



**Republic v Brown & another (Criminal Case E010 of 2022)
[2023] KEHC 24314 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE E010 OF 2022
JN KAMAU, J
OCTOBER 25, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JAPHETH BROWN 1ST ACCUSED

WINSTON KOLONGO 2ND ACCUSED

RULING

1. On July 20, 2023, the Prosecution closed its case after calling a total of four (4) Prosecution witnesses.
2. Both the 1st and 2nd Accused persons and the State did not file any Written Submissions on the question of whether or not the 1st and 2nd Accused persons had a case to answer. They all relied on the evidence that was adduced during trial.

Legal Analysis

3. The Prosecution’s case was that on September 23, 2022, Joseph Owiti (hereinafter referred to as “PW 1”) was coming from school when he met one Joshua Ambani who had his memory card. Joshua Ambani’s friend Kelvin Ishunga (hereinafter referred to as “the deceased”) came and held him from the back across his chest. The said Joshua Ambani then hit him on his head and hand with a metal bar. His cousin, Whitney Oprah came and took him home. However, both Joshua Ambani and the deceased followed him to his home with the intention of beating him again. He was later taken to Mbale Referral Hospital.
4. On September 29, 2022at about 10.00am, he was sleeping in his grandfather’s house. His grandfather was called Nathan Inanga. He was a brother to Charles Ayiga (hereinafter referred to as “PW 2”). He heard the said Joshua Ambani and the deceased knocking on PW 2’s gate threatening him that he would see and demanding to know why he (PW 2) had advised him (PW 1)to report them to the police.



5. PW 2 stated that Joshua Ambani was armed with a panga and a hoe stick while the deceased was armed with a hammer and two (2) Maasai Rungus at the material time and they were knocking on his gate with a hammer.
6. A group of about twenty (20) young men who were drunk and going to a funeral meeting (disco matanga) passed by and got into an altercation with the said Joshua Ambani and the deceased who they accused of terrorising elderly people in the village. The chase ended up towards the river, which was about four hundred (400) metres from PW 2's house.
7. PW 2 testified that at about 10.30 am, the 1st and 2nd Accused person's knocked on his gate and politely asked him if he had been attacked by thieves. He told them that the thieves had left. At the time, the 1st Accused person was holding a torch. The 1st and 2nd Accused persons then went towards the river. The following morning, PW 1 and PW 2 learnt that the deceased had been killed.
8. Dr Masika Collins Were, a Senior Medical Doctor at Vihiga County Referral Hospital (hereinafter referred to as "PW 3") conducted the postmortem examination on the deceased on October 30, 2022 and tendered in evidence a Post Mortem Report of even date. He formed the opinion that the deceased died as a result of head injury secondary to trauma, blunt object. He ruled out that the deceased died as a result of a fall because he did not have any bruises on his body.
9. No 234826 PC Kipngetich Rono (hereinafter referred to as "PW 4") was the Investigating Officer in the matter herein. He reiterated PW 1's, PW 2's and PW 3's evidence. He added that the 1st and 2nd Accused persons were arrested at the scene of the murder and he re-arrested them. He also recorded a statement from Joshua Ambani who told him that he positively identified the 1st and 2nd Accused persons as having been in the company of three (3) others who attacked him and the deceased. According to PW 4, the 1st and 2nd Accused persons could not explain where they were on the material date.
10. Notably, only PW 2 mentioned that the 1st and 2nd Accused persons came to his gate on that material night. He was categorical that they were not armed and that the 1st Accused person was only carrying a torch. The only person who could have confirmed that they went towards the river and that they attacked the deceased causing his death was the said Joshua Ambani.
11. On July 19, 2023, the court issued Summons for him to appear in court to testify the following day, on 20th July 2023. However, he never attended court. The Prosecution informed this court that it would close its case as he had become a hostile witness. It indicated that it would only rely on the evidence that was tendered by PW 1, PW 2, PW 3 and PW 4.
12. Notably, section 107 (1) and (2) of the *Evidence Act* cap 80 (Laws of Kenya) stipulates that:
 1. Whoever desires any court 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.
 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."
13. Section 108 of the *Evidence Act* further states that:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



14. In addition, section 109 of the *Evidence Act* states as follows:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
15. Further, article 50(2)(a), (i) and (l) of *the Constitution* of Kenya, 2010 further stipulates that:-
- “Every accused person has the right to a fair trial, which includes the right—
- a. to be presumed innocent until the contrary is proved;
 - i. to remain silent, and not to testify during the proceedings;
 - (l) to refuse to give self-incriminating evidence;”
16. The essence of the aforesaid provisions of the law is that the legal and evidentiary burden lies with the party that asserts a fact. If the opposing party were to opt not present any evidence, the question would be, can that party’s case be sustained at the close of the prosecution’s case? If it cannot be sustained, that party is deemed not to have discharged its evidentiary and legal burden.
17. There is absolutely no obligation on the part of an accused person to assist the prosecution prove its case. As has been stated herein above, such person is presumed innocent and ought not to be compelled to give any self-incriminatory evidence against himself or herself. It is for the prosecution to present a water tight case to persuade that such an accused person ought to be out on his or her defence to defend herself or himself. Indeed, it is trite law that he who asserts must prove.
18. Notably, the law on the number of witnesses to be called is found in section 143 of the *Evidence Act*. It states that:-
- “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
19. This legal principle was affirmed in *Keter v Republic* [2007] EA 135 where it was held as follows:
- “... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”
20. In this particular case, none of the witnesses connected the 1st and 2nd Accused persons herein to the unlawful death of the deceased. The only witness who could have assisted this case was the said Joshua Ambani. As has been seen hereinabove, although the Prosecution was not required to produce a particular number of witnesses to prove a particular fact, he was a crucial witness as PW 4 was emphatic that he was the only eye witness to the altercation between the 1st and 2nd Accused persons and him and the deceased. The fact that he was not called as a witness because he had turned into a hostile witness greatly weakened the Prosecution’s case.
21. Going further, the persons who were said to have arrested the 1st and 2nd Accused persons at the scene of the murder whereupon PW 4 re-arrested them were also not called as witnesses in this case. It was not clear from his evidence who were present when he arrived at the scene of crime at 8.00 am. This is because the incident was said to have occurred at 10.30 pm on September 29, 2022. The circumstances surrounding the arrest of the 1st and 2nd Accused persons were hazy and unclear leaving a wide gap that failed to connect them to the unlawful death of the deceased person.



22. Having carefully considered the evidence by the Prosecution witnesses, the court was of the opinion that the Prosecution had failed to establish a prima facie case against the 1st and 2nd Accused persons. Indeed, the evidence that was adduced by the Prosecution witnesses herein was not sufficient to establish a case against them to warrant them being put on their Defence. It is unfortunate that the deceased lost his life and his killer (s) would continue walking around scot free. However, the law is clear that an accused person could not be put in his or her defence if he or she was not shown to have been connected to the offence.
23. Indeed, section 210 of the *Criminal Procedure Code* cap 75 (Laws of Kenya) binds the court's hands where the Prosecution has failed to establish a prima facie case against an accused person. It states as follows:-

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

Disposition

24. Accordingly, as the Prosecution failed to establish a prima facie case against the 1st and 2nd Accused persons, it is hereby directed that the 1st and 2nd Accused persons be and are hereby acquitted under section 210 of the *Criminal Procedure Code* cap 75 (Laws of Kenya).
25. The Sureties be and are hereby discharged from further obligations regarding their attendance in court. The DR High Court Vihiga be and is hereby directed to process their discharge forthwith.
26. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE

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