



**Republic v Osilu (Criminal Case 51 of 2021)
[2022] KEHC 14106 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 51 OF 2021
WM MUSYOKA, J
OCTOBER 21, 2022
(FORMERLY KAKAMEGA HCCRC NO. 5 OF 2020)**

BETWEEN

REPUBLIC PROSECUTION

AND

STEPHEN KWEYA OSILU ACCUSED

RULING

1. Stephen Kweya Osilu 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 24th day of January 2020, at Emutsa Village, Ebusakami Sub-Location, Luanda Sub-County, within Vihiga County, he murdered Elphas Otwoko Kweya, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 5th March 2020. The hearing of the prosecution's case commenced on 7th July 2022, five witnesses testified.
2. The first on the stand was Harbat Abwao Kweya, who testified as PW1. He stated that he was at his house on 24th January 2020, at 10.0 AM, when he heard screams or noises, it was being said that the deceased had died. He went out of his house, to the house of the deceased, and confirmed that he had indeed passed on. He witnessed as the police removed the body, for transfer to the mortuary. Mikal Okusi Ateku testified as PW2. He was the Assistant Chief for the area. He said that he was at home on the night of 24th January 2020, when, at midnight, he got a call from a neighbour, Francis Oyondi Alembi, who informed him that thugs had raided the home of the deceased and killed him. He informed his superiors, and he was instructed to proceed to the scene. At the scene he found the body lying in bed, with a cut wound on the forehead, and there was vomit. He also saw a stone in the bedroom, with blood stains. He was present when the body was removed by the police, and moved to the mortuary.



3. Dr. Dixon Mchana, a consultant pathologist, testified as PW3. He did an autopsy on the body of a person described as Stephen Kweya Osilu. It had a laceration on the forehead, and bruising at the back of the head. There was a fracture of the skull bone, just below the laceration. There was a bruising of the forebrain, with marked swelling of the brain. He formed opinion that the cause of death was the raised pressure in the brain, secondary to blunt force trauma, following assault. He stated that, according to him, the body that he examined was that of Stephen Kweya Osilu, and not Elphas Otwoko Kweya, for that was the information that was given to him by the police. Jairus Awuondo followed as PW4. He was at his home on 24th January 2020, at 5.00 PM. He said that he saw the deceased that day at about that time. Later that day, between 11.00 PM and 12.00 midnight, the accused came to his home, and informed him that someone had killed the deceased. He went to the scene, and confirmed the death. He did not note any injuries on the body, and he was present when the body was removed to the mortuary by the police. No. 63454, Police Sergeant Lennox Barasa, testified as PW5. He was the investigating officer in the matter. He was instructed by his superior, the District Criminal Investigations Officer, to proceed to the scene. He found the body of the deceased lying on the floor, covered with a blanket, with a mosquito net held in place by stones. The body had an injury on the forehead, and there was some vomit. He arranged to have the body removed to the mortuary. The accused was arrested on 25th January 2020.
4. At this stage I am required, in law, to decide whether to put the accused person on his defence or not. I should determine whether the Republic has made out a prima facie case to warrant putting the accused on his 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 & Bacon JA), as one in which a reasonable court, properly directing its mind to the law and the evidence, could convict, if no explanation was offered by the defence.
5. The elements of the offence of murder, as set out in section 203 of the Penal Code, 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.
6. From the material before me there is prima facie proof that the deceased in fact died. His lifeless remains were seen by PW1, PW2, PW4, and PW5. On cause of the death, the evidence was presented by PW3. He said that he conducted post-mortem on a body of a person whose name did not rhyme with that of the deceased, but rhymed with that of the accused. According to him, he did not perform an autopsy on the body of Elphas Otwoko Kweya, the deceased herein, but on the body of a person known as Stephen Kweya Osilu. He stated that that was the name given to him by the police, and, as pathologist, he only relied on the particulars given to him by the police. He attributed the death of the person, whose body he examined, to head injury, as a result of an assault. PW5, the investigating officer, attempted to explain that the person, whose body PW3 conducted an autopsy on, was the deceased. However, that clarification came too late in the day. The police ought to have had that error, if indeed it was one, rectified well before PW3 testified, for his case was that the body that he examined was that of Stephen Kweya Osilu, and not that of Elphas Otwoko Kweya. As it is, I have no evidence before me on the cause of death of the deceased herein. I have no material upon which I can conclude that the injuries, noted by some of the prosecution witnesses, apart from PW3, were capable of causing his death, and indeed caused the death.
7. The standard of proof in criminal cases is beyond reasonable doubt. The mix-up, presented by the testimonies of PW3 and PW5, can only be resolved in favour of the accused. The prosecution, in this case, was required to establish that the death of the deceased herein arose directly from an act or omission on the part of the accused person. It would only be after that is established that the accused could be called upon to give an account. As the cause of death of the deceased herein was not



established, it would be difficult to link the accused person to a cause of death that was not proved in the first place.

8. Moreover, no eyewitness account was presented regarding how the deceased met his fatal injuries. None of the witnesses presented testified to seeing or witnessing the accused person assault the deceased or cause him the injuries narrated. No one testified on witnessing any altercation between the two. The accused was only linked to the death on account of mere suspicion and circumstantial evidence, on the basis that he lived with the deceased in the same compound, albeit in different houses; that the two had a difficult relationship; and that he was not available for several hours minutes after the death was established after he reported the death to PW4.
9. It is trite that mere suspicion, however strong, cannot found a basis for a conviction of an offence. It is also trite that circumstantial evidence has to be so strong as to irresistibly point to the guilt of the accused. I will say nothing more about suspicion, but on the circumstances, I have seen no material upon which the accused can be said to have caused the death. He was not found with anything that could incriminate him. He was the one who reported the death to PW4. Suspicion arose only because the accused was not available when the police arrived, and he was not available until the next day, when he was arrested. PW5 said that the accused could not explain where he had been for that period. PW5 mentioned an inmate, who had been in remand custody with the accused, a Dixon Akungo, who had allegedly informed him that the accused had narrated to the person and others about what had happened to the deceased. PW5 did not give details of what the accused disclosed to the alleged inmate, and that inmate was not called to testify, and, therefore, that bit of testimony was of no value. PW5 conceded that none of the witnesses linked the accused to the death, and that the case was built on circumstantial evidence, which he described as limited. He said that what he had recommended to the Director of Public Prosecutions was an inquest, rather than a murder prosecution, but the directorate directed otherwise.
10. As the prosecution has not established a sufficient connection between the accused person and the death of the deceased, I hereby find and hold that I do not have, before me, material upon which I can convict him, were he not to offer any explanation. I am not satisfied that a prima facie case exists to warrant his being be put on his defence.
11. That being the case, I shall accordingly find the accused, Stephen Kweya Osilu, not guilty and acquit him, under section 306(1) of the *Criminal Procedure Code*, Cap 175, Laws of Kenya, of the charge of the murder of Elphas Otwoko Kweya, contrary to section 203, as read with section 204, of the Penal Code. He shall be set free, if he be still in remand custody, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF OCTOBER 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Andia, Advocate for the accused person.

