

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO. E009 OF 2021

REPUBLIC.....ODPP

VERSUS

**JOHN MBURU MWANGI.....1ST
ACCUSED**

**AMOS NDUNG’U NG’ANG’A.....2ND
ACCUSED**

RULING

- 1. John Mburu Mwangi and Amos Ndung’u Ng’ang’a, the 1st and 2nd Accused respectively, were arraigned following information presented by the ODPP that they committed **Murder contrary to Section 203 as read with Section 204 of the Penal Code.****
- 2.** It was alleged that at some unknown time, on the night of 21st and 22nd February, 2021, they murdered Samuel Kinyanjui (Deceased). The incident was stated to have occurred at Kongoni Village of Kinamba Location, Laikipia.
- 3.** To prove the case the prosecution called eleven (11) witnesses. **PW1 Frank Gitonga** was out in the field harvesting maize with the deceased. On their return journey the lorry they were using as means of transport developed

mechanical problems at about 9.30pm. The deceased decided to go find some alcohol at a nearby chang'aa den.

4. PW2 Julius Mwangi Mwaura who was well known to them was passing nearby when he found them in a quagmire. The deceased requested him for a lift on his motorcycle to where he could buy alcohol. He agreed and purportedly left him at the alcoholic drinking place. PW1 communicated with the deceased who agreed to take some alcohol to him/them. However, he did not turn up. The following day they went on a search for him. When his body was located he had sustained stab wound injuries on the chest while he had some other injuries on the face.

5. PW3 Veronicah Wambui the wife of the deceased had communicated with him while he was at the place that the lorry got stuck. She viewed her husband's body during postmortem.

6. PW4 Lydia Waithira a village elder received a call from a Mama Githaiga who notified her of a body that had been seen within the village. She informed the area Assistant Chief, PW7 Paul Mureithi who reported the matter at Ng'arua Police Station. They visited the scene and confirmed the presence of the body that turned out to be for the deceased.

7. The team led by **No. 238135 Inspector Bernard Abala** found the body of an African male adult lying upside down on the ground and half naked. He called the scene of crime

personnel led by the late No. 78498 PC Joseph Kipsamo. The scene was photographed.

8. PW11 No. 235562 CI Philip Ochieng took over investigations and established that the deceased went to the homestead of Malakwen a chang'aa brewer as well as a seller where he bought chang'aa for himself as well as for PW2 who excused himself and went to Malakwen's father's home known as 'Rudi Rudi' where he drunk some alcohol.

9. PW1 called him requesting for some alcohol and the deceased having found a container to carry the illicit brew left the homestead at about 2300hrs. Soon thereafter his pone was switched off. The following morning, they embarked upon a search for the deceased. The matter was escalated to the are Chief and the body was ultimately found.

10. The body was found in a piece of land vegetation, the area looked undisturbed. The body had injuries. It was found some approximately 100 meters from where the chang'aa den was. Investigations conducted revealed that the deceased had been paid for the work he had done and that on the material date the deceased was using PW1's cell phone. Further investigations culminated into the recovery of a cell phone which was found in possession of Sunday Wachira who was arrested and placed in custody.

11. PW6 Sunday Wachira Mureithi, 21 years old, testified to have purchased a cell phone from the 1st Accused,

John Mburu. That he was arrested later by the DCI. That at the time of buying it he was in company of Peter Wanjohi and Stanley Muturi in December, 2020. On cross examination he denied having any sale agreement. He said that he bought a cell phone without a box but the one in court had a box and was from a shop hence it could not have been the one that he bought. And, that the police also took away his cell phone which had a sim card and memory card.

12. PW9 Peter Wanjohi Mathenge stated that he was with PW6 when he purchased a cell phone, Techno black in colour from Mburu, the 1st Accused. That the cell phone was small black in colour similar to the one in court (Exhibit 2). On cross examination he said that Sunday said he wanted a cell phone to buy but he did not specify the type but later on he saw him with a cell phone, but he was not present when took possession of the phone but his brother told him that he had purchased it from Mburu. Admitting that the phone in court was similar to other phones he said that he did not see Mburu selling the phone to Wachira.

