



**State v Khai & another (Criminal Case E001 of 2021)
[2024] KEHC 12813 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E001 OF 2021
RE ABURILI, J
OCTOBER 22, 2024**

BETWEEN

STATE PROSECUTION

AND

AYUB OGADA OMOLO ALIAS KHAI 1ST ACCUSED

AMOS OGADA OYIER ALIAS GENGE 2ND ACCUSED

RULING

1. The accused persons in this case are Ayub Ogada Omolo and Amos Ogada Oyier alias Genge. They are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal Code. Particulars of the Information dated 14th January 2021 are that the accused persons on the 27th day of December, 2020 in Usare Village, North West Kisumu Sub location, Kanyawegi Location in Kisumu West Subcounty within Kisumu County, unlawfully murdered George Otieno Odao alias Abiola.
2. The accused persons took plea at different times with the 1st accused taking plea on 21st January, 2021 while the 2nd accused took plea on 31st March, 2022 after a second mental assessment report cleared him of the initial unfitness to plead. Both accused persons pleaded not guilty to the charge.
3. The prosecution has so far called a total of ten (10) witnesses who have testified on oath, several exhibits produced as evidence and the case closed.
4. What now remains for determination at this stage is whether the prosecution has established a prima facie case against the two accused persons or any one of them for this court to place them on their defence.



5. The Defence counsel, Mr. Omondi Abande did request for time to file written submissions on no case to answer. This court granted both parties ten (10) days to file the said submissions but as at today the 20/10/2024 when I am writing this ruling, no submissions have been filed.
6. The default notwithstanding, this court is now called upon to determine whether, at this stage, based on the evidence adduced by the ten prosecution witnesses and the exhibits produced, the prosecution have established a prima facie case to warrant the accused persons to be placed on their defence to answer to the charge of Murder.
7. The burden of proof lies on the Prosecution throughout the trial to prove their case against the accused persons. That burden does not shift to the accused persons. This is so because the accused persons' constitutionally guaranteed rights cannot be taken away. They are presumed innocent at all times throughout the trial. Those rights to a fair trial which cannot be limited include the right to remain silent, the right to adduce and challenge evidence and the right not to give any self-incriminating evidence.
8. However, at this stage, the prosecution is not expected to have proved their case against the accused person beyond reasonable doubt. The measure is for a prima facie case to be established.
9. A prima facie case is established where the evidence tendered by the Prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused exercises his constitutional right to remain silent.
10. On the other hand, Section 306 (1) of the Criminal Procedure Code provides that:

“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.”
11. Therefore, has the prosecution established or made out a prima facie case against the accused persons herein for this court to place them on their defence?
12. In Republic vs Abdi Ibrahim Owi [2013]eKLR, the court defined a prima facie case as follows:

“‘Prima facie’ is a latin word defined by Black’s Law Dictionary 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”
13. In simple terms, prima facie means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt Vs R [1957] E.A 332 at 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’s case, the case is merely one in which on full consideration might possible 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 ...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, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

14. From the above detailed holding by the court, can this court on the basis of the evidence so far tendered by the Prosecution, and this court properly directing itself to the law and evidence convict if the accused chooses not to give any evidence? This is not to say that the court can at this stage convict the accused persons as that would be premature because the fact of placing the accused persons on their defence does not per se mean that they will be convicted of the offence charged.
15. In Ronald Nyaga Kiura Vs Republic, the court stated that:

“It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case 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...”
16. The trial court is however cautioned that at this stage, it should not make definitive findings should it conclude that the accused persons have a case to answer.
17. In Festo Wandera Mukando Vs Republic [1980] KLR 103, the court held as follows:

“...we 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 judgment. Where a submission of “no case” to answer 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 count or counts concerned.”
18. In this case, the evidence adduced by all the prosecution witnesses was circumstantial evidence as none of the witnesses saw the accused persons assault the deceased. The deceased’s decomposing body was according to most witnesses who are known to both accused persons, discovered in a house believed to belong to one of the accused persons hereto. Some items produced as exhibits were also allegedly recovered from the house of one of the accused persons, which items had blood stains whose DNA is said to match the DNA profile of the deceased.
19. Subject to this Court analyzing that evidence in detail, and without delving into the depths of the evidence on record, I am satisfied that the Prosecution have established a prima facie case against both the accused persons herein to warrant them to be placed on their defence. I therefore find that each of the accused persons herein Ayub Ogada Omolo alias Khai and Amos Ogada Oyier alias Genge have a case to answer and both the accused persons are hereby placed on their defence.
20. The provisions of Section 306(2) of the Criminal Procedure Code and Article 50(2)(i)(k)(l) of *the Constitution* are hereby explained to the accused persons in the presence of their advocate Mr. Abande and are guided to consult their advocate for advice on what mode of defence to offer.
17. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF OCTOBER, 2024



R.E. ABURILI
JUDGE

