Republic v Ayienga & 5 others (Criminal Appeal 242 of 2018)
[2023] KECA 1545 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1545 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 242 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 15, 2023

BETWEEN

REPUBLIC ..... APPELLANT

AND

JOEL NYABUTO AYIENGA ..... 1ST RESPONDENT

FLORENCE NYOMENTA NYABUTO ..... 2ND RESPONDENT

PETER MANYANGA NYAKWEBA ..... 3RD RESPONDENT

KENNEDY NYAMWA NGE ONDIGI ..... 4TH RESPONDENT

BENRAD MORARA BIETE ..... 5TH RESPONDENT

EVANS NYAKWEBA KIBI ..... 6TH RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Kisii (W.A. Okwany, J.) dated 30th August 2018 in HCCRA NO. 54 OF 2012)

JUDGMENT

1. The Republic, being the appellant herein is aggrieved by the ruling dated 30th August 2018, delivered in Kisii HCCRA No 54 of 2012 (Okwany, J) acquitting the respondents under section 306 (1) of the Criminal Procedure Code as they had no case to answer. The appellant prays that we make a finding that:

    i. The said ruling acquitting the respondents was erroneous, and be set aside,

    ii. a *prima facie* case had been made out against the respondents,

    iii. the matter be remitted back to the High Court (before a different Judge) for defence hearing.

2. The background to this appeal is that the six respondents herein, Joel Nyabuto Ayiega, Florence Nyomenta Nyabuto, Peter Manyanga Nyakweba, Kennedy Nyamwa nge Ondigi, Benrad Morara Biete and Evans Nyakweba Kibi were jointly charged with three counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offences were that on 21st March 2012 at Boikanga Sub- Location in Gucha South District within Kisii County jointly with others not before the court, they murdered Teresia Bosibori, Kerubo Nyangweso and Zablon Ongoya as per Counts 1, 2 and 3 respectively.

3. The prosecution called 6 witnesses who gave their accounts of the night in question, and which we summarize as follows: While asleep inside his house with his late wife, Kerubo Nyangweso, Nelson Nyangweso Nunda, PW1 heard the sound of stones hitting his roof. Immediately thereafter the respondents stormed into the house while armed with weapons and took off with his wife; she was subsequently lynched alongside two other persons. He stated thus:

> We went back to the house, ate and slept, but at 12 am, we heard the noise from outside, stones were being thrown on top of our roof. We started crying for help but there was so much noise outside from the attackers. They broke into our house, I saw all the accused person storm into my house that night – I knew all of them because we live in the same area. I asked them what the problem was; they threatened to beat me. There were 8 attackers. My statement was not properly recorded. I saw the attackers when they broke into my home because I had a lamp on, but I also had a torch. The lamp was on the table. My house had 3 rooms. I had a torch. All the 6 accused persons entered into my house, I cannot know the sequence of who came first... they took my wife, Eunice Kerubo Nyangweso up to the hill near the shops. There was also another mzee and mama at the shops. I did not follow them to the shops because I feared. When the police came, I went to the scene where they had taken my wife. When l got to the scene, I found that my wife and the other two people had already been lynched. My wife was dragged from my house before my own eyes."

On further cross examination by learned counsel Mr. Ombachi, PW1 was categorical that he shone his torch on Nyamwange's face, saying:

> "...All the 6 accused persons came to my house that night. They are called Nyabuto, Nyomenda, Manyange, Nyamwange, Morara and Nyakweba."

He however did not mention the names of the 1st and 2nd respondents, in his statement to the police.

4. PW2, Mary Ondieki identified the body of her late mother Eunice Kerubo to the doctor who conducted a postmortem. She described the body as having burns all over, and the hands bound using a rope.

