Republic v Ooko (Criminal Case E031 of 2023)
[2024] KEHC 12631 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE E031 OF 2023

RE ABURILI, J

OCTOBER 23, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

CALVIN OUMA OOKO ..... ACCUSED

RULING

1. The accused person herein Calvin Ouma Ooko is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* (Chapter 63 of the Law of Kenya). The particulars of the offence are that on the night of 29th and 30th October 2023 at Pawteng Village, Nyangoma Location in Muhoroni Subcounty within Kisumu County, he murdered Vincent Owindi alias Thomas Juma Obiero. The accused pleaded not guilty to the charge as per the Information dated November 14, 2023.

2. The prosecution called one witness Corporal Jairus Namiti who testified as PW1 in support of the case against the accused person and as there were no other witnesses to call, including the investigating officer PC Nickson Munyua who had expressed his frustrations for inability to get witnesses attend court, in a previous court session on May 29, 2024 and who did not attend court on the hearing date yesterday October 22, 2024, the prosecution case was closed.

3. Under Section 306 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya), this court has a duty, upon close of the prosecution's case, to rule on whether the accused person has a case to answer or not. The section stipulates that:

> " 306(1) When the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused or any one of several accused

committed the offence should, 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."

4. On the other hand, Section 306(2) of the *Criminal Procedure Code* provides that:

> " 306(2) When the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court should proceed to put the accused on their defence and thereby the accused is supposed to present evidence in defense."

5. What is therefore pending before this court at this stage is to determine whether the prosecution has established a prima facie case that would warrant this court to call upon the accused person to give his defence.

6. Section 211 of the *Code* provides that 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. (See *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 334 and 335).

7. However, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for an analytic ruling for a case to answer. Reasons for the finding of no case to answer should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See *Festo Wandera Mukando v Republic* [1980] KLR 103).

Analysis and Determination

8. In this case, PW1 was CPL Jairus Namiti who, infact, was the initial investigating officer who handed over investigations to other officers including PC Munyua and who was said to be sick and proceeding on retirement, and who indeed appeared in court while appearing unwell, testified that 30th October, 2023, he was summoned by his DCIO Muhoroni Subcounty to proceed to a murder scene at Pawteng area and in the company of his colleagues, they proceeded to the scene where they found, near Awasi area, blood by the road side, upon being led by a clan elder who was holding the accused herein as a suspect of the alleged murder.

9. That they then proceeded to Awasi Mission hospital where the deceased had been rushed by the suspect and other members of the public, found the body of the deceased and transferred it to Othoo Funeral Home. They then proceeded to the home of the accused herein and recovered some items namely, an axe, a trouser and shoes which they suspected to have had blood stains and he handed over to the investigating officer Chief Inspector Barasa. The witness arrested the suspect now accused person after conducting a search in the home of accused person and also witnessed post mortem on the body of the deceased.

10. In cross examination, the witness stated that the incident took place at night. That he recovered the axe from the accused's mother's house while the trousers and shoes were recovered at the house of the accused in the presence of the accused and his wife. And they recorded an inventory of the recovered items. He did not know whether or not the recovered items were taken for forensic examination.

11. That was all from the prosecution side that closed the case.

12. For the offence of murder to be proved, the prosecution is under the obligation to establish the following key ingredients:

    a. Proof of death of the deceased, and the cause,

b. Proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased,

c. malice aforethought on the part of the accused.

13. The standard of proof in criminal cases is proof beyond any reasonable doubt. However, at this stage, the prosecution is not expected to have proved its case beyond reasonable doubt. Only a the close of the entire case for both the prosecution and the defence. The Supreme Court of Canada in *R v Morabito* {1949} SCR 172 drew the attention on this matter where it held that:

> "When assessing the prosecution case in consequence of no case submissions, the question of reasonable doubt does not arise at that stage."

14. What is required at this stage is evidence which is sufficient and tends to establish the guilt of the accused which then calls on the court to give him an opportunity to be heard before making a final determination on the evidence.

15. In *R. T. Bhatt v r* {1957} EA 332 the Court observed that:

> "It may not be easy to define what is meant by 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." (See also *R v Samwel Karanja Kuria* {2009} eKLR."

16. In this case, other than the evidence of PW1 that he went to Awasi Mission Hospital and transferred the body of the deceased to Othoo Funeral Home and that he witnessed post mortem on his body, the witness did not even mention the name of the deceased. There was no postmortem report or family member of the alleged deceased to tell the court that the deceased was the person in the Information for murder filed herein. The cause of death is not known and neither is the person who allegedly unlawfully killed the deceased mentioned by any witness. In other words, there is no evidence adduced to suggest that the accused was in any way connected to the death of the person named in the Information for murder. The investigating officer PC Munyua had on the previous occasion even taken oath and stated that the doctor who performed an autopsy on the body of the deceased could not be traced as she never gave her contact telephone or the hospital where she worked. As to why witnesses refused to come to court and testify, including the investigating Officer PC Munyua, is only known to themselves.

17. This Court is therefore unable to find that there was death, the cause of that death, the perpetrator of the alleged death or whether the death was unlawfully caused as no evidence was led to establish any of the essential ingredients for murder, or even manslaughter.

18. No prosecution witness came to court to tell the court that they saw how the deceased allegedly died. In addition, no witness saw the accused person at the scene of the alleged crime and the evidence of PW1 CPL Jairus Namiti was insufficient to establish any prima facie case against the accused person herein.

19. Section 107 and 109 of the *Evidence Act*, (Cap 80 Laws of Kenya) provides as follows:

> "107. 107. Burden of proof;
>
> (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

"109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

20. The burden of proof in the prosecution's case lies in the prosecution's backyard and never shifts. This rule is well established by a line of authorities and the locus classicus is the case of *Woolmington v DPP* (1935) A.C 462 where Lord Sankey in the celebrated Golden thread speech stated:

> " Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to...
>
> The defence of insanity and subject also to any statutory exception. If at the end of the whole case there is reasonable doubt created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

21. Article 50(2) (a) of the *Constitution* provides that-

> " Every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved."

22. This right to fair trial which cannot be limited.

23. It is therefore my view that the evidence tendered fell short and failed to establish a prima facie case against the accused person and that the prosecution failed to discharge the burden of proof.

24. Considering the entirety of the evidence on record as highlighted herein above, I am of the view that the accused person has no case to answer as evidence tendered was insufficient to implicate the accused person herein in the alleged murder of Vincent Owindi alias Thomas Juma Obiero.

25. Accordingly, I find no prima facie case established against the accused person herein. In the end, the accused person herein Calvin Ouma Ooko is found with no case to answer and may not be called upon to defend himself. He is entitled to an acquittal. I hereby acquit him at this stage under Section 306(1) of the Criminal Procedure Code and order that unless otherwise lawfully held, Calvin Ouma Ooko is hereby set at liberty and his surety is discharged. Any security deposited into court to be returned to the surety forthwith.

26. Mr. James Ogenga advocate who represented the accused person on pauper brief basis is hereby discharged from these proceedings and his fees shall be paid upon filing of a fee note accompanied by relevant documentation.

27. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE