Republic v Gatwiri (Criminal Case E049 of 2023)
[2023] KEMC 110 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEMC 110 (KLR)

REPUBLIC OF KENYA

IN THE GITHONGO LAW COURTS

CRIMINAL CASE E049 OF 2023

AT SITATI, SPM

NOVEMBER 30, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MERCY GATWIRI ..... ACCUSED

RULING

1. The Accused person was charged with the offence of being in possession of Alcoholic drinks without licence contrary to section 27(1)(b) as read with section 27(4) of the *Alcoholic Drinks Control Act* No. 4 of 2010. The particulars were that on 1st February, 2023 at 2000hours at Nkomari village in Kariene location the accused person was found in possession of 20litres of Mugacha without an alcoholic drinks licence.

2. The accused person denied the charge. The DPP's case was conducted by Prosecution Counsel Dixon Kibiti while the accused person represented herself at the trial.

The DPP'S Case

3. PW1 Chief Pascasio Murori of Kariene location told the court that on 1st February, 2023 at 8pm he went on night patrol with Assistant Chief Nkoroi and Area Manager Miriti to Nkomari village when one of the villagers tipped them that Mercy Gatwiri was selling illegal brews. PW1 told the court that they went over to the house and found 20 litres of mugacha in a jerrycan on the table. They arrested her and seized the 20litres. They took her to the Kariene Police Station together with the exhibits.

4. PW2 Assistant Chief Samson Nkoroi and PW3 Area Manager Samson Miriti gave an account similar to that of PW1. Their testimonies were unshaken in the cross-examination.

5. PW4 63117 PC Anthony Changwony told the court that on 1st February, 2023 he was the Crime Stand-By Officer when the Chief and other local administrators brought in the suspect under arrest together

with 20litres of mugacha. He told the court that he prepared an Exhibit Memo Form and forwarded a sample of the exhibits to the government chemist for analysis. He told the court that the chemist confirmed that the sample was an alcoholic drink of 2.0% alcohol by volume.

PC Changwony produced the following as exhibits 1 to 4:

1. 20litres of mugacha.
2. Exhibit memorandum form dated 23rd February, 2023
3. Analyst report dated 7th March, 2023.

6. At the end of the testimony, the DPP closed their case. The duty of the court is to determine whether or not the DPP has proved a prima facie case before the accused person can be put to his defence.

Determination

7. 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:-

> 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.
>
> 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."

8. 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)

> The learned Mr. Justice Wakiaga in Nthiwa Makau (supra) went on to pronounce the law as follows:
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> "5. In the case of Republic v Jagjivan M. Patel & Others (1) TLR as follows:-

9. 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.

10. 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)

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:-

> 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).

11. The Court has closely examined the DPP's evidence and found that there was doubt about the manner in which the evidence was handled and processed.

12. The Court studied the Exhibit Memo Form produced by PC Changwony and noted that it was 23rd February, 2023 yet the arrest was made on 1st February, 2023. The Exhibit Memo form was prepared by Chief Inspector Moses Mutinda on 23rd February, 2023 yet he was not the one who received the suspect when she was brought to the station by the Chief on 1st February, 2023.

13. The other notable issue on the Exhibit Memo Form is that when the Chief Inspector Mutinda prepared the exhibit memo in spite of him not being the actual recipient of the officer, this date of 23rd February, 2023 was so far removed from the date of arrest and these two issues offended section 167 of the *Evidence Act* which require timely preparation of exhibit documents.

> *Evidence Act*.
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> 167. Refreshing memory by reference to contemporaneous writing.
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> (1). A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or made so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory
>
> (2). A witness may, while under examination, refresh his memory by referring to any writing made by any other person and read by the witness within the time mentioned in sub-section (1), if when he read it he knew it to be correct.
>
> (3) Whenever a witness may refresh his memory by reference to any writing, he may, with the permission of the court, refer to a copy

> of such writing, if the court is satisfied that there is sufficient reason for the non-production of the original.

14. The Court also noted that when PC Changwony testified today in court, he did not say that he complied with section 167(2) of the *Evidence Act* which the court has reproduced above.

15. In the court's considered view, the preparation of the exhibit memo form by a person who had not received the arrested suspect and the preparation being made 21 days after the alleged seizure contravened section 167 above.

16. The other effect of the delayed preparation of the exhibit memorandum form was that the freshly seized liquid deteriorated in condition and changed its chemical content by fermentation and oxidation and this prejudiced the outcome of the chemical analysis at the laboratory. This is the reason that section 167 required the prompt preparation of exhibit memorandum forms so as prevent the decomposition of perishable substances seized from suspects. A timely preparation of the necessary document also prevents interference with evidence with a view to frame up accused persons.

17. The result is that the exhibit memo form carries little or no probative value because it was prepared outside the timelines of section 167 which required "so soon afterwards" following the event and in the present case 21 days cannot be said to be "so soon". Ideally, it should be prepared within 24 hours after arrest.

18. The effect of the findings of the court is that the Exhibit Memo Form is rejected for contravening section 167 of the *Evidence Act* and without it the analyst report collapses because the analyst report is founded on a suspicious document. The accused person, therefore, has no case to answer and is acquitted under section 210 of the Criminal Procedure Code. She is set at liberty unless otherwise lawfully held. Cash bails released to depositors. Right of appeal is 14 days.

DATED, READ AND SIGNED AT GITHONGO THIS 30TH NOVEMBER, 2023

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HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS