



Director of Public Prosecution v Michubu & another (Criminal Case 27 of 2018) [2023] KEHC 2905 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 27 OF 2018
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

BONIFACE MUTWIRI MICHUBU 1ST ACCUSED

KEN MUNYUA MUNGERIA 2ND ACCUSED

JUDGMENT

1. Boniface Mutwiri Michubu and Ken Munyua Mungeria (Accused 1 and 2 respectively) are charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge are that

On February 24, 2018 at Kimasia village, Antuambui Location in Igembe North sub-county within Meru County jointly with others not before the court murdered Jonah Zacharia Thuranira

Prosecution case

2. The prosecution case as recounted by Victor Mwangela is that on the February 24, 2018 at about 09.00 pm, he was walking home with two others when they heard screams. That they rushed to the scene and found Zacharia Thuranira (Thuranira) lying down groaning in pain. The witness stated he saw some people running away 10 metres away from the scene. He stated one person had a maroon trouser similar to the one Accused 1 normally wore and the second person had dreadlocks similar to the ones Accused 2 donned and that they were not armed. Peter Muriki who was with Victor Mwangela stated he found Thuranira lying down and Accused persons standing nearby. He stated that Accused 2 was armed with a stick.



3. An autopsy on Thurania's body was conducted March 2, 2018. The postmortem form tendered as PEXH. 1 reveals that Thurania suffered bruises on right hand, fractured left skull with subdural hematoma and had dies of cardiopulmonary arrest due to severe head injury with subdural hematoma.

Defence Case

4. Both Accused persons in their sworn defences denied that they were at the scene of crime. They also stated that Thurania was unknown to them.

Analysis and determination

5. Section 203 and 204 of the *Penal Code* under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
6. The sections read as follows:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
7. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.
 - a) The death of the deceased
8. The postmortem form tendered in evidence PEXH. 1 reveals that Thurania suffered bruises on right hand, fractured left skull with subdural hematoma and had dies of cardiopulmonary arrest due to severe head injury with subdural hematoma.
 - b) Proof that accused person committed the unlawful act which caused the death of the deceased
9. According Victor Mwangela did not see Accused persons assault Thurania. The only reason implicated them was because according to him, he saw two people walking away from where Thurania was lying. One person had a maroon trouser similar to the one Accused 1 normally wore and the second person had dreadlocks similar to the ones Accused 2 donned and that they were not armed.
10. The evidence by Victor properly evaluated does not in any way identify the persons he saw at the scene Thurania was lying injured. It is unlikely that Accused 1 is the one person that wears a marron trouser and Accused 2 the only one that donned dreadlocks.
11. Peter Muriki who was with Victor Mwangela stated he found Thurania lying down and Accused persons standing nearby. He stated that Accused 2 was armed with a stick.
12. His evidence contradicts that of Victor who said he saw two men walking away and none was armed and the contradiction created by the two purported eye witnesses leaves the court in doubt as to the truthfulness of their evidence.



13. The evidence by Victor and Peter properly evaluated falls in the category of what the Court of Appeal described in *Ndungu Kimanyi v Republic* [1979] KLR 282 that:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

14. Both Accused persons raised the defence of alibi that they were not at scene of crime. The Supreme Court of Nigeria in the case of *Ozaki & Anor v The State* [1990] LCN/2449(SC) held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.”

15. Our own Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held That:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

16. I have weighed the prosecution case vis a vis the defences of alibi raised by Accused persons and I have found that the defences were not rebutted and they introduce into the mind of the court a doubt that is reasonable considering that the case of the prosecution against them cannot be said to have been proved beyond reasonable doubt.

Malice aforethought

17. The prosecution having failed to prove actus reus, it would be futile for this court to delve into the issue of malice aforethought.

Disposition

18. In the end, I have come to the conclusion that both Accused persons are Not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the *Penal Code* and are hereby acquitted. They shall be set at liberty unless otherwise lawfully held.

DATED THIS 30TH DAY OF MARCH 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused 1 & 2 - Present

For the Accused persons - Mr. Mutegi Advocate

For the State - Ms. Rita (PC 1)

