



**Republic v Kwamboka & 3 others (Criminal Case E011 of 2022)
[2023] KEHC 22304 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL CASE E011 OF 2022
WA OKWANY, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SUSAN KWAMBOKA 1ST ACCUSED

THOMAS NYAKONGO 2ND ACCUSED

WYCLIFFE MOGAKA 3RD ACCUSED

JOSPHAT OSIEMO 4TH ACCUSED

RULING

1. The 4 accused persons herein, Susan Kwamboka, Thomas Nyakongo, Wycliffe Mogaka and Josphat Osiemo were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on May 18, 2022 at Kerema village, Mokomoni Sub-Location, Bosaragei Location in Nyamira North Sub-County within Nyamira County, murdered James Mitema Moturi (hereinafter referred to as the deceased).
2. The Prosecution called a total of 6 witnesses in support of its case. A summary of the prosecution's case, as stated by the witnesses was that the deceased was on May 19, 2022 found injured and sleeping in his house that had a pool of blood on the floor. The deceased was then rushed to hospital where it is alleged that he informed to PW1 that the 1st Accused lured him to her house where he was assaulted by the 2nd, 3rd and 4th accused. The witnesses d that testified that the deceased died on May 24, 2022 while undergoing treatment at a hospital in Eldoret.
3. The court is, in this ruling, called upon to determine if the prosecution has made out a prima facie case against the accused persons that would warrant their being put on their defence.



4. According to the defence counsel, Ms Shilwatso, the prosecution did not tender sufficient evidence to show that any of the accused persons assaulted the deceased prior to his death. It was further submitted that the prosecution's case was heavily anchored on mere suspicion and circumstantial evidence that cannot support a conviction. For this argument, the defence cited the decision in *Abanga Alias Onyango vs Republic*, CRA No 32 of 1990 where the Court of Appeal set out the principles applicable in determining whether circumstantial evidence adduced in a case is sufficient to sustain a conviction as follows: -

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

5. The prosecution did not present any submissions on a case to answer and confirmed that they will rely on the evidence on record.

6. I have considered the evidence so far presented by the prosecution's witnesses, the submissions made and the authorities cited. As I have stated hereinabove, the issue before me at this stage is whether the evidence so far adduced warrants calling upon the accused persons to defend themselves. In other words, do the accused have a case to answer? In *Republic vs Abdi Ibrahim Owl* [2013] eKLR a prima facie case was defined as follows: -

“Prima facie” is a Latin word defined by Black's Law Dictionary, 8th 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] E.A 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 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.”

7. Similarly, in *Anthony Njue Njeru vs Republic* [2006] eKLR the Court of Appeal held that: -

“Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a prima facie case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the Prosecution case, the case is merely one, ‘Which on full consideration might possibly be thought sufficient to sustain a conviction’

Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a Prima facie Case as settled in Bhatt’s Case (supra), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was on record. It seems the Appellant was required to fill in the gaps in the Prosecution case.”

8. The question that this court has to deal with at this stage is therefore, whether, based on the evidence before this Court, a Court properly directing its mind to the law and the evidence may, as opposed to will, convict if the accused opt to give no evidence. In *Ronald Nyaga Kiura vs Republic* [2018] eKLR it was held: -

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie 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. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of Ramanlal Bhat -vs- Republic [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

9. Oxford Companion of Law defines “*prima facie*” in the following terms:

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.

10. Courts have taken the position that there is a danger in making conclusive findings at this stage, especially where the Court finds that there is a case to answer. The reasons for this position was explained in *Festo Wandera Mukando vs The Republic* [1980] KLR 103 as follows:-

“...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the court or courts concerned.”



11. In instances where the prosecution's case as presented, even if it were to be taken to be true, would still not lead to a conviction such as where, for example, an accused has not been mentioned as having been involved in the offence in question and there is absolutely no evidence whether direct or circumstantial linking him to the offence, it would be foolhardy to put him on his defence. This is to say that a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. In other words, an accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. Indeed, the defence case is not meant to fill in the gaping gaps in the prosecution case. In *Public Prosecution vs Zainal Abidin B. Maidin & Another* High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 it was held that:

“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 Sharma J had occasion to observe:

‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”

12. The court in *Republic vs Prazad* [1979] 2A Crim R 45, King CJ held the very same standard on a prima facie case in the following terms:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

13. In the instant case, I note that the evidence linking the accused persons to the case is what the deceased allegedly told PW1 regarding the people who allegedly assaulted him. As I have already stated hereinabove, this is not the stage to critically examine the said evidence and make a conclusive determination as to whether the accused stands guilty or not. I find that it will, in the circumstances of this case, be prudent to hear from the accused persons before making a conclusive determination.

14. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I am satisfied that the prosecution has established a prima facie case for the purposes of a finding that the accused has a case to answer. Whether or not the said evidence meets the threshold for a conviction is a matter that will be considered at the end of the trial

15. I accordingly place the accused persons on their defence.

16. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER, 2023.

W. A. OKWANY

JUDGE

