



**Republic v Mahat (Criminal Case 35 of 2019)
[2023] KEHC 19640 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 35 OF 2019
EM MURIITHI, J
JULY 6, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBLE ABDI MAHAT ACCUSED

JUDGMENT

1. This a decision on the issue of case to answer pursuant to section 306 of the *Criminal Procedure Code* after close of the Prosecution evidence, where because of the verdict that the court has reached a full consideration and discussion of the evidence in the ruling is warranted.
 1. Where, and the Court is required to give full reasons for the decision but not so where the court finds that a prima facie case has been established as held in *Kibera Karimi v R (1979) KLR 36*
 2. The accused is 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 March 4, 2019 at Kongo Atune village, Amwathi II Location, Mutuati division, Igembe North Sub-County within Meru County, murdered Benjamin Kaberia.
 3. The accused pleaded not guilty to the charge and the matter proceeded to trial, where 6 witnesses testified.
 4. PW1 Lawrence Gitonga testified that on the material day, he was looking after their miraa with his brother the deceased herein, when 3 people, including the accused came and started harvesting the miraa. They then left but came back while armed with a gun. He unsuccessfully tried to alert his brother to escape when he decided to run away. As he ran, he heard gunshots and screams from his brother. When he was far off from the incident, he called his uncle PW2 and informed him what had happened.



5. PW2 Cyrus Kanyaru testified that he was informed about the incident on March 6, 2019 by a neighbour and not PW1.
6. PW3 Peter Mwangi learnt about the incident from PW1 on March 6, 2019. He did not know whether PW1 was with the deceased the day before.
7. PW4 Chief Inspector Sammy Kamau was stationed at Mutwati Police Station at the material time. He testified that when an operation was conducted on May 6, 2019 to flush out camel grazing in the farms in the area, 5 herders were arrested namely Abdullahi Abdi Dawood, Roble Abdi Mahat, Mohammed Abidi Yusuf, Abdi Belaman Noor Ali and Mohammed Jere Mohamed. When the arrest was made, it was alleged that one of the persons arrested was responsible for the shooting of the deceased herein. On May 7, 2019, PW1 came to the station and demanded to be shown the suspects who had been arrested so that he could identify the perpetrator of his brother's murder. 'I decided to conduct an identification parade. Where I paraded all the 5 arrested and included 4 more suspects and gave a chance to Lawrence to identify the one he was claiming to have shot his brother. I conducted the identification parade within Mutuati Police Station compound and considering that they were all suspects. I did it in an open room. The open room was next to the Repo DEx and Inquiry Desk. Apart from me, there were officers who were guarding the suspects. There were about 4 of them. After timing up the suspects I invited Mr Lawrence to come and see the suspects. He came and pointed them accused person Abdi Mahat. He went and touched him. The suspect was between Julius Mwangera and Kariithi Ndegwa at position No 3. Lawrence touched the suspect in the shoulder. After conducting the parade, I requested the suspect as to the conduct of the parade and he said he did not know why he touched him in Kiswahili 'Sijui kwa nini amenigusa' I later on did a report on the identification. I requested to place his thumbprint on the report. I wish to produce the identification Report dated May 7, 2019. Court: Report on identification parade dated May 7, 2019 is marked box no T The person who was identified by Lawrence is the accused in the dock (points).'
8. On cross examination, he stated that, 'Mr Gitonga came to the station he wanted to see the suspect. I did not show him the suspect. I wanted to be fair to the suspects. The parade was at 2:00 pm. Mr Gitonga came minutes before. It took about 15 minutes to organize for the parade. It is not my first parade. Why did the suspect say 'sijui kwanini amenigusa.' I did explain to the 5 suspects that someone had said he could identify one of them. I told them in Kiswahili. They could understand. I was not involved in the investigations and I never spoke with any witnesses in the matter. I only did the identification parade.'
9. PW4 Dr Sammy Gathuu Wachira produced the post mortem report which detailed the injuries sustained by the deceased while PW5 Mr Alex Mdingi Mwandawiro produced the 2 cartridges which were expended during the shooting, the exhibit memo and the adhesive report as exhibits.

Submissions

10. The prosecution submitted that a prima facie case does not necessarily mean a case which must succeed, and urged the court to delve further in the case and only consider the material before it to find that it has established a prima facie case for purposes of finding that the accused has a case to answer. It urged that PW1, as the single identifying witness was able to single out the accused as being one of the perpetrators of the offence during the identification parade.



11. The accused submitted that PW1 was not at the scene of the incident and was actually never an eye witness. He faulted the police officer for proceeding with the identification parade yet he had challenges in communication, and cited *Republic v Mwangi s/o Manaa (1936) 3 EACA*, [*Joshua Mutiso Kisese v Republic \(2013\) eKLR*](#) and [*Njibia v Republic \(1986\) eKLR*](#). It urged that the prosecution had failed to establish a prima facie case in accordance with set out standards in *Nyambura & Others v Republic (2001) KLR 355*, *Ramanlala T Bhatt v R (1957) EA 332* and *State v Rajbnath Ramdhan, Amoy Chhin Shue, Sunil Ramdhan and Rabindranath Dhanpaul KCA No S 104/1997*.

