



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Swaleh (Election Offence E001 of 2022)
[2022] KEMC 19 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEMC 19 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
ELECTION OFFENCE E001 OF 2022
JM OMIDO, SPM
DECEMBER 6, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

TWALIB SWALEH ACCUSED

JUDGMENT

A. The Charges

1. Twalib Swaleh, (hereinafter referred to as “the accused person” or “the accused”) is charged with the offence of Defacing of Campaign Materials contrary to Section 13(L) of the *Election Offences Act* No 37 of 2016.
2. It is stated in the particulars of the offence that on the 3rd day of June, 2022 at about 2230hrs at Kinango “B” village within Kinango Sub-County of Kwale County, the accused person defaced campaign posters belonging to one Mtili Said Kajambo a (prospecting) member of County Assembly for Kinango Ward in the upcoming (sic) August 9th General Elections, 2022
3. The accused person denied the charge levelled against him, which then called for a trial.

B. The prosecution case

4. The Prosecution called two (2) witnesses - Said Mtili Rajambo (the Complainant or PW1) and Inspector of Police Abdirahman Omar (the Investigating Officer or PW2).
5. PW1 testified and told the court that he was a resident of Kinango area and a businessman by profession. He explained further that prior to the August 9th, 2022 General Elections, he had expressed his intention to contest the Kinango Ward Member of County Assembly elective position and had subsequently prepared to be cleared by the Independent Electoral and Boundaries Commission (IEBC), the independent regulatory agency that manages general elections in Kenya.



6. It was PW1's testimony that on and/or before to June 4, 2022, he posted electoral campaign material, particularly campaign posters at various strategic places within Kinango Ward. He was to submit his documents to the IEBC for clearance to contest for the position on June 4, 2022.
7. On the morning of June 4, 2022 at about 0600hrs, he received a phone call from one Mwau who informed him that the posters that he had posted within Kinango town had been defaced and that black used motor oil had been smeared or applied on them to the point that the contents could not be seen or read. The complainant went out to see for himself the damage on the posters and confirmed that the same had indeed been damaged as per the information that Mwau had given him. He went around Kinango town and the position was the same in several areas where his posters had been placed.
8. PW1 told the court further that he embarked on looking for Mwau so that he could get more details on what had transpired. On meeting him within Kinango town, Mwau advised the complainant to report the matter to the police, which he did, after presenting his documents to the IEBC and being issued with the relevant certificate clearing him to contest the election. He also made a report to the IEBC.
9. The complainant's further evidence was that he went around with a police officer and the latter collected samples of the damaged campaign posters with the intention of using the same for investigations.
10. It was the further testimony of PW1 that a number of his supporters informed him that they knew the persons who had destroyed his campaign posters. Three of the supporters offered to be witnesses and recorded their respective statements with the police, naming the accused person herein as one of those that had applied used motor oil or black spray on the posters. The complainant explained that the accused person had been engaged as a driver by one of his opponents.
11. In his further evidence, PW1 told the court that a month passed by and no action was taken by the police against the accused person and others who had been named as the culprits. That prompted him to make a report in writing to the Office of the Director of Public Prosecutions, Kwale County subsequent to which the accused person and another were arrested and arraigned.
12. The witness identified in court three posters that the court noted had a black substance smeared or sprayed on them, making their contents illegible and/or unclear.
13. Upon being cross examined by the accused person, the witness told the court that the former went into hiding when he learnt that a report had been made to the police and that it took some considerable time to trace and arrest the accused person.
14. Inspector of Police Abdirahman Omar, the Deputy Officer Commanding Kinango Police Station narrated the events of June 4, 2022 and told the court that on that day the complainant made a report to his station that he had learnt from his supporters that his campaign posters that had been posted within Kinango Ward, Kwale County had been destroyed. While in the company of other police officers, PW2 was led by the complainant to the areas where the posters had been damaged. He explained that the posters had been sprayed with a black substance, totally concealing the message they were intended to convey. The officer took three such posters which he produced as exhibits Pex 1a, b and c.
15. PW2's testimony was further that he recorded statements of three witnesses – Rumba Ali Rumba, Omar Kassim and Rajab Amin – and stated that two of the witnesses stated that the accused person herein was one of those who had damaged the posters by spraying them with a black substance. The officer then embarked on looking for the accused person, who immediately went into hiding. The accused person was eventually arrested and charged.



