

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. E033 OF 2022 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

DIDMUS WEKESA BARASA MUTUA.....ACCUSED

RULING

1. **Didmus Wekesa Barasa Mutua** (the accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; on the 9th day of August 2022 at Chebukwabi village, Kibingel Location , Kimilili Sub- County within Bungoma County the accused murdered Brian Odinga Olunga.
2. The accused person denied the charge and the prosecution called 21 witnesses to prove the charge of murder. At the close of the prosecution this court has been called upon to make a ruling on whether the accused has a case to answer or whether the prosecution has established a prima facie case to warrant the accused being put on his defense.
3. The prosecution and defense filed very detailed submissions which I have carefully read and considered.
4. What is a prima facie case? *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 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 determination can only properly be made when the case for the defence has been heard. 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.”

5. The 21 witnesses called by the prosecution were; Brian Khaemba (Pw1) a candidate during the August 2022 elections, the deceased was his bodyguard. Donald Muema (Pw2) an officer with NYS who was on duty at Chebukwabi primary/ polling station. No. No. 240687 P. C Emmanuel Kisilo (Pw3) an officer who was on duty at Chebukwabi primary station / polling station. Tobia Odinga Olunga (Pw4), the father of the deceased. No. 239225 Inspector Richard Gathioro (Pw5) the Sub- County Investigating officer. Clara Nyama

Wabwire (Pw6) was a presiding officer at Chebukwabi polling station. Ruth Nasimiyu Musumbi (Pw7) a clerk with IEBC. Joshua Wanjala Simiyu (Pw8) a driver of Pw1. No. 231710 Alex Chirchir (Pw9) a Ballistic expert. Dennis Owino Onyango (Pw10) a government analyst. No. 798066 Cpl. Johanna Theuri (Pw11), a scenes of crime officer attached to Bungoma County. Doctor Dickson Muchana (Pw12) a pathologist based in Kakamega but covers Bungoma county. Arata Were Orata (Pw13) an agent of the Governor who was deployed at the polling centre. Adam Ali Adam (Pw14) the accused's driver. Walter Simiyu Barasa (Pw15) a friend of the accused. Cynthia Chessy Akaranga (Pw16) the accused's housekeeper in August 2022. No. 110984 P C Ronald Kipruto (Pw17) an officer attached to the accused. No 215901 Mr. Joseph Ondero (Pw18) CCIO Bungoma. Alfred Mbalani Kahii (Pw19) Inspector of police based at DCIO headquarters Ballistic Section as a ballistic expert. No. 70542 Sgt. Hudson Migiri Tabuki (Pw20) a crime scene investigator and Cpl. Reuben Mwaniki (Pw21) attached to DCIO headquarters .

6. Briefly the prosecution case as follows; Chebukwabi Primary was one of the polling stations in the elections of August 2022. On the 9th of August 2022 the accused and Pw1 were both vying for the position of Member of Parliament. During the morning hours on the material day, the accused and Pw1 visited the said polling station. Pw6 and Pw7 who were IEBC officers on duty conducting the elections. After visiting the polling station. Pw1 decided to leave . Pw1 was with the deceased. They entered his vehicle and within a minute he saw the accused standing on the right side of his vehicle telling the driver

not to drive away. His driver (Pw8) ignited the vehicle and drove away. As they drove away Pw1 heard gun shots and thereafter he saw the deceased leaning on the right side, there was blood on the deceased's face. Pw8 too heard the gun shoots as they drove off. According to the officers at the scene Pw2 and Pw3 the accused shot once in the air to calm a situation that was becoming rowdy after some boys came in armed with weapons. Pw6 and Pw7 heard more than one gun shot by then the accused was back inside the room where they were. The 2 officers and the IEBC officer told court that the accused returned back to the classroom. None of these witnesses saw the accused shoot the deceased nor did they see the accused move towards the vehicle which was carrying the deceased. Pw1 stated that he did not see the accused display his gun but he heard gunshots as they drove off.

7. Police went to the scene and investigated the incident. Various experts visited the scene and all persons with firearms, the officers the accused and Pw1, surrendered them for examination. The police wanted to establish if the gun the accused had, a *glock* pistol, was the one that was used to shoot the deceased. A post mortem was done on the deceased and bullet fragments were retrieved for examination. The said were taken for ballistic examination. Pw9 examined the firearm that was retrieved from the accused. He stated that on physical examination of the bullet fragment which he received, he noted that they were competent parts of a bullet in caliber 9mm made of synthetic polymer material and that the same could have disintegrated during firing. He was of the opinion that the marking on the fragment was not suitable for microscopic

analysis and he was unable to connect it to any of the 3 pistols. That the markings on the plastic fragments could not be compared with the test samples for the 3 pistols. Thereafter he forwarded the fragments to the government analyst for further analysis. During cross-examination he admitted that his report on the same was inconclusive. Pw10 a government analyst testified that the accused's gun was not the one that discharged the bullet whose fragments were found in the deceased's head upon testing and swapping the Accused's pistol, and after test firing had been done by ballistics. The report states that the "*the bullet fragments (B00-11C) material composition was found not to be similar to the control sample bullet (item E).*"

8. The scene was reconstructed. Pw19 was of the opinion that the person who shot the deceased was on the left side of the vehicle and was 5 meters away. This evidence contradicts the evidence of Pw1 who said that the accused was on the right side as they drove off. Pw1 did not state that the accused was close to the deceased on the left side. Further there are 4 witnesses who did not place the accused near or next to the vehicle the deceased was in as they drove off. They also talked of more gunshots after the accused returned to the class room. So, who shot the deceased? The evidence adduced has not revealed who shot the deceased. There was no direct evidence that the accused was seen shooting the deceased. The reports on the firearms do not link the accused to be the one who shot the deceased. The only persons who could shed light on the same to enable this court put the accused on his defense is Pw1 and Pw8. Pw1 testified that he did not see the

accused with a gun nor did he see the accused shoot the deceased. The accused has not been charged with being in the polling station but with the offence murder of Brian Odinga Olunga.

9. In **Ronald Nyaga Kiura vs. Republic [2018] eKLR** Justice Odunga as he then was stated as follows ;

“A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person”.

10. The prosecution must at close of their case adduce evidence sufficient enough for the court to convict the accused in the event that he opts to keep quiet. There was no direct evidence adduced that it was the accused who shot the deceased or that it was his gun that was used to shoot the deceased. In my view putting the accused on his defense would be calling upon him to clarify the gaps in the prosecution case. For if he chooses to keep quiet, this court would find no basis to convict him of the offence of murder. The evidence adduced by the prosecution does not connect the accused to the death of the deceased. Thus, I acquit the accused of the charge of murder under section 306 (1) of the Criminal Procedure Code, Laws of Kenya . The accused is free to go unless lawfully held. Any sureties held to be returned to their depositors.

Dated, signed and delivered at Bungoma this 20th day of July 2023.


R.E. OUGO
JUDGE

In the presence of:

Didmus Wekesa Barasa/ Accused-Present

Mr. Katwa -For the Accused Person

Miss Kariuki H/b for Mr. Bowry – For the Accused

Miss Mukangu - State Counsel

Wilkister/ Okwara- C/A

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