



**Republic v Kimunyu (Criminal Case 13 of 2014)  
[2023] KEHC 21601 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 13 OF 2014  
RM MWONGO, J  
JULY 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CYRUS WARUI KIMUNYU ..... ACCUSED**

**RULING**

1. The accused person was charged with murder contrary to Section 203 as read with Section 204 of the Kenyan *Penal Code*. The particulars of the offence were that on 25th April 2014, at Kinyaga Village within Kirinyaga County he murdered Eliud Warui.
2. He was arraigned in court on 129/5/2014 and pleaded not guilty. The state assembled five witnesses, and closed their case. This ruling seeks to determine whether the accused has a case to answer.
3. The purpose of the examination of the evidence at the close of the prosecution case is to ascertain whether the evidence against the accused satisfies the legal test to oblige him to enter his defence. The test is set out in many authorities, but suffice it to cite the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR, where the court set it out as follows:

“It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a *prima facie* case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*...”
4. The examination of the evidence herein is intended to disclose whether a *prima facie* case was made out against the accused by the prosecution.
5. PW-1 Doctor Ndirangu Karomo he confirmed that he conducted the post mortem examination on the 29th April 2014 and after examination, he was of the opinion that the cause of death was cardio-



respiratory arrest due to severe head injury demonstrated by multiple injuries sustained in an assault. During cross examination PW1 the doctor was of the opinion that it was possible that the injuries would have been inflicted by more than one person.

6. PW-2 Naomi Wanjiku Warui she is the wife of the accused. She testified that on 25th April 2014 at about 2100 hours she was in the house with her husband watching T.V. She heard noises outside on the lower side. She heard the accused's mother (Beatrice Wangithi) screaming for help and the accused (Cyrus Warui) also responded. They ran towards the noises, but she fell and lost consciousness although she was close to the scene. She did not reach the scene but heard that the deceased Warui had died and people had been at the scene to spectate. Later, the accused picked her and they returned to the house.
7. Further, she stated that she has a daughter one Caroline Muthoni who is 11 years old. She stated that the next day Caroline, her daughter, went to fetch water and she came with a phone which she collected near the well. She gave the phone to her father who is the accused.
8. She confirmed that the accused did not help or escort the deceased to Hospital. That the accused who is also her husband gave the phone he had received from the child to the police.
9. PW-3 Caroline Muthoni Warui she is the daughter of the accused. She testified that on the 25<sup>th</sup> April, 2015 which was on a Saturday, she had not gone to school. She found a mobile phone while going to the river on a foot path near her grandmother's home. She picked it and gave it to her father. The phone is identified as MFI- 2.
10. In cross-examination, she stated that she was 11 years old. On the material night, she stated that she did not leave the house.
11. PW- 4 Beatrice Wangithi Kimunyu: The accused is her son. In her testimony she confirmed being at the scene on the 25th April 2014. She corroborated the evidence of PW-1 (Naomi Wanjiku Warui) her daughter in law, that she was screaming and the accused also responded by heading to the scene.
12. She testified that her screams attracted many people among them the village headman whom she was able to identify. When she reached the scene, the deceased was not dead but was on the ground. She stated that the headman and the assistant Chief were saying that the accused (Cyrus Warui) was the perpetrator and that is when she retired back to her homestead. That once at home she noticed a jerry can containing petrol which they took to Sagana Police Station.
13. PW-5 Kimunvu Warui he is the accused's father. He testified that on the 25th April 2014 at about 2100 hours, he heard people talking at his gate and when he went out to check who they were, he noticed the village head-man with the area assistant chief among them.
14. He heard a commotion outside his gate and went to check out. He saw the accused with many people. He had seen the assistance chief during the day. Together with his wife, they found the deceased on the ground. He lay facing upwards.
15. He stated that he was among the people who escorted the jerry can full of Petrol to Sagana Police Station.
16. During cross examination, he testified that he heard noises and went with his wife. They found Eliud Warui lying on the ground facing upwards. He further testified that there were more than twenty (20) people around and that the accused came to the scene when he heard the commotion.
17. PW-6 No 233522 I.P Mercy Makau: She stated that she was not the Investigating officer but she was present with the investigating officer and visited the scene of the alleged crime. She testified that on



- the 26th April 2014, she was assigned the duty to investigate an occurrence that took place on the 25th April 2014. She was able to ascertain that the deceased had walked into the land belonging to the accused (Cyrus Warui's) father with a 5 litre Jerry Can containing petrol at about 2100 hrs.
18. That while still at the Police Station, a family member walked in among them the accused (Cyrus Warui) who had a phone Nokia with a sim card which he handed in and was recorded as an inventory. That she was able to establish the Phone belonged to the deceased and had gotten lost during a fight that had taken place on the night of 25th April, 2014.
  19. In cross-examination, she stated that there was no witness at the scene. The accused lived far from the neighbourhood but his siblings stay in the same compound. There was no witness who saw the accused commit the offence.
  20. The accused did not voluntarily hand over the phone to the police, it was recovered from him by Corporal Bungei. On her part, she said that she did not recover any "rungu" that had been used to attack and kill the deceased.
  21. The accused was arrested because of the possession of the deceased's phone.