5. PW4, Douglas Kariuki Okengo told the trial court that while at his home on the night of 20th March 2012, he heard screams emanating from the home of one Joel Nyabuto Aega; and that there were claims that the son of Nyabuto had been taken away by witches who were walking around the villages; at about 11. 00 p.m, he heard a lot of commotion outside where a large crowd had gathered. The mob took away his mother, Teresa Bosibori (deceased) towards the road. He went up the road, and found an irate mob surrounding his mother, one Mzee (meaning elderly) known as Zablon Ongoya (deceased), and another old lady named Eunice Kerubo; all the three victims were bound with ropes; that the master minds of the spectacle chased all the on lookers away before lynching the three named persons.

This was his verbatim testimony:

> " ...My mother was also tied with sisal ropes and put next to Mzee Zablon. I asked what was wrong but none answered. Another old lady Eunice (deceased) was also brought while tied with ropes. We were then chased away by the master minds who were armed with pangas. They took maize stalks which they heaped on those who had been tied after a short while we smelt burning flesh, and the crowd took off."

On cross-examination he stated that it was dark and he was not able to identify anyone in the large crowd that had gathered at the scene.

6. PW3 Dr. Jared Oeba performed post mortem on the body Eunice Kerubo noted generalized severe burns with soot on the entire head, chest, upper limbs, the burns were 100% deep. There was degloving injury on the skin of lower limbs that is the skin had worn off the bones, and ligatures on the hands which were tied with sisal ropes. The ropes were also tied round the neck. The doctor established the cause of her death to be cardio- respiratory arrest due to severe burns. PW5, Dr. Ongado Zoga performed the postmortem examination on the body of Zablon Ongoya who also had 100% extensive burns covering the entire body; and concluded that he died of extensive severe burns. He also performed a post mortem examination on the body of Teresa Bosibori on 26th March, 2012, and found that she also suffered extensive body burns on 100% of body surface, leading to the conclusion that she died as a result of the extensive severe burns. All the post mortem reports were produced as exhibit in the trial court.

7. Naboth Otieno Ondoro, PW6, the Investigating Officer who visited the scene of the incident found three seriously burnt bodies, 2 female and 1 male; and upon inquiring from the chief what had transpired, he was informed that some members of the public had killed the deceased persons claiming that they were witches. His investigations led him to arrest the respondents, who were then charged with the murder of the three victims.

8. Upon the prosecution closing its case, the learned Judge in her ruling was not convinced that PW1's evidence met the threshold of proof as a single witness. This was because he did not explain how he identified the respondents taking into account that the incident took place around midnight and it was obviously dark.

   He was not present at the scene at the time the deceased Kerubo was lynched; and the incident took place in the presence of a huge crowd and the prosecution should have been able to avail evidence of some of the people who were at the scene to corroborate PW1's testimony.

9. It was for these reasons, that the trial court in its ruling holding that the respondents had no case to answer, found that: the evidence produced by the prosecution was insufficient and did not meet the threshold of proof expected in a criminal case; and that a *prima facie* case was not established to warrant the accused to be placed on their defence. Consequently, the respondents were all acquitted on all the counts of murder. It is this outcome that gave impetus to this appeal.

10. The appellant challenges the ruling of the Superior Court on three grounds of appeal that: a *prima facie* case had been sufficiently established against the respondents as to warrant them being placed on their defence to answer to the charges; the learned Judge misapprehended and misapplied the evidentiary threshold for a *prima facie* case; and failure to

    interrogate whether the threshold of a single witness' evidence in a criminal case, had been met.

11. This is a first appeal and the principles guiding the exercise of jurisdiction of a first appellate court have been restated in several decisions of this Court. Indeed; as rightly pointed out by the appellant in *Josephat Manoti Omwancha v Republic* [2021] eKLR this Court affirmed that:

> " This being a first appeal our mandate is, as was aptly set out in the case of *Okeno v Republic* [1972] EA 32, namely:
>
> > An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.* [1957/ EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R* [1957/ EA 570]. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958/ EA 424."

Our role, therefore is to subject the entire evidence adduced before the trial Court to a fresh evaluation and analysis make our own conclusion as to whether there was sufficient evidence establishing a *prima facie* case against the respondents.

