Republic v Mutembei (Criminal Case E181 of 2023)
[2023] KEMC 300 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEMC 300 (KLR)

REPUBLIC OF KENYA

IN THE GITHONGO LAW COURTS

CRIMINAL CASE E181 OF 2023

AT SITATI, SPM

DECEMBER 14, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JAMES MUTEMBEI ..... ACCUSED

RULING

1. The Accused person was charged with 2 offences. In count I he faced the charge of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars were that on 19th March, 2023 at about 2200hours at Kathiranga location within Imenti Central Sub-County within Meru County willingly and unlawfully damaged 1 iron sheet valued at Kshs 2, 500/- the property of Nancy Kathurima.

2. In Count II, he was charged with offensive conduct contrary to section 94(1) of the *Penal Code*. The particulars were that on 18th March, 2023 at 1700 hours at Kathiranga location within Meru County he used insulting language to Nancy Kathurima by calling her takataka (rubbish) and kuru (dog) with an intention of causing a breach of the peace.

3. The accused person denied the charges. The DPP's case was conducted by Prosecution Counsel Dixon Kibiti while the accused person represented himself at the trial.

The Dpp's Case

4. PW1 NAncy Kathurima told the court that on 18th March, 2023 while chatting with one Kathambi outside the compound, the accused person came by and insulted her by calling her a dog and rubbish then went away. The next day on 19th March, 2023 at 10pm the accused person showed up outside her house and challenged her to come out of the house. He repeated the insults. Out of fear, she did not venture out of the house. He then hurled stones onto the roof and punctured the iron sheets before

leaving the scene. PW1 alerted the Area Manager who arrived minutes later and confirmed that the suspect had left the scene.

5. PW2 Stephen Mwirigi gave an account similar to that of PW1 confirming that he heard the accused person call PW1 a dog and rubbish on 18th March, 2023 at 5pm when he found the accused person confronting PW1 who was then chatting with a friend. He confirmed that the next day 19th March, 2023 at 10pm PW1 called her saying that the accused person had resurfaced at her house and caused damage.

6. PW3 Irene Kathambi told the court that she was chatting with PW1 on 18th March, 2023 when the accused person showed up and called PW1 a dog and rubbish and swore that PW1 was going to die a poor woman.

7. PW4 64871 Sergeant Leonard Langat testified as the Investigating Officer. He told the court that on 23rd March, 2023 a case of malicious damage was reported by the complainant. He and PC Napoya visited the scene and took photographs and recovered 3 stones suspected to have been used to dent and puncture the iron sheet roof. He recorded the witnesses' statements and arrested the accused person.

8. In support of his investigation work, SGT Langat prepared an Exhibit Memo Form dated 30th October, 2023 which he produced as an exhibit in court together with 3 photos dated 30th October, 2023 and the 3 collected stones.

9. 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 established a prima facie case before the accused person can be put to his defence.

Determination

10. 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:-
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> > '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."
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> > 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)

11. 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).

Count I: Malicious Damage to Property C/s 339(1) Penal Code.

12. 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. The Court studied the Exhibit Memo Form produced by SGT Langat and noted that he prepared the Exhibit Memo on 30th October, 2023 yet the scene visit was allegedly made on 23rd March, 2023. This means that the Investigating Officer took 7 months to prepare the Exhibit Memo after the alleged scene visit and as a result contravened Section 167 of the *Evidence Act* which requires timely preparation of documentary evidence:

> *Evidence Act*.
>
> 167. Refreshing memory by reference to contemporaneous writing.

(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.

13. In the court's considered view, the preparation of the exhibit memo form 7 months after the alleged scene visit contravened section 167 above and made the Exhibit Memo stale – section 167 requires "so soon" which is equated to freshness of evidence. It casts doubt on the truthfulness of the witness. Could it be possible that 7months down the line the roof was still punctured and letting in rain water through? This doubt severely weakened the DPP's case and left a gap in the proof of damage. With this doubt, the Accused person has not case to answer as there is no proof of damage due to the suspicious evidence of the exhibit memo which was stale. A timely preparation of the necessary document also prevents interference with evidence with a view to frame up accused persons.

14. The result is that the exhibit memo form carries no probative value because it was stale for being prepared outside the timelines of section 167 which required "so soon afterwards" following the event and in the present case 7months cannot be said to be "so soon". In an ideal situation, this document should be prepared within 24 hours after the scene visit while the matter is still fresh.

15. 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 photos which were allegedly certified after 7months collapse with it. The accused person, therefore, has no case to answer as the DPP has not discharged their evidential burden and is acquitted under section 210 of the *Criminal Procedure Code*. Right of appeal is 14 days.

Count II: Offensive Conduct C/S 94(1) Penal Code

16. Upon a consideration of the DPP's evidence on this count, the Court finds that a prima facie case has been established. The accused person has a case to answer and is put to his defence on Count II only. Section 211 of the *Criminal Procedure Code* is now explained to the accused person so that he can exercise his options thereunder.

DATED, READ AND SIGNED AT GITHONGO THIS 14TH DECEMBER, 2023

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS