



**Republic v Simiyu (Criminal Case 28 of 2019)
[2024] KEHC 195 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 28 OF 2019
DK KEMEL, J
JANUARY 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BABRA CARO SIMIYU ACCUSED

RULING

1. The accused herein Babra Caro Simiyu has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the 7th day of August, 2019 at Mwangi “A” village Kibisi sub-location Bungoma North Sub County within Bungoma County she murdered Ronald Simiyu Wekesa.
2. The accused denied the charge and that the prosecution called six witnesses in support of its case.
3. Samuel Mukhwana Kakai PW1 testified that on the material date at around 8.00 pm the accused turned up at his house and informed him that she was preparing to leave for her parents home and let her husband (deceased) live his own life. She informed him that her husband (deceased) was too drunk and was then lying down. He accompanied her to her house but on reaching there, she refused to enter the house. He entered the house and saw the deceased lying down on the floor while bleeding profusely. He raised alarm attracting the villagers. He testified that the deceased was groaning but could not talk and that he died afterwards. On cross examination, he stated that the deceased had been a drunkard in the area. He stated that the accused had been known to have mental problems for six years prior to the incident. On re-examination, he stated that the accused was not in good mental state but he could detect accused at times knew what she did .
4. Barasa Wekesa (PW2) testified that he joined other people in rushing the deceased to Lugulu Mission Hospital where he died on arrival. He stated that the visited the scene and saw blood stains on the floor. He finally added that the accused used to suffer from mental illness.



5. George Nyongesa Wekesa (PW3) testified that the deceased was his brother and that he visited him at Kibisi dispensary and saw injuries on the nose, mouth, face and head. He added that the accused used to have mental problems.
6. Wekesa Bonaventure (PW4) testified that the deceased was his brother and that he rushed to the scene and found him unconscious and bleeding profusely. He added that they rushed him to hospital but he was pronounced dead on arrival. He finally stated that the accused used to have mental problems.
7. Dr Reuben Kere Nyongesa (PW5) testified that he conducted a post mortem examination on the body of the deceased and noted a fracture of left leg as well as bruises on the face plus a distorted left ear. He also noted some fractures on the parietal and skull bones. He also noticed blood oozing from the ears and nose. He also noted blood inside the brain. He formed the opinion that the cause of death was critical head injury due to blunt injuries as a result of physical assault. He produced the post mortem report as exhibit 1. On cross examination, he stated that he could not tell if the injuries had been inflicted by a mob or one person.
8. No. 80326 PC Philip Kibet (PW6) testified that he visited the scene and saw blood stains on the wall. That he proceeded to the mortuary and noticed injuries on the head and chest that a post mortem examination was conducted on the body. That he later escorted the accused for mental assessment in which the doctor indicated that she was not fit to stand trial and was placed on treatment and when she got well, she was allowed to proceed with the trial.
On cross examination, he stated that it was Chief inspector Mutie who conducted the investigations.
9. Thereafter, the prosecution closed its case. Learned counsels for the parties opted to rely on the evidence so far adduced at this stage of the proceedings and left the court to decide on the singular issue of whether the prosecution has established a *prima facie* case against the accused.
10. I have given due consideration to the evidence so far adduced by the prosecution and find that the only issue for determination is whether the prosecution has established a *prima facie* case against the accused to warrant her to be placed on her defence.
11. It is trite law that prior to placing an accused to his/ her defence, the prosecution is required to have established a *prima facie* case against such accused person. It is a well-established principle that a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind on the law and evidenced could convict the accused if no evidence or explanation was fronted by the defence. See *BHATT -VS R (1957) EA 332*.
12. The prosecution in order to sustain a conviction in a charge of murder must prove all the ingredients of the offence which are *inter alia*; that there was death; that the death was unlawfully caused and with malice aforethought; that the accused directly or indirectly participated in the commission of the alleged crime.
13. As to the fact of death, the evidence of the pathologist (PW5) is sufficient and that the cause of death was established to be critical head injury due to blunt injuries secondary to physical assault.
14. As to the unlawful nature of the death, it is trite that all homicides are deemed unlawful unless authorized by law. The deceased is reported to have been in good health save only that he was known to have been a drunkard. Hence, the death must have been unlawful as he did not contribute at all to his death in any way. As to the issue of malice aforethought, the post mortem report revealed several fractures on the head and both legs as well as bruises on face and hands plus right eye conjunctival haemorrhage. These kinds of injuries leave no doubt that the assailant desired the death of the deceased



or that the said injuries would lead to the death of the deceased. Clearly, malice aforethought (*mens rea*) had been formed in the mind of the assailant prior to the incident.

15. As regards the identity of the perpetrator, the evidence of the witnesses who arrived at the scene immediately is crucial. PW1 stated that the accused visited him and informed him that she had had enough of her husband and wanted to leave for her parents' home. He escorted her back to her house but that she declined to enter the house even though she had claimed that her husband was drunk and lying down. The said witness entered the house and saw the deceased lying down and bleeding profusely. PW2 and PW4 also visited the scene and saw the injuries on the deceased as well as bloodstains on the floor and walls. From the evidence, it came out clearly that the accused was the last person to be with the deceased. The accused herself, informed PW1 that her husband was drunk and lying on the ground but when PW1 visited the scene, he found the deceased seriously injured. It also transpired that the accused refused to enter the house from where she had emerged, when she had rushed to the home of PW1. Accused's claim to PW1 that her husband was drunk and lying down contradicted the state of affairs when she and PW1 visited the scene since the deceased was found lying down on the floor with severe injuries. I find the evidence placed the accused at the scene of crime and thus her identity as the assailant was established by the prosecution. The accused therefore must offer an explanation as to how the deceased met his death.
16. In view of the foregoing observations, I find that in the absence of any explanation to the contrary from the defence, the evidence presented by the prosecution does establish the ingredients of the offence herein and which has placed the accused at the scene of crime and that she had an opportunity to harm the deceased and therefore she has to offer an explanation as to how the deceased met his death. In arriving at the above finding, I am fully aware that the standard of proof at this stage of the proceedings is not one of beyond reasonable doubt as required in a fully pledged criminal trial. What is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder as well as the accused's participation therein. Having established that the accused was the last person to be with the deceased, the accused must now offer an explanation as to how the deceased met his death.
17. In the result, it is my finding that the prosecution has established a prima facie case against the accused herein Babra Caro Simiyu. I find that she has a case to answer and is now called upon to elect to conduct her defence in line with the provisions of Section 306 (2) of the [Criminal Procedure Code](#).

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JANUARY 2024

D KEMEI

JUDGE

In the Presence of:

Babra Caro Simiyu Accused

Miss Wakoli for Accused

Mrs Kibet for Prosecution