### **Prosecution's submissions**

22. The prosecution submitted that there is no doubt that a fight occurred on the 25th April 2014 at the homestead of PW-5 (Kimunyu Warui) as all the Prosecution witnesses were members of his family.
23. They all reported to the Sagana Police Station concerning the fight in which the accused was adversely mentioned or spotted.
24. PW-5 (Kimunyu Warui) puts it plainly that he had noticed the deceased visit his homestead earlier during the day and knowing him as a Land broker, when he spotted him at night in his land as though surveying it, he called members of his family who respondent with the accused among them.
25. The accused was among the people who reported to the Sagana Police Station already with the Phone on the 25th April 2014 and the same would not have been given to him.
26. He is the son to PW-5 (Kimunyu Warui) who called them as PW-2 (Naomi Wanjiku Warui). His wife testified that after the brawl, the accused did not assist in taking the deceased to Hospital.
27. His mother PW-4 (Beatrice Wangithi Kimunyu) confirms that she heard the headsman and the area assistant Chief saying that it was the accused (Cyrus Warui) who had assaulted the deceased.
28. Section 206 of the *Penal Code* stipulates that Malice aforethought shall be deemed to be established by evidence proving;
  - a. An Intention to cause the death or grievous harm.
  - b. Knowledge that the act or omission causing death will probably cause death of or grievous harm to the same person.
  - c. An intention to commit a felony.
29. The prosecution submits the accused was positively identified by PW-1 (Naomi Wanjiku) PW-3 (Beatrice Wangithi Kimunyu) and PW-5 (Kimunyu Warui) as having been at the scene of crime on the 25th April 2014.
30. The gun recovered placed him squarely as the perpetrator that caused the death of the deceased.



### **Accused's submissions**

31. The accused submits that the postmortem report and the testimony of PW1 Doctor Ndirangu Karomo indicates that the deceased was injured by a group of men, they were never arrested or charged with the murder.
32. PW 6 in her written statement dated 5/5/2014 stated that the accused surrendered the phone to the police station but on her re-examination, she contradicted her statement saying that the phone of the deceased had been recovered at the scene. That can only be hearsay evidence she was not at the scene of the crime when the murder happened. This puts her credibility as an investigation officer in doubt.
33. The accused submits that from the facts above and from the evidence adduced by the prosecution witnesses, the prosecution has failed miserably to place the accused at the scene of the crime which was incumbent on their side, they have also failed to produce and connect any murder weapons alleged to have been used in the commission of the murder, thirdly they have failed to bring any witness who could positively and independently identify the accused as the person who committed the Murder. Hence, the decision to charge the accused was purely based on suspicion and hearsay evidence which is inadmissible.
34. Counsel closed by stating that the accused has been in custody for 9 years for an offence he never committed. Additionally, that the prosecution has failed to discharge the burden of proof and it is only fair and just that the accused be acquitted, we urge the court to make a decision that the accused has no case to answer and acquit him under Section 210 of the [Criminal Procedure Code](#).

### **Issues for determination**

35. the only issue for determination is whether the prosecution has made out a *prima facie* case necessitating that the accused be put on his defence.

### **Analysis and Determination**

36. It is for the prosecution, throughout the trial, to prove their case against the accused person. That burden does not shift to the accused person. Hence, at this stage, the prosecution is not expected to have proved their case against the accused person beyond reasonable doubt. What the prosecution must do, however, is avail sufficient evidence to establish a *prima facie* case against the accused.
37. A *prima facie* case is established where the evidence tendered by the Prosecution is sufficient on its own for a court of law to return a guilty verdict even if the accused opts to remain silent.
38. Section 306 (1) of the [Criminal Procedure Code](#) provides:

“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 the several or any one of the 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, record a finding of not guilty.”

39. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 335, the court stated as follows:

“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”.



40. It is trite that murder is proved when it is shown by evidence:

- a) That the deceased is dead.
- b) That his death was due to an unlawful act by the accused
- c) That in killing the deceased accused had malice aforethought
- d) That it is beyond per adventure the deceased death was caused by the accused.