16. The prosecution closed its case after the Investigating Officer made it clear that he was unable to procure the attendance of other witnesses.

C. Issues for determination

17. I have considered the evidence of the two (2) Prosecution witnesses and the exhibits produced herein. The issues for the court to determine are as follows:
- i. Whether the prosecution has made out a prima facie case to warrant the accused person to be placed on his defence?
 - ii. What orders commend the trial at this stage?

D. Analysis and findings

18. With regard to the first issue for determination, a prima facie case was defined in the case of *Ramanlal Trambaklal Bhatt v Republic* [1957] EA 332 as one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no evidence in rebuttal was to be offered by the defence.
19. In the instant case, it would appear, as per the testimony of the two Prosecution witnesses, that the accused person was charged on the strength or basis of the statements that were recorded by witnesses alleging that they saw or knew the accused person as among the people who sprayed the complainant's posters with a black substance, damaging them. PW2 named those witnesses as Rumba Ali Rumba, Omar Kassim And Rajab Amin. Other than that, no other evidence was provided to support the allegation that the accused person was among the people who destroyed the complainant's posters.
20. It is however instructive from the record that the three witnesses named above were not presented by the Prosecution to testify on their allegations against the accused person and have their respective testimonies tested on cross examination. That then means that the claims by PW1 and PW2 that the three witnesses made the allegations against the accused person is mere hearsay. How is hearsay evidence to be treated?
21. In the case of *Kinyatti v Republic* [1984] eKLR it was held:-
- “Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying. It is not original evidence and is inadmissible.”
22. In *Subramaniam v Public Prosecutor* [1956] WLR 965 Justice De Silva had this to say on hearsay evidence:
- “A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible.”
23. From the evidence adduced by the prosecution it is clear that there was no direct independent witness testified as having seen the accused person defacing the complainant's campaign posters. The prosecution presented hearsay evidence. The courts have set the stand of examining such evidence. In the case *Republic v Kipkering arap Koske & another* 16 EACA 135 it was held:-
- “In order to justify the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt.”



24. The jurisprudence that emerges from the authorities above is that hearsay evidence is generally inadmissible. So then, it applies that what is said to have been recorded by the three witnesses in their statements made at Kinango Police Station, particularly that the accused person was one of the persons who defaced the complainant's posters is inadmissible.
25. There is more to say about the evidence of the three witnesses who were not called to testify. It was held in the case of *Bukenya and Others v Uganda* 1972 EA 549 regarding the failure to call crucial Prosecution witnesses, thus:
- “The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”
26. In the case of *Colombus Dindi Okoth v Republic* [2008] eKLR, the Court of Appeal stated as follows:
- “An adverse inference is normally drawn where the evidence tendered to prove an essential fact in a case is insufficient or barely sufficient.”
27. Having considered that the prosecution failed to make available all witnesses necessary to establish the truth or otherwise of the statements that they are said to have recorded, the evidence adduced was barely adequate to establish the truth in this case.
28. Consequently I find it justifiable to make an adverse inference, as guided by the cases of *Bukenya* (supra) and *Colombus Dindi Okoth* (supra) that the evidence of the uncalled witnesses, who were no doubt crucial to the Prosecution case, would have tended to be adverse to the prosecution and that perhaps was the reason as to why the witnesses were not called.
29. My discussion above on the evidence of the two Prosecution witnesses leaves no doubt in my mind that the test in Ramanlal Trambaklal Bhatt on what should explicate a prima facie case has not been met. If the accused person was to be placed on his defence on the charge that he is faced with, there would be no basis upon which he can be convicted if he was to offer nothing in his defence.
30. In the result, I find that the Prosecution has failed to establish a *prima facie* case against the accused person that would warrant him to be placed on his defence. Ultimately, I determine the second issue that the accused person is hereby acquitted under Section 210 of the *Criminal Procedure Code*. He shall be set at liberty forthwith unless otherwise lawfully detained.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

OMIDO, J.M.

SENIOR PRINCIPAL MAGISTRATE

Accused: Present in Person.

Prosecution Counsel: Ms. Mwaura.

Court Assistant: Mr. Kessy.

