



**Republic v Otworu (Criminal Case E005 of 2022)
[2024] KEMC 167 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEMC 167 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E005 OF 2022
PA NDEGE, SPM
JUNE 13, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

GILBERT KIRIAKO OTWORU ACCUSED

RULING

1. The Accused person herein, Gilbert Kiriako Otworu, was on 17/08/2023, charged with the offence of Constructing Without Plans Approval C/S 57(1) as read with section 57(2) of the Physical and Land Use Planning Act of 2019. He denied that on 15/08/ (2023) at about 7.00am along Ravin Road at Provincial General Hospital gate within Nakuru County, he was found having constructed a kiosk without lawful authority of the County Government of Nakuru.
2. The prosecution called 2 witnesses and did not adduce any exhibit. The witnesses, PW1, James Mwangi Macharia, And Pw2, No. 1998002382 Ssgt Robert Makokha, both county enforcement officers at Nakuru County Government, informed the court that on the material day, they were doing routine inspections on buildings that were being erected without the necessary permits. That they went along the road herein, at the gate of the Provincial Hospital where they found that a structure being used as a shade for passengers had been converted into a kiosk. Upon calling for the owner of the kiosk, the accused person herein responded, but that he had no permit authorizing him to do the developments. They thus arrested and handed him over to the police. A photograph of the structure was taken, but not produced in court as exhibit.
3. What is therefore pending before this court at this stage is the role to determine whether the prosecution has presented a prima facie case that would warrant this court to call upon the accused person to give their defense. Under 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. (See Ramanlal



Trambaklal Bhatt Vrs Republic [1957] E.A 332 at 334 and 335). However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See Festo Wandera Mukando Vrs Republic [1980] eKLR 103). In short, this court is hereby therefore required to make a finding on whether the evidence of the 2 witnesses is sufficient to require the accused person herein to be called upon to make his defense.

4. I have looked at the relevant provisions of the [Physical and Land Use Planning Act](#) of 2019. Section 57 provides for the offence herein as follows: -

57.

- (1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
- (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
- (3) A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.

5. Section 2 of the same Act on the other hand defines development to mean carrying out any works on land or making any material change in the use of any structures on the land. The issue herein is whether there were any developments or material conversion on the use of the passenger stand herein. The burden of proving that was on the prosecution and the standard is beyond reasonable doubt.

6. There was an exhibit, the photograph marked as PMFI-1, of the structure that the accused person is alleged to have constructed or converted, in the course of development herein. This photograph was however only marked and not produced and there was no reason or explanation given why the prosecution promptly closed its case without producing this crucial exhibit as evidence herein. In making the distinction between filed documents and 'evidence' properly so called, albeit in a different context, the Court of Appeal held thus in *Kenneth Nyaga Mwige Vrs Austin Kiguta & 2 Others* [2015] eKLR:

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; ... Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case...a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness...we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not



become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight...

7. By deliberately failing to produce the exhibit and hence the evidence of the developments that the accused is alleged to have made, this court is entitled to take into account this gap on the principle of *Bukenya & 2 Others Vrs Uganda* (criminal Appeal No. 903 Of 2014) [2021] UGCA 20 (27 April 2021), that an adverse presumption arises where the prosecution fails to produced evidence where the one adduced barely suffices.
8. I thus do hereby find that the failure of omission by the prosecution to present the photographic evidence of the structure and the developments therein, leads to an adverse presumption that there was no such evidence to be presented, or that the evidence in the photograph was adverse to their case, hence there was no development that required a permit, conducted on the passenger's stand as alleged.
9. I thus do hereby find that no prima facia case has been disclosed and do hereby enter a finding of not guilty. The charges against the accused person herein are hereby dismissed pursuant to the provisions of section 210 of the *Criminal Procedure Code* and the accused person is hereby acquitted of the offence of Constructing Without Plans Approval C/S 57(1) as read with section 57(2) of the *Physical and Land Use Planning Act* of 2019. His Kshs. 10,000/= cash bail deposited herein be released to the depositor.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 13TH DAY OF JUNE , 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court Interpreter: Janet

Prosecutions Counsel: N/A

Accused person: Present

