



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Otieto (Criminal Case 47 of 2013)
[2022] KEHC 15717 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 47 OF 2013
PJO OTIENO, J
NOVEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DICKSON ANDATI OTIETO ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. The particulars of the offence was that on the night of 14th and September 15, 2013 at Eshibanga Village, Emuhaya Sub-Location in Kakamega Central District of Kakamega County jointly with others not before the court murdered Harun Anangwe.
2. Towards discharge of the duty to prove the guilt of the accused, the prosecution called four witnesses being the brother to the deceased, the wife to the deceased, a neighbour and the person who identified the body for purposes of post mortem.
3. Of the four witnesses, PW4 was not within the proximity of the scene of crime and only identified the body. His evidence thus has nothing to link the accused with the offence.
4. PW3 was called by PW1 and told about the death of the deceased. The deceased was a neighbour to the witness while PW1 was a friend. He went to the scene and found many people already gathered there. The accused was also there and had been injured with clothes being blood stained. He however said that he did not know who had killed the deceased. Equally his evidence had nothing to connect the accused to the death.
5. The evidence by PW1 was that on the September 14, 2013, in the evening, at about 6pm he was at his home when he saw the accused and the deceased passing. He greeted them and they told him that they were going to the home of Jane Kwayo who was a chang'aa brewer. He saw the deceased carry a machete for cutting sugarcane. He had no other contact with the deceased till the next day when he



saw the accused pass by his home while going to work in a farm but in the absence of the deceased who was close friend to accused and lived close to the accused house. After a while he heard screams, went to the scene and found PW2 wailing while in the company of the accused while the deceased's body was lying dead in the river. He viewed the body and saw that it had an injury on the forehead and at the lower back. People gathered including the Assistant Chief but the accused disappeared only to be arrested later. He identified the accused as the person he saw at the scene with PW2 and the same person who was with deceased the previous evening.

6. When cross examined, the witness told the court that the accused and the deceased were friends and cousins who would work and drink chang'aa together and that seeing them together was normal. He said that the accused was arrested on suspicion that he was the one who had killed the deceased.
7. PW2 was the wife to the deceased who said that it was the accused who came for the deceased on September 14, 2013, in the morning, and that the two left together after the deceased had sharpened his panga. That day, the deceased, who had two wives, did not come back that night. She said that the accused did not have a wife and therefore would eat in her house every day.
8. The next day, September 15, 2013, as the witness was going to the shamba she saw blood trail like something had been dragged on the ground. She also saw akala sandal and looking further, she saw the body of her husband lying on the ground dead in the river. She saw the accused approach her and asked him what he had done to the deceased. The accused tried to remove the deceased from the river but failed then disappeared after people became hostile. On observing the body, the witness noticed that it had three injuries; on the head, neck and back. The police came and retrieved the body at 1 pm and the accused was then arrested. She identified the accused at the dock as the Dickson she referred to in her evidence.
9. On cross examination, the witness told the court that the accused and the deceased were close friends and that the two did not come back home on the night of 14th/15th September 2013 and she thought that the deceased had gone to her cowife's house. She added that the accused told her that he left the deceased in the company of one Javan Shitemi aka. Olwete. She however said that she did not see the accused kill the deceased.
10. With such evidence the prosecution's case was closed and court asked to determine if a *prima facie* case had been established. While the prosecution relied on the evidence on record without proffering any submissions, the defence filed submissions dated October 27, 2022 on the same date.
11. In those submissions, it is stressed that there is no direct evidence linking the accused with the death of the deceased and that even though PW4 identified the body of the deceased, for purposes of post mortem, no autopsy report was produced as evidence.
12. Further submissions was that other than the death which had to be proved to have been unlawful and caused by the accused, the prosecution had the additional duty to prove that the accused was propelled by malice aforethought.
13. To the defence no evidence was led to connect the accused with the death or that in being so connected, he was propelled by malice aforethought. The decision in *Abanda Ali Onyango vs Republic* Criminal App No 32 of 1990 (UR) was cited for the proposition that for circumstantial evidence to support a conviction, such must be cogently and firmly established to unerringly point towards the guilt of the accused to have been the person behind the crime.
14. In this ruling, the mandate of the court is to determine whether the prosecution has established as against the accused, a *prima facie* case to justify him being called upon to defend himself. A *prima facie* case is defined to the kind of a case that the court may convict upon even if no further evidence is led. It



must be a case that prove the guilt of the accused beyond reasonable doubt which only calls for rebuttal by the accused when given a chance to defend himself¹.

15. Here there is no iota of evidence on how the deceased sustained the injuries seen on his body. In any event the cause of death has not been proved in that no medical evidence was availed.
16. All that there is, is the evidence that the accused was the last person to be seen with the deceased. The accused told PW2 that he had left the deceased in the company of one Javan Shitemi aka Olwete. No effort was made to call the said Javan to confirm whether the deceased was left by the accused in his company harmed or unharmed.
17. There is absolutely no evidence to point to the guilt of the accused. All there is, is the suspicion that having been seen last with the deceased he could know how the deceased met his death.
18. Suspicion alone, however strong, cannot be the basis of a conviction in a criminal trial².
19. It is therefore the conclusion by the court that no *prima facie* case has been established to merit the accused being put on his defence. He is acquitted and should be released forthwith unless otherwise lawfully held.

Dated, signed and delivered in open court this 21st day of November 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Iddi for the Accused

Miss Chala for the State

Court Assistant: Polycap Mukabwa

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¹ *Ramanlal Bhat vs Republic* [1957] EA 332 and *Ronald Nyanga vs Republic* [2018] eKLR

² *Sawe vs Republic* [2003] KLR 364

