



**Republic v Nyaoke & 2 others (Criminal Case 21 of 2019)
[2023] KEHC 26837 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 21 OF 2019
RE ABURILI, J
DECEMBER 18, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

RICHARD NUNDA NYAOKE 1ST ACCUSED

WASHINGTON ODHIAMBO AWILI 2ND ACCUSED

CHARLES HENRY NYAOKE 3RD ACCUSED

RULING

1. The three accused persons herein were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the offence are that on the 24th Day of May, 2019 at Ayweyo Sub Location, Wawithi Location, Nyando Sub County within Kisumu County, the accused persons murdered Solomon Odiwuor Onyango.
2. The accused persons denied committing the offence. The prosecution lined up 17 witnesses to testify out of which only five of them testified before my predecessor Judge F.A.Ochieng prior to his being elevated to the Court of Appeal. This court gave directions under section 200 of the *Criminal Procedure Code* for the hearing to continue from where the case had reached. However, from 23/5/2023 when directions were given, no witness was traced to come and testify for the prosecution. Not even the investigating officer or the doctor who performed the autopsy on the body of the deceased.
3. The prosecution closed their case on 28th November, 2023, when the prosecution stated that they were unable to get in touch with the investigating officer.
4. The issue I must determine now is whether the prosecution has established *prima facie* case against the accused persons to warrant them to be placed on their defence.



5. It is however important to note that as at 27/10/2020, it was reported that the 1st accused person Richard Nondo Nyaoke had died hence the case against him abated and the hearing which commenced on 5/12/2019 was only against the 2nd and 3rd accused persons herein.
6. The burden of proof lies on the prosecution to adduce evidence to establish a prima facie case against the accused persons.
7. I will quickly summarize the evidence adduced by the five prosecution witnesses against the accused persons herein who are under no duty to prove their innocence.
8. PW1 Walter Okuto Wayi was declared a hostile witness and his evidence even in cross examination did not help the prosecution's case. He became completely uncooperative until the court placed him in the cells and later he was stood down. He was never recalled to testify. Nothing in his petty evidence touched on the accused persons herein.
9. PW2 Robert Ouko Uhuru testified that on the material day he took a customer to a funeral and helped her carry her luggage to the home of the funeral and as he was returning to his motor cycle, he saw a person being assaulted at the gate. He stated that he saw one of the men beating the deceased Solo but that he had not seen in court any of the men he saw on that day beating Solo.
10. PW3 Johnson Ouma testified how he went to a funeral and as he sat at the tent where mourners were eating from, he hears that someone a guy called Solo. He stated that the incident happened before he arrived at the funeral so he did not even go to establish the position and that after thirty minutes, the 2nd accused person Henry Nyaoke was to help PW3 carry the generator from the water kiosk and that it was after Henry opened the water kiosk that he got shocked and when PW3 asked him why he was shocked, the 1st accused asked if the guy therein was alive. That PW3 moved closer and saw Solo crying from inside the water kiosk and that Henry switched off the generator which was still running. This witness never mentioned seeing anyone assaulting the deceased. He only stated how Henry called other people including his brothers Washington and Richard (both were accused persons) and uncle who came and together they boarded their family vehicle and went to report the incident to the Police Station. In cross examination by Mr. Onsongo advocate, PW3 stated that the generator was at the water kiosk and that it was running. Further, that Henry is the one who switched it off after he found Solo lying down in the kiosk.
11. PW4 Eric Onyango Oyieng testified that on 24th May 2029 he was attending the funeral at the home of Charles Nyaoke and that he was with Solo when 2 visitors gave them phones to take for charging on the system at the funeral. the following morning, he went to his home but Solo decided to stay on so PW4 told Solo to give out the phones to their owners and that at 9.am, a young man named Koro together with the two visitors who had given out their phones for charging went and woke up PW4, asking him for their phones. He told them that the phones were with Solo so they pushed him to take them to where Solo was sleeping and Solo gave out the phones then the two visitors walked back with PW4 when one of the visitors realized that his phone had no line and on returning back to ask Solo about it, he responded that he had chewed the line.
12. That the visitors forced PW4 to take Solo to the funeral. While they were at the gate, they met Odete and Moses and the two visitors explained what Solo had done then Odete and Moses placed Solo inside the building on top of which there was a tank. This witness never stated that the two visitors or the two people Odete and Moses were any of the accused persons herein. He also stated that he did not know the visitors who had just come to the funeral prior to that day and that he prevented them from beating up Solo. He then contradicted himself and stated that he did not know where Moses was and stated that he had seen Moses in Court that day with the court stating that he had pointed out the 2nd



- accused as Moses. He also stated that he knew Odete whom he had not seen in court, saying he heard that he had died two years earlier.
13. In cross examination he stated that he saw one of the visitors hit Solo with a stick. He also stated that a woman had held Solo by his private parts as the man hit solo. He also stated that Moses prevented the crowd from beating Solo and protected Solo by taking Solo to the Tank House.
 14. PW5 testified how she saw a big crowd holding a young man called Solo and that she did not know how Solo died.
 15. That is all that the prosecution presented as evidence against the accused persons herein.
 16. Does this evidence establish a prima facie case against the accused persons herein to warrant them being placed on their defence?
 17. I have considered the evidence adduced by the 5 prosecution witnesses. I am unable to find any evidence linking the accused persons herein to the alleged murder of the deceased Solomon Odiwuor Onyango. No witness mentions that they saw any of the accused persons assault the deceased. If anything, PW4 says the person claimed to be the 2nd accused Moses, yet with no alias name, prevented the two visitors from beating the deceased. PW5 Violet Atieno Ouma did not recognize anybody in the crowd which was with Solo.
 18. I find that the prosecution has not made out a prima facie case to warrant the accused persons to be placed on their defence. To do otherwise would be tantamount to asking the accused persons to adduce evidence to prove their innocence.
 19. Accordingly, the accused persons are found with no case to answer and are hereby acquitted under Section 306(1) of the Criminal Procedure Code.
 20. Unless otherwise lawfully held, the accused persons Washington Odhiambo Awili and Charles Henry Nyaoke are hereby set at liberty forthwith.
 21. Their sureties are hereby discharged and their securities to be released forthwith.
 22. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2023

R. E. ABURILI

JUDGE

