



**Republic/State v Ithoka (Criminal Case 7 of 2019)
[2024] KEHC 10374 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 7 OF 2019**

**MW MUIGAI, J
JULY 29, 2024**

BETWEEN

REPUBLIC/STATE PROSECUTION

AND

EVANS NZAU ITHOKA ACCUSED

RULING

Background

1. The Accused person herein Evans Nzau Ithoka is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the Accused on the night of 18th and 19th February at Mwanja Mbiti Village In Ngoleni location, Kathiani Sub-County, within Machakos County jointly with others not before court murdered Martin Kithuka Ngewa.
2. The Mental Assessment Report dated 09/04/2019 and filed in Court on 10/04/2019 found the accused person Fit to Plead. The Accused person herein took plea whereof after the charges were read out to in a language that he understood she pleaded Not Guilty. A plea of Not Guilty was entered on his behalf
3. The hearing took off and the Prosecution called a total of twelve (12) witnesses.

Evidence

4. Pw.1 Grace Mueni Kithuka a resident of Ngoleni testified that the deceased herein was her husband. The accused herein was her nephew. On 18-2-2019 around 5 pm her husband was away as he had gone to do some casual work. He arrived at 5pm and left for the market to buy food but never came back. The following day while escorting her daughter to Machakos, someone inquired whether her husband had gone home the previous night, he directed her to a certain place and when she went she found her husband lying next to a land belonging to a former counsellor already dead. There were injuries on the



head, eyes and mouth. The villagers joined her and the deceased's sister went to view the body. They then proceeded to Ngoleni Police post and the police officers agreed to visit the scene. The CID arrived and took photographs and carried the body to Kathiani. On 21-2-2019, she accompanied the family chairman, her son Nicholas Ngewa to the hospital for postmortem. She had known of any grudge between the accused and the deceased as they used to do casual jobs such as charcoal burning

5. On cross-examination she stated that the deceased was her husband and the accused was well known to her for over ten years. She did not hear any noise on the night of 18-6-2019. She visited Ngoleni police post but did not state that she heard the accused's voice on the night of 18-2-2019. The only evidence she had is that she went to the scene and saw the body of the deceased. she came to learn of the death of the deceased at 6.00 am on 19-2-2019 while escorting her daughter when a young man alerted her about it. The young man is not a witness in the case, the owner of the homestead near the scene is also not a witness. The deceased did not sleep at home on the night of 10th and 19th February 2019. She assumed that her husband had spend the night at a bara as he used to arrive home late at night. She did not find anyone near the body when she arrived. She did not know her husband's killers.
6. Pw2 Tabitha Wanza Kisevu a resident of Ngoleni testified that the deceased herein was his lastborn brother. The deceased lived around the same compound. The accused was a nephew. On 19-2-2019 around 6.30 am the deceased's son Kioko came to his house and informed him that his father had fallen down. I accompanied him to the scene where he found the wife in company of other members of the public. He saw the body of the deceased had severe injuries on the head and forehead. He was lying on a road between two homes belonging to Kitomeo and Karanja. He used a bed shet to cover his body.
7. He then joined the deceased wife to Ngoleni police post to report. The police accompanied them back to the scene. They took photographs and the body was put in their landrover. The police made inquires and later picked up some persons the accused included. The body was taken to Kathiani hospital Mortuary and later organized it transferred to Machakos. He learnt that the accused and the deceased used to work together in casual jobs and had not heard of any grudge between them.
8. On cross – examination pw2 stated that Kioko Kithuka came at around 6am to alert him over the incident. He did not witness sthe incident. Kioko is not a witness. Those living near the scene did not record statements. He found a large crowd at the scene. The deceased had already died and he picked a sheet from the deceased's wife and covered the body. He could not tell the identity of the killers. His home was 2km away from the scene
9. Pw3 Nicholas Ngewa testified that the deceased was his father. On 21-2-1019 at Machakos funeral home he was in the company of his mother and brother. A post mortem was conducted on the body which they positively identified. He had the chance to the check the body which had injuries on the face, head and eyes.
10. On cross examination he stated that he recorded statement after the post mortem examination.
11. Pw4 Augustus Kakai Munzu testified that on 18-2-2019 he had placed an order for charcoal which was to be prepared by the deceased. they had agreed on the fees of kshs 1000. He later paid him a deposit of kshs 600 and he was to complete the job. The deceased was in good health and he later received the report that the deceased had been killed. He did not witness the incident
12. On cross –examination he said that he was a pastor as well as a mason. He had hired the services of the deceased to prepare charcoal for him at a fee of kshs 1000. He paid kshs 600 as deposit. He was not present when the incident took place he later learnt from his wife that the deceased had worked jointly with the accused. The deceased had informed him that he would work jointly with the accused. he recorded a statement with the police which he advised his wife to look for another person to burn



