



REPUBLIC OF KENYA



**Republic v Mutuku & 2 others (Criminal Case 11 of 2019)
[2023] KEHC 1172 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 11 OF 2019
JN ONYIEGO, J
FEBRUARY 3, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MWENDWA MUTUKU 1ST ACCUSED

KIMAILI NGANO 2ND ACCUSED

ERICK MUTUKU 3RD ACCUSED

RULING

1. Accused persons herein are jointly with the offence of murder contrary to Section 203 as read out with section 204 of the *penal code* cap 63 laws of Kenya. Particulars are that on the morning of March 19, 2019 at Mkengerenyi village in Mwatate within Taita Taveta county murdered Emmanuel Mwashimba Mwadime while robbing him off his motor cycle Reg No KMDG821H, a black bicycle and Kshs 5,200.
2. Having returned a plea of not guilty, the matter proceeded to full trial wherein seven witnesses testified. Pw1 Caroline Wakesho a daughter to the deceased told the court how she went visiting her father at his farm house on October 19, 2019. That on arrival, she could not find her father who was staying alone. She however discovered that his bicycle, motor cycle, axe, a panga and a jembe were missing.
3. Pw1 reported to the relatives and the police who carried out investigations and later on October 24, 2019 recovered the body of the deceased buried in a quarry. That it was the 2nd accused who was found with parts of the stolen motor cycle.
4. Pw2 Selina Mwashimba wife to the deceased told the court how the deceased visited his home on October 7, 2019 with the intention of picking oxen for ploughing his farm where he was staying alone. That her husband left without the oxen but promised to go back the following Friday which he never did. She then recalled finding her basket on the road on a day she could not remember while on her way



from the market. It was this incident that made her curious as the basket was always with her husband who used to carry bicycle tools with it. It was then that she and her grandson went visiting the deceased in his farm house but he was nowhere. They then reported the matter to the police who later discovered the body of the deceased buried in a quarry. She confirmed that her husband's items among them a bicycle, motor cycle, sufurias, an axe, a jembe and beans were missing from his farm house implying that they were stolen.

5. Pw3 Mutuku Kiilu father to the 1st accused told the court that on March 19, 2019, at night, he heard dogs barking outside his house. When he got outside, he saw one Kimaili (accused 2) pushing a motor cycle towards his son's house (accused 1). That Kimaili (accused 2) hit his son's door with the motor cycle and when he went to see what was going on, Kimaili left the motor cycle there and went away. Pw3 left for his house and in the morning, he proceeded to report to Nyumba kumi elder. In the evening, he saw accused 2 and 3 carrying spanners approach his home in company of his son Mwendwa. That kimaili said that it was getting bad and left with his motor cycle. On the following day, he was arrested in relation with the death of the deceased but got released later.
6. It was his evidence that when Kimalili was arrested, he volunteered to show the police where the deceased's body was buried.
7. Pw4 Musyimi Muia a village elder told the court that on October 20, 2019, he received a report from Mwashimba's wife (Pw2) over the disappearance of her husband. That after 1 day, he received further information from Mutuku mwenda's father that one Mwendwa (accused 1) had been spotted at his home with the deceased's stolen motor cycle. Upon interrogating Mutuku (pw3), he allegedly told him how his son (accused 3) had bragged how their problems were now over despite the motor cycle having been obtained through blood.
8. That after informing the police about what had transpired at his home, they proceeded to arrest Mwendwa (accused 1) and later Kimaili (accused 2) who volunteered information leading to the recovery of the body of the deceased from a shallow grave in a quarry. That kimaili further led them towards the recovery of the dismantled parts of the deceased's stolen motor cycle and bicycle. On cross examination, he told the court that after the arrest of Kimaili by police officers, a search was conducted in his house and a blood stained panga was recovered.
9. Pw6 PC Allan Wanyama and Shem Asher the investigating officer scenes of crime respectively did investigate this case and recovered the body and parts of the dismantled stolen motor cycle and bicycle through the effort of the 1st and 2nd accused persons. Pw6 told the court how they conducted search in accused two's house and recovered a panga, a rungu and a jembe which was allegedly used to dig the grave where the body was found.
10. Pw5 Dr Joiner produced the post mortem report which revealed the deceased had suffered multiple head injuries and a deep cut on the neck. That the cause of death was severe head injury secondly to assault caused by a sharp and blunt object.
11. Upon close of the prosecution's case, parties were directed to file submissions. However, none of them complied. I have carefully considered the evidence tendered by the prosecution's witnesses. It is incumbent upon this court based on the evidence on record to make a finding whether the prosecution have established a *prima facie* case to warrant accused persons put on their defence.
12. It is trite that, at this stage, the duty of the court is not to ascertain that prosecution have proved their case beyond reasonable doubt, but a *prima facie* case expressing the possibility of culpability by the accused in relation to the death of the deceased hence the need to give them an opportunity to give



