



**Republic v Cheserek (Criminal Case 29 of 2017)
[2023] KEHC 18427 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 29 OF 2017
RN NYAKUNDI, J
JUNE 5, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

LYDIA JEMUTAI CHESEREK ACCUSED

RULING

1. The accused herein Lydia Jemutai Cheserek was 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 the 8th day of May, 2017 at Kamoi village Embobut location in Marakwet East within Elgeyo Marakwet County, murdered Noella Jepchirchir Bowen.
2. The accused pleaded not guilty to the charge. He was represented at the trial by Ms. Adongo advocate and the prosecution was conducted by Mr. Mugun, Prosecution Counsel. The prosecution called a total of six (4) witnesses to prove the ingredients of the offence beyond reasonable doubt constituting the following:
 1. The death of the deceased.
 2. The death of the deceased was unlawful.
 3. That in causing death there was malice aforethought on the part of the accused.
 4. That the accused was positively identified as the one who caused or participated in the killing of the deceased.
3. At the close of the prosecution case the defence counsel Ms. Adongo in compliance with section 306 (1) of the *Criminal Procedure Code* made a submission of a no case to answer in favour of the accused.



4. This Court is therefore called upon to determine whether, at this stage, based on the evidence adduced by the six prosecution witnesses, the prosecution have established a *prima facie* case to warrant the accused person to be placed on his defence to answer to the charge of Murder.
5. It is important to note that the burden of proof lies on the Prosecution throughout the trial to prove their case against the accused person. That burden does not shift to the accused person. This is so because the accused person's constitutionally guaranteed rights include the right to remain silent, the right to adduce and challenge evidence and the right not to give any incriminating evidence. However, at this stage, the prosecution is not expected to have proved their case against the accused person beyond reasonable doubt. The measure is for a *prima facie* case to be established.

Section 306

(1) of the Criminal Procedure Code provides: 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 the several or any one of the 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, record 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....”

6. The Oxford Companion of Law at pg. 907 gives the definition of a *prima facie* case as: “A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”
7. The procedure in determination whether indeed, the accused has a case to answer was discussed in the case *Republic v Stephen Chomba Kamau*. [2021] eKLR thus: -
Republic v Samuel Karanja Kiria [2009] eKLR Justice JB Ojwang (as he then was) stated: -

‘The question at this stage is not whether or not the accused is guilty as charged but whether there is cogent evidence of his connection with the circumstances in which killing of deceased occurred. That the concept of prima facie case dictates as a matter of law that an opportunity created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled ... The Court of Appeal is Criminal Appeal No 77/2006 expressed that too detailed analysis of evidence stage at no case to answer stage is undesirable if the court is going to put accused on his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted.’

8. In addition, in the case of *Uganda v Mulwa Aramathan* Criminal Case No.103 of 2008 the Court stated that; -

A prima facie case does not mean a case proved beyond any reasonable doubt since at this stage, Court has not heard the evidence for the defence.”



9. In Ronald Nyaga Kiura vs Republic, the court held:

It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a *prima facie* case 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...”

9. From the evidence placed before me, I am satisfied that the test of a *prima facie* case has been met by the prosecution to warrant the accused person to be called upon to answer. The test to be applied here is as expressed under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities.

10. The provisions of Section 306(2) of the Criminal Procedure Code and Article 50(2)(i)(j)(k) of the Constitution are hereby explained to the accused person in the presence of her advocate Ms. Adongo.

11. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE 2023

In the Presence of:

Mr. Adongo Advocate for the Accused

Accused Present

.....

R. NYAKUNDI

JUDGE

