



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kaula (Criminal Case 17 of 2018)
[2023] KEHC 21412 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 17 OF 2018**

**GMA DULU, J
JUNE 29, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES MUSYOKI KAULA ACCUSED

JUDGMENT

1. The accused herein stands charged with murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 4th to 5th August, 2018 at Salama township in Mukaa Sub County within Makueni County murdered Catherine Mueni Muteti.
2. He has denied the charge.
3. In providing their case, the prosecution has called nine (9) witnesses PW1 Evaline Mbulwa Muteti a sister of the deceased testified that her sister Catherine Mueni Muteti (the deceased) lived with the accused in a house at Salama and that they quarrelled from time to time and that the accused assaulted the deceased on 27.6.2018.
4. It was her evidence that on 4th August, 2018 at 1p.m, she phoned deceased who told her to go and take spaghetti from the deceased's home and cook. She proceeded there and found the accused and picked the spaghetti and left, cooked the same at home and ate and proceeded to the market to watch video at 7p.m. At 8p.m. the deceased came to the video and informed her that this witnesses' son was crying. The deceased then left for her home.
5. According to this witness also, on the next day (5th August, 2018) she did not see the deceased though she went to her home and knocked. She said that she went there at 9a.m. and noted that the house was locked with a bigger padlock than the usual one, and the open shoes of the deceased and those of the accused were at the door. She thereafter called the deceased on phone in the evening but there was no response. On 6th August, 2018 she phoned the deceased again in the morning but in vain and



- proceeded to the deceased's house but found it still locked. She however found shoes belonging to the accused person at the door.
6. It was her further evidence that on 7th August 2018, she phoned the deceased, again she phoned her on 8th August 2018 and on getting no response, went to the deceased's house and on trying to peep inside, was met with a stench of bad smell; and proceeded to inform her mother about what she noticed. Thereafter, an aunt informed (Paul) the landlord about the situation.
 7. It was also her evidence that when the landlord came, he removed one glass piece from the window and on pushing the curtain, they saw the deceased's body lying on the bed, covered with a blanket. As a result the police from Salama Police Station were called and came and broke the padlock and entered the house which had a sitting room and a bedroom. In the bedroom was the deceased's body and under the bed they saw a brown tee-shirt and a hammer. The witness noted that the body of the deceased had injuries on the head, leg, and the lower part was naked but the upper part had a bra.
 8. It was her evidence also that the police removed the body and, a few days later, the accused was arrested at Masaa. According to this witness the deceased bore a child in 2007 who was in boarding school.
 9. PW2 was Rita Mumbua Muteti an aunt of the deceased and PW1, who operated a kiosk at Salama. On 5th August, 2018 she called the deceased Catherine Mueni on phone for the deceased to send her women group merry go round contribution. It was her further evidence that PW1 a sister of the deceased, also tried to contact the deceased on that day but in vain.
 10. The witness phoned the deceased again in the evening in vain and on 6th August, 2018 she called her phone at 2p.m and 7p.m but did not get through to her. Then on 6th August, 2018 and 7th August, 2018 PW1 told her that she had not seen or managed to contact the deceased. Then on 8th August, 2018 PW1 came at her kiosk and informed her that she had not managed to raise the deceased, and the witness left PW1 at the kiosk and proceeded to the mother of the deceased (Damaris) and both proceeded to the house of the deceased. The witness then informed Paul the landlord who went to the deceased's house and, on removing the glass from the bedroom window and on peeping the deceased's body was seen lying on the bed.
 11. It was her further evidence that she reported the incident to the police who came and broke the padlock and entered the house and, on lifting the blanket it became clear to her that it was the body of Catherine the deceased lying on the bed. She noted blood stains on the head, and saw a hammer on top of a shirt. In the lower part of the deceased, the body had no clothing. There was also a jacket on a seat at the sitting room. It was her evidence that the items were taken by the police, and that she identified the body during post mortem examination.
 12. According to her, the deceased lived with James Musyoki; the accused, and that the deceased had a child who was in Standard 7. She identified the open shoes of the deceased, the keys found on the seat, and the open shoes of the accused and socks. She also identified the accused person in court.
 13. PW3 was Paul Wambua Nyamai a businessman at Salama and the land lord of the deceased. It was his evidence that he knew Musyoki the accused who lived with his girlfriend in one of the witnesses houses and that the girlfriend Catherine the deceased, was the tenant.
 14. It was his evidence that he last saw Catherine the deceased on 3rd August, 2018. According to him, on 5th August, 2018 at 4a.m. in the morning, he went to the toilet outside to relieve himself when he heard noise at the gate and when he peeped, he saw the accused person at the gate as there was security lights on. Thereafter the accused person opened the gate and left.



