



**Republic v Waka & 4 others (Criminal Case 18 of 2014)
[2023] KEHC 18313 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 18 OF 2014
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER MUSITA WAKA 1ST ACCUSED

JULIUS OMONDE SHIHAYA 2ND ACCUSED

SAMWEL WAKA OBUCHERE 3RD ACCUSED

ANJELINE WAKA OBUCHERE 4TH ACCUSED

ROBAI ADHIAMBO OLUKU 5TH ACCUSED

RULING

1. 5 witnesses gave evidence in this matter. None of them testified to have witnessed the accused persons assaulting the deceased or doing something to him which could have caused his death. PW1, Milka Mmbone Eronde, was the wife of the deceased. She was informed of the death, while she was away in Kisumu. PW2, Javan Odinga Opuka, was a brother of the deceased, he was informed of the incident by the 1st accused, and when he went to the scene he saw the body, and assisted the police put the body in their vehicle. PW3, Gladys Achieng Asira, was called by the 1st accused, and informed that the deceased had attacked him, and in the process he was hit by those who were with him, and he was badly hurt. PW4, Wellington Otopi Opuka, was a brother of the deceased, and was informed of the incident by another brother, and went to the scene, and found the deceased dead. PW5, Daniel Ochieng Okelo, did not go to the scene where the deceased died. The last witness testified on January 17, 2017, and no other witness testified. The prosecution closed its case on February 22, 2023.
2. The defence has submitted that no case to answer has been established. *Republic vs. Abdi Ibrahim Owl* [2013] eKLR (Mutuku, J), was placed before me, to support that submission.



3. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
4. On whether the deceased died, I have the evidence of PW1, PW2, PW3, PW4 and PW5. They all confirmed that the deceased had died. Some of them saw the dead body of the deceased. The pathologist did not testify, and so I cannot tell what caused his death. The cause of death was not directly linked to the accused, for none of the witnesses saw the accused harm or assault or do anything that would have caused the death. The only thing that the prosecution has against the 1st accused person is the fact that the deceased died at his compound, or his body was found there. No evidence was led as to how he died. Whereas the other witnesses mention the 1st accused as having been the one calling them to alert them of what happened, none of the other accused persons were mentioned. As it is, there is no evidence at all against the 2nd to 5th accused persons, and the only reason the 1st accused is in court appears to be mere suspicion that since the deceased was found dead within his compound, he must have known something or other about his death.
5. As it is clear that there is no evidence against the 2nd to 5th accused persons, there is no material upon which I can hold that there is a case against them, to require me to put them on their defence. Regarding the 1st accused, the burden lies with the prosecution to establish beyond reasonable doubt that he caused the death of the deceased. There is no concrete evidence. The only circumstantial evidence is that he died at his compound, beyond that there is nothing. I am not persuaded that that would be adequate to convict the accused in the absence of any explanation from him. I equally, in the circumstances, also find and hold that no prima facie case was established against him to warrant his being put on his defence.
6. As no prima facie case has been established against the accused persons, I shall acquit them, under section 306(1) of the *Criminal Procedure Code*, cap 75, Laws of Kenya. They shall be set free from remand custody, if they are still in remand, unless otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
2ND DAY OF JUNE 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

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

Ms. Aligula, instructed by Akwala & Company, Advocates for the accused person.

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