



**Republic v Murunga (Criminal Case E033 of 2023)
[2024] KEHC 14629 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E033 OF 2023
RE ABURILI, J
NOVEMBER 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID APOLLO MURUNGA ACCUSED

RULING

1. The accused person David Apollo Murunga is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the Information dated 20th December, 2023 at around 1000hrs at Kalusi Village, Chiga Sublocation, Kolwa East Location in Kisumu East Subcounty within Kisumu Count, the accused murdered Bavian Omondi Odhiambo.
2. The accused person took plea of not guilty on 16/1/2024 after being mentally examined and found to be fit to stand trial. The prosecution called ten witnesses who testified against the accused person and now the question is whether a prima facie case has been established to warrant the accused to be placed on his defence for the alleged murder of the deceased minor, Bavian Omondi Odhiambo.
3. Mr. Oregó counsel representing the accused person on pauper brief basis submitted on o case to answer. He submitted that the elements of murder had not been established. That according to the eye witness PW2, he claimed that he was pushed into a hole in where he remained for a while and that he suspected that the deceased had fainted. Counsel submitted that no adult witnessed the incident. That malice aforethought had not been proved as there was no evidence of any quarrels between the family of the accused and the deceased. Further, the there was no evidence that the sticks which were produced as exhibits were used to assault the deceased. Counsel also doubted if the photographs produced were taken at the scene as they had no date and therefore, they are an afterthought.
4. The prosecution relied on the evidence adduced.



5. I have considered the evidence of the ten prosecutions witnesses and the submissions by Mr. Orego, the defence Counsel.
6. The burden of proof lies on the prosecution throughout the trial. That burden of proof does not shift to the accused person to prove his innocence, as that is the only way fair trial of the accused person can be guaranteed as stipulated in Article 50 (2) of the *Constitution*.
7. An accused person enjoys the right to remain silent and give no evidence or self-incriminating evidence in his defence and the court would decide the case on the basis of the evidence adduced, without making any adverse inference against him.
8. However, an accused person's right to adduce evidence and challenge the evidence adduced against him is guaranteed under Article 50 (2) (k) of the *Constitution*. It is upon the court to inform him of that right and let him elect to exercise those rights as mentioned herein, with guidance from his advocate.
9. Having said so, the standard of proof required in criminal cases is that of beyond reasonable doubt. However, that standard is not the yardstick at this stage where the prosecution is only expected to have established a prima facie case against the accused person to warrant him to be placed on his defence.
10. 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 opts to remain silent.
11. 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.”

12. Having considered the testimonies of the ten (10) prosecution witnesses, the question is whether the evidence tendered establishes a prima facie case against the accused, or whether the accused has a case to answer.
13. In *Republic v Abdi Ibrahim Owi* [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 presumption unless disapproved or rebutted”. ‘prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”

14. Simply put, 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 v R* [1957] EA 332 at 335, the court stated as follows on the question of what a prima facie case is:

“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.”

15. From the above detailed holding, can this court on the basis of the evidence so far presented by the Prosecution witnesses, and this court properly directing itself to the law and evidence convict if the accused chooses not to give any evidence?
16. In *Ronald Nyaga Kiura v Republic* [2018] eKLR, it was held:

“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...”
17. The trial court is however cautioned that at this stage, it should not make definitive findings should it conclude that the accused has a case to answer. This is what the Court in *Festo Wandera Mukando v Republic* [1980] KLR 103, stated:

“...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, and 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. Having considered the evidence of the prosecution witnesses, and without delving deep into the merits thereof as that would prejudice the accused person herein, I am satisfied that a prima facie case has been established against the accused person to warrant him to be placed on his defence.
19. Accordingly, I find that David Apollo Murunga has a case to answer and he is placed on his defence. His rights under Article 50 (2) (i) (k) and (l) of the *Constitution* as read with Section 306 (2) of the *Criminal Procedure Code* are guaranteed and explained to him in the Dholuo language which he understands best, by the Court Assistant Mr. Osir. The accused is however informed that since his advocate Mr. Oregio has not been reached on phone as he is non-responsive, he will be notified to consult the accused and the matter will be mentioned on 3/12/2024 to fix a defence hearing date. The accused to inform his advocate if he has witnesses to call and what mode of defence to offer.
20. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

