



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 40 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

FESTUS MUKHWANA.....ACCUSED

CORAM: LADY JUSTICE R. SITATI

RULING

The charge:

1. On the 19th December 2012, the accused herein, FESTUS MUKHWANA pleaded not guilty to a charge of Murder Contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 20th day of January, 2011 at Sango, Chebwai Sub Location, Kakamega North District within Western Province, the accused, jointly with others not before court murdered ABEL NAMASAKA.

The Prosecution Case

2. In its endeavor to prove the charge against the accused, the prosecution called four (4) witnesses. Briefly, on the evening of 20th January, 2011, between 8.00 and 9.30pm, Edward Bushuru Kasembeli, PW2, and Fanuel Kasembeli, PW1 were in their respective houses when they heard screams from the deceased. The deceased was shouting that he had been attacked by robbers. PW2 rushed out of his house and ran to the deceased's house whereupon he came across Timothy Muchesi and Moses Muchesi who were standing outside the deceased's house. When the two saw PW2, they took their bicycle and ran away, leaving the deceased struggling with the accused inside the deceased's house. Shortly afterwards, the accused ran out of the house and disappeared.

3. PW1 also arrived at the deceased's house but after the accused had disappeared. The deceased told both PW1 and PW2 that it was Festus Mukhwana (the accused), Timothy and Moses who had attacked him. The two brothers, PW1 and PW2 took the deceased to the AP camp and while at the AP camp, the deceased told the police that it was Festus Mukhwana (accused), Timothy and Moses who had attacked him. The deceased died while being taken to hospital.

4. Caleb Bushuru, PW3 also joined PW1 and PW2 at the deceased's house and heard the deceased saying "Mukhwaha ananinua" "(Mukhwana is killing me)." The AP's are the ones who called Kabras Police Station to take the deceased's body to hospital. The police later arrested accused and charged him with the instant offence after a post mortem examination had been done on the body of the deceased.

5. Dr. Dixon Mchana of Kakamega County General Hospital carried out the postmortem examination on the body of the deceased on 21st January, 2011 after the body was identified to him by two family members. From the examination, the deceased had an angular cut wound above the right ear on the scalp measuring 1.5cm. There was on a large internal blood clot; though there was no fracture. Dr. Mchana opined that the cause of death was head injury following assault.

Issue for Determination

6. The issue for determination is whether the prosecution has established a *prima facie* case requiring the accused to be put on his defence. In making this decision, the court is not required to satisfy itself that the case against the accused is a very strong one. That is for another time, but it is also to be remembered that no amount of worthless evidence shall constitute a prima facie case. Generally see ***Bhatt versus Republic [1957]EA 332***.

Analysis and Determination

7. Applying the principles in the **Bhatt Case** (above) I am satisfied that the prosecution has established a prima facie case that requires the accused to be put on his defence. He is accordingly put on his defence. In this regard, the accused may give sworn or unsworn evidence. If he gives sworn evidence the accused may be asked questions both by the court and the prosecution. If the accused so desires he has the option of remaining silent and letting the court decide the case on the evidence that is before it. If the accused testifies, whether on oath or not, he has a right to call witnesses.

8. I now call upon the accused to indicate to the court how he intends to defend himself.

Orders accordingly.

Ruling written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Ruling delivered, dated and countersigned in open court at Kakamega this 22nd day of June, 2018.

RUTH N. SITATI

JUDGE

In the Presence of

Mr. Ngetich present for the state

Miss Oduor for Kundu for the accused

Polycarp Mukabwa - Court Assistant