

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL DIVISION
CRIMINAL CASE NUMBER E020 OF 2022

REPUBLIC

.....**PROSECUTOR**

VERSUS

OTOMA MURUNKA KITAMISHE

.....**ACCUSED**

RULING ON A CASE TO ANSWER

1. The accused person herein is facing a Murder charge contrary to section 203 as read with section 204 of the penal code. The particulars are that on 22nd day of September 2022 at around 1800hrs at Olepelellngo shopping centre in Ilmunkush location in Mashuru sub- Subcounty within Kajiado county, Jointly with others not before the court, Murdered **MORRIS MUOKI MUTUNGA**.
2. The accused denied the charge when arraigned in court on 10th November 2022 hence the trial which commenced on 19th February 2025.
3. The prosecution called Ten (10) witnesses whose testimonies are set out herein below albeit in brief.
4. PW1 Joseph Mutuku aged 16 years testified and told the court that the deceased was his elder brother. That on 22nd September 2022, he had gone to buy some potatoes in the shopping centre and saw his brother with Leonard together with Sam. The two requested the deceased to do some repair work on their father's (accused) Motor cycle. The two took the deceased inside the plot and held him firmly like a thief and took him to the accused shop. He followed them to the accused shop and pretended like he was buying something from the accused shop. He found his brother lying on the floor of the shop hands tied behind his back as well as the legs. Inside the shop were Caroline, the accused wife, Leonard, John Mutoi and Sam. The witness

confirm that the accused was not in the shop. Caroline, the accused wife ordered him to leave the shop. Leonard followed and slapped him. He went home and reported to his elder brother one Stephen and told him that the deceased had been held at the accused shop.

5. They went back to the accused shop to inquire the reason for the deceased detention, but the accused is said came out with a sworn and threatened to harm them if they do not leave. He could hear the deceased crying and screaming that he was being attacked. He called his other brother Richard and asked that he informs the police about the incident but was not successful because the incident had occurred in Kajiado and his brother was in Makeni a different Jurisdiction. Richard later arrived and went to the accused shop and managed to get the deceased who according to the witness was burnt all over the body. The witness mother and Richard took the deceased to the Hospital at Machakos and later referred to Kenyatta National Hospital where he passed on.
6. In cross examination by counsel, the witness confirmed that the accused at the time was not at the shop. there were only four people, Caroline, Leonard, Sam and John. That he saw the deceased being beaten by John Muloi and Peter Kumari.
7. **PW2 Agatha Wayua Mutunga** the deceased Mother told the court that of her six children, Morris the (deceased), was her third born. She recalled that on 22nd September 2022, at around 1800hrs, Pw1 told her to accompany him to the accused shop where the deceased was being held. On arrival, she saw the deceased at the accused shop with hands and legs tied being beaten. She saw John Molei, Peter Kumari and Samwel Kasee beating the deceased using whips and sticks. The deceased was crying and pleading for Mercy but the beating continued. She asked Caroline, the accused wife to intervene but that too was in vain. Leonard and Dunca, accused sons held her by the neck and pushed her back. It was then that the accused is said to have come out holding a sword and threatened to harm her. She called Richard her son who went to the scene using a motor cycle and carried his injured brother home. The deceased told them that John Moloï had poured petrol on him and lit a match stick setting him on

fire. She took the deceased to a nearby dispensary and the following day made a report at police station in Mashuru. They then took him to Machakos Hospital where they were referred to Kenyatta National Hospital for specialised treatments. Unfortunately, the deceased passed on. The witness blamed the accused person for the death of his son because he refused her to intervene and save her son from the beatings.

8. In cross examination, the witness stated that she did not see the accused beat the deceased but he prevented and threatened harm on her when she tried to intervene. Further that she had been threatened and have since moved from the area as a result. That the accused had approached her to have the matter settled.
9. **PW3 Bernard Mutunga**, told the court that the deceased, Morris was his Son. He witnessed his deceased son post-mortem done on 4th October 2022, at Kenyatta National Hospital Mortuary.
10. **PW4 Kituu Richard Mutunga** was in the market on 22nd September 2022 when she received a call from her mother Agatha PW2 who told him to proceed to the village forthwith as his brother was being attacked. He proceeded using a Motor Cycle and arrived at the scene where he found Morris both hands and legs tied outside the accused Shop. He tried to talk to him but the deceased at the time was unable to talk. He saw burns in his body. Standing beside him was John muloi and the accused herein. He untied him and took him home and later to hospital where he unfortunately passed on.
11. **PW5 No 61853 CPL Gabriel Koskei** scene of crimes officer based at the DCI Kajiado received films from PC Mainge with a request to process photographic prints which he did. The same were produced as exhibits.
12. **PW6 NO 71332 Corporal Samuel Ngumbu** told the court that while at Mashuru police station on 29th September 2022, a report was made of a person who had been burned and taken to hospital but unfortunately died while receiving treatment. He informed the OCS who directed him to proceed to the scene where the incident had occurred. He proceeded with the relatives of the deceased around 2200hrs. The accused herein who was adversely mentioned by the

witnesses was arrested at the scene. The others also adversely mentioned disappeared and have not been traced to date.

13. **PW7 NO 117851 P.C WILSON MAINGE**, investigated the matter and established that the accused person had sent Leonard Otoma, his Son and Samwel Kasee to take the deceased who was in a nearby shop, to his shop within Olpelerengo Shopping Centre. The deceased was with his younger brother PW1 who followed them behind and found the deceased tied with ropes inside the accused shop. PW1 went home to inform his mother who proceeded to the accused shop and found the deceased being beaten by Leonard, Kasee and Peter Kumari. The witness stated that the deceased mother pleaded with the accused to have her son's life spared but she was instead chased away and threatened with harm. The deceased mother went away and sought help by calling her other son Richard who rushed to the scene and found the deceased had been burnt.
14. The witness established that, there had been allegations of theft made against the deceased but no report of the same had been reported to any police station. The officer told the court that one Christine Wayua witnessed the incident and saw John Mloi pour petrol on the deceased and lit the fire. Christine poured water on the body of the deceased and put off the fire. She also witnessed the accused threaten the deceased mother not to intervene to save her son. The officer told the court that Christine who is a wife to one Samwel Kasee had been threatened not to testify in court although she had recorded her statement on 4th October 2022 and a subsequent one which were produced as exhibit 3(a) and (b).
15. The witness visited the scene of crime and found some burnt items that were taken for analysis. The outcome of the analysis is contained in a report which established the presence of petrol in the collected items.
16. The cause of death according to the Post Mortem report was as a result of complications resulting from the burnt injuries.
17. Based on investigation above, the officer was satisfied that the accused took part in the commission of the offence as he prevented any efforts to rescue the deceased and never intervened himself.

18. In cross examination, the witness reiterated that the accused had sent people to bring the deceased to his shop. That he was however not involved in the actual violence that resulted in deceased death but had power to intervene and save the deceased from harm.
19. **PW8 DR. Benard Midia** a pathologist based at Kenyatta National Hospital and Lecturer in the University of Nairobi, conducted the Post Mortem on the Body of the deceased who had 2nd degree burns involving the head, Neck, the right hand, chest and the back. In total the deceased had suffered 53% burns. He concluded that the deceased passed on as a result of complications arising from the injuries sustained.
20. **PW9 Mboria Alexander Mbaya** an analyst and Govt Chemist produced a report prepared by Lucy Wachira as she could not be able to attend on account of a medical procedure that she underwent. The witness told the court that some debris from the scene of crime were submitted for analysis to ascertain whether the fire remains contained fire accelerants. After analysis, the witness told the court that traces of petrol was detected on the items submitted.
21. **PW10 Chrispin Nguru Njeru** Govt analyst received the following items requiring his analysis; piece of grey sleeve material attached to a sisal rope, and sample of blood in a container marked B1 Morris Muoki Mutunga. The items were subjected to DNA analysis and the findings were that the piece of grey sleeve material and rope A1 had no presence of any blood. The report was produced as exhibit in this case.
22. At this stage of the proceedings, the prosecution is under a duty to establish a prima facie case against the accused person so as to warrant his being placed on defence. A prima facie case is one in which a reasonable tribunal directing its mind to the law and evidence placed before it, can convict an accused in the absence of evidence to the contrary. In other words, the evidence tendered by the prosecution at this stage of the proceedings should be sufficient to convict the accused person if he elects to remain silent in defence. See **BHATT VS. R [1957] EA 334.**

Section 306 of the Criminal Procedure Code requires the Court to evaluate the evidence presented to establish whether a prima facie case has been established to require the accused to offer an explanation.

23. In **Republic v Abdi Ibrahim Owl [2013] eKLR** a prima facie case was defined as follows: -

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”.

“Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:

“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 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.”

24. The Court at this stage is not concerned with the test of beyond reasonable doubt, but whether there exists some prima facie evidence capable of calling the accused to state his defence
25. The ***Criminal Procedure Code under Section 306*** provides as follows:

“(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether is intended to call any witness as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

26. From the above, it is clear that what the law requires at this point of the proceedings is for the court to satisfy itself that there exists a prima facie case as against the accused to require his rebuttal. The court is not required to venture into considerations of the merits of the case and /or the credibility of prosecution witnesses. And so, based on the evidence submitted by the prosecution I hold that a prima facie case has been established sufficient enough to require the accused rebuttal. The accused thus has a case to answer and he is now called upon to elect to conduct his defence in accordance with the provisions of section 306 (2) of the Criminal Procedure Code

It is so ordered.

**DATED AND DELIVERED AT GARISSA VIRTUALLY THIS 20TH DAY OF
APRIL 2026**

**HON JOHN T LOLWATAN
JUDGE**

ORIGINAL