



**Republic v Kipkosgei & another (Criminal Case E068 of 2020)  
[2024] KEHC 12936 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E068 OF 2020  
RN NYAKUNDI, J  
OCTOBER 25, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JACOB KIPKOSGEI ..... 1<sup>ST</sup> ACCUSED**

**DANIEL KIPCHIRCHIR ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons were 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 the 27<sup>th</sup> October, 2020 at Kapng'etuny village Kipsombe location within Uasin Gishu County the accused persons jointly murdered DARIUS KIPLIMO.
2. The accused persons denied the elements of the offence on 11<sup>th</sup> November, 2020 vesting the duty upon the prosecution to prove the following elements of the offence beyond reasonable doubt:
  - a. That the deceased is dead
  - b. That the death was unlawfully caused by the accused persons.
  - c. That besides the unlawful act or omission there was malice aforethought and
  - d. Finally, there is prima facie evidence directly or circumstantially placing the accused persons at the scene.
3. As at 8<sup>th</sup> May, 2024, the prosecution had not adduced an evidence to establish any of the elements of the offence of murder contrary to section 203 as punishable under Section 204 of the *Penal Code*. The primary purpose of Art. 50 2(a) is that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved; (b) to be informed of the charge and



sufficient details to answer it; (c) to have adequate time and facilities to prepare a defence; (e) to have the trial begin and concluded without unreasonable delay.

4. From the record, the prosecution appeared to have applied for adjournment on several occasions seeking leave of the court to avail the necessary witnesses to tender their evidence to ensure the proceedings took place with a view for the standard and burden of proof absolutely vested with the prosecution discharged as stipulated in Section 107 (1), 108 and 109 of the *Evidence Act*. The trial in this case was adjourned severally with effect from the 11<sup>th</sup> November, 2020 to 8<sup>th</sup> May, 2024 when the lead prosecution counsel Mr. Mugun fundamentally found it difficult to persuade the court for a further adjournment to trace and bond witnesses who would otherwise establish a prima facie case. The patterns within which the decisions for adjournments were made demonstrate that the accused persons suffered prejudice which consequently occasion an injustice infringing the right to a fair hearing as expressly stated in Art. (50) (2)(e) which protects and guarantees that the trial of an accused person ought to begin and be concluded without reasonable delay. The right to a fair trial is guaranteed by Art. 50 of the *Constitution* protects an accused person's constitutional rights which transcends the Bill of Rights in Art. 24, 25,26,27,28,29, 47 and 48 of the *Constitution*.
5. The court in determining an alleged violation of Art. 50(2)(e) of the *Constitution* has to bear in mind that he is not to apply a mechanistic or mathematical formulae. Instead, the session judge is required to balance the protection afforded to the individual by this same provisions against other factors which inevitably lead to delay. These factors include but not limited to the following:
  - a. The length of the delay;
  - b. Any waiver of time periods by the defence;
  - c. The reasons for the delay including:
    - i. Inherent time requirements of the case
    - ii. The actions of the accused
    - iii. The actions of the prosecution
    - iv. Limitation on institutional resources
    - v. Other reasons for the delay and the prejudice to the accused person
6. The right to a fair trial is considered one of the most essential and fundamental Human Right not only in Kenya but in the community of nations that respect the rule of law. Its applicability on a criminal charge does not start when an accused person has been indicted by the prosecution as provided for in Art. 157(6) & (7) of the *Constitution* but it dates back from the commencement of investigations by the national police service running through to the time when he/she is presented before a court of law to be informed of the relevant offences in which he/she is required to be prosecuted by the state. The right to a fair trial under Art. 50 is non-derogable and it entitles an accused person at all times to be presumed innocent until proven guilty by way of sufficient evidence to discharge the elements of the offence. The right to a fair trial without unreasonable delay has been recognized by numerous international legal instruments such as *Universal Declaration of Human Rights*, International Covenant on Civil and Political Rights, The African Charter on Human and People's Rights, The African Court on Human and People's Rights. In Art. 10 of the *UDHR*, everyone is entitled to full equality to a fair and public hearing by an independent and an impartial tribunal on his/her rights and obligations and of any criminal charge against him. Art. 11(1)(c) also deals with the rights to be tried without undue delay. The *African Charter on Human and people's rights* in Art. 7(4) the accused person has the right



to be tried within a reasonable time by an impartial court or tribunal. In applying the international and regional instruments, our *Constitution* in Art. 2(5) and (6) entrenches international law as part of our legally binding sources of law in making determinations on protection of guarantees in the Bill of Rights.

7. The question which begs for an answer is whether at the close of the prosecution case on 8<sup>th</sup> May, 2024, a prima facie case has been made out against the accused person to warrant them to be legally placed on their defence. In other words, does the accused have a case to answer? In *Republic v 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*, 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.”

8. In *May v O’Sullivan* [1955] 92 CLR 654 it was therefore held that:

“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”

9. As I indicated earlier on, the Prosecution did not call any witness in an attempt to discharge the burden vested on them. The prosecution may elect not to call a material witness but they do so at the risk of their own case. (See the case of *Ng’ang’a v R.* [1981] KLR 483).
10. The right to a fair trial in this case on the criminal charge against the accused persons was not observed from the moment the investigation and the criminal charge was levelled against the accused persons until the prosecution admitted that they could no longer hold the criminal charge against the accused person at abeyance for long periods of time in absence of the key witnesses being summoned and bonded to attend court. The accused persons’ right to equality before the law, right to human dignity and right to freedom and security of the person, right to life all protected and guaranteed by the Constitution seems to have been violated by the state.



11. Having considered the material on record and the pieces of evidence as adduced by the prosecution, I have come to the logical conclusion that the prosecution has failed to discharge its burden of proving beyond reasonable doubt that the two accused persons caused the death of the deceased. I therefore find no prima facie case has set out against the accused persons requiring this court to put them on their defence for the offence of murder contrary to the Section 203 as punishable under Section 204 of the *Penal Code*. As a consequence, they are acquitted and shall be held free unless and otherwise lawfully held. I so direct.

**DATED AND SIGNED AT ELDORET THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024**

**R. NYAKUNDI**

**JUDGE**

