



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

1. ALEX MUSEMBI MUTUKU.....1ST ACCUSED

2. MICHAEL MBAI MUTUKU.....2ND ACCUSED

RULING

1. The accused, **Alex Musembi Mutuku** and **Michael Mbai Mutuku** were charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged on 30th September, 2013 at Katine Village of Matungulu District, the accused jointly with another murdered **Daniel Mwanzia Mutiso** (Deceased).

2. I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where 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 their defence. 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:**

“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.”

3. 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, 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.”**

4. In Republic vs. Abdi Ibrahim Owl [2013] eKLR a *prima facie* case was defined as follows: -

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5. Oxford Companion of Law at pg 907 defines “*prima facie*” in the following terms:

“A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”

6. That there is a 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.”

7. 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 recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a 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 person should 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. 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.”

8. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution vs. Zainal Abidin B. Maidin & Another that:

“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in

Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:

‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”

9. The court in Republic vs. Prasad [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.”

10. In this case, PW1's testimony was that on 30th September, 2013 at 3 pm based on the information received from PW2 that her son, the deceased, was being killed by the two accused persons and one **Mose**, she proceeded the scene where she found the deceased with his shirt having been removed and there was blood on his head and the rest of the body. He also had cuts on the head and his hands and legs had been broken. At the scene were the 1st and 2nd accused holding stick which the 2nd accused threw away. When she inquired why the deceased was that badly injured, the 2nd accused insulted her and threatened that he would kill her with her son.

11. PW5, a taxi driver testified that on 30th September, 2013 he was called by **Peter Kyalo**, the accused's cousin, a fellow taxi driver, who directed him to the two accused persons who were known to him as neighbours and who were by the roadside and who informed him that there was a person who was cutting their trees and they wanted him to take him to police station. The accused persons brought the person who was injured and could not walk and was carried by the accused persons and placed in the back seat after which PW5 took him to Tala Police Post.

12. There was evidence that the deceased eventually passed away and the post mortem report indicated that though he had a pre-existing kidney problem, his condition was exacerbated by the injuries he sustained. There was evidence that before he died the deceased mentioned that he was attacked by inter alia the accused persons.

13. 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. 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. I am guided in so finding by the holding of this Court in **Julius Juma vs. Republic Kisumu High Court Criminal Appeal No. 405 of 1981** where **Trainor, J** expressed himself as follows:

“When an accused person pleads not guilty he is saying in a technical way: you say I am guilty, prove it. At the end of the prosecution case, without giving any explanation of his alleged behaviour, he is entitled to ask the Court to dismiss the charge against him because the evidence does not prove his guilt beyond reasonable doubt. If, however the court considers that a prima facie case has been made out against him, it may refuse to dismiss the case and call upon the accused to make his defence. If the accused declines to give or call evidence, then the court must assess all the evidence before it for truth and reliability (not necessarily the same thing) and decide whether or not it establishes beyond reasonable doubt that the accused is guilty. The fact that the accused has not given or called any evidence does not per se have any bearing on the assessment of the evidence that has been given by the prosecution’s witnesses. I emphasise the words “per se” because by declining to give evidence the accused is exercising his right to conduct his defence in the way he thinks best, but his silence may have a bearing in that that evidence remains uncontradicted.” [Emphasis added].

14. 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.”

15. 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.”

16. Accordingly, I will refrain from delving further in this matter. Based on the evidence of PW1 and PW5 in particular, I am satisfied that the prosecution has established a *prima facie* case for the purposes of a finding that the accused have a case to answer. As to whether the said evidence meets the threshold for convicting the accused persons is a matter that will have to be considered at the end of the trial.

17. Having considered the material placed before me I am unable to find, at this stage at least, that the accused have no case to answer.

18. I accordingly place the accused on their defence.

19. It is so ordered.

20. This ruling is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the 2nd Accused having consented to that mode of delivery.

Ruling read, signed and delivered in open Court at Machakos this 8th day of May, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Langalanga for Mr Tamata for the accused persons

Mr Ngetich for the State

CA Fridamela

1st accused present

2nd accused in attendance through Skype