REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 21 OF 2018

REPUBLIC ……

PROSECUTOR

VERSUS

VICTOR MAKUTUBU SHIERE ……

ACCUSED

RULING

1. The Accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 3rd November 2017, at Esisenye Village, Isingo Sub-location in Mumias East Sub-County within Kakamega County, he murdered Zachaeus Nyende Wanzala.
2. The brief facts are that on the material date, the deceased was found lying unconscious at the home of one Collumban Nanzushi Makutubu. He had visible injuries. There were allegations that the Accused had assaulted him.
3. The prosecution adduced evidence through nine (9) witnesses, none of whom saw the Accused assaulting the deceased. All the seven civilian witnesses and the Assistant Chief testified that

they were informed that the deceased was assaulted by Victor Shiere, the Accused herein. There was no circumstantial evidence adduced to link the Accused to the assault.

4. Whereas the deceased's brother, PW1 and Investigating Officer, PW9 testified that a post mortem was done and it was established that the cause of death was severe head injury due to subdural haematoma, the post mortem was never produced.

5. This court is tasked with determining whether the prosecution has established a prima facie case.

6. In seeking to prove its case, the prosecution has the onus to establish a rebuttable presumption of guilt by discharging its evidential burden of proof. To this end, the prosecution must adduce evidence which is sufficient on its own to create a presumption of guilt upon the Accused and to call for the Accused to profer an explanation in order to exonerate himself.

7. In the landmark case of ***Ramanlal Trambaklal Bhatt v. Republic [1957] E.A 332***, the Court of Appeal held that the prosecution is said to have failed to establish a prima facie case when the evidence presented at the close of its case is too weak that no reasonable tribunal would convict the Accused based on it, even if the Accused chose to keep quiet and tender no defence and held that:-

"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 "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."

8. In ***Antony Njue Njeru v. Republic [2006] eKLR***, the Court of Appeal set aside a conviction where the Appellant had been convicted based solely on hearsay evidence.

9. In this case, the cause of death was not proven as the Doctor who performed the post mortem on the deceased did not give

evidence and produce the post mortem report. Secondly, the other ingredients of murder being that the killing was unlawful or that the killing was done with malice aforethought was not established. The Investigator should have filled the gaps in his case by procuring the evidence of at least one person who saw the Accused assault the deceased, or through forensic evidence tying the Accused to the assault. Failure to do so rendered the prosecution's case untenable as the vital ingredients of the offence of murder were not established.

10. Having applied my mind to the law and evidence, I find that the prosecution's case rests entirely on hearsay evidence. Such evidence is so faulty a foundation, that no tribunal in its reasonable mind should seek an explanation from the Accused. The prosecution's case therefore does not meet the legal threshold to warrant the Accused being placed on his defence.

11. Consequently, I find that the Accused has no case to answer. He is acquitted under Section 306 (1) of the Criminal Procedure Code. He is therefore set free forthwith unless otherwise lawfully held.

Dated, signed, and delivered at Kakamega, this 4th day of May 2026.

A. C. BETT
JUDGE

In the presence of:

Ms. Chala for the Prosecution

No appearance for Mr. Isiakho for the Accused

Court Assistant: Polycap