



**Republic v Muteshi (Criminal Case E111 of 2021)
[2023] KEHC 27200 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E111 OF 2021
PJO OTIENO, J
DECEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENARD MUTESHI ACCUSED

RULING

1. Having charged the accused with the offence of murder of one Raymond Suter at Kakamega forest within Iloro area, Shibuye location of Shinyalu division in Kakamega County, and after the accused denied the charges, the prosecution called and led evidence from four witnesses.
2. Of the four witnesses, Dr. Dickson Mchana, testified as PW1 and identified himself as a consultant pathologist stationed at the Kakamega County General Hospital who performed autopsy on the body of the deceased on the 19.3.2021. That report indicated that external observation of the body showed that the lips, nails and tongue appeared bluish in colour and that there were three deep cut wounds on the head towards the back.
3. When he opened up the body, he detected three depressed skull fractures with resultant bleeding above and below the brain covering into the brain substance. The brain was slightly swollen to point to the death having occurred shortly after the injury was inflicted. He thus formed the opinion that the death was due to penetrating head injury secondary to sharp force trauma following assault. Before dating and signing the report, the doctor took nail samples and gave to the investigating officer for DNA analysis by the Government Chemist. He produced the autopsy report as PEXH.1
4. Nothing substantial came out of both cross examination and re-examination save for the point that the body was indeed identified by witnesses whose names were however not recorded in the form.
5. The next witness, PW2, was Japheth Kipkurui Mutai, an employee of Kenya Forest Services and a colleague to the deceased who was with the deceased on patrol duties on the material day. He told the



- court that as they were patrolling the forest they encountered a group of 5 people who were cutting a tree. Two were cutting while three stood by. They sought to arrest the invaders two of whom he identified as brothers called Michael Muchesia and Musebe Muchesia.
6. The witness and the deceased gave a chase, with the witness pursuing Musebe as the deceased followed one he called Tyson, the witness looked back and realized the deceased was behind him, he called, and telephoned him but received no response. The witness and other colleague, PW3 later found the body near a stream. The body had cut wounds on the head. He reiterated that he saw the deceased chase Tyson whom he had known before as a neighbor to the forest.
 7. On cross examination, the witness said that the accused was not one of the people cutting the tree and that they chased the two who were cutting the tree and that the deceased chased Tyson who was not the accused. He confirmed that in his statement recorded with the police the next day, he did not mention the accused to have been at the scene but confirmed that he knew the accused personally but did not know his name and that he never gave accused description to the police.
 8. On re-examination PW2 told the court that he neither gave the name nor description of the accused to the police because he had not known his name.
 9. The evidence of PW3 was to the effect that he was in the company of PW2 and the deceased but remained behind to check on cows which could destroy young trees as the deceased and PW2 went to check the people destroying the forest. PW2 then came back to him and complained that they had given a chase on different directions but was thereafter unable to trace the deceased whose phone was not being answered. Him, the witness, and PW2 went on a search and found the body lying down lifeless with the gun and club next. Senior forest officers came to the scene and collected the deceased body. He confirmed having not seen any of the people who were cutting trees.
 10. When questioned by Ms. Wanyonyi for the family of the victim, he said that he saw the three cuts on the deceased body and concluded that they were inflicted by a panga strike. On cross examination by Mr. Kombwayo the witness told the court that he had worked with the deceased and PW2 for about 1½ years and the relationship was cordial and that by the time he met PW2, the deceased had not been in touch for about 30 minutes. He said that PW2 did not have a gun nor a panga and that he only had a rungu. He added that PW2 told him that it was Muteshi who had killed the deceased.
 11. The last witness, Jacob, Suter, was a brother to the deceased whose evidence was that he was called and informed about the death by one Moses Komen. He later attended the post-mortem, identified the body to the doctor and saw that it had three deep cut wounds on the head.
 12. When the matter came up before the court for further hearing of the prosecution's case, the investigating officer never attended court and the prosecutor was compelled to close its case after an adjournment was declined.
 13. The court's duty at the juncture is to establish if a prima facie case has been established so that the accused is placed on his defence to rebut the created rebuttable presumption of a guilt. If, however no prima facie case is established, then the accused stands to be acquitted for it is not his duty to fill in the gaps left in the prosecutor's case.
 14. A *prima facie* case is the kind of a case that would entitle the trial court to enter a conviction even if the accused elected to remain quiet and lead no evidence. It is thus a well proves case that may only be disturbed by the accused giving evidence that disproves that already offered by the prosecution.
 15. In this matter, the evidence by PW2 and 3, as the only persons who were proximate to the scene of incident do not connect the accused with the attack and injuries that PW1 connects with the death.



16. While PW3 insisted that PW2 informed him, while at the scene the body was found, that it was Muteshi who had killed the deceased, no such evidence came directly from PW2. In fact, in his entire evidence PW2 did not credibly connect the accused to have been at the scene. In his evidence he said that the deceased went chasing one Tyson who was with the accused. However, before saying that he had not placed the accused at the scene. He did not mention his name or description to the place where he recorded the witness statement. That raises a reasonable doubt to the credibility of his assertion that he knew him before the incident and the material day.
17. In the opinion of the court, it was PW2 who saw and chased the people who were destroying the forest and it would have been of great assistance to the court if he had given evidence even to the effect that the accused was in company of the two brothers he adequately described.
18. Noting that even the investigating officer did not give evidence to say how the accused was arrested and connected to the offence, there is no material connecting the accused to the offence hence it would be unjust to ask the accused to defend himself.
19. The consequence is therefore that the court finds and records a finding of not guilty under section 306 of the *Criminal Procedure Code*.
20. The accused is therefore acquitted and directed to be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF DECEMBER, 2023

PATRICK J O OTIENO

JUDGE

