



**Republic v Wabwoba (Criminal Case 21 of 2020)
[2023] KEHC 19358 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 21 OF 2020**

DK KEMEL, J

JUNE 30, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

ALVIN WABWOBA ACCUSED

RULING

1. The accused herein Alvin Wabwoba has been charged with an offence of murder contrary to section 203 as read with SECTION 204 OF THE *Penal Code*. The particulars are that on the May 9, 2020 at Moding area, Mbakalo Location in Bungoma North Sub- County within Bungoma County, jointly with another not before court murdered Emmanuel Nandepelwa Chepkwesi.
2. The accused denied the charge and thus the hearing kicked off in earliest on the July 6, 2022 The prosecution called nine (9) witnesses in support of its case. PW1, was Kevin Amutali Kisaka who testified that on the material date he was riding motorcycle and on reaching Moding junction, he met a large crowd and saw the deceased herein lying on the ground and bleeding profusely. He stated that the deceased was fellow motorcycle operator in the area. He stated that he organized for the deceased to be rushed to hospital for treatment and that the following day he learnt that he had passed on. On cross examination, he stated that the accused was not at the scene and that he could not tell if any grudge existed between accused and deceased.
3. PW2 was Anthony Juma who testified that he had accompanied the deceased to check on his sugarcane and later on reaching Moding junction, the accused and one Brian emerged from their gate and attacked the deceased. The accused’s companion Brian cut the deceased with a panga and when the deceased fell down, the accused herein used a jembe (hoe) stick and hit him with it. He stated that he raised alarm attracting members of public. He teamed up with Kevin (PW1) and assisted the deceased to hospital for treatment. On cross examination, he maintained that the accused and one Brian caused



- the death of the deceased. On examination, he stated that there were no other people when deceased was attacked.
4. PW4, was Eric Simiyu , who stated that he was heading home when he heard somebody shouting for help. He rushed to the scene and found the deceased on the ground with an injury on the head. He organized for the deceased to be taken to hospital he teamed up with villagers in pursuit of the assailants. They managed to apprehend one Brian who had bloodstains on his hands and that the irate villagers attacked him and who later passed on while undergoing treatment. He informed both on cross examination and re- examination that he did not witness the incident.
 5. PW4, was Humphrey Chesoli Chikani who testified that he was at his home due to the curfew which was then in place when he heard noise. He rushed there and saw the accused herein assaulting the deceased who was then on the ground with a jembe (hoe) . He together with Anthony Juma assisted the deceased to hospital. On cross examination, he stated that the confronted the assailants as to why they were attacking the deceased and further added that he was the first person to arrive at the scene.
 6. PW5 was John Katee Keya who testified that as a clinical officer at Kimilili Sub- County Hospital, he attended to the deceased herein who had sustained injuries on the head. He stated that at the time he was the proprietor of Kibisi medical services. He added that he gave the deceased first aid and referred him to Lugulu Mission Hospital but that he passed on before he could be taken there. He produced the treatment notes as exhibit one. He maintained that he did not know the cause of death.
 7. PW6 was Dr. Reuben Nyongesa Kere who testified that he conducted a post mortem examination on the body of the deceased on 15.5.2020 at Lugulu Mission Hospital. He noted out wounds on the left side of the head and that there were three skull fractures as well as bleeding in the brain. He formed the opinion that the cause of death was critical head injury due to physical assault arising from blunt and sharp objects. He produced the said report as exhibit two. On cross examination, he stated that injuries were due to assault as there were wounds on both arms confirming that the deceased was defending himself. He reiterated that the injuries could not have been sustained through a fall or accident.
 8. PW7 was George Mparayapili and who testified that on the 9.5.2020 he was on his way when he heard noise. He checked and saw the accused herein and one Brian who were in possession of a jembe and panga respectively. He also saw the deceased lying on the ground bleeding from the head and that the accused was hitting him with a jembe . He stated that the two assailants fled on seeing him approach . He stated that the deceased assisted to hospital by Anthony Chesoli and Eric Wattimah and that he later learnt that the deceased passed on while in hospital. On cross examination, he stated that he had purchased land from an uncle to the assailants and that he was their neighbour and had no grudges with them. On cross examination, he stated that he saw the accused assaulting the deceased with a jembe.
 9. PW8, was Ronald Wanjala Simiyu stated on learning of the incident, he rushed to Kibisi dispensary and found the deceased who was then unconscious and that they rushed him to Lugulu Mission Hospital but was pronounced dead on arrival. He witnessed the post mortem conducted on 15.5.1010 where he noticed a fracture of the skull. On cross examination, he stated that he did not witness the incident.
 10. PW9 was NO. 113223 PC Felix Oduor Ojowi who testified that he investigated the case and established that the accused and one Brian had attacked the deceased while armed with a jembe and panga respectively. He later recorded statements and had the accused who was already in custody charged with the offence herein. On cross examination, he stated that he did not recover the assault weapons and that he did not see bloodstains at the scene.