Determination

12. The Court has considered the evidence presented by the prosecution in this trial, and at this stage of decision on case to answer pursuant to section 306 (1) of the Criminal Procedure Code, finds that the evidence is not sufficient to call upon the accused to make his defence there being not established a prima facie case within the meaning of *Bhatt v R (1957) EA 332*.
13. The evidence of the Prosecution was that PW1 identified the accused on the material day and later on during an identification parade. PW1 stated that, 'At about 5.00 pm a group of three people including the accused came to the shamba. They used to come to graze their cows and they would ask for water and miraa which we would give them. On this day. They came and entered the miraa shamba and started harvesting miraa. They were carrying handcuffs. After some they entered into the forest. They later came while carrying a gun. I saw the accused. I saw them carrying a gun. I tried to call my brother to escape but he did not hear me. I went through the forest and ran away. As I ran I heard screams coming from the shamba where I had seen my brother. It was my brother who was screaming. I heard several gunshots. I went to a far off place for the incident and I called by uncle and told the people at the area what had happened. This was at Mwanamattoo area. My uncle is called Cyrus Kanyani, I used my phone to call him. On May 6, 2019, the police arrested two people and they asked me to attend an identification parade. I identified the accused. He is the one I saw on March 4, 2019.'
14. When the witness was being cross examined, he contradicted himself by first saying that he knew all the 3 people who came to the shamba and then later said that he only knew one of them. Even the court noted that the witness appeared confused.
15. It is clear that PW1 was the only eye witness in this case, and the court must warn itself against the dangers of relying on the evidence of a single eye witness, and more particularly if the offence took place at night and the witness appeared confused in court.

Identification Parade

16. For the evidence of identification to have some probative value, the identification parade must comply with the laid down procedure. The Court of Appeal in [*David Mwita Wanja & 2 others v Republic \[2007\] eKLR*](#) emphasized on the importance of a properly conducted identification parade and expressed itself as follows:

' The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See *R v Mwangi s/o Manaa (1936) 3 EACA* There are a myriad



other decisions on various aspects of identification parades since then and we need only cite for emphasis *Njihia vs R* [1986] KLR 422 where the court stated at page 424: -

It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.'

17. The correct procedure of conducting an identification parade is provided for under chapter 42 paragraph 7 of the National Police Service Standing Orders as follows:

- ' (5) Where a witness is asked to identify an accused or suspected person, the following procedure shall be followed— (a) the accused or suspected person shall always be informed of the reasons for the parade and that he or she may have a counsellor or a friend present when the parade takes place; (b) the police officer-in-charge of the case, although he or she may be present, shall not conduct the parade. (c) the witness or witnesses shall not see the accused before the parade; (d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her; (e) where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not specially apparent; (f) not more than one accused or suspected person shall appear on an identification parade; (g) the accused or suspected person shall be allowed to take any position he or she chooses and shall be allowed to change his or her position after each identifying witness has left if he or she so desires; (h) care shall be exercised that witnesses do not communicate with each other; (i) where the witness desires to see the accused or suspected person walk, hear him or her speak, see him or her with hat on or off, this shall be done, but in this event the whole parade shall be asked to do likewise; (j) the conducting officer shall ensure that the witness indicates the person identified, without the possibility of error by touching; (k) at the termination of the parade, or during the parade, the officer conducting it shall ask the accused or suspected person if he or she is satisfied that the parade is being or has been conducted in a fair manner and make a note in writing of his or her reply thereto in form p.156; (l) when explaining the procedure to a witness the officer conducting the parade shall tell him or her that he or she shall see a group of people which may or may not include the person responsible, and the witness shall not be told, 'to pick out somebody' or be influenced in any way whatsoever; (m) a careful note shall be made after each witness leaves the parade, to record whether he or she identified the accused or suspected person and in what manner; (n) a record shall be made by the officer conducting the parade of any comment made by the accused or suspected person during the parade, particularly comments made when the accused or suspected person is identified; (o) the parade shall



be conducted with utmost fairness, otherwise the value of the identification parade as evidence shall be nullified; and (p) no police officers shall be used as witnesses in an identification parade unless a police officer is the accused or suspected person.'

18. PW4 testified that the accused was placed among 8 other persons 4 of whom were from his tribe while the other 4 were from a different tribe. Those people are listed in the identification parade report to be Abdullahi Adi Daud, Julius Mwirabua Thurania, Roble Abdi Mahat, Kariithi Ndewa, Mohammed Abdi Yusuf, Peter Kimaru, Abdi Rahaman Noor, David Kinyua and Mohammed Jelle Mohammed. In mixing the tribes of the persons lined for the parade, the quality of the identification parade was compromised, for obvious reasons. The accused is a Borana, who have distinctive physical features like their silky curly hair and the colour of their skin. PW4 stated that, 'The suspect was between Julius Mwongera and Kariithi Ndegwa at position No 3. Lawrence touched the suspect in the shoulder.'
19. All the evidence proved was the fact of death but not the other ingredients of the offence of murder, namely, the act of the accused caused the death with malice aforethought. See section 203 of the Penal Code and Etyang, J in *R v Nyambura & 4 Others [2001] KLR 355* and *R v Gachanja [2001] KLR 428*.
20. The Counsel for the DPP has in submissions filed before the court urged that:
 - ' 15. In the light of the aforesaid, a prima facie case does not necessarily mean a case which must succeed. I urge this Honourable court not to delve further in this case and only consider the material placed before it and humbly come to the conclusion that the prosecution has established a prima facie case for the purposes of finding the accused has a case to answer.'
21. With respect, the definition of prima facie case in *Ramanlal T Bhatt v R (1957) EA 332, 335* as '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'. Again, where the court has considered that there is not established a prima facie case, the accused is entitled to an acquittal, as held by the Court of Appeal for East Africa in *Murimi v R (1967) EA 542*.

Orders

22. The Court finds in accordance with section 306 (1) of the Criminal Procedure Code that there was no evidence that the accused committed the offence and, therefore, enters a finding of not guilty for the accused on the murder charge contrary to section 203 as read with 204 of the Penal Code.
23. The accused is consequently acquitted of the offence of murder contrary to section 203 as read with 204 of the Penal Code.
24. Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF JULY, 2023

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Mwilaria Advocate for the Accused.

Mr. Masila Principal Prosecution Counsel for DPP.