15. It was his further evidence that on 8th August, 2018 at 10a.m while at his shop, PW2 Ritah Mumbua went and told him that the deceased had gone missing and that she wanted him to assist and check in the house. He did so and noted a body lying in bed in the house.
16. He then advised PW2 to make a report to the police which she did and police officers broke the padlock and entered the house which had two rooms. The body was confirmed to be that of Catherine and he noted blood on the head and saw a tee-shirt and a hammer under the bed. He identified the padlock and the shirt and hammer. The police took the body to Machakos funeral home.
17. According to him, about a month before this incident while at his house at night, he heard screams from Catherine's house and when he went to check, Catherine came out and asked him to help her as she had been injured by the accused person. He also saw the accused person outside the house and Catherine asked the witness to tell the accused to leave, and he talked to him and the accused left.
18. PW4 was Damaris Wayuwa Muteti a bar business woman at Salama. It was her evidence that on 4th August, 2018 while at home at Salama, her daughter Catherine (the deceased) went to greet her brother James. The deceased then returned at 4p.m to enquire if the witness had seen the accused because he had her house keys. The deceased then spoke to the accused on phone and when he said that he was at home, the deceased proceeded there and returned with the keys at 6p.m, and then left again for her house.
19. It was her further evidence that next day, she went to the deceased's house and found it locked, and neighbours said that they had not seen her. On 6th August, 2018 the witnesses daughter Evelyne Muteti and deceased's brother Jefrice Muteti and Rita, phoned the witness and asked if she had seen the deceased. She then went to the deceased's home and found it locked.
20. On 7th August, 2018 at 12 noon, she saw the accused person proceeding to the deceased's house from a distance. On 8th August, 2018 at 9a.m Evelyn and Rita came and they all proceeded to the deceased's house, and on checking through the window noticed many flies inside and also noted a foul smell.
21. Then Rita the sister of the witness, called the landlord who peeped through the window and saw the body of the deceased. The police were then called and the door broken and when they entered they saw the deceased lying on the bed dead. There was blood and an injury on the head. On the floor was a hammer lying on a T-shirt. She identified the T-shirt and hammer in court.
22. According to this witness, the police took photographs of the body and the scene and took away the body as well as exhibits. She also testified that in 2017, the accused person badly assaulted the deceased, as well as March, 2018 both of which incidents were reported to the police. It was her further evidence that the deceased had a child by the name Irene who was in boarding school.
23. PW5 was Miriam Mutuku Muteti, a sister of PW4 Damaris, and an aunt of the deceased. According to her, two post mortem examinations were done on the deceased and she witnessed both post mortem examinations. She stated that the first post mortem examination done by Doctor Waithera was done in an unclear manner, thus the second post mortem examination. She stated also that they could not trace the deceased from 5th August, 2018, and on 8th August, 2018 they learnt that she was no more. She confirmed that Rita was her sister.
24. PW6 was David T. Muteti a brother of the PW4 who worked for an Asian in Nairobi. It was his evidence that on 8th August 2018, he received news from Mbulwa about the death of the deceased. He testified that the first post mortem examination was done on 16th August, 2018 but was not accepted by the family. It was his further testimony that the second post mortem examination was done on 24th



