Republic v Ali & 2 others (Criminal Case 3 of 2021)
[2025] KEMC 1 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEMC 1 (KLR)

REPUBLIC OF KENYA

IN THE KAHAWA LAW COURTS

CRIMINAL CASE 3 OF 2021

DR KAVEDZA, J

JANUARY 21, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

UNKNOWN ALIAS MIRE ABDULAHI ALI ..... 1ST ACCUSED

HUSSEIN MOHAMED ABDILLE ALI ..... 2ND ACCUSED

MOHAMED ABDI ALI ..... 3RD ACCUSED

RULING

1. On 15th January 2019, the Dusit D2 Hotel at Riverside Mall was attacked by terrorists including a suicide bomber. Twenty-one innocent people lost their lives as a result of the attack while several others were injured. Upon investigations, three persons were arrested and charged before court including, the 2nd and 3rd accused persons herein. The 1st accused (Unknown alias Mire Abdulahi Ali) was convicted upon successfully plea-bargaining with the state. Pursuant to the plea agreement he was sentenced appropriately.

2. This case therefore proceeded against the two accused persons, the 2nd accused Hussein Mohamed Abdille Ali and the 3rd accused Mohamed Abdi Ali.

3. The two accused persons were charged with various terrorism related offences under the *Prevention of Terrorism Act* (Cap 59B) Laws of Kenya.

4. The issue for determination before me is whether or not a prima facie case has been made out by the prosecution to warrant the 2nd and 3rd accused be put on their defence in terms of section 306 (2) of the *Criminal Procedure Code* (Cap. 75) Laws of Kenya.

5. Section 306 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides as follows:

(1) 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 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 recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.

6. In defining what a prima facie case is, the Court of Appeal in *Ramanlal Trambaklal Bhatt vs R* [1957] EA 332 expressed itself thus:

> "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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. 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."

7. At this stage, the Court is not called upon to make definitive findings on the charges before court and neither is it called upon to conduct a rational explication of the evidence on record. For doing so would prove foolhardy and the court would fall into the trap as cautioned by Trevelyan and Chesoni, JJ in *Festo Wandera Mukando vs. The Republic* [1980] KLR 103 where the learned judges stated that;

> "...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."

8. It has been restated time without number that a prima facie case is not necessarily one that must succeed hence a finding that a prima facie case has been established does not render an obligation upon the Court to return a guilty verdict after full trial. At the end of the trial, the court is still under an obligation to evaluate the evidence in totality and make a determination as to whether the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable in determining whether a prima facie case exists. I must hasten to add that by finding that the accused persons have a case to answer, it does not necessarily mean that the burden of proof shifts to the accused persons as this burden remains with the prosecution throughout the trial.

9. In *Republic vs Jones Mutua Anthony & 3 others* [2019] eKLR, Justice Odunga (as he then was) while weighing on the standard required for the Court to find that a prima facie case has been established stated as follows:

> "...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..." (Emphasis added).

10. Indeed, I agree with the above holding by the learned Judge in *Republic vs Jones Mutua Antony & 3 others* (*supra*).

11. For the foregoing reasons, I will refrain from making conclusive findings on the guilt or otherwise of the 2nd and 3rd accused persons at this stage.

12. Having considered the evidence of fifty-five witnesses including expert witnesses and the material placed before me, I am satisfied that the prosecution has made out a prima facie case against the two accused persons, I accordingly place the 2nd accused Hussein Mohamed Abdille Ali and the 3rd accused Mohamed Abdi Ali on their defence under section 211 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JANUARY 2025

.....

D. KAVEDZA

JUDGE

In the presence of:

Mr. Ondimu and Mr. Machira for the State

Ms. Ngesa for the 2nd Accused

Mr. Chacha for the 3rd Accused

Joy and Mohammed Abdi Court Assistants.