



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Kimunya (Criminal Case 33 of 2019)  
[2023] KEHC 21598 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE 33 OF 2019  
DO CHEPKWONY, J  
AUGUST 1, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**HARRISON GAKURU KIMUNYA ..... ACCUSED**

**RULING**

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 Laws of Kenya.

The Particulars of offence are that:-

' On the April 23, 2019 at 10:00 pm at Kibichoi shopping Centre in Githunguri Sub-County within Kiambu County, the accused murdered Phillip Kamau Kairu.'

2. The accused was arraigned in court on August 16, 2019 wherein he was informed of the Charge against him but was not required to say anything until such time as he will have been examined as his mental capacity to plead and assigned counsel.
3. The accused was confirmed fit to plead on August 29, 2019. He was also assigned M/S Ndombi as his counsel. He took plea on September 4, 2019 whereby he pleaded 'Not Guilty' to the offence of Murder.
4. The prosecution called four witnesses in support of their case being Rahab Wanjiru as PW1, Fredrick Gichiri Njenga as PW2, Cecilia Wangare as PW3, PC Wilfred Lagat as PW4 and Doctor Eunice Mugweru as PW5 and they closed their case. This Ruling is therefore in respect of whether or not the prosecution has established a prima-facie case against the accused person to warrant him be placed on his defence.



5. PW1 testified that on April 23, 2019, she was with her brother, the deceased in the house and he took early supper and left with his companion to go to the shopping centre. She went on to state that the following morning, she was called and informed that the deceased had been seen lying on the ground at the shopping centre. When she went there, she found him lying down. It was her evidence that the deceased was using hand signals and could not talk. She took him home where she washed him and later took him to Kigumo hospital for treatment. That he was treated and later transferred to Gatundu Hospital where she was informed by the doctor there that the deceased had passed on. On cross examination, she stated that she did not know who killed the deceased or who the accused was.
6. PW2 gave evidence that he assisted PW1 in taking the deceased to the Kigumo hospital when he was semiconscious and later to Gatundu Hospital where the deceased died. He too stated that he did not know how the deceased died.
7. PW3 testified that she was called and informed that Kamau, the deceased had been injured and had been taken to the hospital where he had passed on. She also stated that she did not know what the cause of his death was, as it happened at the shopping centre while she was at home on the night.
8. PW4, PC Wilfred Lagat testified that a report was made by PW1 who wrote her statement as reiterated in her evidence which will not be rehashed here. He further stated that he also recorded the statement of one Peter Kaguru Njuru who stated that he was in the company of the deceased at Kibichoi centre near a bar when the deceased asked for a 'pikipiki' to take him home and that the said Peter Kaguru Njuru called One Harrison, the accused and the deceased informed the accused that he only had Kshs 50/= which the accused told him was not enough. He said that the accused took the Kshs 50/= and knocked the deceased on the leg and kicked him (swiped him). The deceased fell backwards and hit the road near the tarmac and did not get up again. PW4 stated that it was the said Peter Kaguru Njuru statement that he together with the accused carried the deceased to a vegetable kiosk until the next morning when PW1 came to take him. It was PW4's evidence that the last person to be with the deceased was the accused who had kicked him. PW4 stated that they arrested the accused and when the post-mortem was conducted the cause of death was found to be injury by blunt object.
9. PW5, Doctor Eunice Mugweru produced the post mortem report for the deceased which showed that the deceased had multiple external injuries on the head and abrasions on the chest and abdomen. PW5 established that the cause of deceased's death was head injury due to blunt trauma. On cross-examination, PW5 stated that blunt trauma can be caused by a fall. She stated that the injuries were fresh and had been sustained just before the deceased died.
10. On July 6, 2022, PC Josphat Koskei informed the court that he had challenges of tracing the key witness in the case who had been evasive and court ordered that the said witness Peter Kaguru Njuru be arrested and brought to court. On November 29, 2022, the court was again informed that the said Peter Kaguru Njuru had not been arrested and warrants of arrest were extended.
11. When the matter came before me, the court issued directions for the matter to proceed from where it had reached under Section 200 of the *Criminal Procedure Code* and the prosecution marked their case as closed. The court is now tasked with determining whether the accused has a case to answer or not. The counsel for the parties elected not to file submissions on the same.

