



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mutende (Criminal Case 17 of 2019)  
[2023] KEHC 18082 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18082 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 17 OF 2019**

**AC MRIMA, J**

**MAY 25, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**JANET CHEBET MUTENDE ..... ACCUSED**

**JUDGMENT**

1. Janet Chebet Mutende, the accused herein, was 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 November 20, 2018 at Michai village within Trans Nzoia County, the accused jointly with another person not before Court murdered Wycliffe Alele (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned before Court, she pleaded not guilty to the offence. After the close of the prosecution’s case, this Court found that a prima facie case had been established to place the accused on her defence.

**The Trial**

3. The prosecution called seven witnesses in its bid to establish the charges drawn against the accused.
4. Before his death, the deceased was a thirty-six-year-old mason. He was the son of Alice Murinchi who testified as PW2. The accused shared a neighborhood with the accused, Kevin Gitahi Nabibia (testified as PW1) and he was a seventeen-year-old Form 1 student as well as Kelvin Karata Wanyama (who testified as PW3).
5. On November 20, 2018, PW1 watched a football match between 5:00 p.m. and 9:30 p.m. together with his twenty-two-year-old cousin one Kevin Barasa (not a witness). On their way back home, PW1 and his cousin Kevin bumped into the accused. She was with one Mike Nyongesa. The two held the deceased on the ground. According to PW1, he witnessed the accused taking money and a phone from



- the deceased's pocket. Upon seeing PW1 and Kevin, the accused and the said Mike fled the scene. PW1 stated that although it was at night he was aided by light from a torch to see.
6. The following morning PW1 and PW3 learnt that the deceased had passed on. They rushed to the scene. PW1 realized that the deceased was lying at the very place he had seen him being assaulted and robbed by the accused and Mike the night before.
  7. PW2 also received the news of the death of the deceased. She rushed to the scene and found the deceased lying naked in a pool of blood. He also had a cut on the neck and head. PW2 also spotted some shoes that were identified as to belong to the said Mike.
  8. According to PW3, the accused developed a propensity to fight with men.
  9. Based on PW1's account, the accused person was arrested by members of public and taken to Sibanga Patrol Base on 21<sup>st</sup> November, 2018 with the aid of the Assistant Chief. The accused was then re-arrested by PW4 one Charles Osiemo who was at the Report desk. He then placed the accused in the cells.
  10. PW4 then informed the DCI Department at Kachibora who took over the conduct of the matter.
  11. The matter was investigated by PW7 one CPL Tom Ndolo. He visited the scene in the company of his colleagues. They found the deceased's body naked with blood on his body. PW7 collected the shoes that were taken to the Government Chemist for further analysis. After completing investigations and collecting the evidence, PW7 charged the accused with the present offence.
  12. The body was transferred to the Kitale County Referral Hospital Mortuary. It was identified by the deceased's brother Kennedy Ishuga (who testified as PW5) on November 27, 2019 during its post mortem examination which was conducted by Dr. Okumu.
  13. The Post Mortem Report was, however, produced in Court by Dr. Dennis Nanyingi (PW6). According to the Report, the deceased was found to be in good nutrition and physique. Externally, he had a cut on the right parietal scalp, occipital and transverse cut on the neck anteriorly. Internally, his head suffered a scalp hematoma on the occipital area and right parietal area of his skull. The conclusion was that the deceased died due to severe head injury secondary to intracerebral hemorrhage secondary to assault caused by a sharp object.
  14. After the close of the prosecution's case, the Court found that the accused had a case to answer. She was placed on her defence. Her sworn alibi defence was that on the fateful night she was at Jackie's Bar consuming alcohol. She retreated home drunk denying that she was with Mike Nyongesa or ever met the deceased. However, she overheard the said Mike Nyongesa talking with others whom she didn't recognize. She denied the offence stating that the charges leveled against her were based on suspicion.
  15. After close of the defence case, parties filed written submissions. However, as at the time of writing this judgment, the Court was only in receipt of the submissions by the prosecution. Learned Prosecution Counsel submitted that the prosecution had discharged its burden of proof to the required standard in establishing that the accused murdered the deceased.

### **Analysis:**

16. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No.



352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

17. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

#### **The death of the deceased:**

- 18. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See section 118A of the *Evidence Act*, cap. 80 of the Laws of Kenya).
- 19. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased wounded, bleeding and lying dead at the scene. Some witnessed a Post Mortem examination conducted on the lifeless body of the deceased. The body was later released to its relatives and was subsequently buried.
- 20. The second way in which the death of the deceased was proved was through the evidence of the Medical Doctor who conducted the autopsy on the body of the deceased.
- 21. During the autopsy, it was observed that the deceased had injuries both externally and internally. It was concluded that the deceased died due to severe head injury secondary to intracerebral hemorrhage secondary to assault caused by a sharp object.
- 22. This Court, therefore, finds and hold that the death of the deceased in this case was proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

- 23. There was only one witness who testified on the identity of the accused as the perpetrator of the offence. That was PW1. As such, the evidence of a single evidence ought to be carefully treated.
- 24. In *R v Turnbull & Others* [1973] 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

25. The Court of Appeal in *Wamunga v Republic* [1989] KLR 426 stated as follows: -



.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

26. The Court of Appeal further held in *Nzaro v Republic* [1991] KAR 212 and *Kiarie vs Republic* (1984) KLR 739 that evidence of identification/recognition at night must be absolutely watertight to justify conviction.
27. Still the Court of Appeal in *Peter Musau Mwanzia v Republic* [2008] eKLR dealt with the distinction between recognition and identification of a suspect. The Court stated as under: -

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.

28. Back to the testimony of PW1. From the record, it is not apparent how far PW1 was when he saw the accused and Mike. Further, it is not on record the part of the accused which PW1 saw as to recognize the accused as the assailant. The mode of dressing of, as well as the time PW1 took with, the assailant were crucial aspects, but missing. Likewise, the strength of the torch which PW1 used to see was not alluded to.
29. Given that the incident took place at night and in view of the above lapses, this court finds it a tall order to establish that it was the accused that was at the scene of crime.
30. There is also the issue of failure of Kevin Barasa who allegedly witnessed the ordeal that led to the death of the deceased with PW1 to testify. The failure was not explained to or at all.
31. The Courts in *Bukenya & others v Uganda* [1972] E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku v Republic* [1985] KLR 412 re-affirmed the legal principle that in instances where crucial witnesses are not called to testify without any justification, then it is presumed that such witnesses would have been averse to the prosecution.
32. The totality of the foregoing is that the sole evidence of PW1, in the circumstances of this case, cannot be favourable and free from possibility of error as to safely make it the basis of a conviction. The evidence casts doubt as to render a conviction unsafe.
33. This court, therefore, finds and hold that there is no evidence to establish that it was the accused who committed the unlawful act which caused the death of the deceased.
34. Having answered the second issue in the negative, this court finds no need of dealing with the last issue since it adds no value to the matter. As such, the court finds that the prosecution failed to prove the charge of murder.
35. Consequently, the accused is accordingly acquitted and set free forthwith unless otherwise lawfully held.



Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court in the presence of:**

**Miss. Mwemeke, Learned Counsel for the Accused.**

**Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.**

**Regina/Chemutai Court Assistants.**

