



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ndiema (Criminal Case E015 of 2021)  
[2023] KEHC 656 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E015 OF 2021**

**DK KEMEL, J**

**FEBRUARY 2, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JONATHAN KIPYEGON NDIEMA ..... ACCUSED**

**RULING**

1. The accused herein Jonathan Kipyegon Ndiema, was charged with the offence of murder contrary to sections 203 as read with section 204 of the *Penal Code Act*, Cap 63. It is alleged that on the 26<sup>th</sup> Day of March, 2021 at Kaboywo sub location Mount Elgon sub-County within Bungoma County with others not before this Court, jointly murdered Ronald Matui.
2. The accused is represented by Counsels Mr Olonyi and Miss Wakoli whilst the State is represented by Miss Mukangu.
3. The Prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the *Penal Code* are: -
  - i. That the deceased is dead;
  - ii. That the death was caused unlawfully;
  - iii. That there was malice aforethought; and
  - iv. That the accused directly or indirectly participated in the commission of the alleged offence.
4. The Prosecution called a total of eleven (11) witnesses in an attempt to prove its case. PW1 was Gideon Kachuwai who testified that the deceased was a neighbour and that the accused person was an uncle. He recalled that on March 25, 2021 the deceased came to his compound to enquire if he was interested in



purchasing a parcel of land but he however informed him to be patient for a week to enable him finalize his work first. After a week, he visited the land together with the deceased and they entered into an informal ten-year lease at Kshs 100,000/= as they had known each other. He proceeded to prepare the farm for planting maize on March 26, 2021, in the presence of his driver, Samuel Tukei, Chesebe plus Orlando and the deceased herein. The accused herein was quarrelling with his brothers and father and that several stones were being pelted their way by those claiming that the land was theirs. He alerted the police and they left the farm. He spotted some women screaming as the accused threw stones towards the deceased and another brother of his who were in his direction. They claimed the deceased illegally leased their land without their consent. He quickly left the place and later learnt that the deceased had been killed. On cross examination, he told the Court that he was not aware that the land belonged to the grandparents of deceased and accused person and that there was a dispute on the same. He stated that he did not witness the killing of the deceased. On re-examination, he told the Court that he could not identify the individuals who were throwing stones towards the deceased.

5. PW2 was Daniel Orlando who testified that he is the brother-in-law of the accused person herein. He recalled that on March 26, 2021 he was sent by PW1 to go to a certain farm which he had leased for purposes of planting maize. A large crowd of people started advancing towards him and out of fear for his life, he took off. He later learnt that somebody had been killed. He further told the Court that he was in the company of PW1 and that he never knew the deceased as he was not able to see him. On cross examination, he told the Court that he found PW1 at the farm and that he could not tell the identity of those making noise as they were many people. He did not make any report with the police.
6. PW3 was Samuel Tukei who testified that he recalled on March 26, 2021 he was sent to a certain farm to prepare it for plantation of maize by his employer (Pw1). After working on a two-acre portion, he heard noises from several people at the farm and out of fear he fled. He was with PW1, PW2 and one Dennis Chesebe. He told the Court that he did not know the identity of the villagers and could not tell what exactly transpired and he thereafter fled for his life. On cross-examination he told the Court that he does not know the accused herein and could not recall seeing him on March 26, 2021. He further clarified that he did not see the identity of the persons who made the noises and threw stones.
7. PW4 was Denis Chesebe who testified that he recalled on March 26, 2021 he received a call from PW1 who directed him to releases some fertilizer to be used in a certain farm for planting but did not visit the farm.
8. PW5 was No 69563 PC Japhet Mutua who testified that he is stationed at Kaptama Police Station and he recalled that on March 28, 2021 he left for Kitale nursing home mortuary where he witnessed the post mortem examination on the body of the deceased herein.
9. PW6 was Dr Davis Nangili who testified that he is a senior medical officer at Kitale Referral Hospital. He recalled on March 28, 2021, he performed a post mortem examination on the body of the deceased herein. He noted that the external appearance revealed two open wounds on the scalp temporal area and the right parietal area. He observed that the body had bruises on the face, posterior aspect of the thorax and both upper limbs. On the internal appearance, the head had haematoma on the right temporal parietal area. He further noted that the nervous system also had haematoma at the right temporal parietal area between the meninges and the brain. The brain was compressed on the affected sides. He formed the opinion that the cause of death was head injury secondary to assault. He proceeded to produce the post mortem report dated March 28, 2021 as Exhibit 1. On cross examination, he told the Court that the deceased had multiple bruises on the body and some of those injuries were affiliated with those inflicted by a mob. He further told the Court that the cause of death was head injury secondary to assault which would have been caused by other means not related to assault.