- the charcoal as the deceased had been killed. He denied being involved in the death of the deceased. The accused and the deceased had been in good terms and he had no problem with the accused and deceased working together in the task. He did not witness the incident.
13. Pw.5 Sabina Nthenya Nzioka testified that on 19-2-2019 she was at home when she saw people running and upon inquiring they did not tell her the reason behind their running. She joined them and found the body of an unknown person lying on the ground. She alerted the village elder and assistant chief and then went back to her house.
 14. On cross examination she stated that she lived with her children as her husband was away at Mua Hills then. Her home was about 200 metres from the scene. She found many people at the scene including the wife and the sister to the deceased. she later came to know the identity of the deceased as Kithuka who turned out to be a neighbor. She did not hear of any screams or alarms. The deceased was lying on the ground and she could not tell the cause of death.
 15. Pw.6 Daniel Muia Wambua testified that on 18-2-2019 the deceased went to the bar in the company of two people who included the accused and one Kitel. He served them with drinks. They shared Dalas Vodka. They had arrived at 7pm and the two later left leaving the deceased behind. The deceased then order for half a bottle of dalas vodka which he drank alone. He looked drunk. The accused came later at 10 and left in the company of the deceased. he could not tell the directions they took as he continued with his work. The following day he saw people rush to the scene where the body of the deceased was found. He also went there and found the body of the deceased covered with a sheet. The deceased and the accused were great friends. The accused was the last person in the company of the deceased as they left the bar.
 16. On Cross – examination he stated that he has run that bar for the last six years since 2014. On 18-2-2019 he opened the bar at around 5pm the deceased in the company of another arrived at 7pm. The accused returned to the bar and left with the deceased at around 10pm. His neighbor Bob alerted him of the incident the following day. Deceased lay about 400 metres from his place of business. He did not hear of any screams. The accused home was quite far from where the body of the deceased was found. He did not manage to view the body of the deceased to see if he had any injuries. The deceased was not that totally drunk. The accused and the deceased exited the bar through the rear door. The two have been good friends.
 17. Pw.7 Paul Ngila Mwanitested that on 19/02/2019 he was at home when he received a report about the incident. He went there and found the deceased lying on the ground having been killed. The deceased forehead had a deep cut. There were no other noticeable injuries. He helped the police load the body on the vehicle. He had known the accused since he was his first cousin. The accused and the deceased had been great friends.
 18. On cross examination he stated that the deceased and the deceased were his cousins. He arrived at the scene around 9 am and found the body had been covered with sheet leaving only the head. The body lay near the compound of Kalanza and a member of the County Assembly. He did not see the accused at the scene and he could not implicate anybody since he did not witness the incident.
 19. PW8 Dr Kamotho Watenga testified that he is a Pathologist – Medicine & Surgery Degree Moi University after 6 years from 2005. He did my Masters in Human Pathology at U.o.N 2014 – 2017. Since then he is practicing as Government Pathologist Muranga County. He had a post mortem under request from Kathiani police station of Martin Kithuka Ngewa. The mother Grace Mwanthi Kithuka and son Nicholas Ngewa identified deceased. On 21/02/2019 at 12 p.m. at Machakos Funeral Home. Findings externally – Face swollen and covered with blood and soil and both hands were covered with soil. Injuries – He had very deep cuts on the mid forehead which exposed the underlying skull



