



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL CASE NO. 41 OF 2012.

REPUBLIC:..... PROSECUTOR.

VERSUS

WILLIAM MWILITSA :..... ACCUSED.

R U L I N G

1. The accused person was arraigned in court on a charge of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the charge were that on the 9th day of October, 2012 at Busanyi village, Matanyi location in Kakamega South District, within Western Province, unlawfully murdered Samuel Ubenda.
2. The plea was taken on 3rd December, 2012 and the accused person pleaded not guilty to the charge. The case proceeded to hearing with the prosecution calling five (5) witnesses before closure of its case. This court heard the evidence of PW4 and PW5 after compliance with the provisions of sections 200(3) as read with section 201(2) of the Criminal Procedure Code.
3. PW1, Mable Khatambi Luganda, of Malinya sub-location, Kakamega County adduced evidence that on 10th October, 2012, at around 9.00 p.m., one William Mwilitsa, the accused person, went to her mother-in-law's house by the name of Fridah Masike, yelling that he wanted land. He was talking loudly that he wanted land. PW1's husband, who was the accused person's father, went out of their house. The accused person started fighting him. The accused person had said that he would deal with anyone who would come out of any house.
4. PW1 informed the court that the commotion lasted for about fifteen (15) minutes and then stopped. She went out to find out what had happened. She found her husband on the ground bleeding from the back of his head. PW1 went to wake up her mother-in-law Fridah and carried her husband into her house. They could not take him to hospital at that time. The stayed at home until the following day when PW1 was assisted to get a motor cycle and took her husband to Shirwe sub-district hospital. He was transferred to the Kakamega Provincial Hospital. She was accompanied by Calistus Ndombi. PW1's husband died while undergoing treatment and his body was preserved at the mortuary.
5. They went to Isulu Patrol Base and reported the matter. She then recorded a statement with the police. PW1 testified that the accused person was well known to her as she had known him for three (3) years. She informed the court that she did not see him but she recognized his voice without any doubt. She identified the accused person, William Mwitlitsa, in the dock. She informed the court that her mother-in-law was in her house during the incidence and that they were the only ones in the houses.
6. On cross-examination by Mr. Simasi Advocate, PW1 informed the court that the deceased was her husband for around three (3) years. She was married in 1999 and had four (4) children with him. She had

nothing to prove their marriage. The children were all asleep in the house. Their eldest child was aged fifteen (15) years at the time she testified. She did not know where the accused person came from as she only heard him hitting the door to her mother-in-law's house. She reiterated that she only heard the accused person's voice. She knew that the accused person used to drink local brew. PW1 informed the court that the deceased also used to drink but on that day he had not drunk (sic).

7. Further in cross-examination, PW1 stated that she did not go out of the house since the accused person said that he would kill whoever would go out. The accused person did not bang the door to her house. PW1 estimated the distance between her mother-in-law's house and hers to be about two (2) metres. The homes are in the same compound and are the only houses there.

8. PW1 also informed the court through cross examination that the deceased had only one brother who lives far away, where he bought land. She estimated the distance to the nearest neighbour's house to be about fifty (50) metres from their house. The neighbour is called Angeline Massero. She lives with her husband, Philip Masero, and their children. The neighbours only went to their rescue after the accused person had left. PW1 informed the court that they live in harmony with the neighbours. She raised the alarm when the two were fighting outside. People feared the accused person's threats that whoever would go near there he would tell him. The accused person used Kiswahili language. PW1 informed the court that the accused person's father is a brother to the deceased. She stated that she knew Stephen Mwenesi who is their Village Elder. She calls him her in-law.

9. On re-examination, PW1 informed the court that the accused person first hit the door to his grandmother's house which is just next to her house. PW1 raised the alarm while inside the home but neighbours feared the threats that were being issued by the accused person. Her children who were asleep did not wake up.

10. PW2, Stephen Mwenesi, of Musangi area, Malinga sub-location in Kakamega County informed the court that he was a Village Elder at Musangi village. On 11th October, 2012, at around 07.00 a.m., he was at home when he was called by Agnes Khasiala who informed him that the accused person had injured his step-father, the deceased, and had run away to PW2's area of jurisdiction. PW2 mobilized people in the village who searched for the accused person and he was arrested. PW2 was with 3 other people. PW2 testified that at the time of his arrest, the accused person had a hoe handle in his hand. They took him together with the hoe handle to the Police at Mahinya Administration Police Lines. He was then re-arrested and taken to Malaika Police Station. PW2 informed the court that he knew the accused person from birth and that PW1 is his step-mother. PW2 identified the hoe handle that the accused person was arrested with and marked as PMF1. He identified the accused person in the dock.

11. On cross-examination, PW2 informed the court that Musangi village where he resides and Mosaka B village, where the accused person hails from are neighbouring villages. PW2 was with one Ndombi and another man he found along the road, at the time he arrested the accused person.

12. PW3, Agnes Khasiala Ndombi of Mahinya sub-location informed the court that on 11th October, 2012, she was in her house at 6.00 a.m., and heard from a distance that the accused person had beaten his father. The voice came from a woman who was a co-wife since her husband and hers are brothers. She is called Josina Shivoko. PW3 then followed her and went to the deceased's house. On reaching there, she saw the deceased at the sitting room in his house, lying on the floor. He was bleeding from the head. PW3 told the deceased's wife one Mebo Khatambi (Mable Khatambi) PW1, to look for a motor cycle, which they did. The deceased was taken to hospital by PW1 and one Patrick Libanga. They left for Shibwesa Sub-District Hospital. PW1 later on called PW3 to tell her that the deceased had died while undergoing treatment. PW3 told the court that she has known the accused person since birth as a son to her in-law. The accused person had left for his uncle's home and only came back when he was 27 years old.

13. PW4, Dr. Dixon Mchana testified that he is a Consultant Pathologist for Kakamega County with 5 ½ years experience as a Pathologist. He conducted the autopsy on the body of the deceased Samuel Openda Matuvache at Kakamega Provincial General Hospital on 15th October, 2012. Two witnesses, Membo

(Mable) Katambi and Calister Dobi identified the deceased's body. The Doctor stated that the deceased's clothing were soiled and damp. The deceased was an African in his mid forties of average build, He was 5 feet, 11 inches in height. The body had been kept in the fridge and four (4) days had elapsed since death.

14. The Doctor's findings were that externally, the extremities appeared bluish in colour. It was a sign of lack of oxygen before death. There were signs of medical intervention. One was access to a vein and shaving of the head. There was a star shaped laceration on the top of the scalp to the right. It was 9cm by 7 cm. There were defence injuries on both forearms. Internally, there was diffuse blood clot below the scalp. There was a depressed skull fracture on the left part of the skull extending to the right side. There was massive bleeding above and below the coverings of the brain, that is subdural and epidural haemorrhage. There was bruising on the left forebrain.

15. Doctor Mchana formed the opinion that the cause of death was closed head injury secondary to blunt force trauma following assault. He filled in burial permit No. B581394. He signed the post mortem report dated 15th October, 2012 and stamped it with the hospital stamp. He produced the post mortem report as Exhibit 2.

16. On cross-examination, Doctor Mchana informed the court that the probable type of weapon used was a blunt object.

17. PW5, No. 51639, Corporal Samson Otieno Awino, was the Investigation Officer in this case before he was transferred to Migori County. On 11th October, 2012, while at Isulu Patrol base, they were called by the Officer Commanding Police Division (OCPD) for a meeting at Malenya. They reached there at 8.00 a.m. After the meeting they were informed that a certain person had been taken there by the members of the public on allegations that he had beaten the deceased on 10th October, 2012 using a jembe stick.

18. The accused person had been arrested by Administration Police Officers from Malenya. He was escorted to Kakamega Police Station where he was held as investigations were ongoing. The deceased person was at first escorted to Shibwe District hospital on 11th October, 2012, but the Doctors referred him to Kakamega Provincial General Hospital. The deceased died on 12th October, 2012, while undergoing treatment. A post mortem was done on the body of the deceased. The Doctor established that the injuries sustained by the deceased was the cause of his death.

19. They charged the accused person with the offence of murder after gathering information from witnesses who have testified. A jembe stick was taken to the Police by members of the public as being the one which the accused person attacked the deceased with. PW5 produced it as exhibit No. 1. He got information from witnesses that the accused person went to the deceased's home and demanded for land. Since it was night time, the deceased person informed him that it was at night and that he should go there the following day. The accused person resisted and did not leave. The deceased was hit by the accused person with the jembe stick and he fell down. The deceased's wife heard the struggle and on going out of the house she found the deceased lying on the ground. He had been hit on the head. They tried to look for transport in vain, as it was at night time. The deceased was taken to hospital on 11th October, 2012, when he died.

20. On cross-examination, PW5 informed the court that the deceased and the accused person were cousins. PW2 informed him that the accused person is the son to his brother. The accused person was at first arrested by members of the public. The attack took place on the midnight of 10th October, 2012.

21. The foregoing was the evidence that was put forth by prosecution in support of its case.

Determination of whether there is a case to answer

This trial court has to be satisfied that a prima facie case has been established in order to put the accused person on his defence as provided under the provisions of section 306 (2) of the Criminal Procedure Code.

22. In the case of **R. vs. Jagjivan M. Patel and others (1) T.L.R. (R) 85** the court stated thus:-

“..... all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if it is believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

23. In the case of **Wibiro alias Musa V R [1960] EA at 184**, the Court of Appeal held that:-

"a prima facie case does not mean a case proved beyond reasonable doubt. The reasons which would lead a Judge to a decision on a submission of "no case to answer" would not in law be the same as would activate him when deciding at the closing of the proceedings whether to convict....."

24. After considering the evidence of all the prosecution witnesses herein which I have replicated in this ruling and more particularly the evidence of PW1 who heard the accused person demanding for land and issuing death threats to anyone who would go out of their houses and guided by the above Court of Appeal decisions, I make a finding that a prima facie case has been established to put the accused person on his defence in accordance with section 306(2) of the Criminal Procedure Code.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this**26TH** day of**APRIL**,....., 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the accused person.**

..... **for the office of the DPP.**

..... **Court Assistant.**