



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL (MURDER) CASE NO. 42 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ANTHONY MULULI SHIKANGA .....ACCUSED**

**R U L I N G**

**Introduction**

1. The accused person herein was arraigned before this court on 06.07.2011 on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge as per the information dated 16.06.2011 are that on the 8<sup>th</sup> day of June, 2011 at Shingalole Village, Makhokho sub-location Ikuhu location Kakamega South District within Western Province he murdered MORIS OTUNGA KHAYEKA. He denied the charge.

**The Prosecution Case**

2. The prosecution called 4 witnesses. PW1 was Sophia Khayeche Shikoti who testified that on the material day, she saw the deceased and the accused herein together with their brother known as William who was trying to restrain the accused from beating the deceased, but that the accused hit the deceased using a fist and the deceased fell down on his back and that the accused then kicked the deceased in the stomach. The accused lost consciousness though he later regained consciousness and went to PW1's house after which his wives were summoned and took him away. One day later the deceased died.

3. PW2, Peter Aromana Kaayeka identified the body of the deceased to Dr. Dickson Mchana PW4 who carried out a post mortem examination on the body of the deceased on 15.06.2011 at the Mukumu Hospital Mortuary. Dr. Mchana testified of some defence injuries on both arms and forearms. He also testified that there had been some medical intervention in the form of a drip and operation on the stomach before the deceased died. Dr. Machana also testified of visible extensive contusions over the entire anterior abdominal wall plus left lateral chest, up to adjoining left axilla. Other injuries noted during the post mortem examination were extensive bilateral fibrous adhesion of the plaura, closed fracture of 4<sup>th</sup> and 5<sup>th</sup> left ribs with haematoma surrounding the fracture ends and left upper lobe with contusions on antero lateral aspect. There were also fibrous adhesions over the entire peritoneal cavity and surface of viscera. There were injuries of the large intestines and part of the small intestines had been removed. There was blood clot behind the liver and pus between the abdominal cavity. The spleen bled easily.

4. According to Dr. Mchana, the cause of the deceased's death was severe inflammation following

abdominal trauma due to assault.

5. Number 40584, Inspector Stephen King'ori testified as PW3. He is the one who filled post mortem form and also witnessed the post mortem examination by Dr. Mchana.

6. PW3 stated that after the autopsy, he visited the scene which was at the home of one SOPHIA AISHA (not called as a witness) from where he established that the accused and the deceased had been engaged in a fight on the evening of 08.06.2011. PW3 further testified that the accused person herein surrendered himself to the police on 12.06.2011 at the AP's station at Koitut in Nandi County. After recording witness statements, PW3 charged the accused with the offence of murder. The prosecution then closed its case.

### **Submissions on No Case to Answer**

7. At the close of the prosecution's case, the defence submitted that the prosecution has not proved a prima facie case against the accused person to warrant him being put on his defence. The gist of the submission is that the evidence by PW1 lacks corroboration by other eye witnesses. That the testimony by PW1 is not truthful and further that Dr. Mchana's evidence is not conclusive, is not credible and has no probative value. Counsel urged this Honourable Court to return a verdict of no case to answer under Section 306 of the Criminal Procedure Code.

8. Mr. S. Ng'etich, Counsel for the prosecution submitted that he relied on the evidence on record in response to the submissions made on behalf of the accused person that he has no case to answer.

### **Analysis and Determination**

9. I have now carefully analyzed the evidence on record and also considered the applicable principles as set out in the case of **Bhatt – vrs – R[1957]EA.336**. It is imperative to note that at this stage, the prosecution is not expected to prove the case against the accused person beyond any reasonable doubt, nor is the Court expected to confirm whether the evidence is weighty enough to result in a conviction. All that this court must satisfy itself of and I hereby do is that the evidence on record is such that if the accused person says nothing in response to it, then this court properly addressing its mind to the evidence could convict if there is no response from the accused person.

10. Applying the above principles to the evidence on record, I am satisfied that the prosecution has established a prima facie case against the accused person to warrant him being put on his defence. The accused is accordingly put on his defence. The law gives the accused person the liberty to give evidence on oath or to give an unsworn statement and to call witnesses as provided under Section 306(2) of the Criminal Procedure Code. If the accused person does not wish to give evidence on his behalf, he has the right to say so and leave the court to decide the case on the evidence that is before it.

11. It is now the accused person's duty, either by himself or through his advocate, to inform the court which of the three options he intends to take and whether he has any witnesses to call.

It is so ordered

Ruling delivered, dated and signed in open court this **16<sup>th</sup> day of January, 2017.**

**RUTH N. SITATI**

**JUDGE**

In the presence of:-

Mr. Oroni.....for the State

Mr. Munishi for Mr. Ondieki.....for Accused

Mr. Polycap..... Court Assistant