



**Republic v Makutwa & 3 others (Criminal Case 12 of 2021)
[2024] KEHC 5341 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 12 OF 2021**

**JN KAMAU, J
APRIL 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ASWANI HASSAN MAKUTWA 1ST ACCUSED

FRANCIS OTIENO FATI 2ND ACCUSED

BONIFACE OCHOLI OKUSI 3RD ACCUSED

SHADRACK MAKOMBO PANYAKO 4TH ACCUSED

RULING

1. This matter emanated from Kakamega High Court. It had previously been handled by Mwita, Sitati, Njagi, Amin, Musyoka and P.J. Otieno JJ. This court became seized of it on 18th April 2023.
2. On 28th February 2024, the Prosecution closed its case after calling a total of eight (8) Prosecution witnesses.
3. The Prosecution and the 1st, 2nd, 3rd and 4th Accused persons informed this court that they would not file Written Submissions on the question of whether or not the Accused persons had a case to answer or not but that they would rely on the evidence that had been adduced by the Prosecution witnesses.
4. Simon Omusambai (hereinafter referred to as “PW 1”) was the father to Simon Esilaba (hereinafter referred to as “the deceased”). He testified that he saw the 1st Accused person at his compound on that material date. He did not know the other attackers.
5. Andrew Wesa Ingati (hereinafter referred to as “PW 2”) told this court that he shone light from a torch on the attackers and recognised all of them. He said that he knew four (4) of them very well. He



- positively identified the 1st and 2nd Accused persons as having been part of the fifty (50) people who he saw on that night having gone to attack his son, Joseph Ingati.
6. Rael Ambasa (hereinafter referred to as “PW 3”) was PW 2’s wife. She confirmed having seen many people attack her son, Joseph Ingati but could not recognise any of them.
 7. On her part, Beatrice Omukasa (hereinafter referred to as “PW 4”) was PW 1’s wife and the deceased’s mother. She only identified the 1st Accused person’s voice as having been one of the people who beat the deceased. She positively identified him by pointing at him in the dock.
 8. Felista Awinja (hereinafter referred to as “PW 5”) was the deceased’s wife. She testified that she heard the 1st Accused person’s voice She positively identified him by pointing at him in the dock.
 9. Antony Atieli (hereinafter referred to as “PW 6”) was the Assistant Chief of Esirulo Sublocation. His evidence was that Joseph Ingati told him that on the material date, he was in the company of the deceased when Aswani Makutwa, Shadrack Panyako, Boniface Ocholi and Rashid Omollo attacked them. He identified the 1st, 2nd, 3rd and 4th Accused persons as the persons Joseph Ingati informed him had attacked him. He was emphatic that he used to hear people referring to the 2nd Accused person as Rashid Omollo.
 10. Rispa Inyundu Buyengo (hereinafter referred to as “PW 7”) was the deceased’s wife. Her testimony was that she heard the name of “Aswani” being called out when the deceased was being attacked. She said that she did not know the other persons.
 11. PC Phillip Cheruiyot (hereinafter referred to as “PW 8”) was the Investigating Officer. He rehashed the evidence of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6 and PW 7. He also tendered in evidence the Postmortem Report dated 6th June 2016 that was produced and marked as Exhibit 1.
 12. Having carefully considered the evidence of the said Prosecution witnesses, the court was of the opinion that a *prima facie* case had been established against the 1st and 2nd Accused persons herein who had been mentioned by PW 1 and PW 2 to warrant them being put on their defence.
 13. On the other hand, it was clear from the evidence of all the Prosecution witnesses that none of them identified the 3rd and 4th Accused persons as having been present during the attack on the deceased that subsequently led to his death. None of the said Prosecution witnesses also placed them at the scene of crime at the deceased’s house or that of Joseph Ingati.
 14. Notably, the said Joseph Ingati was said to have been alive as he was not killed by the marauding gang. He was a crucial witness as he would have placed the 3rd and 4th Accused persons as the centre of this incident, if at all, as he allegedly told PW 6 that they were part of the group that beat him and the deceased on the material date and perhaps confirmed if they were part of the group that came to his compound on that material night.
 15. For the said reason, this court hereby finds and holds that no prima facie case was established against the 3rd and 4th Accused persons warranting them to be put on their defence. Indeed, it is not the duty of an accused person to fill the gaps that have been left gaping by the prosecution. He or she has the right to remain silent during the entire trial and not adduce evidence. If the evidence that has been adduced against him cannot pin him or her to the crime, he ought to be acquitted without much further ado.

Disposition

16. For the foregoing reasons, the 1st and 2nd Accused persons be and are hereby put on their defence.



17. On the other hand, the 3rd and 4th Accused persons be and are hereby acquitted under Section 215 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). It is hereby directed that the 3rd and 4th Accused persons be and are hereby released from custody forthwith unless they be held for any other lawful cause.

18. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF APRIL 2024

J. KAMAU

JUDGE