12. As to whether a *prima facie* case was established, the appellant contends that PW1 saw all the accused persons storm into his house and drag the deceased out; that he was able to see all the respondents whom he knew, as they all lived near his home; that when the attackers broke into his house he not only had a lamp on, but also a torch, and was able to see Nyamwanga who had a rungu, Kiboi had a panga and Morara had a panga. Further, that the witness had told the trial court that although the 1st and 2nd respondents did not enter the house, they urged the attackers saying: "Take her. Take her. She has bewitched my child" and in the morning he found the deceased lynched alongside two others, and being persons well known to him he recognized their voices.

13. The appellant urges us to be guided by the decision in Bhatt v Republic [1957] EA which set out the legal principles to consider when addressing the question as to what constitutes a *prima facie* case, to argue that the arrival of PW1 at the scene after the deceased had been lynched, did not negate the fact that the respondents were seen dragging the deceased away. The appellant argues that the prosecution did not need corroboration of the facts surrounding the incident for the respondents to be put on their defence.

14. The appellant submits PW1 was able to physically identify the respondents; that he described the source of light; and that this identification was fortified by a voice recognition.

15. The appellant acknowledges that the burden of proof rests with the prosecution, but contends that the essential ingredients of the offence were established; and coupled with PW1's evidence of identification by recognition, the reasons behind the attack being the belief that Eunice, had bewitched a child belonging to their kith and kin; the respondents taking the deceaseds, away who never went back home lynched and were found dead the following morning, were adequate circumstances demanding that unless a rebuttal or an explanation to the contrary was given, then the court would be left with no other option but to convict them, hence the necessity to put on the respondents on their defence.

16. In opposing the appeal, the respondents submit that the sequence of events as regards opportunity for identification, was murky as to make it unclear at what time the lamp was lit; that PW1 did not mention the names of the 1st and 2nd respondents to police at the first opportunity; and that a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence be a basis for requiring an accused person to give his version of events just so as to satisfy the prosecution's curiosity.

17. The respondents argue that as a constitutional principle, no person should be called upon to answer any allegation made against him by the State, unless and until there is *prima facie* evidence that there is a case worthy the answer; that an accused person is protected literally from giving any evidence at all as this is the duty of the prosecution, and at no point should it shift to the accused person. The respondents explain that the rationale behind this was elaborated by Field, J, in *Baker v Brown* 44 N.E. 1120 (N.Y. 1896).

> " The essence and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration, it is plain to every person who gives the subject moment's thought. A sense of personal degradation in being compelled to incriminate oneself must create a feeling of abhorrence..."

18. The respondents are categorical that the prosecution did not prove its case to a standard that would place them on their defence; and there was no way they could be called upon to prove their guilt. In this regard, they point out that PW1 and PW4 said they did not know who killed the deceased persons, and there would be no basis to place them on their defence when the main prosecution witness, never even witnessed the killing.

19. The question this court has to answer is whether the prosecution had a *prima facie* case. The provision as to whether an accused person has no case to answer at the High Court in criminal trials, is found under section 306(1) which states:

> 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... 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...
>
> The term *prima facie* means sufficient to establish a fact or raise a presumption unless disproved or rebutted. *prima facie* case is the establishment of a legally required rebuttable presumption [See *Black's Law Dictionary*, Ninth Edition, Bryan A. Garner Ed]

20. This Court has defined a *prima facie* case in *Anthony Njue Njeru v Republic* [2006] eKLR. Also, in *Republic v Rafiki Chibunja Karisa & 2 others* [2020] eKLR, this Court observed that:

> " The power of the court to determine existence of a *prima facie* case is provided for under Section 306 (1) as read with subsection (2) of the *Criminal Procedure Code*. The essence of the provisions is that if at the close of the prosecution case and in assessing the evidence in light of the elements of the offence the court is of the view that the prosecution has proved any of the elements against the accused sufficiently to require him or her to state or answer the charge. There should be no hesitation for the court to enter a verdict of not guilty. As

a consequence, the accused is to be acquitted of any culpability. It is also clear under sub-section (2) of the same provisions if the proper test is met, then of necessity, the accused person(s) must be called upon to proceed and offer his or her defence to the offence...

