Republic v Wachira (Criminal Case 10 of 2017)
[2024] KEHC 14092 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14092 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL CASE 10 OF 2017

AK NDUNG'U, J

NOVEMBER 12, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MOSES NJAGI WACHIRA ..... RESPONDENT

RULING

1. The Accused person herein Moses Njagi Wachira is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 18/10/2017 at Kamburaini location, Kieni East subcounty, Nyeri County, murdered John Maina Gathongo (herein referred as the deceased).

2. The accused took plea on 20/11/2017 and he pleaded not guilty to the charge. The prosecution called a total of thirteen (13) witnesses and on 08/11/2023, the prosecution closed their case.

3. In this ruling, the court is being called upon to decide whether or not the prosecution has made out a prima facie case against the accused that would warrant this court to call upon him to give his defence.

4. The prosecution filed written submissions dated 22/01/2024. The Accused's counsel did not file written submissions. The prosecution case is that the fact and cause of death of the deceased was proved and that the evidence on record revealed that the cause of death was complications of 49% total body surface burns. That the prosecution relies on the circumstantial evidence and a dying declaration. She submitted that from the evidence of PW1 and PW6, the accused person was the last to be seen with the deceased before his death. The prosecution relied on the doctrine of the last seen as enunciated in the case of Republic v EKK (2018) eKLR. Further that other than being the last person seen with the deceased, the accused person had confronted the deceased when the deceased poured the accused beer and an argument ensued between them.

5. That other than the evidence of PW1 and PW6, PW2 testified that he interrogated the deceased who informed him that he could remember that he poured Moses beer by mistake and he was beaten by Moses and lost consciousness and found himself burnt. The counsel submitted that that statement amounted to a dying declaration as provided under section 33(a) of the *Evidence Act* which states that;

> " Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead...are themselves admissible in the following cases-
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question...

6. Further reliance was placed on the case of Philip Nzaka Watu v Republic (2016) eKLR and Chonge v Republic (1985) KLR 1. She submitted that the dying declaration by the deceased is admissible and the same was corroborated by circumstantial evidence. That the circumstantial evidence strongly links the accused to the death of the deceased and that when all facts are combined, it is within all human probability that the accused murdered the deceased.

7. The learned prosecution counsel further submitted that the malice aforethought was proved due to the nature of injuries the deceased sustained coupled with the fact that the deceased was found lying by the roadside which points to an intention by the accused to cause grievous harm. Further that through the evidence adduced in court, the prosecution has proved a prima facie case against the accused as explained in Remanlal Trambaklal Bhat vs. Republic (1957) EA 332 and Ronald Nyaga Kiuria vs. Republic (2018) eKLR.

8. I have considered the evidence so far from the prosecution's side, the submissions made and the authorities cited. As I have stated above, the issue before me at this stage is whether the evidence so far adduced warrants calling upon the accused to defend himself. In other words, does the accused have a case to answer? In Republic vs. 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, 8th 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] E.A 332 at 334 and 335, the court stated as follows:
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> "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."

9. The question that this court has to deal with and answer at this stage is therefore, whether based on the evidence before this Court, the court after properly directing its mind to the law and the evidence may convict if the accused chose to give no evidence. It was therefore held in Ronald Nyaga Kiura vs. Republic [2018] eKLR wherein it was stated as follows:

> " It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie 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. 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. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

10. It therefore follows that a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. Having considered the material placed before the court, it is my view that the prosecution has established a prima facie case for the purposes of a finding that the accused has a case to answer and I so find. He is placed on his defence.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF NOVEMBER 2024.

A.K. NDUNG'U

JUDGE