



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic (ODPP) v Rajab (Criminal Case 30 of 2016)  
[2024] KEHC 14226 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 30 OF 2016  
AC BETT, J  
NOVEMBER 15, 2024**

**BETWEEN**

**REPUBLIC (ODPP) ..... PROSECUTOR**

**AND**

**SALIM ABDUL RAJAB ..... ACCUSED**

**RULING**

1. The Accused Salim Abdul Rajab is 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 13<sup>th</sup> day of September 2015 at Al Karim Mosque in Kakamega township sub-location of Kakamega Central Sub-County of Kakamega County, the Accused unlawfully murdered Deka Ibrahim.
2. The Prosecution adduced evidence through six witnesses. PW1 was an eighteen (18) year old student at Kakamega Muslim Secondary School. He stated that he and the deceased who was his younger sister were attending Madrassa at Ali Karim's village on 13<sup>th</sup> September 2015 at around 10.00 a.m. when the Accused who was their teacher called the deceased and her desk mate Assiza to the front. According to PW1, the Accused struck the two girls with a red cane. He struck Assiza on the buttocks. Assiza had not mastered the verse they were reading. The Accused then turned to the deceased. As he struck the deceased, she struggled and hence was struck on different areas. She was lying on the floor while being struck. The deceased then rose up and the Accused struck her twice on the head. The deceased was in pain and so the witness and his younger brother Mohammed Ibrahim took her home then returned for classes. PW1 stated that when he returned home at 1p.m., he found that the deceased had been taken to Kakamega General Hospital. The witness visited the deceased the same day at 6 p.m. and the deceased died on 14<sup>th</sup> September 2015. In cross-examination, PW1 denied that the deceased was sickly.
3. PW2 was Mahamud Ibrahim, a student at kakamegea Muslim Secondary School and also an older brother to the deceased. He stated that on 13<sup>th</sup> September 2015 the Accused was punishing students for failing to master reading. He struck the deceased and her colleague whose name he could not recall



- using a red plastic cane. He struck the deceased on the head and she fell down whereof he and PW1 took her home and handed her over to their mother and returned to class. Upon cross-examination, PW2 said that the deceased used to contract malaria characteristics by fever and joint pains. He denied that before his sister died she was on drugs. He stated that the cause of her death was known as they were told at the hospital that she had a fracture on the head.
4. PW3 was the mother to the deceased. She said that the deceased was nine (9) years old when she died. On the material day, the witness says she was at home while her children PW1, PW2 and the deceased had gone for Madrassa classes. According to her, PW1 and PW2 brought Deka home at 11 am with a report that their Islamic teacher had struck her severally on the head. The deceased was coughing blood. PW3 called the father then she took the deceased to Kakamega General Hospital where the Doctor requisitioned an X-ray which was done the following day. The deceased was in a bad state and died. PW3 said that she knew the Accused who was the teacher of the school. A post mortem was not performed on the body because of their Islamic faith. In cross-examination, she said that the death of the deceased was due to the assault since the deceased was in a bad state when she was taken home.
  5. PW4 was Ibrahim Mohamed and the father to the deceased. He said that on 13<sup>th</sup> September 2015 he was at Kakamega town when he received a call from his wife PW3 informing him that the deceased was unwell. He proceeded home and found the deceased coughing blood. The deceased told him that she had been struck by their Madrassa teacher. The deceased was taken to hospital. In the evening, he went to the hospital and found the child being attended to. He took her for an x-tray and returned her to the ward. The child died on 14<sup>th</sup> September 2015.
  6. PW5 was Dr. Dixon Mchana, a Pathologist with Kakamega County. He said he carried out a post mortem on the body of one Deka Ibrahim who is the deceased herein on 15<sup>th</sup> September 2015 at their home in Makaburini Estate, Kakamega Township at 10.00 a.m. The body was that of a Somali girl aged between 11-12 years, thin and 4'7" tall having died within the preceeding twelve (12) to twenty four (24) hours. According to PW5, the fingers, tongue and lips appeared bluish in colour. The deceased had two stripped bruises on the scalp and forehead measuring 3 cm x 1 ½ cm each. The rest of her body was intact and there was evidence of recent medical intervention. PW5 said that he did not carry out any internal examination as the deceased's parents, who were Muslims, declined. The witness could therefore not ascertain the cause of death as it could not be determined through viewing alone. On cross-examination, PW5 said that there was evidence of injection marks on the body and he was not given any medical records. In response to the court, the witness said that the bluish fingers, lips and tongue could be caused by lack of oxygen either in the brain or the lungs before death but since he did not open up the body, he could not tell which organ lacked the oxygen.
  7. The last witness was the investigating officer, Sergeant Sophia Ibrahim who took over the matter from one Samson Bore who was the initial investigating officer. She familiarized herself with the file and upon undertaking further investigation established that the Accused who was then a suspect, had fled Kakamega. According to her, the Accused was arrested in March 2016 at Kiminini and consequently the Accused was arraigned and charged with the offence of murder. The investigating officer produced as an exhibit the red cane that was used to cane the deceased. The cane, was a plastic handle from a water bucket. She said that the report was that the cane was recovered from the Madrassa. On cross-examination, the witness said she did not visit the scene of crime.
  8. At the close of the prosecution's case, Counsel for the Accused submitted that there was no case to answer. Mr. Osango for the Accused submitted that since the cause of death of the deceased was unknown and in view of the fact that the initial investigating officer failed to testify to confirm what transpired, then the prosecution failed to establish a *prima facie* case against the Accused. The prosecution did not make any submissions.