- bone. Bruises on right forehead and a cut on the top of the left eye, nose was fractured bruised and fractured with a cut on the right side. On right cheek, bruise and bruise on the left cheek and cut on the lower lip on the right side and lower front teeth were loose.
20. Internally when he opened up the deceased chest, Abdomen and lower limbs no injuries on the head found and upper part both sides had bruises on the scalp and had haemorrhage on the back aspect of the head. A fracture on the mid frontal aspect of the skull bone and the fracture was depressed and into many pieces. Due that fracture there was exposed brain matter. This fracture extended to the orbit – the bone below the both eyes. There was a maxillary bone fracture - bone of the cheek and the bone had detached from the rest of the skull.
 21. They opened up the brain – bleeding on the surface of the brain which affected the whole brain and more pronounced in the frontal aspect.
 22. In view of the findings he found the opinion the cause of death was severe head injury secondary multiple impacts of blunt post trauma. He took samples of DNA blood fingernails and hair with its roots. He issued death certificate Number 1004405 and consequently appended my signature on the said form. He produced the post mortem Report as exhibit. Post mortem report MFI-2 produced as Exhibit 2.
 23. On cross examination, he stated that the date of death is on night of 18/19/02/2019. The 1st part of the Post Mortem was filed by the police and he cannot attest to what is filled herein. The Bar attendant testified that the deceased was drinking at the Bar. The injuries are multiple and localized – targeted injury in form of an assault. The fall cannot break the skull and detach the skull.
 24. PW9 Patrick Sila Mitisya testified that On 10/02/2019 he was at home got a call from Sabina Nzioka that they found somebody found dead. He went to the place and saw it was Martin Kithuka Ngewa who was on the scene. He called the Assistant Chief and informed him of the deceased's body. There were many people police officers and village elders and they started to find out what happened. They went to Kathiani, found blood on the road and it led them to the deceased's home where there was a hole/pit and soil had been removed. They came back to where the deceased lay. Chief and police officers found them at the scene. They went towards the scene where there were blood stains and they began to investigate the cause of the deceased's death. He went back to where the deceased's body was and waited there. He knew the accused person in court. He knows his parents.
 25. On cross examination he stated that he was a mzee wa mtaa (village elder). He was dealing with this matter as a village elder. He was informed in the morning at 7.00 a.m. and he came back.
 26. The distance is from there to Machakos Hospital Level 5 and he ran to the scene when he was called. He knows the deceased as a relative from the same clan. He looked at the place where the deceased was, he had blood and there was no blood around the place. He followed the blood stains and followed to where they led to. He was not an expert to investigate the scene but he used his eyes and saw the blood drops on the road up to where it took him. The weather was dry and there was no rain. On arrival at the scene he found the deceased dead.
 27. PW 10 Elizabeth Oyiego testified that she was a Government Analyst. She has Bachelor of Science U.o.N and Masters in Science in Applied Analytical Chemist from Kenyatta University. With the matter in court, on 9/4/2018 at Government Chemist Laboratory/Nairobi the items listed were received from PC. Njuguna Lawrence from DCI Machakos and accompanied by Memo Exhibit Form. Blood samples in a bottle marked 'A' Martin Kithuka Ngewa, Nail hair in Khaki envelope, Martin Kithuka Ngewa marked 'B', Blood sample marked 'C' & "D", Evans Nzau Ithoka, A blue red white shirt



– marked ‘E’, A navy blue pair of trousers marked ‘F’, Swab stick & marked ‘G’ ‘H’ ‘I’ ‘J’ ‘K’. They were to examine the items and determine the DNA matching of any blood stains on items.

