



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Syala (Criminal Case 5 of 2018)  
[2023] KEHC 21413 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21413 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 5 OF 2018**

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

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**STEPHEN MUTUA SYALA ..... ACCUSED**

**JUDGMENT**

1. The accused person herein stands charged with the offence of murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 27<sup>th</sup> January, 2018 at Yikivala village in Kibwezi District within Makueni County murdered Benard Musyoka Muambe.
2. He has denied the charge. In their effort to prove the charge the prosecution has called six (6) witnesses.
3. PW1 was Franciscah Mutindi Maumbi a village administrator from Kibwezi West and a sister of the deceased, who lived with her.
4. It was her evidence that in 2017 she heard rumours that Steven Mutua Syala the accused was complaining about an affair between the deceased and the wife of the accused. Though she enquired about the rumour from Musyoka, the deceased, the deceased denied the rumour, while the accused's wife also denied the affair but said that her husband was so complaining.
5. According to her, Stephen the accused even phoned her in November/December 2017 and complained that the deceased was having an affair with his wife.
6. According to this witness, she then tried to raise fare for the deceased to travel to their home of origin, but before that happened in January 2018 she received a phone call from Franciscah informing him that Musyoka had been killed.



7. After receiving the phone call on the death of the deceased, they tried to trace the accused, including asking his wife, but he could not be traced. The accused was traced and arrested some days later at Malindi after his brother and father had been arrested by the police.
8. It was the evidence of PW1 that the wife of the accused also disappeared after the incident. She stated that the accused was a neighbor and that her brother (the deceased) had educated and paid for driving lessons for the accused. According to this witness, the accused had a wife and two children. It was also her evidence that the deceased was a very social person, and that the witness even assisted the accused person by giving County Government bursaries to his children. She identified the accused person in court.
9. PW2 was Obadia Wambua Mutuku a shopkeeper at Yakinda village whose evidence was that on 27<sup>th</sup> January, 2018 at 5p.m while at his shop, he saw an old man by the name Syala Mwalimu accompanied by his two sons Ndavi and Musembi. He also saw Musyoka the deceased. Thereafter, at the back of the shop he saw Syala and Musyoka arguing and he advised them to leave the shop and Syala Mwalimu left through the front door, while Musyoka left through the back door.
10. According to him, after about one hour Mwalimu came back to the shop and stated that he had left Musyoka somewhere.
11. He testified further that on 28<sup>th</sup> January, 2018 when he opened the shop, he heard that someone had been killed near Ikivala Primary School about 300 metres from the shop. The police later came and took away the body of the deceased Musyoka. All he could say is that Musyoka had an argument with Syala the previous day.
12. PW3 was Peter Musembi Mutea from Ikivala village who stated that on 27<sup>th</sup> January, 2018 at 6p.m he left home and proceeded to Ikivali market where he met friends Wambua, Nzavi Musyoka and Mutunga at a shop where Obadia Wambua (PW2) operated his business. Musyoka then left shortly after.
13. It was his evidence that after about 15 minutes, Stephen Syala and his elder brother Nzulei Syala and father Syala Mwalimu arrived looking for Musyoka because Musyoka had attempted to assault Syala Mwalimu. According to this witness Stephen carried a Masai club, his father Syala Mwalimu carried a panga (machete), while Nzulei was not armed. They however did not find Musyoka as he had already left.
14. After they left, Musyoka came back to the shop and on being informed that he was being sought, he responded that he did not know the reason why he was sought. At 7p.m, the witness left the shop leaving behind Musyoka and Mutunga.
15. Next day which was a Sunday, he got information that Musyoka had been killed at Ikivala School. He identified Stephen Syala the accused in the dock and said that he was the person who carried a Masai club on 27<sup>th</sup> January, 2018. He stated also that it was Nzulei who asked for the whereabouts of Musyoka.
16. PW4 was Doctor Kavuli Musyoka a Medical Officer at Makindu Hospital, who carried out post mortem examination on Bernard Musyoka at Kibwezi funeral home and prepared and signed the post mortem report.
17. The doctor observed a deep cut wound below the right eye extending to the skull, fracture frontal bone, broken bone and multiple fractures. The jaws and nose bone were broken, and skin was scratched on the neck. In the respiratory system, there was a cut with haematoma. Frontal bone of the head and



