



**Republic v Wakhisi (Criminal Case E011 of 2022)  
[2024] KEHC 6264 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E011 OF 2022**

**DK KEMEL, J**

**MAY 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**HERMAN MUKHEBI WAKHISI ..... ACCUSED**

**RULING**

1. The accused herein has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the night of 10<sup>th</sup> and 11<sup>th</sup> March, 2022 at Bukeng'ele village in Bungoma South sub-County within Bungoma County he together with another who has since been discharged murdered Purity Nekesa.
2. The prosecution called a total of ten (10) witnesses in support of its case. However, vide a ruling dated 17.5.2024, the evidence of Belinda Anyango (PW1) who had initially been charged alongside the accused herein was expunged from the record. This then left the prosecution with nine (9) witnesses.
3. The prosecution's case is that the deceased herein lost her way while heading home and eventually failed to turn up. The following day, frantic efforts were made by the clan elder (PW2) plus the villagers in the search for the deceased whose body was eventually recovered from a nearby river. Further investigations led to the discovery of the body of the deceased which was found at the river and that there were blood stains which led to the house of the accused herein. The house was searched and some fresh cowdung that had been used to cover the bloodstains were collected as well as some half burnt wooden stick. The body was taken to Bungoma County Referral hospital where a post mortem was conducted by Dr. Elly Kiplimo Kosgey (PW5) who noted some deep cut wounds on the forehead as well as blood (hematoma) in the brain. He formed the opinion that the cause of death was asphyxia due to drowning and severe head injury. The post mortem report was produced as exhibit 1. The scene was processed and photographs taken by the scenes of crime officer Johana Tanui (PW8) which were produced as exhibits 2 and 3. Some of the recovered exhibits were forwarded to the Government Chemist for analysis by



- Polycap Luta Kweyu ( PW10) who found that the bloodstains on a polyethene bag and soil/cow dung had some DNA profile which matched with the *DNA* profile of the deceased herein.
4. At the close of prosecution's case, learned counsels opted to rely on the evidence already tendered on the issue of whether the prosecution has made out a *prima facie* case against the accused herein so as to warrant him to be put on his own defence.
  5. I have considered the evidence presented at this stage of the proceedings. I find the only issue for determination is whether the prosecution has established a *prima facie* case against the accused herein to warrant him to be called upon to make a defence.
  6. It is trite that prior to placing an accused on his/her defence, the prosecution is required to have established a *prima facie* case against such accused person. A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind to the law and evidence placed before it can convict an accused if no explanation is offered by the defence to the contrary. See *Bhatt v R* ( 1957) EA 332.
  7. The prosecution in order to sustain a conviction in a charge of murder must prove the ingredient of the offence which are inter alia; that there was death; that the death was unlawfully caused and with malice aforethought; that the accused directly or indirectly participated in the commission of the offence.
  8. As to the fact of death, the evidence of the pathologist ( PW5) is quite sufficient and that the cause of death was established to be asphyxia from drowning with severe head injury.
  9. As to the unlawful nature of the death, it is trite that all homicides are deemed unlawful unless caused accidentally or authorized by law. The deceased was reported to have been a vicarious 14 years old girl in good health and who did not in any way contribute to her own death and hence the death was unlawful.
  10. As to the malice aforethought, the injuries sustained and the cause of death left no doubt that the assailant desired the death of the deceased or that the said injures would lead to her death. Clearly, malice aforethought ( *men's rea*) had been formed and or conjured up in the mind of the assailant prior to the incident.
  11. As regards the identity of the perpetrator, it is noted that the body of the deceased was recovered from Chwele River a few meters from the house of the accused herein. It is also noted that some blood stains were found leading from the house of the accused to the river bank and further that some fresh cow dung had been used inside accused's house to cover the blood stains. As the evidence of the accused's wife ( PW1) have been expunged, it is only the circumstantial evidence to be considered. The evidence of the government analyst ( PW10) established that the DNA profile generated from the bloodstains contained in some recovered cow dung /soil and plastic bag matched with the DNA profile of the deceased. It transpired from the evidence of the arresting and investigating officers that the accused led the officers and members of public to Chwele river where the body of the deceased was recovered. Again, the bloodstains which led from the house of the accused towards the river as well as the fresh cow dung and soil used to cover the blood stains in his house placed the accused at the scene of crime. Having been placed at the scene of crime, the accused must now offer an explanation as to how the deceased met her death.
  12. In view of the foregoing, i find that in the absence of any explanation to the contrary from the defence, the evidence so far tendered by the prosecution has placed the accused at the scene of crime and that he had an opportunity to harm the deceased and that there is reason to believe that he had a hand in the demise of the deceased. Hence, if the accused was to elect to remain silent in defence, then the evidence tendered at this stage of the proceedings is sufficient to sustain a conviction against him. As the accused



has been placed at the scene of crime, he must now offer an explanation as to how the deceased met her death.

13. In the result, it is my finding that the prosecution has established a prima face case against the accused herein , Herman Mukhebi Wakhisi. I find that he has a case to answer and is now called upon to elect to conduct his defence in line with the provisions of section 306(2) of the [Criminal Procedure Code](#).

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF MAY 2024**

**D. KEMEI**

**JUDGE**

In the presence of :-

Herman Mukhati Wakhisi Accused

Natwati for Wakoli for Accused

Miss Kibet for prosecution

Kizito Court Assistant