Equally, *prima facie* evidence of such proof must be available for the accused to be placed on his defence

#### **That the deceased is dead**

41. it is not in dispute that the deceased died. The evidence by PW1 Doctor Ndiranqu of the post mortem and the Post mortem report are sufficient. He was of the opinion that the cause of death was cardio respiratory arrest due to severe head injury demonstrated by multiple injuries sustained in an assault.

#### **That his death was due to an unlawful act by the accused**

42. The prosecution submitted that the accused was positively identified by PW-1 (Naomi Wanjiku) PW-3 (Beatrice Wangithi Kimunyu) and PW-5 (Kimunyu Warui) as having been at the scene of crime on the 25th April 2014; and that the phone recovered from accused placed him squarely as the perpetrator that caused the death of the deceased.

43. Section 107 (1) of the [Evidence Act](#) states that:

- “1) Whoever desires any Court to give judgement as to any legal right or liability is dependant on the existence of facts which he asserts must prove those facts exist
- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

44. It was manifestly clear, however, that the evidence of PW 2, PW 4 and PW 5 was that the accused came to the scene of the incident in response to the distress calls that rung out in the night. PW2, the accused’s wife, in fact testified that she was at home watching TV with the accused when the distress calls sounded. She and her husband then ran out to see what was happening. This does not amount to evidence of his involvement in the crime any more that anyone else who went to the scene.

45. PW-4 Beatrice Wanqithi Kimunyu stated that the headman and the Assistant Chief were said that the accused (Cyrus Warui) was the perpetrator and that is when she retired back to her homestead. In cross-examination, she stated that she was not at the scene of the incident and had not seen what had happened. Her evidence is no more than hearsay.

46. PW-6 No. 233522 I. P Mercy Makau confirmed that she was not the Investigating Officer but she was present with the investigating officer and visited the scene of the alleged crime. In cross-examination, she stated that there was no witness at the scene. The accused lived far from the neighbourhood but his siblings stay in the same compound. She confirmed that there was no witness who saw the accused commit the offence, and also that the accused was arrested because of his possession of the deceased’s phone.

47. PW3- Caroline Muthoni Warui the daughter of the accused, testified that on the 25<sup>th</sup> April, 2015 which was on a Saturday, she had not gone to school. She found a mobile phone while going to the river on a foot path near her grandmother’s home. She picked it and gave it to her father. This phone was surrendered to the police by the Accused.



### **That in killing the deceased accused had malice aforethought**

48. PW-5 Kimunyu Warui testified that he heard noises and went with his wife. They found Eliud Warui lying facing upwards, he further testified that there were more than twenty (20) people and that the accused came to the scene when he heard the commotion.
49. PW-1, the doctor testified that he was of the opinion that it was possible that the injuries on the deceased would have been inflicted by more than one person.
50. According to PW-6 the accused did not voluntarily hand over the phone to the police, it was recovered from him by Corporal Bungei. She however, did not recover any rungu that had been used to attack and kill the deceased.
51. I agree with accused's submission that the prosecution failed miserably to place the accused at the scene of the crime. It was their obligation to do so. They also failed to produce and connect any murder weapons alleged to have been used in the commission of the murder. Further they failed to bring any witness who could positively and independently identify the accused as the person who committed the murder. The fact that the Accused had the deceased's telephone is well explained by the evidence of his daughter PW-3 Caroline Warui. Hence, the decision to charge the accused was purely based on suspicion and hearsay evidence which is inadmissible.
52. The Prosecution's submission was that PW-4 confirmed that she heard the headsman and the area Assistant Chief saying that it was the accused (Cyrus Warui) who had assaulted the deceased. That information is mere hearsay and uncorroborated.
53. In *Republic v Lewis* (Criminal Case E077 of 2021) [2021] eKLR it was held:

“In order to prove that a suspect was guilty of a criminal offence, a prosecutor had to often also prove that, the suspect had a particular mens rea (criminal intent) when committing the offence.”
54. In the present case there is no evidence of the accused's motive; there is no evidence that the accused and the deceased had interacted before or they had bad blood. Further, there is no witness who saw the accused attacking the deceased on the material night.
55. In light of all the foregoing, I find that the prosecution has not availed evidence that satisfies the prima facie test to enable the accused to be put on his defence
56. Accordingly, the Prosecution case is dismissed and the accused is set at liberty forthwith unless otherwise lawfully held.
57. Orders accordingly.

**DATED AT KERUGOYA THIS 27<sup>TH</sup> DAY OF JULY 2023**

**RICHARD MWONGO**

**JUDGE**

In the presence of:

Accused in Person

Ms. Nzuki holding brief for Nyaga for Accused

Mr. Mamba for State

