Republic v Lenaitukuto (Criminal Case E043 of 2025)
[2025] KEMC 53 (KLR) (1 April 2025) (Ruling)

Neutral citation: [2025] KEMC 53 (KLR)

REPUBLIC OF KENYA

IN THE MARALAL LAW COURTS

CRIMINAL CASE E043 OF 2025

AT SITATI, SPM

APRIL 1, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

PRESSY LENAITUKUTO ..... ACCUSED

RULING

1. The accused person denied the charge of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars were that on 20th February, 2025 at 1700hours at Kisima trading centre within Samburu Central Sub-County of Samburu County she stole cash totalling Kshs 37,000 the property of Mohamed Naston.

2. The Accused person represented herself while the DPP's case was conducted by Prosecution Counsel Moses Ndira.

The DPP'S Case

3. PW1 Mohamed Naston told the court that he had employed the accused person as a shop assistant and cleaner. He added that on 20th February, 2025 he was inside the shop with other assistants when the accused person showed up for her cleaning duties. He said that he had placed some cash under the counter totalling the sum of Kshs 37, 000/= in notes currency.

4. The complainant stated that after her cleaning duties, she stayed on for other tasks up to 4pm when she exited the shop. At 9pm, he closed the shop only to realize that the Kshs 37, 000 cash was missing. He immediately suspected the accused person and decided to investigate the subject.

5. PW1 stated that for 5 days he closely observed the accused person and other shop assistants for any clues to their possible involvement in the theft of the cash. He noted that the accused made a large cash expenditure when she bought from Mama Selina's shop a new mattress, a new carpet and new utensils.

He then called her over to question her expenditure whereupon she admitted that she found the Kshs 37, 000 cash on the floor and took it. Her disclosure made PW1 report her to the police who effected her arrest. At the police station, PW1 confessed to the police the theft.

6. Naston told the court that he had employed her for 3months on a daily wage of Kshs 200/-.

7. In cross-examination, the witness told the court that after he arrested her, she took them to her house where she said that she only had Kshs 4,000 in the house.

8. PW2 Abdimalik Aden Omar told the court the he was a brother to PW1 and worked in the shop. He recalled that on 20th February, 2025 his brother complained to him about the missing cash. He advised his brother to conduct discreet inquiries to establish how the cash got lost.

9. Afterwards, PW1 told him that PW1 suspected Pressy as the main culprit on account of her expenditure beyond her means. PW2 accompanied PW1 and the suspect to her house where he saw newly purchased goods.

10. PW3 S/NO. 112254 Police Constable Stephen Ochieng' testified as the investigating officer. He told the court that on 20th February, 2025 the complainant took the accused person to the police station and reported that she had stolen his cash days earlier. PC Ochieng recorded the report and the witnesses's statement. He added that whne he questioned the accused person, she confessed to PW3 that it was true that she had stolen the cash from the shop and used the money to buy goods to furnish her house. She admitted that she worked in the shop as a casual employee. He produced the investigation diary in evidence as P.Ex.1. the DPP then closed their case.

Issue For Determination

11. The only issue to be decided is whether the DPP has established a prima facie case against the accused person. There is no dispute that no one saw the accused person stealing the cash and no marked currency was recovered from the accused person.

12. In order for the court to place the Accused person to his defence, the court must be satisfied that a prima facie case has been established. What constitutes a prima facie case has been well explained in the authority of Ramanlal Trambaklal Bhatt -versus- Republic (1957) EA 332 which has recently been re-applied in the case of Republic -versus- Benard Nthiwa Makau [2019] eKLR (Wakiaga J.) where the latter superior court had this to say:

> "4. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a prima facie case to enable the court place the accused person on his defence. Prima facie case has been defined in the case of *Ramanlal Trambaklal Bhatt V Republic* (1957) EA 332 as follows:-

13. Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

14. This is perilously near suggesting that the court could 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 argue 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."

15. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by 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." (Emphasis added)

16. The learned Mr. Justice Wakiaga in Nthiwa Makau (supra) went on to pronounce the law as follows:

> "5. In the case of Republic V Jagjivan M. Patel & Others (1) TLR as follows:-
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> All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt.
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> A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction." (Emphasis added)
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> 6. Justice J.B. Ojwang as he then was in the case of Republic V Samuel Karanja Kiria Cr. Case No.13 Of 2004 Nairobi [2009] eKLR had this to say on prima facie case:-
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> The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .
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> The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted." (Emphasis added).

17. In the court's considered view, with no one seeing the accused person committing act of stealing, there is no direct evidence to show the accused person as the offender. The purported Kshs 4, 000 recovered from the accused and which was not produced in court bore no special mark or features to show that the money belonged to the complainant.

18. The only evidence linking her to the crime is the alleged admission by the accused person that she took the money.

19. In law, for such an admission to carry evidential weight, it must be an admission made before either a Judge or a Magistrate or a Police officer the rank of a Chief Inspector and above. This legal principle was re-affirmed by the Supreme Court of Kenya in Republic -versus- Ahmad Abolfathi Mohammed & another [2019] Eklr (Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ) the learned Supreme Court Judges held as follows:

> 91. Parliament must have heeded the above call for via *The Statute Law (Miscellaneous Amendments) Act No. 7 of 2007*, there was an insertion added to section 25A, so that it now read as follows:
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> A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of police, and a third party of the person's choice".

20. Applying the foregoing principles to this case shows that from the evidence, when the accused person came to court to take her plea before the Magistrate, she denied the charges and made no admission of criminal liability.

21. As is clear, neither a private citizen such as Mohamed nor a police officer of the rank of a constable such as PC Ochieng' has legal power to record a confession to criminal liability for the purposes of its admissibility in court during criminal proceedings. That being so, the court treats the evidence of PC Stephen Ochieng' stating that the accused person admitted to them to committing the crimes as carrying no legal weight taking into account the fact that PC Ochieng' did not obtain the receipts of purchase of the alleged new goods bought using stolen cash. P./Ex.1 -the investigation diary shows that PC Ochieng' did not forward the suspect to a superior officer for the recording of her confession. It also shows no scene visit done to her house to take photos and receipts of the purchased goods.

22. The receipts of alleged purchase would have provided independent evidence to corroborate the alleged admission made by the accused person if at all PC Ochieng' had taken her to a Chief Inspector to record a confession. The rejection of the DPP's case is because in law, only a Chief Inspector or higher rank or Judge or a Magistrate can legally record an admission of criminal liability. Following the rejection of the doubtful admission, there is no other evidence connecting the accused to the crime. She has no case to answer and is acquitted of all the charges under section 210 *Criminal Procedure Code* and is set at liberty unless there are other lawful causes for his detention. Right of appeal is 14 days.

DATED, READ AND SIGNED AT MARALAL THIS 1ST DAY OF APRIL, 2025

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HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Accused Person

DPP Ndira

Ketter Court Assistant