



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL CASE NO. E055 OF 2021**

REPUBLIC.....PROSECUTION  
VERSUS  
BRIAN OTIENO  
OCHIENG.....ACCUSED

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **204** of the **Penal Code**. The particulars of the offence are that on the 7<sup>th</sup> day of June, 2021 at Jela Kubwa area in Rhonda Estate within Nakuru County jointly with another not before Court murdered **David Ndebwa**.
2. The accused was arraigned on the 14<sup>th</sup> of December, 2021 to the charge to which he pleaded “*Sio Ukweli*” (It is not true). The matter then proceeded for hearing with the Prosecution availing eight (8) witnesses in support of its case.
3. On the 24<sup>th</sup> March 2025 this court found a “prima facie” case had been established warranting the accused person being placed on his defense and which he elected to offer sworn testimony without calling any witnesses.

4. Upon close of the defense case this court allowed both the accused and the prosecutions to file written submissions in fortification of their respective cases.
5. Notwithstanding the leave so granted for the parties to file written submissions, both the prosecutions and the defense failed to comply, the Prosecution did not file any written submissions while the defense irregularly filed its written submissions physically and the same are on file(physically) while absent in the Case Tracking System (CTS). This court has in the interests of justice considered the accused persons submissions as physically filed.

#### **The Prosecution's Case**

6. The prosecutions called eight witnesses, PW1 was the pathologist who testified of the post mortem examination and his report produced as exhibit 1, PW2 was the Aunty to the deceased whose testimony revolved on the identification of the body, PW3 was an eye witness who was unable to identify the accused stating he could only do so is the accused had dreadlocks.
7. PW4 was an eye witness that was unable to identify the accused in a dock identification, she firmly maintained that the accused was not the "brayo" she was familiar with.
8. PW5 was a family member that identified the body as the post mortem was conducted, PW6 was an arresting officer whose

testimony revolved on the circumstances of arrest and that a member of the public mentioned that the suspect he arrested was a fugitive suspected of committing murder. PW7 was an eye witness who purported to identify the accused in a dock identification, he however could not recall if the Assailant had dreadlocks, that he never knew the assailant before and that on the material day he heard him being referred to as Brian

9. PW7 was the investigating officer whose testimony related to the investigations conducted and that the accused was arrested after being on the run for over 5months. In his evidence the witness indicated that the 1<sup>st</sup> information report was made by John, Mike Indasi an uncle to the deceased, that this nephew was attacked by men on a motorcycle and that PW4 had recorded a statement indicating she knew the accused. And that PW4 and PW7 could identify the Assailant at the point they recorded their statements

### **Analysis and Determination**

10. It is trite law that under Section 203 of the Penal Code, the following elements of murder must be established by the prosecution as a constitution organ under Article 157 with the mandate to initiate any criminal charge against an accused person. Thus:
  - a) The death of the deceased.
  - b) That his death was through unlawful acts or omission of the accused.
  - c) That the accused had malice aforethought.

11. The standard of proof required to guide me to make a just decision is well set out in **Miller vs. Minister of Pensions [1947] 2 All E.R. 372** at page 373 to page 374, Lord Denning stated quite succinctly that;

*"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice."*

12. In this instance this court is afraid that the prosecution's case falls below the standard of proof on identification of the accused and that the failure to conduct an identification parade was fatal and the inconsistency and contradictions on identification cast a doubt as to whether the accused was identified on the 7th day of June, 2021 at Jela Kubwa area.
13. Of importance is PW1 Dr T. Ngulungu's evidence and the post-mortem examination report produced as exhibit No. 1 which reveal that on the 16<sup>th</sup> June 2021 the pathologist was provided with the

circumstances of the deceased death as having been assaulted by *unknown people* at mazembe grounds within Rhonda area and he succumbed while undergoing treatment at the Nakuru PGH.

14. Of significance is that the Assailants were unknown, the location of the incident varies from the information against the accused.
15. The question that begs is? if at all the accused was recognized at the scene by PW3, P4 and PW7.
16. It was PW4 testimony that on the fateful day at around 11am she went out of her house in kaptembwa kwa plot and found a fracas ongoing between the “kazi kwa vijana mtaani ” group and “vijana wengine” that she knew some of them “brayo and chris” and that she was familiar with brayo for the previous one year. She could not identify the accused as the “brayo” she knew, that the brayo she knew had dreadlocks and that she could identify him in court even if he never had dreadlocks.
17. PW7 Oliver Aliganya was involved in the fracas that led to the demise of the deceased, he never knew the accused previously but identified him on the dock as the Brian he heard being referred to by the crowd. The witness could not recall if the accused he identified on the dock had dreadlocks on the fateful day.
18. In **Peter Musau Mwanzia v Republic [2008] eKLR**, the Court of Appeal stated as follows: -

*“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”*

19. In this matter the critical eye witnesses were PW4, PW7, the deceased, one Purity that was never called and many more according to the testimony of PW7.
20. Of the eye witnesses that testified PW3 asserted that the assailant had dreadlocks and that he could only identify the assailant if he had dreadlocks, PW4 did not positively identify the accused but firmly asserted that the Assailant “brayo” had Dreadlocks and that she could identify him as she had recognized him for the previous one year, while PW7 attempted the dock identification on the basis of hearing the name being referred to by the crowd, while indicating he was unaware if the accused had dreadlocks.

21. In **Wamunga v Republic, [1989] KLR 424-Criminal Appeal No 20 of 1989**, this court held that: -

*“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.*

22. In this case the 1st information report to the police was to the effect that the Assailants were unknown and no evidence of description of assailants was provided. The prosecutions case fails to positively identify the accused and as such the two other elements in proof becomes of academic significance.
23. It is thus apparent that the prosecutions case falls short of the standard of proof, the failure to subject the accused to an identification parade would fatally affect the entire case where the alleged assailant is reported as unknown and that no dock identification may cure such fatality.

24. It is the finding of this court that the prosecution has failed to prove beyond reasonable doubt that the accused through unlawful acts or omission caused the death of the deceased.
25. The benefits of doubt are always in favour of the accused and in this instance this court finds that the prosecution's case remains unproven to the required standard and as such the accused is found not guilty to the offence preferred.
26. The accused shall forthwith be released from prison custody unless he is otherwise being held for another unrelated offence(s).

It is so Ordered

**Dated, signed and delivered at Nakuru**

**On this 16<sup>th</sup> day of February, 2026**

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**Mohochi S.M.**

**JUDGE**