11. Thereafter, the prosecution closed its case. Learned counsels opted to rely on the evidence so far tendered at this stage of the proceedings and left the court to establish whether a *prima facie* case has been made out by the prosecution.
12. I have given due consideration to the evidence adduced at this stage of the proceedings. The issue for determination is whether a *prima facie* case has been established by the prosecution so as to warrant the accused to be placed on defence.
13. It is trite law that in criminal trials the burden of proof is always on the prosecution to discharge. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution's case discharging that burden of proof. Indeed, the prosecution has an obligation to establish the guilt of the accused for the offence charged beyond reasonable doubt. See *Woolmington -vs DPP* (1935) AC 462. The burden of proof is also expounded in Section 107 of the *evidence Act* which provides that whoever desires any to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
14. The test and procedure for a trial Judge to decide if there is no case to answer is attributed in section 306 of the *Criminal Procedure Code* which provides as follows:-

“At the end of the prosecution's evidence on either submissions by the prosecution or defence or on the court's own initiative; may make a finding on whether there is sufficient evidence to prove the elements of the offence. If the prosecution evidence is capable of establishing the case for an independent tribunal to conduct it, it may call upon the accused person to state his or her defence in rebuttal. Whereas on the other hand if the evidence is insufficient for any independent and reasonable tribunal directing its mind to the facts may reach a verdict of not guilty and acquit the accused”.
15. The above test in the criminal procedure code has been amplified in *R B Glbrait* 73 CR. Appeal R 124 as follows:-
 - a) if there is no evidence that the crime alleged has been committed by the defendant then there is no difficulty. The Judge will stop the case.
 - b) The difficulty arises when there is some evidence, but is a serious character, for example because of inherence, weakness or vagueness or because it is inconsistent with other evidence.
 - c) When the Judge comes to the conclusion that the provision evidence taken its high- rise is such that a jury directed could not properly convict upon it, it is his duty upon a submission being made to stop the case.
 - d) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which are generally speaking with 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”.
16. The prosecution was under a duty to prove the essential elements of the offence as provided for under Section 203 as read with Section 204. The elements are inter alia; that the deceased is dead; that the death was caused unlawfully; that there was malice aforethought and that the accused directly or indirectly participated in the commission of the alleged offence. Hence the prosecution while discharging the burden of proof, must establish at this stage of the proceedings that the evidence so



far tendered should be sufficient to sustain a conviction against the accused were he to elect to remain silent in defence. (see *Bhatt vs R* (19573) EA 332)

17. In the instant case, the evidence of the doctor (Dr. Reuben Nyongesa Kere) confirmed that the deceased died and that the cause of death was head injury secondary to physical assault with both sharp and blunt objects. I also find the evidence of PW2 placed the accused at the scene of crime since he was in the company of the deceased before the attack took place and that he witnessed the whole episode. The evidence of PW2, was also corroborated by that of PW4 who arrived at the scene and found PW2 trying jto intervene and save the deceased from further attack. Again, the evidence of PW7 placed the accused at the scene of crime since he found him assaulting the deceased with a jembe (hoe). These very witnesses further stated that the accused and one Brian fled the scene and that the villagers managed to apprehend Brian whom they attacked and who later died while undergoing treatment while the accused herein and his siter were rescued by police officers form Mbakalo police station. I find the totality of the evidence presented at this stage of the proceedings has met the threshold of a *prima facie* case. This thus means that the prosecution has made out a *prima facie* case against the accused to warrant him to be called upon to make a defence. In a nutshell I find the evidence adduced at this stage is sufficient to sustain a conviction where the accused to elect to remain silent in defence . The accused was placed at the scene of crime and now must render an explanation as to how the deceased met his death.
18. In the result it is my finding that the prosecution has established a *prima facie* case against the accused herein Alvin Wabwoba . I find that the accused has a case to answer and is now called upon to elect to conduct his defence in accordance with the provisions of Section 306 (2) of the *Criminal Procedure Code*.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE, 2023

D KEMEI

JUDGE

In the presence of:-

Alvin Wabwoba Accused

Wekesa for Olugi for accused

Ayekha for prosecution

Kizito Court Assistant

