



**Republic v Ngetich (Criminal Case 4 of 2019)
[2024] KEHC 13977 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 4 OF 2019
SM MOHOCHI, J
NOVEMBER 6, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANKLINE NGETICH ACCUSED

RULING

1. Frankline Ngetich is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code;

“That on the 24th January 2019, at Barut Rhonda Estate in Nakuru West Sub-county within Nakuru County, murdered Peter Omare Mugusu.”

2. The accused was arraigned on the 20th February 2020 to answer to the charge and a plea of not guilty was entered. The accused has been admitted to a surety bond during his trial.

3. On the 31st July 2019, the trial commenced with three (3) witnesses being called to testify.

4. PW1 – Monicah Awuor Mayet a Secretary at Hopewell High School and a colleague to the deceased, testified how on the Night of 24th January 2019 at 10.49pm, while in her house, she heard loud screams she was called at the same time by one Benard Kirui a neighbor who informed her that, the deceased had been attacked by unknown persons. She never witnessed the incident.

5. PW2- Alfred Mchabanywa a Deputy Director at Hopewell High School testified how he was called on the Night of 24th January 2019 at 10.52pm by Doreen, wife to the deceased but a student spoke on the line, indicating that the deceased “patron” had been attacked by unknown persons and the wife had passed out. The witness narrated how he responded finding the deceased had already succumbed. His evidence incriminating accused was that he was told by the deceased wife that the deceased had a



fracas with a student- Bantaza Ochieng over a phone, that the interrogation of the student led to the arrest of the accused.

6. PW3 - Samuel Mutei was a watchman who testified that on the fateful night he was on duty, the deceased came by while he was patrolling the school and after his return he notified the witness that he had found two boys one a student and another (the accused) outside the school compound and that they had a phone. That the deceased was considering action to take on the accused who brought the phone and it was agreed that the witness was to go to and see the Accused grandfather to implore on the accused not to bring phones to the school. This witness never witnessed the occurrence of the incident. In cross-examination clarified that the phone was taken away by the deceased and that he only obtained the name of the accused from the police summons and that he had not known the accused's name.
7. PW4 - Doreen Moraa Omosa, the deceased's wife and a matron at Hopewell High School who testified how on the fateful night, while going to the girl's dormitory she was told by PW2 that the deceased had fallen down and upon responding she found that the deceased had been injured. She raised alarm and students responded and some students told her that the deceased had taken a phone from a boy called Baltus and that the phone belonged to the accused Franklin and that the deceased was to talk to his parents it being a second incident. This witness gave hearsay evidence and did not identify those who told her. She never witnessed the attack or the alleged incident involving the two boys and the deceased.
8. PW5 - Gregory Kipngeno Yegon a student at KITI College testified how on the fateful night he went to sleep in his room at 10pm and shortly heard screams and upon responding he found the deceased injured in the presence of PW2 and he and Tony arranged for the deceased to be taken to hospital. That the accused who shared the room with the witness was not in the room when the witness went there and only joined him after his return from the hospital.
9. PW6 - PCW Cpl. Joyce Chemutai was the duty officer at the Rhonda Police Station on the fateful night she recorded the incident from PW4 and the Chief Barut Location, Mr. Kering at 12.30pm. went to the scene, led by PW1 to the accused house from where they arrested him and recorded witness statements. That further on the 25th January 2019 she visited the scene conducted a search thereupon and recovered a biro pen marked as exhibit 1. The witness admitted in cross-examination of not recovering the alleged phone impounded by the deceased.
10. PW7 - Dr. Titus Ngulungu, conducted the postmortem and prepared the postmortem report; cause of death was severe head injury, extensive skull fracture and multiple blunt trauma.
11. PW8 - PC Noah Meli testified how on the fateful night he was awoken up at 10pm by the OCS and he did respond to the report by visiting the scene, he found a pen which he recalls was written Kenya Pipeline. That he was also the arresting officer.
12. The Prosecution's case was closed on the 25th September 2024 after the prosecution failed to avail more witnesses and failed in their quest to adjourn the matter.

Analysis

13. I have considered the evidence so far from the prosecution's side, the submissions made and the authorities cited. 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.

14. In *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 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, 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.”

15. The Court of Appeal similarly held in *Anthony Njue Njeru vs. Republic* [2006] eKLR that:

“Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a Prima facie Case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the Prosecution case, the case is merely one, ‘Which on full consideration might possibly be thought sufficient to sustain a conviction’ Taking into account the evidence on record, what the Learned Judge said in his Ruling on no case to answer, the meaning of a Prima facie Case as settled in Bhatt’s Case(supra), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case.”

16. The question that this Court has to contend 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, as opposed to will, convict if the accused chose to give no evidence. It was therefore held in *Ronald Nyaga Kiura vs. Republic* [2018] eKLR wherein paragraph 22 it is 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.”



17. This Court is alive to danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer, is not farfetched and the reasons for not doing so are obvious. As was appreciated by Trevelyan and Chesoni, JJ in *Festo Wandera Mukando vs. The Republic* [1980] KLR 103:

“...we once more 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 judgement. Where a submission of “no case” 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 my view, where clearly the prosecution’s case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognized and there is absolutely no evidence whether direct or circumstantial linking the accused to the offence it would be foolhardy to put him on his defence.

19. In this instance no eye witness evidence was presented, the alleged phone impounded by the deceased was never recovered to link the accused, the pen recovered at the scene was never subjected to forensic analysis and that the theory of the mobile phone circumstantially linking the accused to the offence amounted to hearsay. No murder weapon was presented and only the post mortem report was produced as an exhibit.

20. There is no magic in finding that there is no case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An accused ought to not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. Defence case is not meant to fill in the gaping gaps in the prosecution case. It was therefore held by the Court of Appeal decision in the case of *Anthony Njue Njeru vs. Republic* Crim. App. No. 77 of 2006 [2006] eKLR that:

“Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case..., we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused.”

21. In the case of *Republic vs. Prazad* [1979] 2A Crim R 45, King CJ held the very same standard on a prima facie case in the following terms:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

22. Whereas upon consideration of the totality of the evidence at the end of the trial, the Court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has not been made out.



23. As has been said time and again a prima facie case does not necessarily mean a case which must succeed. In other words, despite finding that a prima facie case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer.
24. In *May vs. O'Sullivan* [1955] 92 CLR 654 it was therefore held that:
- “When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law.”
25. The test in such matters was therefore laid down in *Republic vs. Galbraith* [1981] WLR 1039 in the following words:
- “(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
- (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:
- (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
- (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses’ reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”
26. Accordingly, having considered the material placed before me I am satisfied that the prosecution has not established a prima facie case for the purposes of a finding that the accused has a case to answer and that the said evidence on record does not meet the threshold for convicting the accused should he remain silent on defence to be considered at the end of the trial.
27. Consequently, the accused has no case to answer and is acquitted of the charge under Section 306 (1) of the *Criminal Procedure Code*.
28. The accused shall forthwith be set to liberty unless otherwise lawfully held.
- It is so ordered Accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 6TH DAY OF NOVEMBER, 2024.

S. MOHOCHI



JUDGE

In the presence of:

Court Assistant – Schola

Mr. Bore Advocate for the Accused

Ms. Mburu for the State

