



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Inyanje (Criminal Case 27 of 2021)
[2023] KEHC 2761 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 27 OF 2021
WM MUSYOKA, J
MARCH 24, 2023
(FORMERLY KAKAMEGA HCCRC NO. 10 OF 2015)**

BETWEEN

REPUBLIC PROSECUTION

AND

NELSON INYANJE ACCUSED

RULING

1. Nelson Inyanje is charged with murder contrary to section 203 of the *Penal Code*, cap 63, Laws of Kenya, as read with section 204 of the *Penal Code*. The particulars of the offence allege that on 4th day of February 2015, at Muhudu trading centre, Muhudu Location, Hamisi Sub-County, within Vihiga County, he murdered Moses Mmbayia alias Musa Ambani Rasta, hereinafter referred to as the deceased. he pleaded not guilty to the charge, and a hearing ensued, where 3 witnesses testified, on November 13, 2015.
2. PW1, Selina Musimbi, was the mother of the deceased. She testified that the accused came to her house on February 4, 2015, at 10.00 PM, and knocked. He told her the deceased had knocked off his teeth. She asked the accused to find a motorcycle, so that she could pay the fare for him, the accused, to be ferried to hospital. He left. She was later telephoned by the Chief, who informed her that the deceased was at the point of death, and asked her to go to the police. She met the Chief at Stage Mawe, where she also found the accused, who told her that the death of the deceased was accidental. She found the body of the deceased at a mortuary at Kisumu. It had a depression on the forehead. She did not witness the accused beat the deceased.
3. PW2, Mark Arugani Emoli, was the husband of PW1 and the father of the deceased, gave similar testimony, as he alleged to have been home, when the accused came and made the report that he made to PW1. He added that he visited the deceased at hospital at Kisumu, on February 5, 2015, where he had been admitted. He described his condition as bad, and said that he died later that day. He noted



- an injury on his forehead. He said that it was the Chief who told him that the accused had assaulted the deceased.
4. PW3, Bonface Akosia Amara, testified to have been with the deceased and the accused on February 4, 2015, at a bar at Stage Mawe, at 10.00 PM. The accused was there with the Chief, who was also his brother. There was an issue about the Chief's phone, which was found in the pocket of the accused. The Chief slapped the accused twice. In the course of the evening, the deceased rose to go to the washrooms, whereupon PW3 followed him. At a corridor, the accused was lurking, holding a stick, and PW3 said that he saw the accused hit the deceased with it, at the back of his head, and fled.
 5. No other witness testified after November 13, 2015, and the prosecution closed its case on July 26, 2022. At the close of the prosecution case, none of the parties submitted on the matter of a no case to answer.
 6. At this stage, I am required, by law, to decide whether to put the accused on his defence or not. I should determine whether the Republic has made out a *prima facie* case to warrant putting him on his defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt v R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP & Bacon JA), to be what a reasonable court, properly directing its mind to the law and the evidence, would convict on, if no explanation was offered by the defence. See also [Republic v Silas Magongo Onzere alias Fredrick Namema](#) [2017] eKLR (Nyakundi, J).
 7. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
 8. From the material before me, there is prima facie proof that the deceased in fact died. 2, of the 3 witnesses who testified, were his parents, who stated that he died. The fact of his death is, therefore, not in dispute.
 9. The cause of death was not proved, as the pathologist did not testify, and a post-mortem report was not produced. There was evidence that he was hit with a stick, and it could be surmised that that could have led to his death. However, none of the witnesses described the nature of the injury, if at all, that was inflicted by the hit on the head with the stick. I cannot tell, therefore, whether the same could cause death, and I shall, accordingly, find that the cause of death was not established.
 10. On whether the accused caused the death, or had a role in the causation, there is evidence, by an eyewitness, that he hit the deceased with a stick, who fell, and had to be rushed to hospital. That witness, PW3, did not describe the nature of the injury caused, as all he said was that the deceased was hit at the back of the head, and fell. The other 2 witnesses talked of an injury at the forehead. It is not clear whether the hit by the stick was at the forehead or at the back of the head, or whether the forehead injury was as a result of the fall. Either way, it would appear that the hit caused the fall, and the accused had something to do with it. The challenge is that there is no evidence on the cause of death, and without the evidence on the cause of death, it cannot be concluded that the hit by the accused caused the death.
 11. The last consideration is on malice aforethought. Whether there was malice aforethought on the part of the accused would depend on the cause of death being certain, for criminal liability cannot attach on an accused person, where the cause of death is not determined, for the role of the accused in the causation is linked to the cause of death being determinate, and the question of malice aforethought depends on both. In the absence of evidence on the cause of death, I am unable to determine whether the accused had malice aforethought or not.



12. Consequently, I hereby find and hold that I do not have, before me, material upon which I can convict the accused, were he not to offer any explanation. I am not satisfied that a *prima facie* case exists, to warrant his being put on his defence. That being the case, I, accordingly, find the accused, Nelson Inyanje, not guilty, and acquit him, under section 306(1) of the *Criminal Procedure Code*, cap 175, Laws of Kenya, of the charge of the murder of Moses Mmbayia alias Musa Ambani Rasta, contrary to section 203, as read with section 204, of the *Penal Code*. He shall be set free, should he be still in remand custody, unless he is otherwise lawfully held.

ULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF March 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Wilunda, Advocate for the accused person.

