



**Republic v Odhiambo (Criminal Case E021 of 2022)
[2022] KEHC 15811 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E021 OF 2022
KW KIARIE, J
NOVEMBER 30, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

ALPHONSE ODHIAMBO ACCUSED

RULING

1. Alphonse Odhiambo is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offences are that on the 23rd day of June, 2022 between Ringiti and Remba Islands in Mfangano North location of Mbita sub county within Homa Bay county, murdered Meshack Otieno.
3. There was an allegation of interference with the fishing nets of the crew of “Al Bushra” boat by the deceased and his fellow crew members. A quarrel ensued. In the course of the argument, the quarrel degenerated into physical confrontation. The deceased fell into the water and drowned. It was alleged that the accused hit with a paddle and caused him to fall into the water.
4. Fredrick Otieno Onyango (PW1) was in the same boat with the deceased. His evidence was that he and his fellow crewmen were using hooks to catch fish. Their hooks were entangled with fishing nets and while in the process of extricating them, “Al Bushra” boat approached them on high speed. It had three crewmen. They accused them of interfering with their nets. In spite of an explanation of what had happened, a quarrel ensued. They left on high speed after extricating their hooks.
5. The “Al Bushra” crew pursued them on high speed. They caught up with them and used their boat to block theirs. One of the crewmen of “Al Bushra” got hold of the fuel line of the other boat and there was a struggle over the same. According to this witness (PW1), it was at this juncture that another crew member of “Al Bushra” hit the deceased and he fell into the waters of Lake Victoria.



6. It is worth noting that at this point in his evidence, PW1 does not identify the accused. He called him “another” one in the boat. It was at the tail end of his evidence that he purported that he identified the accused and that it was the accused who hit the deceased before he fell into the Lake. This raises doubts whether he identified the person who hit the deceased if indeed he was.
7. PW1 in his evidence testified that it was not the accused who took their boat’s fuel line. This however contradicted the evidence of corporal David Mugambi (PW2) who said that when the accused hit the deceased, he was trying to snatch from him the fuel line. The question is from whom this officer got this evidence.
8. Corporal David Mugambi (PW2) in his evidence testified that they went to the house of the accused and recovered the fuel line which Fredrick Otieno Onyango (PW1) identified as the one taken from their boat. The investigating officer on the other hand testified that he was told that the fuel line was recovered from the boat of Fredrick (PW1). He added that it was Fredrick who handed the fuel line to the police.
9. The medical evidence contained in the post mortem report indicated that there was no overt sign of external trauma. The pathologist formed an opinion that the cause of death was asphyxiation suffocation secondary to drowning. This contradicted the evidence of Fredrick Otieno Onyango (PW1), that the deceased was hit on the head.
10. There was evidence that the boats were being rocked by the waves and the by the struggling crew. There was a possibility therefore, that the deceased may have lost balance and fell into the lake waters.
11. When a court is confronted with such material contradictions in evidence of witnesses whom it is expected to rely on, it must heed to the wisdom by the Court of Appeal in the case of [*Ndungu Kimanyi v Republic*](#) [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

In the instant case, the contradictions are far too many for any reasonable tribunal to believe the evidence on record.

12. In the [*Black’s Law Dictionary, 10th Edition*](#) *prima facie* case is defined as follows:
 - Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption.
 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.
13. The Court of appeal in the case of [*Ramanlal Trambaklal Bhatt v R*](#) [1957] EA 332 at 334 and 335, defined prima facie case as follows:

It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
14. Article 50 (2) (i) of the [*Constitution of Kenya*](#) provides:
 - (2) Every accused person has the right to a fair trial, which includes the right-



(i) i) to remain silent, and not to testify during the proceedings;

In the instant case, if the accused opts to exercise his constitutional right hereinabove stated, I cannot convict him based on the evidence on record. This therefore means that the prosecution has not established a *prima facie* case against him. I accordingly acquit him of the offence of murder under section 306 (1) of the [Criminal Procedure Code](#). Each is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF NOVEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

