unlawfully caused.

    c. That it was actuated by malice aforethought contrary to section 26 of the *Penal Code*.

    d. That the accused person before court was placed at the scene of the homicide which resulted in the death of the deceased.

7. It is therefore the duty of this court at the close of the evidence in support of the charge to consider whether or not a sufficient case is made out against an accused to require him to make a defence. In this sense, if the court considers that such a case is not made out in so far as the ingredients of the offence of murder is concerned, it shall be moved to dismiss the charge and have the accused acquitted forthwith.

8. The phrase of no case to answer and what the court should look for in exercising discretion was well articulated by the Learned authors of Blackstone's Criminal Practice 2010 at D15.56 thus;

> "(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the court has shown to be of doubtful value.
>
> (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippey (1988) Crim LR 767) where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful, and that it would not be proper for the case to proceed on that evidence alone."

9. The provisions of Section 306 of the *Criminal Procedure Code* require that at the close of the prosecution case, the court is required to consider whether there is evidence sufficient enough for the court to make a finding of a *prima facie* case. If at the close of the prosecution case there is no evidence to

link the accused person to the offence charged or any other offence of which he might not be convicted, the court is then at liberty to find a no case to answer and have the accused person discharged of his/her culpability.

10. The test to be applied is in the case of 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."

11. At this point in time, the court is only concerned with the question as to whether on a balance of probability the essential elements constituting the offence charge or any other offence has been proved and not whether there is proof beyond reasonable doubt.

12. In my judgment, I have evaluated the evidence of PW 1 to PW 5 in consonant with the provisions of Section 203 of the *Penal Code*. As to the satisfying of the criteria on the salient features of the offence. The renowned principles on circumstantial evidence are now well settled as acknowledged in the case of R v Taylor Weaver & Donovan (1928) 21 CR App R20 where the principles of circumstantial evidence were enunciated as follows;

> " Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified examination is capable of providing a proposition with the accuracy if mathematics, it is no derogation of evidence to say that it is circumstantial".

13. Such a context of interpretation as to what is the role of a judge in considering whether the prosecution has produced sufficient evidence of a *prima facie* case to warrant the accused on his defence or on the other hand the goal was partly attainable or lost is profoundly stated by Lord Devlin in Trial bt Jury, The Hamlyn Lectures (1956, republished in 1988) he stated:

> " There is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope would bear a certain weight or take a certain strain is

a question that practical men often have to determine by using their judgment based on their experience. But they base their judgment on the assumption that the rope is what it seems to the eye to be and that it has not concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary before he sends out to see what it has to see that it has no flaw, that is a job for an expert. It is the business of the judge as the expert who has mind trained to make examination of the sort to test the chain of evidence for the weak links before he sends to the jury. The trained mind is the better instrument of detecting flaws in reasoning to ascertain whether the case has any reliable strength at all."

14. I have carefully considered the prosecution case, both with strains of direct and circumstantial evidence. I find that in the absence of any explanation to the contrary from the defence, it is not in dispute that there was death of the deceased person. Secondly, from the testimony of PW 1 and PW 4 in their perspectives, the deceased primarily suffered physical injuries and thereafter he succumbed to death as tabulated in the P3 and post mortem report. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof of beyond reasonable doubt as required for a full-fledged criminal trial. The relevant provisions which are to be adhered to with specifics involve Section 306 of the *Criminal Procedure Code*. Briefly it states 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....."

15. The test to be applied by a trial court is more precise from the persuasive observations made in *Chief Constable* V Lo (2006) NICA 3 that:

> "The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not as himself the question, at the close of the prosecution case, "I do I have a reasonable doubt? The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivable support a guilty verdict."

16. The burden of proof rests upon the prosecution who made the claim of murder against the accused persons. The primary objective of Section 306 of the *CPC* is for the court to analyze the fact situations that arise out of the evidence to measure whether a *prima facie* case is justified and if not, a motion of no case to answer is ruled in favor of the accused persons. It is a negotiated balance to establish between the evidence which is sufficient to render reasonable conclusion in favor of the allegations made by the prosecution with that of a fixed rule on the degree of evidence that does not support effectively, the issues contemplated in section 203 of the *Penal Code*. Therefore, shifting the angle from the defence

on their rights on presumption of innocence and the refutation by the prosecution on the weight of the evidence admitted, there exist a *prima facie* case to place the accused persons on their defence under section 306 as read with Section 307 of the *Criminal Procedure Code*. Defense hearing on 19.9.2024

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

In the Presence of

Mrs. Sharu for the Accused

Accused

.....

R. NYAKUNDI

JUDGE