### **Analysis and Determination**

12. To determine whether or not the prosecution has established a prima-facie case to warrant the accused be placed on defence. It is important to start with the definition of what amounts to a prima-facie case.



A prima-facie was defined by the Court in the case of *Republic –vs- Abdi Ibrahim Owl [2013] eKLR* as follows:-

' Prima facie' is a Latin word defined by Black's Law Dictionary, 8<sup>th</sup> Edition as 'Sufficient to establish a fact or raise a presumption unless disproved or rebutted'. 'Prima facie case' is defined by the same dictionary as 'The establishment of a legally required rebuttable presumption'. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v R [1957] EA 332 at 334 and 335*, the court stated 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.'

13. The important aspect in prima-facie case is to establish whether there is substantive evidence of the accused in connection to the offence. This was the position in the case of *Republic -vs- Samuel Karanja Kiria [2009]eKLR* Justice JB Ojwang 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'.

14. In this case, the prosecution called for witnesses but did not call the key witness to testify in support of its case. For instant, a witness by the name Peter Kuguru Njuru who had been with the deceased on the fateful night and even recorded his statement was never called, and the reason given was that he had become evasive. It is worth pointing out that although the prosecution is at liberty to choose who to call and who not to call as its witnesses, it is prudent for the prosecution endeavour and call all the necessary and relevant witnesses, especially in cases such as this one where life was lost. It leaves the victim's wanting for answers and closure over the loss of their loved ones. One is left wondering why a witness such as Peter Kuguru would be avoiding in failing to attend court and testify when he recorded a statement which led to the arrest of the accused. The question becomes, could it be the fear of being exposed as having been involved in the death of the deceased? In this Court's view, the failure to call such key witness in this case has left a gap in the prosecution's case, whose benefit can only go to the accused.



15. It is trite law that where there are gaps in the prosecution's case, a doubt is raised whose benefit is granted to the accused. This was the position in the case of *Edwin Wafula Keya -vs- Republic, Court of Appeal [2005] eKLR*, where the Court stated that:-

' In our view failure to call all or any of the three police officers who arrested the appellant some two months after the offence left unbridgeable gap in the prosecution's case and the appellant must have the benefit of that gap.'

16. See also the case of *Pius Arap Maina -vs- Republic [2013] eKLR* (Criminal Appeal No 247/2011) where the court noted that:-

' It is gainsaid that the prosecution must prove a criminal charge beyond any reasonable doubts. As a corollary, an evidential gap in the prosecution's case raising material doubts must be in favour of the accused'.

17. In the instant case, the prosecution's witnesses PW1, PW2 and PW3 all testified that they did not know how the deceased died or even who killed the deceased. PW4's evidence was purely based on the statement of the alleged key witness Peter Kuguru Njuru who could not be traced and availed in court to give evidence to corroborate PW4's evidence, which is merely considered to be hearsay. PW5's evidence was mainly on the cause of death of the deceased but not who caused the death.

18. Considering the entirety of the evidence on record as highlighted herein above, this Court finds that the prosecution has failed to establish a prima-facie case against the accused person to warrant him be placed on defence as none of the witnesses who testified tendered any evidence to implicate him for the unfortunate death of the deceased. In the circumstances, the accused has no case to answer.

19. As a result, the Court hereby finds in favour of the accused by entering a verdict of not guilty and acquits him under Section 306(1) of the Criminal Procedure Code which 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 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.'

20. The upshot is that the accused is hereby set at liberty unless otherwise lawfully held.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 1<sup>ST</sup> DAY OF AUGUST, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

M/S Ngesa counsel for State

M/S Gathua counsel for the accused person

Accused – present

Court Assistant - Lucy