Findings:

28. The shirt item ‘E’ lightly stained with blood. Pair of trousers moderately stained with blood. Swab item G, H, I, J & stains of blood did not generate DNA profile. DNA profile of items A, B, C, D, E & F were tabulated in the annexed table. The accused’s DNA profile locus frequency of occurrence in the evidenced items = 2.6×10^{20} .
29. The conclusion the DNA profile for blood on the shirt and trousers and matched the generated samples of the accused persons.
30. She filed the form and signed it on the 3/06/2020.
31. On cross examination, she testified that I recovered the samples on 9/04/2019. She was not aware where the alleged offence took place. The Exhibit memo showed 18th – 19th February, 2019. She recovered the samples on 9/04/2019 it was 2 months after the alleged incident. Referrals from the prosecution and the same can be examined but depolarising of various factors, there were those that will not generate DNA profile. As long as they are well preserved the specimen were well preserved when she received them. There was a shirt and trousers. She received the whole shirt and part that was contaminated only slightly stained not the whole shirt was soaked in blood, she said slightly stained.
32. PW.11 – Sworn 235122 – INSPECTOR MAURICE testified that he was at the Crimes Regional Office – Embu Incharge formerly Incharge at Machakos County. He is Graduate from Makerere University and a trained Officer normal instructions at Kiganjo and trained locally and internationally. He works in Crime Scene managements – Crime Scene documentation and processing and collection of evidence - Crime scene reconstruction. He was the link between scientific and general investigation.
33. On 19/02/2019, around 14.13 hours he accompanied Mutisya Simon with other officers to Ngoleni market – Mwanja Mbiti village. He was requested to document a scene of murder. He took 12 coloured photographs; Photo 1 – 5 – general and closer view of the deceased lying across the path a few metres behind the market. Photo 6 – 11 – General and closer views of the deceased’s head and forehead. Photo 12 – closer view of deceased’s shoe.
34. He helped the investigating officer to collect blood samples on the ground and on the 2 alleged suspected. He marked them on the swabs and exhibit memo was produced by investigating officer and they were taken.
35. On 13/03/2019 he took the film for processing. He prepared the certificate and appended the signature and date and/on photographs 1 -1 2 and the office stamp. Photographs 1 -12 – MFI-1 – P. Exhibit 1. Certificate – MFI- iv – P. Exhibit 4.
36. On cross examination he stated that he arrived at the scene at 14.13 hours. He was at the scene for about 1.30 hours due to the blood spotted on the road they* followed the traces to where they met and went to both accused’s home and around the suspects home. The body was at primary scene and it is due to the disturbance and shoe placed. It was not a secondary scene. He used the forensic gadget they normally use. The officers arrested several suspects and they left the scene 3 – 4 p.m. His vehicle usually does not carry the body. It is the officer in charge who carries the body. After he checked the body and scene OCS took over. He left the scene at 3 p.m. when whoever said the body left the scene at 10 a.m. it is a lie.