9. In a criminal case, where the court determines that the prosecution has failed to establish a *prima facie* case, the Accused is liable to be acquitted as provided by Section 306 (1) of the [Criminal Procedure Code](#) which provides as follows:-

“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 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.”

10. A *prima facie* case was defined in [Republic v. 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.”

11. At this stage of the proceedings, all that is required is for the prosecution to have tendered sufficient evidence on its own for the court to find the Accused person guilty if no other explanation controverting the prosecution’s case is tendered. The holding in the [Abdi Ibrahim case \(Supra\)](#) echoed that of the court in [Ramanlal Trambaklal Bhatta v. R \[1957\] E.A. 332 at 334 -335](#) where the Court stated:-

“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 true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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.”

12. This court must therefore ask itself whether the evidence so far, would lead to a conviction if the Accused person were silent when called upon to defend himself.

13. A post-mortem examination was conducted on the body of the deceased which post mortem was not conclusive as it was a “view” only autopsy.

14. A post-mortem examination, also known as an autopsy is a medical examination of a deceased person to determine the cause of death. From the post mortem form, the procedure entails methodical inspection or examination of the external and internal parts and organs of a dead body for injury, disease or other abnormality. The post mortem exercise therefore enables the examining Pathologist to



establish and determine the cause of death especially where the death occurred in unclear or suspicious circumstances.

15. Although it was not disputed that the deceased passed on hardly a day after being struck by the Accused, the Pathologist testified that he could not ascertain the cause of her death principally since he did not conduct an internal examination because the deceased's parents who are Muslims, denied him permission to conduct the internal examination. To compound this, the deceased's medical treatment notes were not produced to assist the Pathologist. At the end of the examination, the Pathologist was in the dark as to how the deceased met her death.
16. As earlier stated, the factors that would lead to the finding that the prosecution has failed to establish a *prima facie* case are absence of or insufficient evidence.
17. The evidence before the court is that the Accused struck the deceased twice on the head. The court had the opportunity to examine the "cane" or weapon used. It does not look dangerous enough to cause a grievous injury. But then, the court is unable to tell how much force the Accused used for the deceased was of a tender age and may as well have sustained grievous injury from the Accused's beating. In absence of a history of sickness on the part of the deceased, this court is suspicious that it is the Accused's beating that caused her death. However, without the benefit of a comprehensive post mortem report, the suspicion remains speculative. In *Sawe -vs- Republic* [2003] KLR 364 the Court of Appeal held as follows:-

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by the evidence beyond reasonable doubt.”

18. Similarly, in the Court of Appeal case of *Mary Wanjiku Gichira -vs- Republic*, Criminal Appeal No. 17 of 1998, cited in the case of *Kevin Kiswaki Kyongi -vs- Republic* [2018] eKLR, the court rendered itself thus:-

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.”

19. Having painstakingly evaluated the prosecution's evidence, I find that the failure to establish the cause of death is fatal to the prosecution's case. There is therefore a dearth of evidence to place the Accused on his defence.
20. In the end, I find that the prosecution has failed to establish a *prima facie* case against the Accused and I therefore acquit the Accused under Section 306 (1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:-

Ms. Chala for the Prosecution

Mr. Osango for the Accused

Court Assistant: Polycap

