



**Republic v Kaunda & another (Criminal Case E034 of 2022)
[2024] KEHC 14004 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E034 OF 2022
KW KIARIE, J
NOVEMBER 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SIMON KAUNDA 1ST ACCUSED

SAMUEL WEKESA 2ND ACCUSED

RULING

1. Simon Kaunda and Samuel Wekesa are charged with murder contrary to section 203, as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 21st day of December 2019, near Ong’ombe stadium at Nyandiwa, in Rachuonyo Suba Sub County within Homa Bay County, they murdered Nelson Mandela Nyawara.
3. There are undisputed facts in the case. The Beach Management arrested the deceased and Peter Ouma for fighting on the beach. It is alleged that the deceased, Nelson Mandela, was disarmed, and both were taken to the police station.
4. After investigations were conducted, Peter Ouma was released and was to be treated as a prosecution witness against the deceased, who remained in custody to be later charged. While in custody, the deceased tricked an officer that he wanted to go and answer a call of nature. He escaped, and he was pursued.
5. According to the evidence of CPL. Damianus Okong’o (PW5), PC Kaunda was injured by the deceased, and the latter managed to escape. He assisted PC Kaunda (accused one) to seek treatment. Later, when they went to check on some noise emanating from Ong’ombe stadium, a crowd that had gathered scattered and left a man who was injured on the ground. This was the deceased. They



assisted him to the hospital, where he succumbed to the injuries inflicted by the crowd. This version was supported by the evidence of Chief Inspector Alphonse Anaswa (PW6).

6. Wilson Obong'o (PW7), an investigator with IPOA, introduced the second version. He testified that it was the two accused persons who rearrested the deceased and took him into custody, from where he developed health complications and was taken to the hospital. He denied that members of the public had beaten the deceased. By implication, he was shifting the burden of proof to the accused. He said he relied on the evidence of Francis Okoth Okech (PW2), who described the police officers who beat the deceased.
7. In his evidence, Francis Okoth Okech (PW2) testified that he heard that the people assaulting the deceased were police officers. This was inadmissible hearsay. Though he testified that he witnessed the deceased being hit with the butt of a gun and being stepped on with boots while another officer was whipping him, he did not identify the culprits. Since he said they were not previously known to him, no identification parade was conducted.
8. Apparently, the accused persons were charged on suspicion. The Court of Appeal in the case of *Sawe vs Republic* [2003] KLR 354 held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
9. After considering the evidence on record, the question is whether the prosecution has established a prima facie case against accused persons. In the *Black's Law Dictionary*, 10th Edition, prima facie case is defined as follows:

Prima facie case. (1805) I. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.
10. The Court of Appeal in the case of *Ramanlal Trambaklal Bhatt vs R* [1957] E.A 332 at 334 and 335 defined prima facie case as follows:

It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
11. Article 50 (2) (i) of *the Constitution* of Kenya provides:
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (i) to remain silent, and not to testify during the proceedings;

In this case, if the accused persons choose to exercise their constitutional right, as mentioned earlier, I cannot convict any of them based on the current evidence. Therefore, the prosecution has not established a prima facie case against them. I hereby acquit each of them of the charge of murder under section 306(1) of the Criminal Procedure Code. Each is set at liberty unless he is lawfully held for another reason.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

