



REPUBLIC OF KENYA



**Republic v Kesi & 4 others (Criminal Case 34 of 2017)
[2022] KEHC 11528 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 34 OF 2017
DO CHEPKWONY, J
APRIL 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

VENANT MWALIKO MWASARU 1ST RESPONDENT

SARA KESI 2ND RESPONDENT

VALD MBADI 3RD RESPONDENT

ABEDNEGO FUNDI MWENDWA 4TH RESPONDENT

CHARO KAZUNGU CHARO 5TH RESPONDENT

RULING

1. The accused persons, Kesi Sara, Venant Mwaliko Mwasaru, Vald Mbadi, Abednego Fundi Mwendwa And Charo Kazungu Charo are charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).

The particulars are that:-

“On 21st July, 2017 within Mombasa County, the accused persons together with others not before court, jointly murdered JM”.

2. The accused persons were arraigned in court on 24th July, 2017 but plea was taken on 20th September, 2017, whereby the accused pleaded “Not Guilty” to the charge. The trial commenced on 8th May, 2018 and at the end of it, the prosecution had called twelve (12) witnesses in support of their case and closed its case.



3. Briefly, the facts from the evidence of witnesses in this case are that on 21st July, 2017, JM, (herein referred to as “deceased”) who was aged about Eight (8.2) years old, boarded the School Bus Registration No.KBB xxxx at 6.15am to go to [Particulars Withheld] School where he was a pupil in KG 3 with his sister, SMP, who was in Class 5 at the same school (hereinafter referred to as PW3).
4. According to PW3, whenever they boarded the School Bus, the conductor, Charo (hereinafter referred to as the accused person) would show them where to sit. And on this day, he showed her where to sit but did not show the deceased. She told court that the deceased went to sit at the back where the boys would usually sit while she sat at the front where the girls always sat. She went on to state that she fell asleep when the bus started moving and was only woken up by one Imani who was sitting on the same seat as her and she told her that her brother had fallen off the bus through a hole in the bus.
5. The police came to the scene of accident and investigations led by No.231773, Superintendent Immanuel Daniel Okada, who was the Regional Traffic Enforcement Officer at the Coast Region (hereinafter referred to as PW12) commenced. He told court that when he arrived at the scene, he saw the body of a pupil behind the bus which was stationary along Wajir road in Mombasa. He then called the Accident Standby Officer from Makupa Traffic Police Base to come and cordon the scene before taking action. The officer came and cordoned the scene. He also called Scenes of Crime Personnel and his Seniors.
6. The body of the deceased was moved to Coast General Hospital Mortuary for Post Mortem examination while the Motor Vehicle was moved to Makupa Police Station for processing by Scenes of Crime Personnel. The Motor Vehicle Registration No.KBB xxxx make Isuzu type bus was inspected by PW11, Geoffrey D’manche D’silla, a gazetted Motor Vehicle Inspector on 21st July, 2017 at Makupa Police Station. He indicated his findings in the report which he signed and produced as Exhibit P9.
7. PW10 – No.235210, Chief Inspector Klein Kulicher said he was called and instructed to document a school bus which had been involved in a road traffic accident. He said he took fifteen (15) photographs which mainly captured the inside of the bus and the hole in the bus. He prepared the report, certificate and produced them as Exhibit P5 – 8. The accused persons were charged with the offence of Murder contrary to Section 203 of the Penal Code. PW12 recorded statements of witnesses, the accused persons and collected the documentary evidence which he produced as Exhibits P1 to P10. The prosecution closed their case.
8. The prosecution having closed their case, the issue for determination then becomes whether a prima-facie case has been established to warrant the accused person(s) be placed on defence in this case.
9. In a Criminal case, a trial court is guided by the long established principles set out in enacted statutes and by courts. Our justice system has heavily borrowed from the common law system. In the early case of *Woolmington -vs- DPP*[1935] E.A 462, laid foundation on which today’s principles stand. In fact Section 107 of the *Evidence Act* (Cap 80), Laws of Kenya reproduced the words as follows;-

“Whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist”.
10. At the close of the prosecution’s case, a trial court is enjoined by law to determine that the burden of proof has been discharged on the evidence to warrant the accused be placed on his or her defence.
11. The East African Court, Kenyan courts and statutes have borrowed heavily from the common law system. Lord Parder, C.J in the English case of *Sanjil Chattai -vs- The State* [1985] WLR 925, stated:-

“A submission that there is no case to answer may properly be made and upheld;



- a. When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence;
- b. When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict it”

12. In the Kenyan case of *Bhatt –vs- R*[1957] E.A 332, the often quoted passage was this:-

“Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima-facie case is made out if, at the close of the prosecution case, the case is merely one which on full consideration might possibly be through sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is, but rather hopes the defence will fill the gaps in the prosecution’s case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredit evidence”.

13. These are the tests to be applied in the instant case to determine whether the prosecution in their evidence of twelve (12) witnesses has established a prima-facie case.
14. Under our Penal systems, the test to be applied is one which is provided for in Section 306 of the [Criminal Procedure Code](#) and the legal principles reproduced herein above.
15. In their submissions, both counsel for the parties agree that the standard of proof is that which was pronounced in the case of *Bhatt – vs- R*. In these submissions, two new elements have been introduced. The first one is by the prosecution in averring that public interest should be considered in this case because the verdict thereof ought to be one which will serve as an example to people (other schools) offering similar services. On the other hand, counsel for the accused persons have submitted that the recommendation by the Investigating Officer (PW12) were overruled without corresponding recommendations.
16. The powers of the Director of Public Prosecutions (DPP) are enshrined in [the Constitution](#), 2010 under Article 157(4), (6) (a), (b) and (c) and 10 which donate the said powers. Article 157(11) is a cautionary provision in that it provides that in exercising these powers, the Director of Public Prosecutions (DPP) should do so with due regard to public interest, the interest of the Administration of Justice and the need to prevent and avoid abuse of legal process.
17. Under Article 157(4) of [the Constitution](#), the Director of Public Prosecution has power to direct the Inspector General of Police to investigate any information or allegations of criminal conduct. It makes it mandatory for the Inspector General to comply. This is a power granted to the Director of Public Prosecution to rescue any case which he deems the investigative organs of the Police, DCI, and or any other authority have not covered a certain aspect therein. The Director of Public Prosecution has power to institute, undertake criminal proceedings against any person before any court except the court martial; take over and continue any criminal proceedings at any stage before Judgment.
18. Sub-Article 10 gives the Director of Public Prosecution power to institute proceedings without the consent of any person or authority and shall not be under the direction of any or control of any person or authority.



19. Upon application by a person, the function of any court of law at this stage in the justice system is to scrutinize and establish whether the Director of Public Prosecution complied with his constitutional mandate.
20. In reliance to the evidence of PW5 and PW12, Counsel for the accused persons submitted that the investigative organ, and more particularly, PW12, the Investigating Officer, Superintendent Emmanuel Daniel Okoda recommended charges other than the charge Murder after conducting investigations in the case. The argument suffers constitutional strictures in view of the powers of the Director of Public Prosecution as provided for under Article 157 (10) of *the Constitution* since the Director of Public Prosecutions could not have been bound by the said recommendations. Therefore, the argument cannot hold.
21. Pursuant to Article 157(12) of *the Constitution*, Parliament went on to enact The Office of the Director of Public Prosecutions Act, 2013, so as to spell out the functions, powers and the general administration of the said officer. By dint of Section 5 of this Act, the office has been given very wide powers as enshrined in *the Constitution*. In view of this, I find and hold that the Director of Public Prosecution was well within the legal mandate to institute the criminal charge of murder against the accused persons herein.
22. However, what the parties ought to demonstrate is whether, in exercising this legal and constitutional mandate, the Director of Public Prosecutions did so reasonably and without leading to abuse of the judicial system, hence in breach of Article 157(10) and (11) of *the Constitution*. To cross-check what any person or authority has proposed, the office of the Director of Public Prosecution has been given both Constitutional and Statutory powers. Under Article 157(4) of *the Constitution*, the Office of the Director of Public Prosecution has power to direct the Inspector General to investigate any information or allegation of criminal conduct of a person who is enjoined by law to comply.
23. In the case before me, the evidence that has been adduced by the twelve(12) witnesses is what PW12 collected in the course of his investigations. No evidence was tendered by a person from the Office of the Inspector General that it was collected on instructions of the Director of Public Prosecution in exercise of its constitutional mandate.
24. In their submissions, what the Director of Public Prosecution has asked the Honourable Court to do is to have the determination in this trial used as a warning to those running schools to ensure the safety of the students/pupils and for the parents who entrust their children with the said schools and consume similar services to have confidence in the criminal justice system.
25. In my view, this appears to be asking the court to decide the case without regard to the evidence that was tendered by the witnesses and put the accused persons on defence on whims and for the sake of the public, in the hope that by their defence, the accused person(s) respectively will fill in the gaps that may have been left by the prosecution. Also, I find this proposition contrary to the generally accepted principles set by statute and case law, more particularly Section 107 of the *Evidence Act* and the decision in the case of Bhatt –vs- R (supra). Our justice system does not operate on that line as proposed by the Director of Public Prosecution.
26. The accused persons are charged with the offence of Murder contrary to Section 203 of the Penal Code, which states as follows:-

