



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Matsili (Criminal Case 48 of 2014)
[2023] KEHC 1029 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 48 OF 2014
PJO OTIENO, J
FEBRUARY 17, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID MATSILI ACCUSED

RULING

1. The accused, David Matsili, 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 were that on the September 8, 2014 at Shiasaba village, Shiasaa sub-location Shibute location in Kakamega East District within Kakamega County, the accused unlawfully killed Charles Busieka.
2. The accused person pleaded not guilty to the charge a plea the prosecution sought to controvert by parading a total of six witnesses. The gist of the evidence by the prosecution's witnesses can be summarized as below.
3. PW1, a sister to the deceased testified that on September 9, 2014 at 7am the accused brought to her his three children saying he was to embark on a journey only to learn three days later that the accused was involved in a quarrel with his uncle and that the uncle had since died. In cross examination, the witness told the court that the wife to the accused had left him with the children who were all school going ages. She said the accused was a bodaboda rider who would leave the children with the grandmother but on that occasion he grandmother was away hence the need for the children being taken to her. The witness never witnessed the quarrel.
4. PW2, mother to the accused stated that on September 8, 2014, she returned home from a funeral and found the accused had quarreled with the deceased and the deceased was dead though the accused was not at home. She stated that the body of the deceased had cuts and that he found many people at home but did not ask them anything. The witness attracted no cross-examination from the defense.



5. PW3, the Assistant Chief of Shiasaba sub-location told the court that on September 9, 2014 at about 8am, he received a call from PW2 informing him that his son had killed his uncle, the deceased. He went to the scene and found the body of the deceased lying on the ground near the gate to the accused with panga cuts. The police came for the body and took it to the mortuary and later the accused was arrested by the village elder. He was not told by PW2 what caused the quarrel between the accused and the deceased. In cross-examination, the witness told the court that the deceased, the accused and PW2 lived in the same compound.
6. PW4, a village elder gave evidence that on September 11, 2014 at about 6:30 am he was on his business when he overheard some women say that the accused who was ahead of them had killed a person in the nearby village. He approached him and saw him carry some firewood which the accused intended to go and sell and the witness called some men with whom they arrested the accused, who admitted to having killed a person, and took him to the police station. In cross examination, he told the court that the women who gave him the information did not record statements just like the young men who helped effect the arrest.
7. PW5, No 66970 and the investigating officer reiterated the testimony of PW1, PW2 and PW4, told the court about the report and the visit to the scene followed by removal of the body to the mortuary. At the scene he spoke to PW2 who told him that she had left the deceased at the compound she shared with the deceased, the accused and three children of the accused, only to come back the next day and find the deceased dead and recovered a blood stained panga which she handed over to PW5.
8. He added that the accused was taken to the police station by member of the public on the September 11, 2014 and that on September 15, 2018 he attended postmortem examination by the pathologist and he collected blood and other samples from the accused which on October 14, 2018 he forwarded with the blood stained panga to the government analyst for analysis. He did so using an exhibit memo form which he produced as Pex 1. He also produced the sketch plan as Pexh 2 and marked the post mortem report as Mfip 3. He was transferred before the government analysts report could be availed and could not know if the report was ever received. He added that PW2 had told him that the accused was a drunkard who had been drunk on the evening of September 8, 2014, had previously attempted to burn the house of the deceased over some unga and that both the accused and the deceased were never married.
9. When cross-examined, the witness said that, PW2 was not at the scene when the fight took place but that there had been a quarrel between the accused and the deceased on the September 8, 2014 but that her statement to the police did not mention the quarrel. Even his own statement did not advert to the alleged quarrel. He then admitted that both the murder weapon as well as the analysts report was not before the court and that the information leading to the arrest of the accused was given by the women who were carrying firewood.
10. PW6, a consultant pathologist at the Kakamega County General Hospital gave evidence that he conducted an autopsy on the body of the deceased on September 16, 2014. On examination, the deceased had three deep cut wounds across the right elbow on the front, across the left elbow at the back and across the left forearm almost being chopped. He was of the opinion that the deceased died due to external blood loss secondary to sharp force trauma following assault. On cross examination, the witness told the court that the injuries on the deceased body were largely on the forearm and could be classified as defensive wounds.
11. It is the analysis of that corpus of above evidence that should dictate to court whether a *prima facie* case has been established to justify the accused being placed on his defence. A *prima facie* case is the



kind that requires rebuttal by the accused¹ and would entitle the court to reach a conviction even if no further evidence is availed².

12. The task before the court at this stage is to be satisfied that the evidence on record is self-speaking that the admitted death of the deceased was caused by the unlawful conduct of the accused and that such conduct was propelled by malice aforethought.
13. At the close of the prosecution's case, there was never any direct evidence that it was the accused that inflicted the panga cuts on the deceased's body. What was availed by the evidence of PW1, 2, 3 and 4, was in the nature of circumstantial evidence whose goal was to show that the accused's behavior on the evening of September 8, 2014 of having quarreled with the deceased, taking his children to PW1 and thereafter being unavailable at the home he shared with the deceased was suspect and pointed towards his guilt. That may be indeed a very legitimate suspicion and rational by a reasonable mind not bound by the dictates of the law. However, suspicion however strong cannot be the basis of a conviction. In *Mary Wanjiku Gichira v Republic*, criminal appeal No 17 of 1998, the Court of Appeal did reiterate the law when it held that:-

“Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.”

14. Even though there was no direct evidence to connect the accused with the offence, the prosecution had recovered a blood stained panga together with samples from the deceased body and had the same forwarded for analysis but no outcome was received or if received back never tendered in evidence. The effect is that a gapping void was left conspicuously showing. It is therefore the finding of the court that the evidence is so lacking in weight, and reliability that it would be unsafe and wholly a travesty of the principles of law applicable to convict on it.
15. The court thus finds that no prima facie case has been demonstrated, enter a verdict of not guilty and acquits the accused under section 306(1) *Criminal Procedure Code*. Let the accused be acquitted forthwith unless otherwise lawfully held.

Dated, signed and delivered in Kakamega this 17th day of February 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Alugula for Iddi for the Accused

Ms. Chala for the Prosecution/State

Court Assistant: Polycap

¹ Republic v Abdi Ibrahim Owl [2013] eKLR

² Ronald Nyaga Kiura v Republic [2018] eKLR