37. PW12 232872 Inspector Simon Mutisya testified that he was from DCIO – Kathiani. On 19/02/2019 he was in the office with Chief Inspector Maina while there they received a call that there was a dead body found at Ngoleni location. He proceeded to the scene with Chief Inspector Maina and Pc. Lawrence Njuguna. They were accompanied by Scenes of Crime – officer Inspector Ndunda. They got information that on night of 18/09/2019 during the day he was in the company of the accused person and were burning charcoal business. That night the deceased and accused person went on a drinking spree and later left together.
38. At the scene they found the deceased was injured on the head and had blood drifting and these droplets leading to accused persons home. On 19/02/2019 they arrested the accused person and he had blood stained clothes. The scene was processed by C.I. Ndunda scene of crime. They conducted investigations and found out that on the fateful night he was with 7 others suspects digging sand at a road reserve at a place known as ‘Kailoti’. However, the Accused person left alone with the deceased. On 19/02/2019 he filed CM Misc. Application No.14 of 2019. He was granted orders to have the accused person and other 7 suspects for 10 days. They preferred charges against the 7 for mining sand and were fined 2 million in default 2 years imprisonment. He charged the accused person with the charge of murder.
39. On 19/02/2019 he visited the accused person’s home and underneath the mattress recovered blood stained shirt and 1 pair of trousers. They interrogated the accused person’s Auntie and she said she took food to the suspect person and she did not find the accused in the house. She is now deceased. Swabs were taken by C.I Ndunda of Scenes of Crime and the accused had blood stained nails. he prepared the exhibit Memo form with the blood stained shirt and trousers and swabs and later on he obtained the Government Chemist Report and charged the accused with the offence. He produce exhibits; Shirt – MFI-5 (exhibit 5), Trouser – MFI-6 (exhibit 6)
40. Accused person DNA – blood sample from Machakos Level 5 and gone to Government Chemist. He also obtained sample of deceased’s blood during post mortem. He did not him before
41. On cross examination he stated that he was the investigating officer. He joined DCI – 1997 and worked with police force for the last 33 years. He has handled such cases in Kathiani for the last 3 years. He did not record All statements, he recorded the statement of the accused person on 20/02/2019 at 4.00 he submitted to the ODPP with police file. He did not know where statement were availed. He served the witness statements in court in 2023 and the accused signed. All other witnesses had testified at the time. He asked him to give the statement which he did. He got the information through the OCS I. Njuguna .He was accompanied by CI Maina, Inspector Ndunda, Pc Maina and driver of the motor vehicle. He recorded his statement and Lawrence Njuguna and Inspector Ndunda of scenes of crime At Ngoleni they had Administration officers. The whole area is manned by Kathiani police station and Ngoleni police post.
42. It was 10 a.m. when they got to the scene and was informed by OCS at 8a.m. they waited for a vehicle that had brought suspects to court. They had to call the vehicle back. It took 2 hours – waiting for a vehicle. He had to go to the scene with a motor vehicle as we would transport the body. He found the body covered with a lesso.
43. There were signs of struggle and he deemed it as the primary scene from where the body was to the home of the accused person there were bloodstains/blood dropouts. He was familiar with inventory – he had the expert C.I. Ndunda from scenes to crime who proceeded to the scene. He did not conduct photographs taking - the scene of crime Personnel did so. The lesso was used to cover the body by members of the public. Tabitha Wanza Kisevu – (PW.2) statement was recorded by PC Njuguna.



44. The accused and deceased were working together and lived near each other. The accused person lived in Ngoleni with his auntie. The Previous day they were harvesting sand/burning charcoal. They were called by Patrick Kakei to burn charcoal.
45. When he went to the scene he found many members of the public were at the scene. Others had left the scene. He cannot tell if the accused person was at the scene. They followed the blood droplets from the scene that led us to his house.
46. Daniel Muia Wambua (Mrefu) PW.6 stated that the 2 accused person and deceased were friends and they left together after drinking. He was not in court thus does not know what Pw.6 told the court. He did not investigate how many people operated the bar. He did not find out the number of people who drink in that bar that night. The trousers and shirt blood stains were found under the accused person's bed/mattress. The blue trousers had blood stains and the shirt also and the Government Chemist found the blood. There are blood stains were determined by the Government Expert. The deceased was cut on the head, he did not recover any weapon. The distance from the bar where they were drinking to the primary scene where the body was found is about 100 metres within the Township. He did not know the distance from the scene of crime and accused person home. The body was lying opposite the gate. No one in the area is a witness in this case.
47. The Prosecution closed its case and the Court directed the parties to file and serve their written submissions. Each party was granted 21 days to do so.

