

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 63 OF 2013

REPUBLICDIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

ALFRED MWITSA.....ACCUSED

JUDGMENT

1. Alfred Mwitisa is charged with murder contrary to section 203, as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 18th day of December 2013 at Mukhonje 'B' Village, Mukhonje Sub-Location in Kakamega East District within Kakamega County, he, with others not before the court, murdered Eliakim Likoko, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 23rd December 2013.
2. The hearing of the prosecution's case commenced on 14th July 2015, three witnesses testified.
3. The first on the stand was Dr. Dickson Mchana, who testified as PW1. He was the one who had examined the body of the deceased and conducted the post-mortem on it. He testified that, externally, he noted a swelling on the back of the head. When he examined the body internally, he found a complex skull fracture from the back left to the front horizontally and to the base of the left skull. He identified the cause of death to be severe head injury secondary to blunt force trauma following assault. He produced a post-mortem report dated 19th December 2013.
4. Ezekia Kidiya Osiako, national identity card number 8785543, testified as PW2. He was the father of the deceased. He was at his usual place of work, as a night guard, on 18th December 2013, when he received a report that the deceased had died. He rushed to the scene and confirmed the fact. He witnessed the post-mortem examination on the body.
5. Samson Barasa Kidiya, national identity card number 29246719, testified as PW3. He was a brother of the deceased. He received a telephone call that evening from Samson Zweyo, who informed him that his brother, the deceased, was unconscious after he had been involved in a fight with the accused and another. He rushed to the scene, found the deceased there, injured, and as he was arranging for a vehicle to rush him to hospital, he died. They made reports to the police, the body was removed to the mortuary and he was among those who identified the body for post-mortem purposes.
6. No other witnesses testified thereafter. The matter came up for hearing next on 7th October 2015, when it was adjourned on account of lack of state witnesses. On 9th February 2016 the matter was adjourned again at the behest of the state for lack of witnesses. On 20th April 2016 the matter did not take off because the prosecuting counsel was away on a training. The state caused another adjournment on 13th March 2017, on which occasion the Judge marked the adjournment as the last on the part of the state. On 19th June 2018 the state again caused the matter to be adjourned as it did not have the police file nor the witnesses in court. For a second time the adjournment was marked as the last. The next hearing came on 1st April 2019, the police file was not in court and there were no witnesses, the matter was adjourned, and Officer Commanding the Kakamega Police Station was summoned. His deputy showed up in court on 10th July 2019, to say that the matter did not belong to their station. On 22nd October 2019, the matter was placed before me. The state again applied for adjournment for lack of witnesses, I declined and the state closed its case, necessitating that I make a determination as to whether the prosecution had made out a *prima facie* case to require the accused person to be put on his defence.
7. Mr. Ondieki for the accused made brief submissions. He urged that the state had not proved their case against the accused person to require that the accused be put on his defence. He stated none of the three witnesses who testified attributed the death of the deceased to the accused person. PW1, Dr Mchana, only dealt with cause of death, he did not mention the accused. PW2 and PW3 were not at the scene where the deceased met his death. They only went there after the event had happened. I was urged to find that no case had been established to require that the accused be put on his defence, and that I ought, in the circumstances, to acquit him under section 306 of the Criminal Procedure Code, Cap 75, Laws of Kenya.
8. What I am required in law to do at this stage is to decide whether to put the accused person on his defence or not. In other words, I am required to determine whether a *prima facie* case has been established against the accused to warrant putting him on his defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 as one in which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation was offered by the defence. See also *Director of Public Prosecutions vs. Geoffrey Mukonza Mwangangi* [2018] eKLR and *Frankline Muthoka Mumo vs. Republic* [2019] eKLR.
9. The elements of the offence of murder as defined 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.
10. From the material before me there is *prima facie* proof that the deceased in fact he died. That was confirmed by his father PW2 and his brother PW3, and PW1, the pathologist who did the post-mortem on his body after the same had been identified to him by PW2 and PW3.

The cause of death was said, by PW1, to have been head injury secondary to a blunt force trauma following assault. On who assaulted the deceased and caused the grave injury that led to his death, there was no evidence. PW2 and PW3 mentioned names of persons that they claimed assaulted the deceased. PW2 and PW3 were not themselves at the scene, and, therefore, they did not witness what happened. The names they mentioned were of persons who were mentioned to them by other persons, yet those others did not testify. On the role of the accused, therefore, in the possible causation of the deceased's death, there is no direct nor circumstantial evidence.

11. On malice aforethought, the deceased died at the scene not so long after the assault. The assault must have been violent enough to cause death within a very short time. It would mean that it was inflicted by a person who had an intent to cause death or very grave injury, or by a person who must have known that inflicting such grievous harm on a human being could lead to his death. Malice aforethought could be inferred in the circumstances. However, as no evidence was led as to who inflicted the injury, malice aforethought cannot be inferred on the accused person, as the witnesses who testified were not at the scene and could not give evidence on what inflicted those injuries on the deceased and how it happened.

12. The standard of proof in criminal cases is put at beyond reasonable doubt. The prosecution was required to establish beyond any shadow of a doubt in this case that the death of the deceased herein arose directly from an act or omission on the part of the accused. It would only be after that is established that the accused can be called upon to give an account or explanation. As the prosecution has not established any connection between the accused and the death of the deceased, I do not have before me material upon which I can convict him were he not to offer any explanation. I am not, therefore, satisfied that a *prima facie* has been established to warrant the accused being put on his defence.

13. That being the case, I hereby, accordingly, find the accused, Alfred Mwitsa, not guilty and acquit him under section 306(1) of the Criminal Procedure Code, of the charge of the murder of Eliakim Likoko, contrary to section 203, as read with section 204 of the Penal Code. He shall be set free unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE