



**Republic v Otieno & another (Criminal Case E011 of 2023)  
[2024] KEHC 6036 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E011 OF 2023  
RE ABURILI, J  
MAY 28, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DOUGLAS OCHIENG OTIENO ALIAS SMOKIE ..... 1<sup>ST</sup> ACCUSED**

**GEORGE OWUOR OMINO ALIAS APOTH ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The two accused persons herein Douglas Ochieng Otieno alias Smokie and George Owuor Omino alias Apoth are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The charge is as per information for murder dated 5<sup>th</sup> June 2023 whose particulars are that on the 8<sup>th</sup> day of May, 2023 at Nyabera village in Kisumu West Sub-county, jointly with others not before court murdered Dennis Odongo Otieno.
3. The two accused persons denied the charge. The prosecution called 6 witnesses and closed its case on 16<sup>th</sup> May 2024.
4. The defence counsel was granted 7 days to file written submissions as requested but as at last night when writing this Ruling, I have no written submissions.
5. Having considered the testimony of all the 6 witnesses cumulatively, and without delving deep into the evidence of each witness and the merits thereof, the question is whether a *prima facie* case has been established against the accused persons to warrant them to be placed on their defence.



6. The [Oxford Companion of Law](#) at pg 907 defines “*prima facie*” in the following terms:

“A case which is sufficient to all an answer while *prima facie* evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”
7. The Court of Appeal similarly held in [Anthony Njue Njeru vs. Republic](#) [2006] eKLR that:

“Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a *prima facie* Case to warrant the trial Court to call upon the Appellant to defend himself? It is a cardinal principle of law that, the onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if at the close of the Prosecution case, the case is merely one, ‘Which on full consideration might possibly be thought sufficient to sustain a conviction’

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 settled in Bhatt’s Case(supra), we are of the view that the Appellant should not have been called upon to defend himself as all the evidence was one record. It seems the Appellant was required to fill in the gaps in the Prosecution case.”
8. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not unlikely and the reasons for not doing so are obvious. As was appreciated by Trevelyan and Chesoni, JJ in [Festo Wandera Mukando vs. The Republic](#) [1980] KLR 103:

“...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”
9. Taking guidance from the above decision and having considered the evidence adduced by the prosecution witnesses, I am persuaded that a *prima facie* case has been established against both the accused persons herein to warrant them to be placed on their respective defences.
10. This is not to say that the accused persons are culpable but that at this stage, this court is not expected to find whether the prosecution has proved its case against the accused beyond reasonable doubt.
11. The accused persons remain innocent until proven guilty and their rights under Article 50(2) of the [Constitution](#) are guaranteed.
12. Accordingly, Douglas Ochieng Otieno alias Smokie and George Owuor Omino alias Apoth are found to have a case to answer and are hereby placed on their defence.
13. The provisions of Article 50(2) (i) (k) (l) of the [Constitution](#) as read with Section 306(2) of the [Criminal Procedure Code](#) are hereby complied with and read out to both the accused persons in Kiswahili language which they understand best.
14. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MAY, 2024**

**R. E. ABURILI**



**JUDGE**

