



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO. 44 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

SHABIR WACHIRA WESONGA.....ACCUSED

CORAM: HON.LADY JUSTICE RUTH N. SITATI

RULING

1. The accused person herein is charged with murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that on the night of 19th and 20th July 2014 at Mureko village Bulafu sub location in Butere District within Kakamega County, he murdered JUMA OKUNE SHIUNDU. The accused pleaded not guilty.

2. The trial has been ongoing during which the prosecution called 8 witnesses. P.W.1, Nelly Apiyo Ogola testified of how at about 1.00 a.m., on the material night, the accused person and another stormed the deceased's house, went to the bedroom and started pushing the deceased. The accused took the deceased out of the house and was later followed by his companion who had remained in the deceased's house for about 10 minutes restraining P.W.1. Early that same morning the deceased's body was found lying a short distance from the house, with a cut wound on the head. The deceased was bleeding and also had an injury in one eye.

3. A report was later made to Butere Police Station. The police went to the scene and took away the deceased's body to St. Mary's Hospital Mumias.

4. Among the other witnesses was Dr. Juma Khayombe, of St. Mary's hospital, Mumias. He testified as P.W.8 and produced the post mortem report concerning the deceased on behalf of Dr Mose Mose who had since left for further studies at University of Nairobi. From the said report the deceased had 2 lacerations on the head, one of which exposed the brain. There was a comminuted skull fracture of the occipital bone with resultant loss of brain tissue on the occipital region as well as massive intracranial haemorrhage. In the doctor's opinion, the cause of death was severe head injury secondary to blunt force injury.

5. The issue that arises for determination at this stage is whether the prosecution has established a prima facie case requiring the accused person to be put on his defence. The principles to apply in this case are those set out in **Bhatt Vs Rex (1957) EA 332** in which the Court of Appeal for Eastern Africa held, inter alia that "the onus is always on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction..... A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence"

6. I have carefully considered the evidence on record in light of the above stated principles and I am satisfied that the prosecution has established a prima facie case against the accused person requiring him to be put on his defence. Accordingly, the accused is put on his defence.

7. In defending himself the accused person may give sworn or unsworn evidence; the only distinguishing element being that his unsworn evidence would not be subject to cross examination. In either case, the accused person is at liberty to call witnesses. In the alternative, the accused person may elect to remain silent and let the court decide the case on the evidence that is before it.

8. I now call upon the accused person to indicate to the court which of the three options he will take in defending himself.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega on this ...24th day ofMay2019

R.N. SITATI

JUDGE

In the presence of

.....Mr.Juma.....for State

.....Mr. Luchivya.....for accused

.....Polycap and Erickcourt assistant