Republic v Nyakina & another (Criminal Case 19 of 2019) [2025] KEHC 11403 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL CASE 19 OF 2019

WA OKWANY, J

JULY 31, 2025

BETWEEN

REPUBLIC .... PROSECUTOR

AND

JAMES OGWAGWA NYAKINA .... 1ST ACCUSED

JACKSON KIRUI KIPNGENO .... 2ND ACCUSED

RULING

1. The Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 27th August 2019 at Keera Location of Nyamira Sub County within Nyamira county, jointly murdered Amos Kemosi Kereri.
2. The Accused Pleaded not guilty to the offence and a trial was conducted in which the Prosecution called a total of fourteen (14) witnesses.
3. The Prosecution's case, as narrated by PW1, Anson Kurao Omagwa, a community policing officer, was that on 19th August 2019, he accompanied the Accused persons on a night patrol when they met the deceased herein, Kereri Jomo, a boda boda operator, speaking to a woman named Vane. PW1 testified that the 1st hit the deceased with a stick, handcuffed him and escorted him to the police post. He stated that the Accused persons continued to beat deceased at the police post and that he later succumbed to the injuries that he had sustained in the beating. The cause of death was established to be asphyxia due to contusion of the lung and acute lung injury due to blunt force trauma which was consistent with assault.
4. I have considered the evidence presented by the Prosecution witnesses together with the exhibits that they produced. Section 107 (1) of the *Evidence Act* Cap 80 of the Laws of Kenya provides that: -

1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

5. It is trite that the burden of proof in criminal cases rests on the Prosecution. The court is at this juncture required to consider the evidence presented before it in order to determine if a prima facie case has been established.

6. Section 306 of the *Criminal Procedure Code* states thus: -

(1) 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.

(2) 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.....

7. *Mozley and Whiteley's Law Dictionary* 11th Edition defines a prima facie case as follows: -

> "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

8. In *Republic vs. Abdi Ibrahim Owl* [2013] eKLR a prima facie case was defined as follows: -

> "Prima facie is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v. R* [1957] E.A 332 at 334 and 335, the court stated as follows:
>
> 'Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the 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 would 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 agree 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". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a "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.'"

9. From the foregoing case law, it is clear that the duty of the court, at this point of the trial, is not to analyse and scrutinize the evidence with a view to delivering a well-reasoned decision as to the guilt or innocence of the Accused person. Such a determination can only be made in the final judgement that

is expected at the end of the trial, should the accused be placed on his defence, if he is found to have a case to answer.

10. In *Republic vs. Karanja* Criminal Case Number 13 of 2004, Nairobi (2009) eKLR Prof. J.B. Ojwang J. (as he then was) in held thus:-

> " 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 . . .
>
> 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."

11. Similarly, in *Anthony Njue Neru vs. Republic*, Criminal Appeal No. 77 of 2006 (2006) eKLR the Court of Appeal stated as follows: -

> " Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt's case..., we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused." (Emphasis mine.)

12. The test for determining whether a prima facie case has been established by the Prosecution was laid down in the case of *Republic v Galbraith* [1981] WLR 1039 as follows: -

> "(1) 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.
>
> (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:
>
> (a) where 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 it, it is his duty, upon a submission being made, to stop the case.
>
> (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where 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."

13. The offence of murder under section 203 discloses three elements that must be established by the Prosecution as follows: -

    i. Death of the deceased;

    ii. That the death was occasioned by the unlawful acts or omissions of the Accused; and

    iii. That there was malice aforethought on the part of the Accused.

14. I have considered the evidence presented by the Prosecution against the test established in the above cited cases and statute and I am satisfied that the Prosecution has established a prima facie case against the Accused persons herein. Consequently, they are hereby placed on their defence and called upon to elect the manner in which they will present their defence in accordance with the provisions of Section 306 of the *Criminal Procedure Code*.

15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 31ST DAY OF JULY 2025.

W. A. OKWANY

JUDGE