



**Republic v Mbashila & another (Criminal Case 23 of 2015)  
[2023] KEHC 27024 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 23 OF 2015  
PJO OTIENO, J  
NOVEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GABRIEL INGOI MBASHILA ..... 1<sup>ST</sup> ACCUSED**

**KENNEDY OPATI MBASHILA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons were charged with the Murder of one Mariko Anzala, who was their father. The particulars given were that the offence was committed on the 24.3.2015 at Indangalasia sub location in Kakamega County.
2. At the close of the prosecution's case, a total of eight witnesses had testified including the investigating officer and the doctor whose report dated 26.4.2015 was produced by consent of both counsels.
3. None of the eight witnesses who testified witnessed the incident leading to the death of the deceased. In essence the evidence led was purely circumstantial and not direct.
4. PW1, Rita Queen Noah, testified that while at Busia, she received a call from one Anjelina Masicha, a wife to the deceased to the effect that the deceased was sick in Kakamega. The witness was asked by the caller to confirm the condition from the 1<sup>st</sup> accused who was known to the witness since his youth. When she called the 1<sup>st</sup> accused, she was told that the deceased had died and that it was out of a resolution by the deceased brothers that he be killed. She was not given the names of the brother who has so resolved. The next day, she went to the home and found blood in a basin which was under a bed.
5. There were also blood stains on the bed and floor. The witness added that she was a friend to the deceased with whom they had a daughter when both lived together in Kericho. In cross examination,



- she expressed suspicion that the accused persons killed the deceased even though he never spoke to accused 2.
6. PW2 was a village elder to the deceased who had been harvesting sand from the deceased's land. On the 23.3.2015, he went to the home at 10 a.m. to do the work, met the deceased, and both went to the lower part of the shamba. He did his work till 1 p.m. when he went to the deceased house to keep his tools, found the deceased who was living alone cooking, was offered lunch but he declined.
  7. The next day, he went to the home at 3 p.m. and found the door to his bedroom opened. He entered and found the deceased dead with body on the bed covered with a blanket from the abdomen upwards. He did not see any injuries on the legs.
  8. He then called the first accused who said he was in Mumias. The 1<sup>st</sup> accused asked if anything had happened and he reported that the deceased was dead.
  9. He asked first accused to come but he did not only asking the witness, on the phone, to report the matter to the village elder. The village elder could not be reached on phone but the witness managed to contact one Mr. Kombo who came to the home on behalf of the village elder in the company of two others; Sore and Shamalla.
  10. As the team was leaving the home, the village elder called and requested the team to go to his home. At the home of the village elder, the elder told the team that the two accused persons had been seen near the home of the deceased. At the elder's home, the two accused persons arrived and the elder accompanied them back to the deceased home from where the elder called the chief and his assistant. The witness left the homestead before the body was collected. The witness identified the two accused persons as children of the deceased. He had known them for about one year before the incident because he had just bought land and established a home in the area.
  11. On cross examination, he confirmed to court that between 4 p.m. and 8 p.m. he was all alone at the home and that he was unaware that the deceased had sold part of his shamba. He denied having killed the deceased.
  12. PW3 was the Shamalla who had been called to the scene by PW2. He indeed found the body of the deceased lying on bed in his bedroom. He identified the two accused persons as his cousins. He denied knowledge of who killed the deceased.
  13. PW4 and 6 gave evidence about a transaction over sale of a portion of the deceased land which was conducted by the two accused persons with the authority of the deceased. He told the court that he visited the land on 22.3.2015 with his aunt and her husband in the company of the village elder and met the two accused but did not meet the owner of the land, the deceased who was reported to be elderly. The next day, they went back in company of the surveyor, carried out the exercise before going to his home to sign the agreement of sale at a price of Kshs.260,000/=. He did not meet the two accused but was later told that their father had been killed and he was required to record a statement with the police. He identified the two accused as the people he had dealt with over the sale of land.
  14. On cross examination he stated that there was no person called Gabriel during the transaction over sale of land.
  15. PW5, a brother to the deceased, told the court that he was called by 2<sup>nd</sup> accused on 25.3.2015 and requested to wait for the caller because the 1<sup>st</sup> accused had killed the deceased. He waited for him but he did not come till midnight when the witness' daughter-in-law told him that the deceased's body had been taken to the mortuary.