13. The information presenting the argument that the deceased's death resulted from an unlawful cause was presented by the prosecution who therefore bore the duty to present sufficient evidence that would require the accused persons to render an explanation as to what transpired. The evidence should be one that would justify a conviction even if not rebutted.

14. In **Antony Njue Njeru v Republic [2006] KECA 339 (KLR)** the Court of Appeal stated that;

“It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”.

The issue of what is a prima facie case in criminal trials was clearly explained in RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332 at p. 334-335 where it was said:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

“Which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

- 15.** It is the obligation of the prosecution to establish a prima facie case against an accused in order for him to be called upon to defend himself. An Accused person has no duty of proving his innocence.

16. Section 203 of the Criminal Procedure Code provides thus;

If at the time appointed for the hearing of the case both the complainant and the accused person appear before the court which is to hear and determine the charge, or if the complainant appears and the personal attendance of the accused person has been dispensed with under section 99, the court shall proceed to hear the case.

17. The prosecution was therefore duty bound to prove that;

- ***Death occurred.***
- ***The killing was unlawful and of malice aforethought.***
- ***It was caused by the Accused.***

18. Witness who found the body of the deceased were in concurrence that it was lifeless on being found. The body was moved to Nyahururu County Hospital where a postmortem was conducted by PW5 Dr. Miring'u who concluded that the cause of death was subdural haematoma following severe blunt force trauma/head injury. This was evidence of the fact of death.

19. The deceased was going about his business when his life was shortened. The act that caused his death could not have been justified as it was contrary to the law. Injuries

sustained were multiple bruises on the forehead and temporal regions. There was subdural haematoma secondary to severe blunt force trauma/head injury. The person who committed the unlawful act definitely intended to cause at least grievous harm. This was proof of malice aforethought. (See **Section 206 of the Penal Code**).

20. As to whether the Accused persons were the perpetrators of the act. The only thing that the prosecution purported to rely on as a link to the murder was circumstantial evidence since there was no direct evidence as to who committed the act in question.

21. In **Republic v Kipkering Arap Kuske & Another (1949)** **EACA 135** it was held that;

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

22. In *Musili Tulo v Republic [2014] KECA 412 (KLR)* it was held that;

“In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480, thus:

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

23. In the instant case it was alleged by PW6 that he bought a cell phone from the 1st Accused. This explanation was rendered upon his arrest. He was the initial suspect. PW1 alleged that he had given his black Techno cell phone to the deceased. He could not recall its serial number. He stated that he could recognize a receipt bearing his name but it was for a phone make Techno model Imei 3565371176999710 dated 1st August, 2020.

24. PW6 said he could identify the phone that he bought by colour - black. He however denied that it could have been the phone in court for it did not have a box. The sale was

allegedly witnessed by PW9 who denied having been present when PW6 bought the cell phone but he was told by PW6's brother who was not called as a witness to state that PW6 had purchased the cell phone from the 1st Accused.

25. PW6 was a suspect. He stated that the police took away his phone and a sim card. This fact remained unexplained. Evidence as to whether the Techno phone availed in court is that one that the deceased had is wanting. Further, evidence that Sunday bought a phone from the 1st Accused remains unsupported hence evidence adduced failed to prove beyond doubt if it was the cell phone presented in evidence.

26. In **Hanumant v The State of Madhya Pradesh (1952)** **AIR 343** the Supreme Court of India had this to say;

"It is well to remember that in cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should be of a conclusive nature and pendency and they should be such as exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion

consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused.”

27. The police arrested the Accused having believed PW6. But, they did not go further to carry out investigations that would unravel the mystery of the cell phone being in possession of PW6 without cogent evidence of the same having been sold by the 1st Accused. Evidence adduced would not justify a conviction if the Accused were to be placed on their defence and opt to remain silent.

28. From the foregoing, at the close of the prosecution’s case evidence adduced is insufficient for purposes of placing the Accused on their defence. In the result they are not guilty and accordingly acquitted pursuant to the provisions of **Section 306(1) of the Criminal Procedure Code.**

29. It is so ordered.

Dated, signed and delivered virtually this 2nd day of February, 2026.

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L.N. MUTENDE

JUDGE