



Republic v Kilavi (Criminal Case 4 of 2020) [2023] KEHC 20124 (KLR) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 4 OF 2020
TM MATHEKA, J
JULY 10, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MUASYA KIOKO KILAVI ACCUSED

RULING

1. At the close of the case for the prosecution the only issue before me is whether the prosecution has established a *prima facie* against Muasya Kioko Kilavi the accused to warrant his being put on his defence.
2. He was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) where it was alleged that on the night of 4th and January 5, 2020 at Kima Village, Kwale Location in Mukaa Sub-County within Makueni County he murdered Jimmy Peter Kanu.
3. He took plea on the February 19, 2020 and pleaded not guilty. A full trial ensued wherein the prosecution called seven (7) witnesses in support of its case.
4. Serah Kamande Muindi the deceased’s mother was PW1. She testified that the accused was known to her as she had seen him at Kima many times. That on January 5, 2020 at 6:30am she was at home when she received a phone call and was informed that her son Jimmy had been assaulted at Kima and was lying down. She proceeded to the scene and found that he had been taken to hospital. She returned home. Jimmy was discharged the same day but he e was in bad shape and was not talking. There was blood in his mouth and the back of the head. He could not walk. She took him to a hospital in Wote where he had a head x-ray and was admitted for one week. Thereafter he was discharged home on drugs. She said that his penis had been pulled and he found it difficult to urinate. He died after one week at home. She reported to the police.
5. She added that she was not aware of a relationship between her son and the accused.



6. On cross examination, she said that she lived with Jimmy at her home. That he left home at 4am and went to Kima to harvest sand. She did not meet him when she rushed to Kima. He was x-rayed at Wote and they were given the results. He was admitted to hospital for a week and then they were told to take him home to take drugs there. He was not cured. He needed assistance from two people in order to move. The doctor did not tell them the reason they discharged him from hospital in that condition. They did not take him to another hospital before he died.
7. The deceased's uncle, Stephen Muteti Mola was PW2. He testified that he taxi driver. That on January 5, 2020 at 6:30 am, he was called on phone by deceased's mother and informed that the deceased had been assaulted at Kima. He proceeded to the place in his car and found a crowd. Muasya was there tied with ropes. He tried to talk to Jimmy. Jimmy was injured at back of the head, and side of the face and also complained about pains in the lower abdomen near the navel.
8. Jimmy could not walk. He put him in his vehicle to take him to hospital. Muasya was put in another m/v belonging to the brother in law of PW2. They went to the police station in Kilome Sub-County, Kasikeu Ward. The report was booked in the OB and they were directed to take the injured and the accused to Sultan Hamud Police Station. On arrival, the accused was arrested and they were told to record a report before taking Jimmy for treatment. They then took Jimmy to Sultan Hamud Dispensary where they were referred to Wote for a head scan. On their way they went by Makindu hospital where they were also advised to go to Wote for the same. They did so and returned to Makindu hospital where he was admitted for about 4 days. Jimmy was not able to talk and only stammered abit
9. After about 4 weeks the mother called him and informed him that Jimmy was worse. Then he died.
10. On cross examination, he said that he was phoned while at home near Kima town and took 10 minutes to go to the market. Jimmy was not able to talk. He could open his eyes and could move his arms. He knew Mwasia because he saw him there surrounded by people. He used to see him before passing around and was a sand harvester. He took the deceased to Sultan Hamud, then Makindu on the same day. The next day they took him to Wote. They took 8 hours from Wote to Makindu. It took two (2) days between injury and admission to hospital. He was admitted for about 5 days. At discharge, the medical personnel said Jimmy was fine. He was not given a discharge summary as he was only driving taxi. At discharge he could not walk and had to be held to move. They did not have means as his mother is a charcoal burner. He did not see Muasya assaulting Jimmy and only met a crowd of people.
11. Diana Kameni Kimuyu, was PW3 She testified that she was a resident of Kima area and a businesswoman and on January 4, 2020 at 10 pm she was at selling alcohol at F2 bar at Kima. Muasya was seated in the bar among other customers. Jimmy came in around 2am and stood at the counter. She sold him drinks. Soon thereafter he and Muasya disagreed. They started quarreling. Jimmy was saying that the accused should leave the bar as he had no money to buy drinks. They did not fight in the bar.
12. Then the accused asked her why Jimmy was provoking him. She told accused to ignore him as he was drunk.
13. The accused told her to caution Jimmy from provoking him. She then advised the accused to leave the bar as he had stopped taking alcohol. The accused left. After one hour, Jimmy told her he was going home. The accused left at 2:30 am and Jimmy left at 3am. She later closed the bar and went to sleep. At 2:30 pm, she woke up and was informed that the accused had been arrested for assaulting Jimmy.
14. On cross examination, she said that the accused entered the bar at 9:30 pm and started taking drinks. Jimmy entered at 2am and was already drunk. Jimmy started the quarrel between the two. Though the accused complained to her, she did not tell Jimmy to leave. Jimmy had a spade which he used to point at the accused. She took the spade and put it in the counter. When she told the accused to leave, he