- occipital bone were fractured. The cause of death was strangulation and severe head injury with blunt object with intention to kill. He produced the post mortem report form as an exhibit.
18. In cross examination, he stated that though there were signs of strangulation, the injuries on the head could possibly have been caused by a traffic accident.
  19. PW5 was Paul Nzuki Syala an elder brother of the accused person, whose evidence was that the deceased lived with a sister Jesica Mutindi who was a neighbor.
  20. According to him, the accused was married with four (4) children and operated a motor cycle (boda boda) business. On the 27<sup>th</sup> January, 2018 at 5p.m. after seeing the accused walk down towards the market, the witness called on phone Mercy a child of the accused, who told him that her mother had left home and had not come back.
  21. According to this witness, another child of the accused Muendo also informed him that the mother and father had disagreed. It was his evidence that though they sought for the accused, they did not find him until 7:50p.m when the accused came back home. At 8p.m, the wife of the accused went to the home of the witness and told him that she had disagreed with the accused person because he was not providing assistance at home like giving money.
  22. It was his evidence that the accused person also had a complaint that his wife had a lover called Musyoka, which information the witness got from the public.
  23. At 6a.m that morning, he heard from a neighbour's child that a person had been seen lying on the road and at 1p.m while at the market, he received another report about the dead person and this time he was given the name of the deceased as Musyoka, but he did not bother to go to the scene.
  24. It was his further evidence that police came to his house next day, a Sunday, and arrested him and his father and kept them in cells for two weeks, took them to court, but were later released when the accused person was found. He did not know the person who killed the deceased.
  25. PW6 was Sergeant Martin Samurumo of DCI Nzauni area and previously attached to Kibwezi Sub-County, the investigating officer of the case.
  26. It was his evidence that on the 28<sup>th</sup> January 2018, they received a report in the morning from Chief Benjamin Mutisya that a body had been found at Ikikala village and it was suspected that the person had been killed. They then proceeded to the scene and saw the body of Boniface Musyoka Mumba lying on the road with injury on the head, right eye and mouth. They were also informed that the suspected culprit was not present.
  27. They took the body to the mortuary and later two people were arrested by Administration Police officers and they re-arrested them. These were Joel Syala and Paul Syala a father and a son.
  28. Later, they received information that the suspect had gone to an aunt at Watamu and he was thus arrested there. The body was put through post mortem examination and he witnessed the same. He conducted investigations and was convinced that there existed an allegation of a love affair between the deceased and the wife of the accused. He then charged the accused person in court. He identified the accused in the dock.
  29. When put on his defence, the accused tendered sworn defence testimony and called no additional witnesses.
  30. It was his defence that the deceased was his neighbor, but denied that he killed him on 27<sup>th</sup> January, 2018. According to him, on that day he woke up at 9a.m and left for Kasyani market to sell a goat to



