



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**HIGH COURT CRIMINAL CASE NO. 25 OF 2013**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**MUSA MOLENJE.....ACCUSED**  
**RULING**

**Introduction**

1. He accused person herein, Musa Molenje made his first appearance before the Deputy Registrar of this Honorable Court on 09.05.2013 when his case was fixed for plea on 04.06.2013. Unfortunately, the Court was not sitting on 04.06.2013 so the plea was deferred to 04.07.2013, but again the Court was not sitting on 04.07.2013 and the plea was again deferred to 15.07.2013.

2. On 15.07.2013, the accused person appeared before Honourable Mr. Justice Said Chitembwe to answer a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 5<sup>th</sup> day of May, 2013, at Tombo Village, Tombo Sub-Location in Kakamega North District within Kakamega County, he murdered LUKA LUTOMIA MASITSA. He denied the charge and the case was fixed for mention on 31.07.2013 for bond application.

3. When the case came up for mention on 31/07/2013, the state opposed the bond application but at the conclusion of hearing of the application the Court ordered the accused to be released on bond of Kshs. Two million with two sureties of a similar amount. The case was thereafter fixed for hearing on 14.11.2013. The case proceeded to hearing on 14.11.2013 when Rose Wayeko Musa testified as PW1.

**The Prosecution Case**

4. From the testimony of PW1, the prosecution case is that on the fateful day, after the accused and PW1 had taken their supper with their children, the accused left home to attend a funeral at a neighbour's home. Then the deceased, Luka Lutomia Masitsa came to the accused's home and together with PW1 they went into PW1's kitchen where they remained until the accused returned home later that night and found the two in the kitchen. On seeing PW1 and the deceased together, the accused screamed. PW1 ran away as the accused and the deceased struggled with each other. According to PW1, people from the burial ceremony where the accused had been came to the accused's home and killed the deceased. PW1 stated that from her hide-out after escaping from the kitchen, she could hear Luka Saying "Mnaniua"- "You are killing me." It was only later that PW1 learnt the deceased had died. She never returned to the matrimonial home.

5. During cross examination, PW1 told the court that the accused person herein was unaware of her relationship with the deceased and that when the accused returned home and found PW1 and the deceased together he was shocked. She also stated that the deceased died at the scene.

### **Adjournments**

6. Upon completion of the evidence by PW1, the prosecution applied for adjournment which was granted and the case fixed for hearing on 25.05.2014. On that hearing date, the prosecution informed the court that there were no witnesses as all the potential witnesses had moved away from their original place of abode. The case was adjourned to 29.10.2014. The case did not proceed on the said date nor did it proceed on 23.02.2015, 03.06.2015, 01.12.2015 and 21.09.2016 inspite of orders to the OCS Kabras Police Station to appear in Court and explain why witnesses could not be availed. On the 21.09.2016, the case was fixed for hearing on 28.09.2016 but once again, the prosecution had no witnesses and applied for adjournment which was declined on grounds that if the prosecution had failed to avail witness for three years in a row, any further adjournments would serve no useful purpose. The prosecution had to close its case, hence this ruling.

### **Analysis and Determination**

7. The issue that arises for determination now is whether the prosecution has established a prima facie case requiring the accused person to be put on his defence. In other words is the evidence on record such that on full consideration by this court the evidence might be thought sufficient to sustain a conviction. At this stage, the court is not required to apply its mind in finally deciding whether the evidence is weak or strong or whether it can be believed or is weighty enough to prove the case beyond reasonable doubt. See **Bhatt – Vrs –R [1957] EA 332.**

8. After applying my mind to the only evidence on record, namely the evidence given by PW1, I have reached the conclusion that the prosecution has not established a prima facie case requiring the accused person to be put on his defence. Even if I were to apply the weakest of standards, the testimony given by PW1 does not meet the threshold of establishing a prima facie case.

9. In the circumstances of this case, I have reached the conclusion that the only logical thing to do is to make a finding that the accused person herein Musa Molenje is not guilty of the murder of Luka Lutomia Masitsa. He is accordingly acquitted of the same under the provisions of Section 306(1) of the Criminal Procedure Code. Unless he is otherwise lawfully held, the accused person shall be released from prison custody forthwith.

Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 6<sup>th</sup> day of October, 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of;

.....Mr. Jamsumbah (present).....for State

.....Mr. Kundu for Mrs Muleshe (present).....for Accused

.....Mr. Okoiti.....Court Assistant