Written Submissions

Prosecution submissions dated 2nd April, 2024

48. The Prosecution submitted that it availed twelve(12) witnesses in support of its case and the following raised the following issues determination namely;-
 - a. Was the accused involved in the murder of the deceased?
 - b. Did the accused have malice?
 - c. Was the accused identified appropriately?
 - d. Was the cause of death as a result of the injuries inflicted?
49. On the issue of whether the accused was involved in the murder of the deceased the testimony of Pw6 places the accused as the last person to be seen with the deceased and that was solely responsible to what transpired to the deceased
50. Reliance was placed in the case of Moses Jua vs The state (2007) regarding the doctrine of last seen
51. On the issue of malice On whether the accused have malice Section 206 of the Penal Code states that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
 - a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;



- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In the present case it is evident that the deceased met his demise as a result of injury he sustained on the head

- 52. On the issue of whether the accused was properly identified, the state relied on circumstantial evidence to place the accused at the scene of the crime.
- 53. On the issue of whether the cause of death, PW8 Dr Kamothe who conducted the post mortem formed an opinion that the cause of death was exsanguination due to severe head injury secondary multiple impacts of blunt force trauma.
- 54. Reliance was made in the case of Ronald Nyaga Kiura –vs- Republic [2018] eKLR wherein paragraph 22 it is stated as follows:-

“It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. 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 rebutted is offered by an accused person.

- 55. Also in the case of Ramanlal Bhat -Vs- Republic [1957] EA 332 at 334 and 335 relied on by the state the Court stated as follows:-

“It 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.”

- 56. Similarly in R. v. Jagjivan M. Patel & Others 1, TLR, 85 the Court stated;-

“All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the Court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

- 57. The Prosecution finally submitted that by availing testimonies of twelve witnesses as well as documentary evidence it has proved its case beyond reasonable doubt and the accused ought to be placed in his defence under Section 306 (2) of the Criminal Code.

Accused person’s submission dated 7th May, 2024

- 58. The Accused submitted that the applicable law was section 210 of the CPC, Article 50(2) and 51 of the Constitution of Kenya, section 107 of the Evidence Act.



59. He relied on the cases of Woolmington Vs DPP [1935], Hc Criminal case No 17 of 2018, JOO vs Republic, Aboud Rogo Mohamed and 3 others vs Prosecutor, Regan Mokaya vs Republic {2006} eKLR, Trambaklal Bhatt v R [1957]
60. It was submitted that no case had been made by the prosecution to warrant the accused be placed on his defence. None of the prosecution witnesses linked the accused to the offence and that the accused should thus be acquitted.
61. It was submitted that for any criminal charge to stand, the evidence tendered by the prosecution should be free from any inconsistencies, contradictions and innuendos. That the evidence of the daughter of the deceased as well as the reportee and John Kiok was crucial to this case but the prosecution chose to ignore it. He relied on the case of Republic vs Joseph Njuguna Wainaina and the case of Bukenya and others vs Uganda [1972] that there was need for evidence of independent witnesses as opposed to evidence of relatives only.
62. It was submitted that the evidence tendered is insufficient and incapable of supporting the charge. The prosecution case was built on suspicion and should fail.

Finding

63. This matter/hearing commenced on 27/02/2019 before Hon G. V Odunga – J, then Kemei J who heard prosecution's case – Pw1, Pw2, Pw3, Pw4, Pw5 Pw6 and PW7. This Court took over the proceedings on 19/10/2021 when the Court sought proceedings to be typed and availed to the parties/ Counsel before directions.
64. The prosecution closed their case and the Court directed parties to file Written Submissions.

Disposition

1. Upon this Court's consideration of the totality of the evidence adduced and on record, the evidence discloses commission of the criminal offence of murder c/s 203 of the Penal Code.
2. The evidence of Pw6, Pw8, PW10 & PW12 coupled with the formal witnesses of Pw1, Pw5, PW9 & Pw11 confirms that the deceased died from an unlawful act and places the Accused person at the scene and time of incident and the circumstances outlined target the Accused person is sufficient to warrant the Accused person to be placed on her defense.
3. The law requires that the Accused exercises the legal right as prescribed under Sections 306 CPC.
4. FMD ON 20/9/2024

It is so ordered.

DELIVERED DATED SIGNED IN OPEN COURT ON 29/7/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