- August, 2018. He stated that in the first post mortem report, death was reported to be natural but in the second post mortem report it was noted that there was a fracture on the right side of the head.
25. PW7 was PC Rodney Ombae, who on 8th August, 2018 was instructed by Corporal Simiyu to go to a scene of crime with another police officer. They proceeded to the scene at a plot in Salama town and removed a crowd. They found the house locked with a metal padlock from inside. They peeped through the window and saw a female body lying on a bed.
 26. They then broke the house and entered and found that the sitting room was fine. In the bedroom they removed the duvet and the mother of the deceased identified her dead daughter whose body was decomposing. The body was naked from the waist downwards. There was blood and they also saw a hammer on top of a T-shirt on the floor. At the front of the bed was a bunch of keys. There was also a reflector jacket on the other bed.
 27. It was his evidence that they removed the body to the mortuary at Machakos and photographs were taken. They also took the brown T-shirt, reflector jacket, bunch of keys. It was his evidence that the case was handed over to DCI for investigations.
 28. PW8 was Doctor Sylvester Maingi a Consultant Pathologist from Nairobi County who was called to assist perform the second post mortem at Machakos Funeral Home. He was informed by David Muteti a relative of the deceased that relatives were not satisfied with the first post mortem examination conducted on 16th August, 2018. This witness then phoned the initial post mortem doctor Waithera and they agreed to the repeat post mortem for 24th August, 2018.
 29. On that date, he proceeded to Machakos Funeral Home and Doctor Waithera availed herself, but declined to participate in the repeat post mortem examination. The witness thus conducted the post mortem examination on the body of Catherine Mueni Muteti identified by three relatives Rita Mumbua Muteti (aunt), Miriam Muteti (aunt) and David Muteti (uncle).
 30. The body had moderate decomposition and was embalmed but was markedly pale. He noted two circular injuries on the right lower limbs both 4cm in diameter, bruises on right leg and ankle as well as outward protrusion of right eye. There were stitches on top of head and across the chest from the previous post mortem examination.
 31. On the head externally, there was a 6cm laceration on the right front part which was also stitched. On opening he found a bone fracture extending to the middle of the head and one towards the eye. The brain had liquified and disappeared. In his opinion, the cause of death was excessive blood loss due to blunt trauma to the head. He prepared and signed the post mortem report which he produced as an exhibit. He also noted from the previous post mortem report that the doctor noted the head injury but concluded that she could not ascertain the cause of death.
 32. PW9 was Corporal Rotich attached to Mukaa DCI office and the investigating officer of the case. It was his evidence that on 8th August, 2018 they received a death report and proceeded to the scene with Sergeant Simiyu and PC Ombayo. It was a housing estate in Salama belonging to Paul Nyamai.
 33. They found the house locked but could sense foul smell. They broke the door padlock and entered the house which had two rooms. The body was on a bed in the bedroom which had two beds. The body was of a woman, naked from waist downwards. They found a hammer beside the bed. They removed the body. They noted that blood had oozed from the head through the mattress to the floor, which was now dry.
 34. On the other bed they found a jacket and helmet. They also took the padlock which he was told belonged to the accused. They also took two bundles of keys said to belong to the accused. They also



- took open shoes one pair brown and one pair black. They also recovered socks. He produced all these items as exhibits.
35. According to this witness, they took the body to Machakos County Hospital to await post mortem examination. When the first post mortem examination was done on 16th August, 2018 and Doctor Waithera said cause of death could not be ascertained, the family were not happy. He produced this post mortem report as an exhibit. Another post mortem examination was conducted by a doctor from Nairobi.
 36. It was his evidence that the accused was later arrested by the member of the public at Masaa market about 15km from Salama. He identified the accused person in court.
 37. When put on his defence, the accused tendered sworn defence testimony and did not call additional witnesses. He said that he was a sand loader. It was his defence evidence that on 4th August, 2018 he was at Salama looking for work. The deceased called him to go for supper at around 7:30p.m. He had not got work and started going home and on reaching the door, a lorry driver phoned and told him that they were at Malili and he left for the road to get work and arrived at the river at 12:30a.m They loaded sand from 2am that Sunday, and continued on Monday, Tuesday and Wednesday.
 38. On Wednesday, he proceeded to the market to get his phone and noted a number of missed calls. The first call was from his sister who stated that they heard screams and on going there they found my wife dead in the house.
 39. According to him, in the evening he went to claim his money. On Thursday he started travelling by lorry to Kilia cha Party town at 11a.m but alighted because the lorry was taking a long route. He decided to take a short cut. He got a boda boda (motor cycle) rider and asked him to transport him to Salama but took him to Masaa first where he alighted. He entered a shop and bought cigarettes and on coming out at 7:30p.m, he asked two motor cycle riders to take him to Salama but they declined saying they would not do so at night. He then decided to walk and after walking for 200meters he was followed by a motor vehicle with 3 passengers and a driver. The vehicle stopped and the passengers alighted. They produced sticks and ordered him to sit down. He thought they were thieves but they produced a rope and tied his hands.
 40. On arrival at Masaa, one of them asked him whether he knew what he had done and as he tried to give an explanation one of them hit him with a stick. Then many people came towards him and told him to wait for the Chief. It was around 9:30a.m to 10a.m that the police arrived. Before that some people had come with tyres to burn him but later agreed with the others not to burn him. He was then taken to Salama Police Station, where he denied killing his wife, the deceased. He said that when his wife died, he was not present.
 41. This is a murder case. The accused stands charged with murder. Though both the prosecution counsel and the defence counsel had indicated at the close of the case that they would file written submissions, they did not do so.
 42. The elements of the offence of murder are whether the deceased died, secondly whether the death is unlawful, thirdly whether the accused person caused the death of the deceased, and lastly, whether the death was caused with malice afterthought.
 43. On the first element whether the deceased died, there is no doubt that PW1 Evaline Mbulwa Muteti, PW2 Rita Mumbua Muteti, PW4 Dmaris Wayua Muteti and PW5 Mriam Mutuku Muteti found that the deceased who was their relative was missing from 5th August, 2018. On 8th August, 2018 they called



