



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 39 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTISO.....ACCUSED

RULING

1. The accused herein, **James Mutiso**, is charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused, on the nights of 11th/ 12th November, 2012 at Kithunguni Market in Machakos District within Machakos County, murdered **Mutua Mutiso Kasimu**.

2. This is a ruling on the submissions made on behalf of the accused that he ought to be acquitted as he has no case to answer as no prima facie case has been established by the prosecution to warrant placing him on his defence. 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, can 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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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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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. I am alive to the fact that there is no direct evidence linking the accused to the death of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence without any evidence of a single eye witness.

8. 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."

9. 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."

10. The court in 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."

11. In this case the prosecution's case was that on 1st November, 2012, PW2 and PW3, watchmen were on duty at Kitituwareini Market when they heard some screams. Upon approaching the source of the screams, they saw the accused lying on top of the deceased. When the deceased saw them he ran away but later returned after PW2 and PW3 hid from site. The accused, who was known to the said witnesses then continued sodomising the deceased. The said witnesses then apprehended the accused but he escaped and ran away. The said witnesses then helped the deceased from whose anus faeces were coming out. They later reported the matter to the Assistant Chief two days after the incident.

12. PW5 who was called by PW2 and PW3 confirmed that when he went to the scene he found the deceased lying on his side with his legs bent. His trousers had been removed up to his knees and his buttocks were swollen. He had passed stool which the dogs were licking. According to PW5, the deceased had been sodomised.

13. PW6 was the pathologist who carried out post mortem on the body of the deceased on 16th November 2012. According to him, the body was of a male African approximately 67 years of age and was well preserved by refrigeration. It was his finding on external examination that the abdomen was extended and there was faecal matter coming from the mouth. The anus was loose with faecal material and it was inflamed and torn on the mucosa at the anterior wall. The internal examination revealed that the intestines were distended and peritonitis lining had pus and faecal material with external inflammation. The anterior rectal wall was torn – 2 by 2 cm and the pouch of Douglas – (a space between the intestines anterior rectal wall) was filled with faecal bacterial peritonitis resulting from perforation of the rectum caused by blunt object. The faecal from the torn anus went to the stomach and caused inflammation. According to him, the tear of the anus was a result of some trauma and could be seen in the internal part and the perforation was by a blunt object. It then resulted in inflammation. According to him, this was a case of rape as determined from the version level of investigation – eye witnesses, police report, post mortem & DNA and that the history pointed to use of an object – either through sodomy or any other blunt object.

14. PW10 who produced the PRC for the deceased testified that upon examination of his anus it was loose and could not hold faeces. Accordingly, he formed the opinion that there was evidence of anal assault and it was recorded that he placed on post exposure prophylaxis and STI treatment. It was his evidence that there was evidence of anal assault.

15. It is submitted on behalf of the accused that the evidence of PW2 and PW3 was full of contradictions. An issue was further taken regarding the proper identification of the accused under the circumstances prevailing that night. It was submitted that the only two material witnesses herein, **PW2**, and **PW3** gave evidence of identification which is unreliable and contradictory. On the other hand, the Police failed to carry out any meaningful, or any investigations at all and the court was not even informed of when the accused went to reside in Kyumbi area or how it was discovered that he was in that area. The prosecution refused to avail documents that could have proven the innocence of the accused, although the onus is on the prosecution to prove the guilt of the accused as per law required. It was contended that the period between the alleged offence and arrest of the accused did not disclose anything the accused may have done that may be considered to be consistent with any guilt. There is no evidence as well to show that indeed the person having sex with the deceased had any malice aforethought or that it was a sexual assault or consented to homosexuality.

16. In this case, there is evidence from PW2 and PW3 that they found the accused assaulting the deceased. The medical evidence shows that the deceased was sexually assaulted and that his death was as a result of the said assault.

17. 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.

18. The English Court in **May vs. O'Sullivan [1955] 92 CLR 654** 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.”

19. 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.”

20. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I am unable to find, at this stage at least, that the accused has no case to answer. Based on the evidence of PW2 and PW3 who purportedly witnessed the offence and apprehended the accused before he allegedly escaped coupled with the medical evidence, I am satisfied that the prosecution has established a *prima facie* case for the purposes of a finding that the accused has a case to answer. As to whether the said evidence meet the threshold for convicting an accused is a matter that will have to be considered at the end of the trial.

21. I accordingly place the accused on his defence.

22. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 17th day of October, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kayugira for Mr Mwangangi for the accused

Ms Mogoi for the State

CA Geoffrey