“ Any person who commits the felony of manslaughter is liable to imprisonment for life”.



Malice aforethought is explained by Section 206 of the Penal Code where four (4) elements are listed. It states as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

27. From these provisions, it is clear that the mind of an accused person and planning, leading to execution must be proved by evidence. The evidence of PW1, PW2, PW3 and PW4 is that of family members. With the above elements in mind, and given the various position each accused person was employed to hold and the roles they each play at the school, this ought to have been succinctly documented by evidence of the witnesses.
28. It is important to note that from the report of the Motor Vehicle Inspection Unit, the school maintenance section plays a key role in the safety of passengers on board the school vehicle especially given the fact that the passengers are minors who have limited sense of danger to themselves.
29. PW5, the Motor Vehicle Inspector testified that he inspected the offending bus on 28th April, 2017 and certified it as road-worthy and safe for use by the passengers. In his testimony, PW5 told court that at the time of the inspection, “the Motor vehicle was found to have had no defects and was roadworthy”. He accordingly issued a Certificate for Vehicle Inspection Report (V.I.R), Exhibit P7.
30. PW11, also a Motor Vehicle Inspector testified and merely supported the evidence of PW5 that the said vehicle had been inspected on 28th April, 2017 and concluded that the next inspection was not yet due since the required period of One (1) year had not lapsed as at the time of the accident.
31. PW6, the Chairlady of Board of Management, Mrs. Maneno, gave evidence in which she explained the role of the Board in running the school and who was responsible for the maintenance of the bus, which she said was the Parents Teachers Association Chairman. She said that it was the one which had infact hired the mechanic.
32. PW12 confirmed that he examined the said Motor Vehicle, noted the defects which he indicated in his report dated 21st July, 2017. This accident happened three months after inspection and certain defects were noted. The pictures produced and examined by witnesses and court, revealed corrosion of the floor of the bus. In my analysis, the evidence that was adduced by the prosecution’s witnesses in this case, weighed against the principles highlighted herein, has clearly not established any malice aforethought on the part of any of the accused persons.



33. The 1st accused person is a Principle of the School and her duties and role in the school has not been brought into question. Her role at the scene of accident has also not been brought out or proved by the prosecution. This is equally the case for the other accused persons.
34. I wish to point out that it is not for the accused persons to fill in the gaps left by the prosecution as this would amount or lead to self-incrimination. I therefore find and hold that there is insufficient evidence adduced by the prosecution to warrant the accused persons or any of them being placed on their defence.
35. Accordingly, I find the accused persons have no case to answer for the offence of Murder under Section 203 of the Penal Code and acquit them under Section 210 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

It is hereby ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Anyumba counsel for the State

Mr. Konde counsel holding brief for Mr. Kadima counsel for the 1st accused person

Mr. Gakuo counsel for 2nd accused person

Mr. Murage counsel for the 3rd, 4th and 5th accused persons

Court Assistant - Gitonga