- the landlord of the deceased PW4 Paul Wambua Nyamai, who broke the glass window of the locked rented house of the deceased and noted that the deceased was lying on a bed in the bedroom.
44. They called the police who came and broke the house and confirmed that the deceased was dead and decomposing. The body was taken to the mortuary at Machakos and two post mortem examinations were conducted. Doctor Sylvester Maingi PW8 produced the post mortem report form for the second post mortem examination which he had conducted, and the cause of death was due to blunt trauma to the head.
 45. In my view, the prosecution proved beyond any reasonable doubt that the deceased died due to bleeding consequent upon blunt trauma to the head.
 46. On whether the death was unlawful, no suggestion has been tendered in evidence to indicate that the death could be lawful. The deceased certainly died a painful death and I find no reason to imagine that her death was lawful. I thus find that the death was unlawful.
 47. With regard to the third element whether the accused person caused the death of the deceased, the evidence of the prosecution on record is circumstantial as nobody witnessed the incident causing the death of the deceased. The prosecution says that the accused person caused the death of the deceased while the accused person says on oath that he was away when the deceased died.
 48. In order to prove commission of an offence by an accused person on circumstantial evidence, the facts connecting the accused person to the offence should lead to the irresistible conclusion that he or she committed the offence and there should be no other reasonable hypothesis than that he was guilty. In this regard, I will cite the case of *Chiragu & Another =Versus= Republic* Criminal Appeal No. 104 of 2018 [2021] KECA 342 (KLR) wherein Makhandia Mbogholi Msagha and H.A.Omondi JJA cited a number of cases including the case of *Sawe =Versus= Republic* [2003] KLR 344 in which the Court of Appeal stated –

‘In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that he is guilty..... The burden of proving facts to justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution.’
 49. The evidence of both the prosecution and the defence was that the accused and deceased lived together as husband and wife, though not formally married. That the two met in the evening of 4th August, 2018. That from the 5th August 2018, the deceased was not seen again until her body was seen recovered by relatives on 8th August, 2018 in the absence of the accused person.
 50. The deceased is dead and cannot thus, say what happened. The accused person stated in his sworn evidence that he was sand harvesting at Salama for a number of days, until he noted messages in his mobile telephone indicating that his wife had died. He was arrested at Masaa days after the death of the deceased, and he claimed to have delayed due to following up his job payments.
 51. In my view, the prosecution proved beyond any reasonable doubt that the accused person caused the death of the deceased. Firstly, the landlord Paul Wambua PW3, who had nothing to gain by implicating the accused, stated in evidence that he saw the accused in unexplained circumstances at the gate of the house of the deceased in the early morning of 5th August, 2018. Secondly, the padlock found on the main door of the house was said to belong to the accused person and he did not deny this. He was also the only person who lived together with the deceased as husband and wife or lovers.



52. More importantly, the accused person absented himself from the deceased's house from 5th August, 2018 and was not seen there even after he became aware of the death. Instead of proceeding home or to the relatives of the deceased after he heard the news of the death he was not concerned and he was found and arrested by the public at Masaa later, a distance away. He also gave a long and unconvincing story in his defence on how he went to Masaa instead of looking for the deceased or her relatives, which was a lie and an attempt to divert attention from the death of the deceased.
53. In my view, the accused person was just playing a hide and seek game by keeping away from the deceased house and relatives. In my view, he knew what had happened to the deceased and his alibi defence was thus an afterthought and a lie.
54. I find that the prosecution has proved beyond any reasonable doubt that the accused caused the death of the deceased person by hitting her head with a blunt object and totally injuring her, thus causing her death.
55. Lastly, was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the Penal Code. It is an intention to cause death or do grievous bodily harm.
56. In my view, the injuries found on the body and head of the deceased were so serious and grievous that they must have been caused with an intention to kill her, as they were so severe that their natural consequence would be death anyway.
57. I thus find that the prosecution has proved beyond any reasonable doubt that the accused committed offence of murder by killing the deceased as alleged in the information. Consequently, I convict the accused person herein for the offence of murder Contrary to Section 203 as read with Section 204 of the *Penal Code*.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JUNE 2023 VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Muraguri for State

Accused

Mr. Otolu court assistant