- agreed and said that Jimmy could continue drinking if he had money. When Jimmy left, she remained with the spade. After they left, she did not see them again and did not witness any struggle. She did not see them fight. She closed the bar at 5 and had not seen the two again.
15. Jackson Makau Peter, the deceased's younger brother was PW4. He testified that he is from Kima and an artisan – mason. He could not remember the date Jimmy died but he identified the body for the Post mortem examination.
 16. On cross examination, he confirmed that his brother died at home and then they carried the body to the police. The body was taken to the mortuary by him and his aunt Kanini.
 17. Josephat Mwangela Matheka was PW5. He was from Kima in Makueni and a farmer and also worked with the deceased as lorry sand loaders. On January 5, 2020 at 4:30 am, he was from Masai Kima river and was heading home. As he was going to a shop to buy bread he passed by a bar by the name Kwa Kamene Club. That is when he saw the accused pulling Jimmy. There was moonlight and he identified them from the door of the bar. He saw him pulling him the train rail track. They were arguing and saying that they should go and fight at the rail track. He took the bread and followed the two. He took a stick from other people who were sleeping outside. He ran and saw the accused who in turn ran away after spotting him.
 18. The people who were sleeping rose and followed him and upon reaching the rail track, the accused jumped on the rail track and disappeared. He then arrived at the place where there was a person lying down and found that other people had also arrived. They observed him closely and noted that he was injured on the head. He however thought that the person was drunk and not seriously injured. He left him there and proceeded home. After day break, he heard that the accused had been arrested by the public and taken to the police. Later, he heard that Jimmy had been taken to hospital and that his speech was not coherent. Later, he learnt that Jimmy had died.
 19. On cross examination, he said that the incident happened on 5th May at Kima. That it happened not far from the bar and both were outside the bar. That there were lights only from outside the houses; that he entered the hotel to buy bread and did not see the person who started the fight. He knew the deceased for many years and the accused for 5 years. He said he was outside the hotel and heard the two arguing as they walked to the railway line which was about 5 paces away. He witnessed the fight. He did not scream.
 20. He woke up the people who were sleeping near the fire before the fight. He could not remember what the deceased was wearing. He could not remember when he recorded his witness statement. He saw Jimmy who was bleeding from the head and left him with other people. He saw the accused hit the deceased with fists. Both were drunk. After day break he learnt that that accused was taken to the police.
 21. PW6 was Samuel Mulandi Paul, a resident of Kima Kajiado and a sand loader. His testimony was that he knew both the deceased and accused as they worked together loading sand. On January 5, 2020 4:30 am, he was at Kima and had been sleeping near a fire. Mwangela PW5 arrived running, took a stick shouted saying that the accused was beating Jimmy. He (PW6) ran towards the railway line and on his return, he saw Jimmy lying on the ground. There was moonlight. He then went back to the river. At about 10:00 am, he was told that the accused had been arrested by the public. At that time, he did not see Jimmy again.
 22. On cross examination, he said that Kima is at the border of Makueni and Kajiado. That he was at Kima Kajiado and what he witnessed was in Kajiado side. He crossed the rail line. The accused was chased. Josephat picked a stick running towards the rail line. He did not see the accused pass by.



23. PW7 was Dr David Kasanga who conducted a post mortem on the body of the deceased following a by Sultan Hamud police station. He found scars on the right side of the face around the right eye, a wound on the front of the face pressure sore on the right hip, wall of urinary bladder was swollen from trauma, there was bleeding inside the head at the back of the head and the whole brain was swollen. The cause of death was failure of both respiratory and cardiovascular system due to severe head injury. He produced the post mortem as P Ex 1.
24. On cross examination he told the court that the said injuries could not have been caused by alcohol but by trauma.
25. PW8 was Richard Langat. He is currently in Meru County but was previously in Sultan Hamud. He testified that on January 5, 2020 at 9.30am, a report of assault was booked in the OB and the case was assigned to him for investigations. He recounted the events leading to the death and how the post mortem was conducted. He also visited the scene at Kima and club F2. He produced the P3 form as P Ex 2.
26. The prosecution closed its case.
27. Section 306 of the [Criminal Procedure Code](#) provides for what should happen at the close of the case for prosecution. It states;
 - "(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, 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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."
28. The Court of Appeal in *Bhatt v R* [1957] EA 332 at 334 and 335, dealt with the issue of a *prima facie* case in the following terms: -

“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.”

29. I must be guided by the Court of Appeal in [Anthony Njue Njeru -vs- R](#) [2006] eKLR t on what I must not do in determining whether or not the accused has a case to answer.

“We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused.”

30. Counsel for the accused submitted that the state had not established a *prima facie* case citing *Sanjit Chattai vs the State* (1985) 39 WLR 925 that a submission of no case to answer may be made and upheld

"(a) when there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence,

(b) when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it"

31. Counsel also cited [Woolmington vs DPP](#) (1935) EA 462 where it was held that in making a finding on a *prima facie* case the court ought to bear in mind that it is the burden of the prosecution to prove the guilt of the accused person beyond a reasonable doubt.

32. Counsel analyzed the evidence on record and urged the court to find that it lacks consistency, is filled with false hoods and renders the case for the prosecution a nonstarter in view of s 107 of the [Evidence Act](#) Cap 80 on the burden of he who alleges to prove the facts. The court was urged to acquit the accused person.

33. I have carefully considered the evidence before me as is required by law, and the submissions by counsel. The only issue is whether on the evidence laid out herein above the accused has a case to answer.

34. It is not in doubt that a person died. There is evidence that the accused person had a quarrel with the deceased the same evening in the bar, and was last seen quarrelling with the deceased just before he was found lying down with a head injury. These facts point to a *prima facie* case against the accused to warrant his being put on the defence.

35. The accused person will be put on the defence in accordance with s 306(2) of the [Criminal Procedure Code](#).

DATED, SIGNED AND DELIVERED THIS 10TH JULY 2023.

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Accused: Present

For accused: N/A

For State: Mr. Tanui

