



**Republic v Isacko (Criminal Case E005 of 2022)
[2024] KEHC 3578 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE E005 OF 2022
JN NJAGI, J
MARCH 19, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

UMURO DUBA ISACKO ACCUSED

RULING

1. The accused is facing two counts of murder contrary to section 203 as read with section 204 of [Penal Code](#). The particulars of the charge in count 1 are that on the 11th July 2022 at around 2120 hours at Yell village in Loiyangalani sub county within Marsabit county together with others not before court they murdered Ltarawan Chana (herein referred to as the deceased in count 1).
2. The particulars of the charge in count 2 are that on the same day, time and place as in count 1 together with others not before court they murdered Ntodow Gathi (herein referred to as the deceased in count 2).
3. The prosecution called 9 witnesses in the case. It was the case for the prosecution that the deceased were aged 12 years and 17 years respectively. They were herders and were at the material time herding their family livestock at a place called Yell in Marsabit county. They were killed by unknown people. The area Assistant chief, Dominic Dokhle, PW1 received the report of the killing and visited the scene. He found spent cartridges at the scene and collected them. He took them to Kargi police post. The killings were reported at Loiyangalani Police station.
4. PW2 was the father of the deceased in count 2. His evidence was that on the 11/7/2022 he received a report that his son who was herding livestock at Yell had been killed. He did not go to the scene of the killing. He did not know what happened to the body.
5. The Chief of Kargi location, Muhamud Arbele PW4 testified that on the 11/7/2022 he received a phone call that some people had been killed at a place called yell which s under Kurkum location. That



- on the following morning the Deputy OCPD Loiyangalani went to Kargi. He PW4 accompanied him to the scene. They found 2 bodies of children at the scene. The elders refused them to collect the bodies claiming that their culture does not allow them to take to the village bodies killed in the wild. They went back to Kargi.
6. It was the evidence of PC Kililo PW3 of Kargi police that on the 12/7/2022 he and other police officers were picked by the Deputy OCS of Loiyangalani police station and they went with him to the scene of the incident. The chief was with them. They found some elders at the scene. He saw 2 bodies with shot wounds. The elders refused them to collect the bodies. They left the bodies at the scene and returned to the police post.
 7. It was the evidence of Cpl Hassan Ibrahim PW5 of Maikona police station that on the 12/7/2022 he was sent by his seniors to go to Karacha police station and pick a suspect. That he went to the said place in the company of 2 other police officers. They went to the home of chief Subdio Abduba, who handed over to them a suspect, the accused. The chief gave them an AK 47 rifle with 3 rounds of ammunition. They took the accused to Maikona police station. On the following day they handed him together with the rifle and the 3 rounds of ammunition to police officers from the DCI Office, Loiyangalani. In cross-examination the witness stated that the Assistant Chief Mamo was there when the chief handed over the gun to them. That the gun was in the house of the chief and it is the Assistant Chief Mamo who was sent to the house to pick the gun and brought it to them.
 8. The case was investigated by PC Jason Karanja PW9 of DCI Office, Loiyangalani. His evidence was that he visited the scene of the incident on 12//7/2022. He took photographs of the bodies. He collected 9 spent cartridges at the scene. The bodies were examined by Dr. Maulidi Shaban PW8, the Resident Medical Officer at Karacha Sub-County Hospital. The doctor found the body of the deceased in count 1 with a gun-shot entry wound on the back of the head and an exit on the forehead. The right hand was completely fractured by a gun shot. The deceased in count 2 had a gun-shot entry wound on the anterior aspect of the chest. He formed the opinion that the cause of death in the two cases was as a result of gun-shot wounds.
 9. On the 13/7/2022, the Investigating Officer PW9 received a report from Maikona Police Station that a suspect had been arrested. He went to the said police station and picked the suspect, the accused. The police station handed over to him an AK 47 rifle loaded with 3 rounds of ammunition that were said to have been recovered from the accused. He charged the accused with the offences of murdering the two juveniles.
 10. PC Karanja sent the AK 47 rifle, P.EXHT.1 together with the 3 rounds of ammunition and the recovered 9 cartridges to the ballistics expert Nairobi for examination. The items were examined by a Firearms Examiner, IP Reuben Bett PW6. He formed an opinion that the rifle and the 3 rounds of ammunition were a firearm and ammunition respectively as defined in the *Firearms Act*. That the rifle was capable of being fired and the ammunition were live. He found that the 9 spent cartridges were formerly component parts of ammunition in calibre 7.62mm. That he did a microscopic examination of them in conjunction with each other that revealed that they were fired by one gun. That a further microscopic examination of them revealed identifiable firearm markings consistent to those emitted by AK 47 rifles. That he did a comparative examination of test cartridges fired in firearms in the Ak 47 rifle EXHB. 1 in conjunction with the 9 spent cartridges that revealed that they were all fired by the K 47 rifle P. EXHT.1. He prepared a report to that end. He produced the report in court as exhibit, P.EXHT.3.
 11. This court is now called upon to determine whether the prosecution has established a prima facie case against the accused as to require him to be placed to his defence.



12. A *prima facie* case was defined in the case of *Ramanlal Rambaklal Bhatt v R*, (1957) EA 332 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 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.”

13. The evidence adduced against the accused is that the Investigating Officer, PC Karanja PW9, recovered 9 spent cartridges at the scene of murder. Further that the accused was found with an AK 47 rifle, P.EXHT.1. That a ballistics expert PW6 did a microscopic examination on the spent cartridges and reached a conclusion that they were fired by the AK 47 rifle, P.EXHT. 1. The accused was thus linked to the murders by the fact that the gun he was found with is the one that fired the spent cartridges that were recovered at the scene. The question is whether the accused was found with the AK 47 rifle P.EXHT. 1.
14. PC Hassan Ibrahim PW5 told the court that he was handed over the accused by chief Subdio Abduba in Karacha area. The chief also handed over to him an AK 47 rifle P.EXHT 1 that was said to have been found with the accused. That an Assistant chief called Mamo was present when the accused and the gun were handed over to him. That the gun was in the house of Chief Subdio and that Assistant chief Mamo was sent to the house to fetch the gun.
15. Neither Chief Subdio Abduba nor Assistant Chief Mamo testified in the case. There was thus no evidence as to who arrested the accused while in possession of the AK 47 rifle, P.EXHT.1. Without such evidence, there is nothing to link the accused with the murder of the two juveniles. The evidence adduced by the prosecution cannot lead to his conviction if he selects to maintain his right to silence over the accusations.
16. The upshot is that the prosecution has not established a *prima facie* case against the accused as to require him to be placed to his defence. I therefore find that the accused has no case to answer and is acquitted of the charges vide section 306 (1) of the [Criminal Procedure Code](#). I order the accused to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MASABIT THIS 19TH DAY OF MARCH 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Nyenyire for accused

Mr. Otieno for Republic

Accused – present



Court Assistant – Jarso.

14 days R/A.

