



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ndiwa (Criminal Case E009 of 2021)
[2024] KEHC 15564 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E009 OF 2021**

DK KEMEL, J

DECEMBER 6, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

HERBERT KIPNUCHE NDIWA ACCUSED

RULING

1. The accused herein Herbert Kipnuche Ndiwa is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Particulars of the offence as per the information dated 10th March 2021 is that on 26th February 2021, at Kapsoromet area of Cheptais Sub-County within Bungoma County, he murdered Charity Nachali Muike.
2. The accused took plea on 11th March 2021 denying the offence and thus the case was set down for hearing. The Prosecution has so far tendered evidence by calling Ten (10) witnesses and the question now at this stage, for this Court, is to determine whether the Prosecution has established a prima facie case against the accused to warrant him to be placed on his defence.
3. The burden of proof lies on the Prosecution throughout the trial. That burden of proof does not shift to the accused to prove his innocence. That is the only way a fair trial of the accused can be guaranteed as stipulated in Article 50 (2) of the [Constitution](#).
4. It follows that the accused is under no duty to give any evidence in defence to rebut the Prosecution's case. The accused herein has the right to remain silent and that the Court would decide the case on the basis of the evidence adduced, without making any adverse inference against him.
5. However, the accused's right to adduce evidence and challenge the evidence adduced against him is guaranteed under Article 50 (2) (k) of the [Constitution](#), albeit he also enjoys the right not to give any self-incriminating evidence. See Article 50 (2) (l) of the [Constitution](#).



6. Having said so, the standard of proof required in criminal cases is that of beyond reasonable doubt. Nonetheless, as earlier stated, that standard is not applicable at this stage where the Prosecution is only expected to have established a prima facie case against the accused to warrant him to be placed on his defence.
7. 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 in defence.
8. Under Section 306 (1) of the *Criminal Procedure Code*:

“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.”
9. 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.
10. In *Republic v 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.”
11. In simple terms, prima facie means the establishment of a rebuttable presumption that an accused is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v 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 a 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 possibly be thought sufficient to sustain a conviction.”
12. 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.”
13. From the foregoing authorities, can this Court on the basis of the evidence so far tendered by the Prosecution and properly directing itself to the law and evidence convict if the accused chooses not to give any evidence?
14. In *Ronald Nyaga Kiura v Republic* [2018] eKLR, the Court 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...”
15. 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.



16. In *Festo Wandera Mukando v Republic* [1980] KLR 103, the Court held:

“...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 court or courts concerned.”

17. Having considered the evidence of the Ten (10) Prosecution witnesses, and without delving deep into the merits of that evidence as that would prejudice the accused herein, I am satisfied that a prima facie case has been established against the accused herein to warrant him to be placed on his defence. It is instructive that the deceased was last seen with the accused herein on the material date prior to her body being discovered with blood oozing from her private parts and strangled. Hence, the accused, having been placed at the scene must now offer an explanation as to how the deceased met her death.

18. Accordingly, I find that the Prosecution has established a prima facie case against the accused herein Herbert Kipnuche Ndiwa. I find that he has a case to answer and is now called upon to elect to conduct his defence in line with the provisions of section 306(2) of the *Criminal Procedure Code*.

DATED AND DELIVERED AT BUNGOMA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Herbert Kipnuche Ndiwa..... Accused

Simiyu.....for Accused

M/s Kibetfor Prosecution

Kizito/Ogendo.....Court Assistant

