Republic v Shisanya & another (Criminal Case 66 of 2018)
[2023] KEHC 21231 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 66 OF 2018

RN NYAKUNDI, J

JULY 21, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MELISHA MHINDI SHISANYA ..... 1ST ACCUSED

SAMUEL AMATUKA EKITUI ALIAS NANG'AM ..... 2ND ACCUSED

RULING

1 The accused persons namely Melisha Mhindi Shisnya and Samuel Amatuka Ekitui alias Nang'am are charged with the offence of murder whereas the particulars of the offence are that: On the night of the October 5, 2018 and October 6, 2018 at Kabulgeny village in Eldoret West sub- county within Uasin Gishu County jointly murdered Geofrey Mateje Lulu .

2 The accused persons pleaded not guilty to the charge compelling the prosecution to summon 15 witnesses to disapprove the presumption to the right of innocence as provided for in article 50(2) (a) of the *Constitution*. At the close of the prosecution case it was submitted by the prosecution that the evidence clearly fell under the limb of a *prima facie* case whereas on the other hand learned counsel Mr Kenei for the accused persons submitted that from evaluation of the evidence the fundamental principles of a prima facie case on the part of the prosecution were far from being discharged by the prosecution. It was contended by the learned counsel that an evaluation of the probative value of the prosecution witnesses suffered the defects of inconsistencies and contradiction impeaching the elements of a prima facie case. Learned counsel urged the court to assess the various formulations of the evidence placed before court by the prosecution witnesses and it would have shown substantially that the charge by all means cannot stand the test of a prima facie case. Learned counsel further alleges that on consideration of the sworn evidence and other documentary material is undoubtedly that the trial court cannot convict in the event the accused persons elect to keep silent.

3 Consequently on the legal considerations learned counsel relied on the cases of *Sewe v Republic* (2003) KLR 364, *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998, *Mohammed & 3 others v Republic* (2005) 1 KLR 722, *Libambula v Republic* (2003) KLR 863, *Ramanlal Tambaklal Bhati v Republic* (1957) E.A 332, *Republic v Charles Kimani Mbugua* eklr.

4 It is against this background learned counsel argued and submitted that a motion of no case to answer is of significance in this trial than a *prima facie* case to warrant an order of acquittal in favor of the accused persons. Apparently the prosecution elected not to file any written submissions as a rejoinder to the defense counsel's submissions. Nevertheless, the prosecution suffers no prejudice for that non-compliance. The court is still would exercise its jurisdiction impartially and fairly on the subject matter under article 50 (1) of the *Constitution* and section 306 (1) & (2) of the CPC.

5 In the charge facing the accused persons there are four critical elements to be proved by the prosecution within the ambit of section 203 of the *Penal Code*. Thus: (a) The death of the Deceased Geofrey Mateje Lulu. (b) That his death was unlawfully caused (c) That the accused persons in causing the death of the deceased were actuated with malice aforethought manifestation contrary to section 206 of the CPC (d) That the perpetrators were none other than the accused persons. (See the cases of *Republic v DWK* (2020) eKLR and in *Republic v Andrew Omwenga* (2009). The administration of criminal justice in Kenya strike a balance between the search for truth and the fairness of the process. These competing interests sometimes causes friction between the states and the accused person underpinned in one key tool the principle of the presumption of innocence until proven guilty. This being a constitutional principle in our criminal law the bar is set so high for the state to ensure that flimsy grounds or suspicious complaints should not find their way to the criminal jurisdiction of our courts. It is that allocation of the burden of proof vested with the state which learned counsel Mr Kenei has questioned on the basis that the evidence so far admitted by the court lacks clarity and incapable of establishing a prima facie case as against the accused persons. (See *Republic v Abdi Ibrahim OWL* (2013) eKLR , Ramanlal Trambaklal Bhatt v R (1957) E.A 332 at 334. The criminal process of trying an accused person in Kenya is tuned at a particular point in the continuum of two extremes. On the one hand it pursues the protocol of a *prima facie* case by the state furiously and vigorously. This is to achieve the objectives of detection, apprehension, prosecution and punishment of the offenders for the common good of society. On the other endeavor is the defence pursuit of the due process model founded on the presumption of innocence. These scales of justice informs the express provision of section 306 (1) &(2) of the CPC. It is part of the means to achieve the ends of substantive justice for the court to acquit an accused person at the close of the prosecution case if no credible evidence is worthy the exercise of the courts adjudicatory powers and to protect the provisions of the bill of rights.

6 This process of evaluating halftime evidence by the court its stipulated in section 306 (1) & (2) of the CPC. The submission under this section for the threshold of motion of no case to answer or a *prima facie* case does not delve into the merits of any evidence on credibility or otherwise of the witnesses summoned by the prosecution.

Determination

7 The aspects of the prima facie relevance of the evidence admitted and which may be deemed necessary to establish the test in section 306 (1) & (2) of the CPC has found its way in the overall case law. It is along this line of jurisprudence trial courts have to find the trajectory to rule in favour or against the prosecution. If at the conclusion of the prosecution proof of the case is based on assumptions a motion of no case to answer carries the day and the accused person shall be acquitted of any wrong doing. The criminal procedure on the other hand states that if a case for the prosecution is made out with substantial evidence to establish all the elements of the offence charged in the information accused

persons shall be called to state their defence. Similarly, after careful attention to detail the evidence adduced is not sufficient to proof any of the elements that may result in a conviction a motion of no case to answer is distinguishable from a prima facie case. The value of that ultimate refinement is truly obvious from the comparative case in *R v Galbraith* (1981) 1.W.L R. 1039 where he said:

1. if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

2. The difficulty arises where there is some evidence but it is of a tenuous nature for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty upon a submission being made, to stop the case.

3. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which ae generally speaking within the province of the jury and where on one possible view of the fact there is evidence upon which a jury could properly come to conclusion that the defendant is guilty then the judge should allow the matter to be tried by jury. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion to the judge.

8 The test of rational connection in testing a prima facie proof of a case by the prosecution is to be evaluated from the evidence of one witness after another which may constitute the connecting factor for the elements of the offence. It is therefore, only essential that in making a finding of existence of a *prima facie* case by the trial court there be some rational connection between the fact proved and the fact presumed as stipulated in section 107 (1) 108 & 109 of *Evidence Act*.

9 Ordinarily a presumption of fact cannot operate against whom has neither possession nor control of the facts presumed. In a searching analysis of the trial court the basis of a rational inference as to whether a *prima facie* case or a no case to answer has been experienced and accomplished by either the prosecution or the defence is a matter purely of evidence. There should be no gamble to permit a trial court to place an accused person on his or her defence whereas the essential typologies of a prima facie case remain in the realm of suspicion or fabrication . There are two senses in which courts ought to construe and use the concept of *prima facie* case in rendering a decision at the conclusion of the prosecution case. The first is in the sense of the prosecution having produced evidence sufficient to render an independent tribunal properly constituted to make a determination on the elements of the offence in question in its favour. In the second sense, it means the prosecution evidence is sufficient to allow the accused person to be placed on his or her defence to answer the charge. In this respect the prosecution evidence on a finding of a *prima facie* case compels the accused to produce evidence in rebuttal and if in default a conviction may ensue.

10 As a matter of law a prima facie case does not shift the burden of proof vested with the prosecution at all times to shift to the accused person at any one occasion in a criminal proceedings. Even the rationalistic approach in section 111 of the *Evidence Act* never militates the elements of the doctrine of proof beyond reasonable doubt. (See *Republic v Subordinate Court of the First Class Magistrate at City Hall, Nairobi and another, ex parte Youginda Pall Sennik and another Retread Limited* (2006) *Republic v Nyambura and four others* (2001) KLR 355 (Etyang J) and *Ali Ahmed Saleh Amgara v R* (1959) EA 654 , *Semfukwe and Others v Republic* (1976-1985) EA 536 (Wambuzi Mtafa and Musoke JJA)., *Chunga CJ Lakha and Keiwua JJA Mbuthia v Republic* (2010) 2 EA 311 (Tunoi Waki and Nyamu JJA. *Dhalay v Republic* (1995-1998). EA 29. Omollo Tunoi JJA and Bosire Ag. *Ramamlai Tambakla Bhatt v R*(1957) EA 332 (Sir Newnham Worley P Sir Ronald Siiclair VP and Bocon JA)

and *Obar s/o Nyrongo v Reginam* (1955) 22 EACA 422 (Sir Barclay Nilhii P. Sir Newham Worley VP and Briggs JA.

11 The *Criminal Procedure Code* in section 306 provisions as well as the various provisions reflect the epistemological aspect of adjudication with the process value to determine at half time whether an accused person has a case to answer.

12 The real issue in this case is whether one party being the prosecution has discharged the half time burden of proof of a *prima facie* case to be granted leave to proceed to the next stage. On the other hand, any meaning that does not fit the definition of a prima facie case is such that it raises a no case to answer verdict. The authors of *Blacksone's Criminal Practice* 2010 at D15.56 favored the following approach as a criteria on a motion of no case to answer.

> (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 it being of a type which the accumulated experience of the court has shown to be of doubtful value.
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> (d) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as Shippery (1988) Crim LR 767 where the inconsistencies ae so great that any reasonable tribunals would be forced to the conclusion, that the witness is untruthful, and tht it would not be proper for the case to proceed on tht evidence alone."

13 For these accused persons to be convicted of the offence of murder the prosecution has to proof all the elements beyond reasonable doubt. That is not the degree of proof expected of the court at this stage but is a matter of scrutiny of the evidence on the face of it discharged by the witnesses against the accused persons to be called upon to contrast it by way of a defense. In reference to the instant case this far from the documentary evidence of a post mortem report the deceased is stated to have suffered multiple injuries to the various parts of his physical body. The pathologist opined that the cause of death was severe head injury due to blunt force trauma. In essence proof of death of the deceased Geofrey Mateje Lulu is not in dispute.

14 The prosecution witness testimonies of PW1 –PW15 substantially hinges on a mixed grill of direct and circumstantial evidence. The residual ingredients of the offence on how the deceased died, the identification of the perpetrator and whether the unlawful act was motivated with malice aforethought under section 206 of the Penal Code are matters to be conclusively determined upon this court giving an opportunity to the accused persons to state their case. The legal architecture for the accused persons to state their defence is governed by article 50 (2) (i) (L) of the *Constitution* as read with section 306 (2) and 307 of the CPC.

15 For those reasons the accused persons be and are hereby called upon to offer an answer to the *prima facie* case on the charge of murder contrary to section 203 of the *Penal Code*.

It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET ON 21ST DAY OF JULY 2023

In the Presence of

M/s Chelogoi for Kenei.

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE

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