- raise fare to go to work because he had a child in secondary school. However, he was called on phone by his cousin Mutuku who told him to go to Emali to meet him on the road at 4p.m and he did that.
31. He then went back home but did not find his wife and left on a motor bike to Kibwezi highway which took him 20 minutes and boarded a lorry driven by his cousin to Mombasa arriving at 1:00a.m.
  32. At 5:00a.m, his cousin took him to the road where he got transport to Malindi arriving at 7:30a.m Next day, he went for the job at the wholesale shop of his aunt place and worked for four days and on 5<sup>th</sup> February, 2018 while at work, three people entered – two women and a man and they greeted Mbogo the husband of his aunt. They then demanded for his name and said that there was information that he had killed someone at Kibwezi.
  33. They then took him to the Chief of Gedi and later to Watamu Police Station and thereafter, police from Kibwezi picked him on Sunday from Watamu and on Monday, he was taken to court. He denied killing the deceased and stated that when the deceased died, he was away from Kibwezi having left at 5:30p.m. He denied having informed PW1 about the deceased having a love affair with his wife, and also denied the testimony of PW3 who stated that he saw accused carrying a panga the evening of the death of the deceased, accompanied by his father and brother.
  34. After the close of the prosecution and defence evidence, defence Counsel M/s Wokabi Mathenge & Company filed written submissions. The prosecution relied on the evidence on record and did not file submissions.
  35. This is a murder case. The prosecution has the burden of proving each of the element of the offence beyond reasonable doubt.
  36. The elements of the offence of murder are firstly, whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused person caused the death of the deceased. Finally, whether the death was caused with malice aforethought.
  37. Proof beyond reasonable doubt has been considered by courts in several decided cases. It does not mean that there should be no doubt, but that if there is any doubt at all, it should be minor and not significant to shake the prosecution case.
  38. Did the deceased die? From the evidence of PW1, PW2, PW6 the investigating officer and PW4 Doctor Kavuli Musyoka, there is no doubt in my mind that the deceased died. Though a number of witnesses described him as Boniface, his name in the charge sheet is Bernard, and the accused person knows him as Bernard. I take it that Boniface and Bernard refer to the same person the deceased. The body was found at a road in the morning of 28<sup>th</sup> January, 2018. It had visible injuries. The post mortem examination conducted established that the cause of death was strangulation and severe head injury as a result of blunt trauma. The doctor PW4 said that the injuries on the head could have been due to a road traffic accident. However, the doctor noted fracture of internal organs in the neck, which in my view was the primary cause of death. The deceased died of strangulation.
  39. I thus find that the deceased died due to strangulation.
  40. Was the death of the deceased lawful? From the evidence on record there is no suggestion either from prosecution or the defence side that the death of the deceased was caused through any lawful or justifiable act. I thus find that the prosecution proved beyond any reasonable doubt that the death was unlawfully caused.
  41. Was the accused the culprit? Nobody saw the accused person commit the offence. Nobody witnessed the incident causing the death. The evidence is circumstantial. For such evidence to sustain a conviction



or to prove a criminal act, the inculpatory facts must lead to no other conclusion than that the accused is guilty of the act see *Sawe v Republic* [2003] eKLR.

42. The evidence on record is that the accused person suspected his wife of infidelity with the deceased. The evidence of the prosecution is that on 27<sup>th</sup> January, 2018 both the accused and deceased were at Yikivala.
43. The evidence of the prosecution is also that the accused was seen armed late in the evening. The accused however, said that he had left from Makindu at 5:30p.m to Malindi for work.
44. In my view, the conduct of the accused himself in this matter shows a guilty mind. Firstly, his own brother said that he had a love affair disagreement with the accused. Secondly, it is unbelievable that the accused could leave his wife and children and relatives without information and go to Malindi for work. His defence is also in contradicting with that of his own brother PW5 Paul Nzuki Syala who has nothing to gain by wrongly implicating him.
45. I am aware that suspicion, however strong cannot be the basis of a criminal conviction – see *Sawe v Republic* (2004) eKLR. However, in my view the evidence on record herein, is beyond mere suspicion, and satisfied the requirement in cases based on circumstantial evidence, in that it points to the irresistible conclusion that the accused person herein, either alone or with others, killed the deceased due to a pre-existing allegation of infidelity between the deceased and the accused’s wife.
46. I thus find that the prosecution has proved beyond any reasonable doubt that the accused person herein, caused the death of the deceased. The suggestion of a traffic accident in my view has no evidential basis.
47. Was the death caused with malice afterthought? Malice aforethought is defined under Section 206 of the *Penal Code*. It is an intention to cause death or do grievous bodily harm. With the severe injuries found to have been inflicted on the body of the deceased, it is clear to me that the intention was to cause the death of the deceased and nothing more.
48. I thus find that the prosecution has proved beyond any reasonable doubt that the death of the deceased herein was caused with malice aforethought.
49. Having found that the prosecution proved all the elements of the offence of murder against the accused herein, I hold that the prosecution proved the offence of murder against him.
50. Consequently, I find the accused guilty of murder Contrary to Section 203 as read with Section 204 of the *Penal Code* as charged, and convict him accordingly.

**DATED, SIGNED AND DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Ms. Muraguri for State

Accused: present

Mr. Otolo court assistant

