



Republic v Boru (Criminal Case 7 of 2020) [2023] KEHC 19191 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT**

CRIMINAL CASE 7 OF 2020

JN NJAGI, J

JUNE 21, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

YUSUF BORU ACCUSED

RULING

1. The accused is facing four counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offences in the respective counts are that on the June 8, 2020 at Badassa area within Marsabit County he murdered Nchuchu Mosor, Jesca Leado, Dan Lantare and George Obeile (herein referred to as the deceased persons).
2. The case for the prosecution is that the four deceased persons were on the June 6, 2020 shot dead while they were riding on a motor cycle along Badassa/Songa road within Marsabit county. The report of the killings was received at Marsabit Police Station. PC Duncan Wachira PW 7 of the District Criminal Investigations Office, Marsabit Central, visited the scene together with other police officers at 6pm. They took the bodies to Marsabit Hospital Mortuary. On the following, day PC Abdullahi Jillo PW4 of the scenes of crimes investigations, Marsabit, went to the hospital mortuary and took photographs of the bodies showing gun shot wounds on the bodies. On the same day, Dr Duba Doyo PW 3 of Marsabit County Referral Hospital performed post mortems on the four bodies. He found them with multiple gun shot wounds. He formed the opinion that the cause of the deaths was due to multiple gun-shot wounds.
3. That on the same day, PC Wachira PW 7 visited the scene of the attack where he collected 10 spent cartridges of calibre 7.62 x 39 mm. He prepared an exhibit memo and forwarded the cartridges to the ballistics section, Nairobi. The cartridges were examined by CI Kenneth Chomba PW 6 who found that they were fired cartridges in caliber 7.62 x 39 mm. He formed the opinion that they could have been fired in any of the firearms chambered to house calibre 7.62 x 39 mm rounds of ammunition such as AK47 rifles.



4. PC Wachira PW7 investigated the case. He received information from Andrew Jardessa Abduba PW5 that one Yusuf Boru, the accused, had approached him and asked him to assist him in revenging the death of his father who had been killed by Rendille community members. The accused had gone underground but the officer arrested him on the July 3, 2020. Andrew Jardesa PW5 then recorded a statement in which he said that on the June 6, 2020 the accused had approached him and asked him to assist him in avenging the death of his father. That he did not take the accused seriously. That on the June 8, 2020 the witness was at Badassa when he heard gun shots. He went to the scene and found four members of Rendille community having been shot dead. He suspected the accused to have been involved with the crime. He went to the homestead of the accused and found him in a celebratory mood. There were other young men at his home. The accused told him that it is him and three others who had killed the Rendille youths in revenge of his father's death. PC Wachira then charged the accused with the four murder charges.
5. The prosecution called 7 witnesses in the case. During the hearing, the doctor who completed the postmortems reports PW4 produced the same as exhibits, P Exhs1-4. The forensic crime scene investigations officer, PW3 produced the photographs as exhibits, Pexh5 -7. The ballistics examiner PW6 produced the ballistics report as exhibit, Pexh9. The investigating officer PW7 produced the exhibit memo as exhibit, Pexh10. The prosecution thereupon closed its case.
6. At the close of the prosecution case, this court is called upon to determine whether the prosecution has established a *prima facie* case as to warrant the accused being placed to his defence.
7. A *prima facie* case was defined in the case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 334 and 335 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. Similarly, in *Ronald Nyaga Kiura v Republic* [2018] eKLR it was 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.”

9. In *Republic v Joseph Shitandi & another* (2014) eKLR a case to answer was defined as follows:-

“A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result.”

10. The star witness for the prosecution in this case was Andrew Jardesa Abdulla PW5 whose evidence was that the accused was his friend. That in April 2020 the accused and his brother approached him and told him that a person called Roba had stolen their rounds of ammunition which were to be used to revenge the death of their father who had been killed by Rendille community members. They asked him to ask Roba to return the ammunition. That he, PW5, contacted Roba and he returned the ammunition to the accused.
11. It was further evidence of PW5 that on the June 6, 2020 the accused approached him and asked him to assist him in killing some Rendille community members in revenge of the death of his father. That the accused offered to pay those who took part in the mission Kshs100,000/= and a cow. That two days later he was at Bandassa when he heard gunshots. He went to the scene and found 4 Rendille youths having been shot dead. He suspected that the accused was involved in the killing. He went to his home and found the accused with several other young men who were armed. The accused was in a celebratory mood. He told him that it was him and the other people who were at the homestead who had killed the Rendille youths in revenge of his father's death. PW5 identified four of the people who were at the home as Adan, Ilme, Gayo and son of Sachule.
12. It was the evidence of PW5 that he did not pass on the information to the police when he received it from the accused because he was a criminal at the time. That he later reformed and agreed to be a state witness. His statement with the police was recorded on July 5, 2020 which was after the arrest of the accused. At the time the witness testified in court in November 2022 he was in prison remand awaiting trial for a charge of robbery with violence.
13. It is apparent that the star witness for the prosecution PW5 was a person of dubious character. He never reported to the police that the accused was in unlawful possession of ammunition. He never reported to the police the information he received from the accused that the accused was arranging to kill members of Rendille community in revenge of the death of his father.
14. The prosecution evidence is built on what the accused is alleged to have told Andrew Jardesa Abduba PW5 that he wanted to kill members of Rendille community to avenge the death of his father and that the accused confessed to him of having committed the crime. There is no other evidence on record to support the evidence of PW5 that the accused told PW5 of the things alleged. In my view, the evidence adduced in the case is not sufficient on its own to return a verdict of guilty if no explanation is offered by the defence. It is not for the defence to fill in any gaps left in the prosecution case. As such, the accused cannot be put to his defence just to explain whether he gave PW 5 the alleged information or that he confessed to PW5 that he killed the deceased persons. The prosecution was required to adduce credible evidence to support their case which evidence was lacking. It has to be noted that it is the right of the accused person to remain silent in his defence. The evidence adduced by the prosecution in this case is barely sufficient to convict the accused if he opted to offer no defence.
15. In the premises, I find that the prosecution has not established a *prima facie* case against the accused as to warrant this court putting him to his defence. The accused has no case to answer and is thus entitled



to an acquittal. I therefore acquit him at this stage under section 306(1) of the [Criminal Procedure Code](#).

Delivered, dated and signed at MARSABIT this 21st June 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Republic

Mr. Halake for Accused

Accused - Present

Court Assistant-Jillo

14 days R/A.

