



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 64 OF 2018

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

VICTOR LIYAI MULINYA.....1ST ACCUSED

NIXON MULINYA SETH.....2ND ACCUSED

EDWIN SHINACHI SETH.....3RD ACCUSED

VICTOR ALULU MULINYA.....4TH ACCUSED

RULING

1. Victor Liyai Mulinya, Nixon Mulinya Seth, Edwin Shinachi Seth and Victor Alulu Mulinya are charged with murder, contrary to section 203 of the Penal Code, Cap 63, Laws of Kenya, as read with section 204 of the Penal Code. The particulars of the offence allege that on the 1st of October 2018, at Kasavai village, Ivonda Sub-Location, Iguhu Location, Kakamega South Sub-County, within Kakamega County, they jointly murdered Walter Lovega, hereinafter referred to as the deceased. They pleaded not guilty to the charge on 22nd October 2018. A hearing was conducted, and five witnesses testified. The first hearing was slated for 22nd January 2019, but the case for the prosecution commenced on 5th November 2019, when four witnesses testified.

2. The first witness, PW1, was Edwin Ngairah Mackenzie. He was the Assistant Chief for Ivonda Sub-Location. He stated that he did not know the deceased but he knew the accused. He said that he received a telephone call from the 1st accused, on 30th September 2018, at 10.00 PM, who told him that he had arrested a person at his home, but he did not disclose to him what the person had done, and whether he had been beaten. He duly informed the local village elder, the area Chief, the local County Commissioner and the officer in charge of the Malaika Police Station. The village elder then called him back with information that the person had been beaten. The police instructed that the person be taken to hospital, and he directed the village elder to get the 1st accused to arrange to have the person taken to hospital. The next day he went to the home of the 1st accused. He found him and his wife, and he saw a body lying next to the house of the 1st accused, covered with a sheet. He confirmed that the person was in fact dead. He alerted the security agencies. He did not recognise or identify the body, as the person did not hail from his area. The police came and took the body away. During cross-examination, he said that he did not know who killed the deceased.

3. PW2 was Elijah Andekwi. He was the village elder for the area of Ivonda Sub-Location where the home of the 1st accused is located. He was related to the accused persons, being children of his in-laws. He testified that PW1 telephoned him at 10.00 PM on 30th September 2018, and was instructed to go to the home of Dickson Obote, the father of the 1st accused, to check on what was going on there. When he got there, the home was quiet. He found a young man lying on the ground, near the house of Dickson Obote. He called out the young man, but he did not respond. He did not know him. The person was breathing. He found the 1st accused and his wife at the home, and so was the 4th accused. They were standing outside the compound. Another woman appeared at the fence, crying. He telephoned PW1 and briefed him. He tried to get transport to take the person to hospital to no avail, and he then left for his home. The next morning, he went back to the home of the 1st accused. He found the person still lying at the same spot, but dead. He did not observe any injuries on the body of the person. During cross-examination, he stated that the body was lying within the compound of Dickson Obote, and that the 1st accused was the person living in the house near where the body was. He described the 2nd, 3rd and 4th accused persons as neighbours of the Dickson's. He stated further that there was a woman who also lived there. He said none of the people he found at the scene were near the body, and that the woman who had come to the scene crying had since died. He stated that he did not see any injuries on the body, and that he did not see the person who killed the deceased. He also said that he did not know the deceased. He said that no one lived in the house of Dickson, and that the 1st accused lived in a *simba* within the compound.

4. PW3 was Josephine Machuma. She was the mother of the deceased. She testified that she was alerted, on 1st August 2018, that the deceased had not reported to work, at the home of MCA Ngala. She went to the house where the deceased was staying, and established that he had died. She found the body at the home of the 1st accused. She said the home of the 1st accused was about 200 metres from the home of MCA Ngala, where the deceased was working. The body was removed from the scene by the police. During cross-examination, she said that she did not know the name of the father of the 1st accused. She said that it was recorded in her statement that the body was found in the home of Seth Mulinya, but she did not know him, and that she was told that it was his home by PW4.

5. PW4 was Jared Nyongesa Kisanya. He was a cousin of the deceased. He said that he knew the 1st and the 2nd accused persons. He stated that on 30th September 2018, at 4.00 PM, he was at the home of a certain Asamba, resting. He saw the deceased come into the compound, and began to play draughts with Asamba. The 1st accused then came into the compound, and joined the pair that was playing draughts, and that he, the witness was seated aside from them. At 6.30 PM, the 1st accused told the deceased that it was getting late, and they left together for home. The following morning, he was called on telephone by Francis Agevi, and was asked to inform PW3 that the deceased had been killed. He accordingly informed PW3, and others. They went and found that the deceased had died at the home of the 1st accused, and was lying between the main house and a kitchen. The 1st accused was at the home, and he told him that he had heard someone touching the electricity metre, he saw two people, they chased them, and arrested the deceased. The witness stated that the accused and the deceased had been drinking beer at the home of Asamba, but they were not drunk at the time they left. He stated that the distance from the home of Asamba to that of the 1st accused was about 20 to 30 minutes' walk. He added that the deceased used to work at the home of a neighbour of the 1st accused. He said that he only saw the 1st accused at the home of Asamba, but not the rest of the accused persons. He saw an injury of the right leg of the body of the deceased. He asserted that the deceased and the 1st accused were well known to each other. During cross-examination, he stated that the deceased and the 1st accused were friends. He said that he was drinking away from where they were. He heard them say that they were leaving for home. He said he could not tell how much beer they had taken, but he could have known if they were drunk. He said he did not know who had assaulted the deceased. He said that the body was next to the well of the father of the 1st accused. He said that the homestead where the deceased died belonged to Seth Mulinya, but he said he did not tell PW3 the owner of the place. He said that when he talked to the 1st accused, he informed him that he came out and saw three persons. He said two of them went towards the road, and one sideways, and they arrested the deceased. He stated that his written statement to the police was to the effect that the 1st accused had told him that the persons wanted to break into his house, he shouted and people came and started to beat him, and he died. He said that if the 1st accused was attacked by thieves, he committed no wrong by screaming for help.