10. PW7 was No 7814 PC Samuel Koech who testified that he is based at Kaptama Police Station. He recalled of April 22, 2021 he was instructed together with his colleague to take over a murder case. The instructions were that two suspects be arrested namely the accused person and one Victor Kiptoo both residing in Museng Village. With his colleagues, they arrived at the village where they managed to apprehend them and hand them over to the DCIO Mt Elgon. On cross-examination, he told the Court that he was the arresting officer and that he did not know the suspects prior to the instructions of arrest. He further told the Court that he arrested two suspects but could only see one in Court. He could not tell on the whereabouts of the other one Victor Kiptoo. On re-examination he told the Court that, he arrested both the Accused person herein and Victor Kiptoo but could only see the Accused person in Court.
11. PW8 was Hillary Laibich Ndiema who testified that he recalled on March 26, 2021 in the company of the deceased they went to work at a certain farm to plant crops. The farm belonged to their family and that the succession Court in Kitale had directed that the farm be allocated to the female children of the deceased. The female children leased the farm to one Harry Kimutai and that they had sent them to go supervise the planting process by the lessee. While at the farm using a tractor planter, the accused person emerged while in the company of others armed with stones. He was hit on the leg by the accused and he fell down. The deceased advised them to flee as the accused pelted the deceased with stones until he fell down. He told the Court that his assailant was one Victor Chebaimor and they hit the deceased on the head. On cross examination, he told the Court that he recorded a statement with the police which stated that Caren, his sister raised an alarm and they saw people start pelting stones at them and that it was the mob that attacked them. He further noted that it was his sister Judith Maigut who paid the hooligans to attack them and that the deceased had a separate land measuring 300 acres while the one where the incident occurred measured 89 acres. He told the Court that he was the first person to be hit by the accused person and that the accused's father is his brother.
12. PW9 was Leonard Amila Wanyonyi who testified that he recalled on March 26, 2021 while on his way to visit the area chief he saw tractors planting a farm nearby. He decided to approach them and engage them in some small talk before he went his way. As they conversed, some motorcycle riders arrived ferrying four women who quickly alighted and started screaming. After ten minutes, some young men, about ten in number, arrived at the farm carrying stones led by the accused herein. They started pelting stones at the persons who were at the farm prompting an exchange between those at the farm and the young men. He saw PW8 was hit and he fell down. He told the Court that the accused was the assailant who pursued the deceased whom they pelted with stones until he fell down. He did not leave the scene but could not manage to approach the deceased. He told the Court that the accused was well known to him as he was a neighbour. On cross examination, he told the Court that he was a neighbour to the accused and his family were wrangling in Court for three years over land. He recorded a statement with the police stating that he was at the scene of the crime but he could not recall all the faces of the mob. He told the Court that at the time of the incident the accused was not living in the area and that the accused, the deceased and PW8 are from one family. The four women who arrived with the motorcycles screaming were Chemisto Ndiema, Caren Chebokiy plus their two relatives. On re-examination, he told the Court that it was the accused who pelted the last stone on the deceased.
13. Pw10 was Dancun Ndiema who testified that he recalled on March 26, 2021 while on his way to look for some change for purposes of paying labourers who were with his father PW8, he came back to find him injured lying on the ground with several stones near him. He noticed PW8 had injuries on the head and leg, and he quickly arranged to rush him to the hospital. He also found the deceased lying on the other part of the farm. The accused, who is a cousin was not at the scene when he arrived. On cross examination, he told the Court that when he came back to the farm with the change to pay the



labourers, he found the incident had already occurred. He also stated that his father has the court order authorizing him to supervise the land on behalf of his sisters.

14. PW11 was No 78205 PC Martin Mutunga who testified that he was the investigations officer in this case. He recalled on March 26, 2021 he was alerted by his senior to go and investigate an incident of mob justice within Kabonywo area of Kaptama. They were not able to make it there thus directed the OCS Kaptama to attend to the scene on March 27, 2021. They revisited the scene where they established that the deceased was murdered by mob justice by villagers. Their investigations established that a piece of land in dispute had been leased out to PW1 for farming. The deceased and PW8 went to supervise the same and this angered some of the family members who attacked them. The deceased's body was taken to the mortuary and he immediately started recording the statement of PW8 who was still at the hospital. Two suspects were arrested by the OCS Kaptama but one was later released. On cross examination, he told the Court that he did not have evidence that the accused planned to kill the deceased and that his investigations established that more people were involved in the incident but fled the area. On re-examination, he told the Court that the existing land dispute played a key role in the occurrence of the incident.
15. Thereafter, Prosecution closed its case and parties opted to rely on the evidence on record.
16. It is trite law that prior to placing an accused on his/her defence, the Prosecution is required to have established a prima facie case against such accused. It is now a well-established law 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 evidence would convict the accused if no evidence or explanation was set up by the defence. See *Ramanlal T Bhatt v R* [1957] EA 332, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited Prosecution evidence.
17. Also, in the case of *State v Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul* HC A No S 104/1997, JP Moosali while quoting Lord Parker CJ in *Sanjit Chaittal v The State* (1985) 39 WLR 925 stated that:

“ A submission that there is no case to answer may properly be made and upheld:

  - (a) when there has been no evidence adduced by the Prosecution to prove an essential element in the alleged Offence;
  - b) when the evidence adduced by the Prosecution has been so discredited that no reasonable tribunal could safely convict on it...”
18. I have carefully evaluated the prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the Prosecution's evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause could be established. On the question of the accused's participation, this Court finds that, in the absence of any evidence to the contrary, the evidence of PW1, PW8 and PW9 does establish participation of the accused in pelting stones which injured Pw8 and fatally wounded the deceased with the evidence of PW8 establishing the accused was the one that threw the last stone that caused the death of the deceased. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, 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 person's participation therein. Indeed, the evidence of Pw8 placed the accused at the scene of the crime and thus in the absence of any evidence to the contrary from the defence or were the defence to elect to remain silent in defence, then the evidence adduced so far is



sufficient to sustain a conviction against the accused herein. I find that there is some evidence adduced against the accused which has established a prima facie case against and which is sufficient to require him to be put on his defence. It transpired that the accused was opposed to the manner in which the family land had been distributed and having visited the scene of crime where he had confronted the deceased and Pw8, he has to explain how the deceased ended up dead at the scene.

19. In the result, it is my finding that the prosecution has established a prima facie case against the accused to require him to make a defence. I find the accused has a case to answer and is now called upon to make his defence in line with the provisions of section 306(2) of the *Criminal Procedure Code*.

It is hereby ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023**

**D.K. KEMEI**

**JUDGE**

In the presence of:

Miss Mukangu for Prosecution

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Miss Wakoli for Accused

Kizito Court Assistant