16. The next day he went to the mortuary to see the body and observed that the throat had been slit. He identified accused 2 as the person who had called him.
17. In cross examination, he told the court that accused 2 was charged because he had called him about the death.
18. PW7 was the village elder who testified that the two Accused persons approached him at his home with the news that the deceased wanted to see him.
19. He went to the home of the deceased and found about 7 people in the home. The deceased told him that the guests had agreed to buy a portion of his land. He was asked by the deceased to accompany the people to the shamba so that they could carry out survey. The deceased also asked him to witness the purchase price being paid to the accused. He did as instructed, witnessed the process of survey, signing of the agreement and payment of the purchase price.
20. The next day, he was called by PW2 and told that the deceased had died. He asked PW2 to call the 1<sup>st</sup> accused who also came to his home and together with others they proceeded to the home of the deceased and found his lifeless body on the bed.
21. He later called the chief who came with the police and collected the body. He then recorded his statement the following day. He identified the two accused persons as well known to him and were known to him since they were born and that he had no grudge against them.
22. In cross examination, the witness told the court that he was not aware of any grudge between the accused and their father. He reiterated that the deceased had instructed that the purchase price for the land be paid to the two and that both accused stayed in Navakholo while the deceased stayed alone at Indangalasia, Emakhaleli. He denied knowledge of who killed the deceased.
23. The autopsy report produced by consent evidences that the deceased body had cut wounds on the neck and face, a stab wound on the anterior left of the chest level below the 3<sup>rd</sup> rib and a superficial cut wound on the occiput.
24. Internally, there was hemorrhage on the chest with fracture of the 2<sup>nd</sup> and 3<sup>rd</sup> ribs. It concluded that death was caused by external blood loss due to cut wounds following assault.
25. Counsel for accused offered oral submissions while the prosecutor relied on the evidence on record and sought not to offer any submissions.
26. The gist of the oral submission by counsel was that none of the witnesses saw any of the accused persons assault or commit any unlawful act against the deceased and that while the death was not in doubt, who committed the offence and the malice afterthought had not been proved.
27. At this juncture, the court's duty after studying the evidence led, is to determine whether a prima facie case has been proved against the accused persons so that they are called upon to controvert same by defending themselves.
28. In criminal law, a prima facie case is one that would entitle a court to enter a conviction even if no additional evidence was available. A *prima facie case* is thus the establishment of a legally required rebuttable presumption. See *Nzuki -vs- Republic [2016] eKLR*.
29. That essentially means that while it is not a proof beyond reasonable doubt, it still suffices to prove the ingredients of the offence as coded in the creating statute. The evidence that qualifies to establish a prima facie case must be beyond a mere scintilla and definitely not a worthlessly discredited evidence.



30. For murder, a prima facie case would be one that proves the death of the deceased, that the death was occasioned by unlawful act of commission or omission attributed to the accused and that in committing such acts, the accused was propelled by malice afterthought.
31. In this matter the fact of death is not in dispute. What is in dispute is identity of the perpetrator and if the said perpetrator was accentuated by malice afterthought.
32. The evidence led in this matter is purely circumstantial which is itself good evidence provided that it is the kind that irresistibly point to the guilt of the accused and giving no other explanation other than such guilt.
33. The entirety of the evidence seeks that the court makes the inference that since the accused persons had sold and received the purchase price for a portion of the deceased land and that they were not forthcoming to the home of the deceased, when the news of his death broke out, they would have something and a hand to the death. The court is unable to draw such inference on the circumstances of this case. It would be too far fetched to draw such an inference in this case because it does not logically flow from the facts disclosed.
34. In the opinion of the court, the entire evidence does not in any remote way link, the evidence accused persons with the offence does not meet the standard of circumstantial evidence that can support a safe conviction. The court finds that no prima facie case has been established and that to put the accused persons to their defence would be to call upon them to help fill the gaps in the particular case. That is not the law.
35. Accordingly, the accused persons are determined to have no case to answer and are acquitted under section 306, *Criminal Procedure Code*. Let both be released and set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2023**

**HON. P.J.O. OTIENO**

**JUDGE**