In this case the burden on a *prima facie* case to be shown by the prosecution according to Lord Denning is consistent with the proposition that the degree need not reach certainty but it must carry a high degree of probability but not beyond reasonable doubt, that there exists evidence which can sustain a conviction. In what I consider one of the land mark cases by the English Court of Appeal in *R v Galbraith* [1981] IWLR it addressed the concept of *prima facie* case in this way, where Lord Lane CJ said:

> " i. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty, the Judge will of course stop the case.
>
> ii. The difficulty arises where there is some evidence but it is of a tenures character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

When the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon on, it is his duty, upon a submission being made, to stop the case. Where however, the prosecution evidence is such that the strength or weakness depends on the view to be taken of the in house, reliability, or other matters which are generally speaking within the province of the jury and when on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury, (in our case to call upon the accused persons to state their case)."

21. In addressing the issue revolving around the *prima facie* case concept, we take into account the accused person's constitutional right to silence and not give self-incriminating evidence, as set out under Article 50(2) (i) of the *Constitution* of Kenya 2010 that:

> the accused has a right to remain silent, and not to testify during the proceedings. under Article 50(h) the accused has a right to refuse to give self-incriminating evidence.

22. This right to non-self-incrimination is based on the maxim Nemo tenetur seipsum accusare which means that: "no man shall be bound to accuse himself."

Indeed, in the Canadian case of *Republic v P (M.B)* 1994 ISCR 555, 579 the Supreme Court of Canada expressed itself as follows:

> " perhaps the single most important organizing principle in criminal law is that right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the court establishes that there is a case to meet, an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her. The broad protection afforded accused reasons is perhaps best discharged in terms of the over-arching principle against self- incrimination. It is up to the state, with its greater resources, to investigate and prove its own case and the individual should not be conscripted into helping the state fulfil this task. Once, however, the crown discharges its obligation to present a

prima facie case, the accused can technically be expected to respond, whether by testifying himself or herself or calling other evidence."

23. We have read through the ruling by the trial court, and pose the question that if the respondents had been placed on their defence, and opted to remain silent, what would have been the outcome bearing in mind that the burden of proof remains the duty of the prosecution? Would the trial court have sent them home or to the penal institution? Would it have been tantamount to asking the respondents to accuse themselves? We note that indeed, the learned Judge delved into a thorough evaluation of the evidence, discounting it for lack of corroboration; though she did not address the question of voice identification. These are activities which in our view, could have been pragmatically dealt with at the close of the entire case, upon evaluating and analyzing the evidence; and appraising herself on the applicable law. It is our considered view that the learned trial Judge erred in fact and on principle, when she delved into the details of the matter before her at the stage of making a ruling, and made a finding that the respondents had no case to answer.

24. Having found that there was an error in fact and principle, do we have the liberty to reverse the acquittal, and order for the respondents to be summoned to the High Court to make their defence? We pose this question in light of Section 379 (5) of the *Criminal Procedure Code* which states that:

> Where a person has been acquitted in a trial before the High Court in the exercise of its original jurisdiction and the Director of Public Prosecutions has, within one month from the date of acquittal or within such further period as the Court of Appeal may permit, signed and filed with the Registrar of that court a certificate that the determination of the trial involved a point of law of exceptional public importance and that it is desirable in the public interest that the point should be determined by the Court of Appeal, the Court of Appeal shall review the case or such part of it as may be necessary, and shall deliver a declaratory judgment thereon.
>
> (6) A declaratory judgment under subsection (5) shall not operate to reverse an acquittal, but shall thereafter be binding upon all courts subordinate to the Court of Appeal in the same manner as an ordinary judgment of that court.

The effect of this provision is that we do not have the liberty to reverse the acquittal, nor can we order that the criminal case against the respondents be re-opened. We can only make a declaration, which we hereby do, to the effect that the learned Judge misdirected herself and fell into error in how she arrived at her ruling that the respondents had no case to answer.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR