



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 49 OF 2011

REPUBLIC PROSECUTOR

V E R S U S

BENSON MACHISU SHELLY ACCUSED

R U L I N G

1. The accused person herein, Benson Machisu Shelly was arraigned before court on one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars being that on the 22nd day of July 2011 at Lirembe village Iguhu Location in Kakamega South District within Western Province, he murdered Gilbert Ashiono Hudson. The accused pleaded not guilty on 20/09/2011, and the case has been ongoing since then.
2. The prosecution called 4 witnesses, among them **Dr. Dickson Mchana** who testified as **PW4**. Dr. Mchana testified on behalf of Dr. Kinuthia Ngugi who carried out the autopsy on the body of the deceased. The doctor's findings were that the deceased's body bore 2 cuts measuring 1 ½ cm each on the nose and on the left eye, with the left eye appearing red. He also testified that internally there was extensive bleeding below the covering of the brain, but more towards the left forehead. Further that the brain was swollen meaning that, the deceased did not suffer instant death.
3. **PW1, Peter Wakhwa Maviuala** alleged that after the accused killed the deceased, he told him (PW1) that he (accused) had finished Ashiono. The matter was reported to the Assistant Chief and PW1 later recorded his statement with the police.
4. **PW3, Number 233427 Chief Inspector Philemon Otieno** testified that upon receipt of a report that the deceased had been attacked by thugs, he went to the scene in company of other officers and carried out investigations during which he established that there had been no attack by thugs. PW3 also testified that the accused herein subsequently surrendered to the police. The body of the deceased was later taken to Kakamega Provincial General Hospital for preservation and postmortem.
5. At the close of the prosecution case, Miss Wilunda, counsel for the accused did not make any submissions on whether or not the prosecution had established a prima facie case to warrant putting the accused person on his defence.
6. I have now carefully considered all the evidence on record. I have also carefully considered the law on what constitutes a prima facie case. I note that at this stage in the proceedings the prosecution is not obliged to prove its case beyond any reasonable doubt. The prosecution only needs to demonstrate to the court that the evidence put forth is such that if the accused said nothing the court could convict. In this regard the court will not accept worthless evidence, but only such evidence as tends to point to the accused as the person who most likely, committed the offence.

7. In my considered view, I am satisfied that the accused person in this case has a case to answer and I proceed to put him on his defence in accordance with the provisions of section 306 (2) of the Criminal Procedure Code.
8. In defending himself the accused person may give either sworn or unsworn statement. If he elects to give sworn evidence, he will be cross-examined by the prosecution. The accused has the third option of remaining silent and letting the court decide the case on the strength of the evidence that is before it.
9. It is now up to the accused to indicate to the court which of the three options he intends to take in defending himself.
10. Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 9th day of April 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Ngetich (present) - For State

Miss Wilunda (present) - For Accused

Mr. Juma - Court Assistant