their side of the story. See the case of *Anthony Njue Njeru v Republic* [2006] eKLR where the court of appeal expressed itself that:

“Having expressed himself so conclusively we find it difficult to understand why the Learned Judge found it necessary to put the Appellant on his defence. Was there a *Prima facie* Case to warrant the trial court to call upon the appellant to defend himself? It is a cardinal principle of law that, the onus is 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 case, the case is merely one, ‘Which on full consideration might possibly be thought sufficient to sustain a conviction’

Taking into account the evidence on record, what the learned judge said in his Ruling on no case to answer, the meaning of a *Prima facie* case as settled in Bhatt’s Case(supra), we are of the view that the appellant should not have been called upon to defend himself as all the evidence was one record. It seems the appellant was required to fill in the gaps in the Prosecution case.”

13. I have considered the evidence before court and exhibits produced thereof. There is no dispute that the deceased’s decomposed body was found while buried in a shallow grave in a quarry. The recovery of the body according to Pw1, Pw6 and 7 was through the efforts of the 1st and 2nd accused person. Stolen parts of the motor cycle and bicycle were equally recovered through the assistance of the 1st and 2nd accused who pointed out where the body was recovered from.
14. Prior to the recovery of the deceased person’s, body, accused 1 had been spotted while in company of accused 2 having a motorcycle which was later associated with and identified as the one stolen from the deceased. Although there is no direct evidence to link the accused persons with the offence, there is prima facie evidence sufficient enough to require this court call upon accused 1 and 2 to tender their evidence in defence in accordance with Section 306 (2) of the CPC.
15. However, having evaluated the entire evidence, it’s clear from the evidence of all prosecution witnesses that accused 3 was not found with any stolen items nor was he identified as having participated in murdering the deceased. His only association with the offence was that at some point he was seen at the home of Mutuku (pw3) while in company of accused one and two. On cross examination, Pw1, Pw2 and Pw3 stated that accused 3 was not found with any of the stolen items. He was not connected with the death of the deceased even remotely.
16. The entire prosecution case is anchored on circumstantial evidence. There is no doubt that there is no evidence to link the 3rd accused person with the offence before court. In fact, Pw 6 the investigating officer stated that he had no evidence to connect accused 3 with the offence. One would wonder why he was charged in the first place. In a nut shell, there is no prima facie case established against him. I have no reason to call upon him to make his defence.
17. To call upon an accused person to tender his defence in a criminal case is not a ritual nor a matter of course but rather a stringent requirement that must meet the threshold set out in law. See *Republic v Patrick Mutisya Mutinda* (2022) eKLR where Odunga J had the following to say;

“In my view, where clearly the prosecution’s case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An



accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival”.

18. In view of the above finding, I do not find any ground upon which to put accused 3 on his defence. Accordingly, he is acquitted for lack of sufficient evidence under Section 306(1) of the CPC unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 3RD DAY OF FEBRUARY 2023

J.N. ONYIEGO

JUDGE