6. PW5 was Dr. Dickson Muchana. He was the consultant pathologist who conducted a post mortem on the body of the deceased. He detailed the injuries he noted, concluded that the cause of his death was a head injury caused by a blunt force trauma following assault.

7. After PW5 testified, the prosecution closed its case. Mr. Khayumbi, Advocate for the accused, submitted that since the investigating officer had not testified, the charges against the accused persons should be dismissed. Mr. Mwangi, for the prosecution, submitted that witnesses who were at the scene had testified on the role played by the accused persons in the death of the deceased.

8. My duty at this stage is to decide whether to put the accused persons on their defence or not, that is to determine whether a *prima facie* case has been established to warrant putting the accused on their defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP and Bacon JA), as one in which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation was offered by the defence. See also *Director of Public Prosecutions vs. Geoffrey Mukonza Mwangangi* [2018] eKLR (Ngenye-Macharia J), and *Frankline Muthoka Mumo vs. Republic* [2019] eKLR (Odunga J).

9. The principal elements of the offence of murder are four, and are defined in section 203 of the Penal Code. They are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought.

10. From the material before me there is *prima facie* proof that the deceased died. His lifeless remains were seen by PW1, PW2, PW3 and PW4, all of whom viewed the body at the scene, where the deceased had had met his death. PW5 was the pathologist who performed the post mortem on the remains. PW1, PW2, PW3 and PW4 were not present when the events that led up to the death of the deceased happened. They all received reports that the deceased had received the fatal injuries. No eyewitness account was given of what transpired, and no evidence was adduced as to the role the accused might have played in the causation of the death of the deceased. There is, therefore, no material before me that would suggest that the accused were linked to death of the deceased in any way. None of the witnesses presented in court were present when the assault happened. None of them saw the accused assault the deceased.

11. However, PW4 testified that he saw the deceased and the 1st accused on the fateful day at about 6.30 PM, when they left for home together. As fate would have it, the deceased turned up dead at the homestead of the 1st accused person, the last person that PW4 had seen him with. According to PW1, it was the 1st accused who telephoned him to tell him that he had arrested a person, whose identity was not disclosed. PW4 said that the 1st accused told him that the deceased was among the persons who had come to his compound for some unknown mission, and whereas the others escaped, the deceased was cornered and assaulted by a crowd that formed after the 1st accused raised alarm. From this evidence, it would appear that the 1st accused had a role in the events that led up to the death of the deceased, for he was the last person who had contact with him. None of the witnesses said anything at all about the other accused persons. They were not placed at the scene at all, except for the 4th accused and there is, therefore, no evidence that they had any role in the death of the deceased. PW2 said that he saw the 4th accused wandering outside the compound with the 1st accused and his wife. He did not see the 4th accused doing anything likened to the death

12. It was suggested that the failure to call the investigating officer was fatal to the prosecution's case, and that I should acquit the accused persons on that score alone. There is ample authority, in *Kiriungi vs. Republic* [2009] KLR 638 (Tunoi, Waki & Onyango Otieno JJA), *Dominic Chesaina vs. Republic* [2015] eKLR (Mwangi J), *SC vs. Republic* [2018] eKLR (W. Korir J), *Pius Mutua Mbuvi vs. Republic* [2021]

eKLR (DK Kemei J) and *Isaiah Sawala Shady vs. Republic* [2021} eKLR (Omondi J), that there is no prejudice in failure to call an investigating officer, or that failure to call the investigating officer not fatal to the case for the prosecution.

13. I have read through the testimonies of PW1, PW2, PW3 and PW4, and I am persuaded that the prosecution has adduced evidence which establishes a *prima facie* case against the 1st accused person, for the reasons that I have given above, and I hereby find that the 1st accused has a case to answer, and I shall, accordingly, put him on his defence. Regarding Nixon Mulinya Seth, Edwin Shinachi Seth and Victor Alulu Mulinya, none of the witnesses mentioned them as having been with the 1st accused when he was last seen with the deceased, and I accordingly find that they have no case to answer, to require that they be put on their defence. Consequently, I do hereby discharge them, on the finding that they are not guilty of the murder of Walter Lovega, contrary to section 203 of the Penal Code, and I hereby acquit them under section 306(1) of the Criminal Procedure Code, Cap 175, Laws of Kenya. They shall be set free, if they be in remand custody, unless they are otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF FEBRUARY, 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Khayumbi, Advocate, for the accused person.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the Republic.