



**Republic v Lwande (Criminal Case E011 of 2023)
[2023] KEHC 24129 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E011 OF 2023
WM MUSYOKA, J
OCTOBER 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MOSES QKEEN LWANDE ACCUSED

RULING

1. The accused herein, Moses Qkeen Lwande, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. The particulars are that on the 20th April 2023, at Nambale Township Village, Nambale Sub-County, within Busia County, he murdered Robert Bahati Maende.
2. 5 witnesses gave evidence in the matter. None of them testified to have witnessed the accused person assaulting the deceased or doing something to him which could have caused his death. PW1, Maende Khaira Maende, was the father of the deceased. He was with the deceased, on 11th April 2023, when the deceased left for work, but did not come back thereafter. He was later found dead. PW2, Faith Akinyi Awino, a niece of the deceased, was at home with him on 17th April 2023, but sleeping in different houses. At night she heard a voice, which she believed to be of Ferdinand or Freddie, a son of the accused, calling out the deceased, who came out of his house, and they left together. The deceased never came back. PW3, Sarah Nabwire Mayende, was the mother of the deceased. She was not at home, when the deceased disappeared. She came home after she heard the news of his disappearance. She found the behaviour of Ferdinand or Freddie suspicious, as he was acting as if he was spying on them. She said that after the police arrested Ferdinand, he informed the police that it was the accused who knew what had happened to the deceased, hence the accused was arrested, but was later released. PW4, Dr. Mike Odhiambo, was the pathologist who did post-mortem on the remains of the deceased. He opined that the death was caused by drowning. PW5, No 254325 Police Constable Francis Otieno Nyadero, was the investigating officer.



3. The parties did not submit.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
5. On whether the deceased died, I have the evidence of PW1, PW2 and PW3, who were relatives of the deceased. They all confirmed that the deceased had died. Post-mortem on the body was conducted by PW4. He said the cause of death was drowning, although the body had physical injuries. The cause of death was not linked to the accused, for none of the witnesses who testified saw the accused harm or assault or do anything that would have cause the death, whether from physical injury or drowning. Although PW3 alluded to the son of the accused telling the police that the accused knew what had happened to the deceased, when PW5 testified he made no mention of the said son saying anything of that sort to the police.
6. There is no direct evidence against the accused person, pointing to him as the person who did anything to the deceased that led to his death. The burden lies with the prosecution, to establish beyond reasonable doubt that the accused caused the death of the deceased. There is no concrete evidence. In fact there is no evidence at all. The only circumstantial evidence is what PW3 alleged, but the same was not supported by the police witness. There was also that about the SMS, but the person who would have testified on that did not take the stand. All there is is tenuous suspicion. It is trite that suspicion, however strong, cannot be basis for a conviction. The suspicion in this case is incredibly weak, for none of the witnesses placed the accused and the deceased together at any time. There is absolutely nothing in this case, upon which the accused could be convicted, in the absence of any explanation from him. In the circumstances, I find and hold that no *prima facie* case was established against him, and I find and hold that he has no case to answer, to warrant his being put on his defence.
7. As no *prima facie* case has been established against the accused person, I shall acquit him, under section 306(1) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of Robert Bahati Maende. He shall be set free from remand custody, unless he is otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF OCTOBER 2023

WM MUSYOKA

JUDGE

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Nabulindo, Advocate for the accused person.

