



**Republic v Matui & another (Criminal Case 2 of 2020)
[2023] KEHC 24293 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 2 OF 2020
AC MRIMA, J
OCTOBER 31, 2023**

BETWEEN

REPUBLIC STATE

AND

PAUL KIMUTAI MATUI 1ST ACCUSED

COLLINS KWEMOI CHEPKOMBE 2ND ACCUSED

JUDGMENT

Introduction:

1. The accused herein, Paul Kimutai Matui and Collins Kwemoi Chepkombe, were jointly 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 30th December, 2019 at Bondeni area in Gituamba Centre, Trans Nzoia West Sub-County within Trans Nzoia County, the accused jointly murdered Martin Lokoi Lobale (hereinafter referred to as ‘the deceased’).
2. When the accused were arraigned in Court to answer to the charge, they pleaded not guilty to the offence. They were tried. The hearing of this case was conducted by two Judges. The first four prosecution witnesses testified before Hon. Kimaru, J (as he then was). The rest testified before yours truly. After the close of the prosecution’s case, this Court found that a prima facie case had been established against each of the accused to place them on their defenses.
3. The accused gave sworn testimonies and no witnesses were called.

The trial:

4. The prosecution called five witnesses to establish that the accused jointly murdered the deceased. PW1 was Dr. Alex Wanyonyi Barasa who conducted the post mortem examination on the body of the deceased. PW2 was No. 66112 Sgt. Maurice Omukale who was the Officer-in-Charge of Gituamba



Police Post. No. 219669 PC Francis Rotich testified as PW3. He was also attached at Gitwamba Police Post undertaking general duties. PW4 was No. 113308 PC Musila Bernard from the DCI Trans Nzoia West and the Investigating Officer was No. 49084 SS Samson Kataka who was based at the DCI Trans Nzoia West Sub-County. He testified as PW5.

5. The prosecution's case was that on 30th December, 2019 at around 1700 hrs., PW2, who at the Gituamba Police Post, received a call from one PC Reservist Alex Otundo (not a witness) who was in Chepramut within Bondeni area and was informed that there was a body lying beside the road and two suspects were being subjected to mob injustice. PW1 quickly arranged a contingent of eight officers and rushed to the scene, which was around one kilometer away, on foot as they had no police vehicle.
6. On arrival the police found the lifeless body of a male adult lying besides the road and two men lying unconscious who were seriously injured. There was a large crowd which was charged and armed with all manner of crude weapons which was baying for the lives of the two unconscious men.
7. The police eventually managed to rescue the two injured persons from the scene and took them to the Police Post as they awaited the arrival of the DCI officers. PW2 was with, among others, PW3.
8. PW2 managed to recover a knife from the scene which was suspected to have been used in killing the deceased. He also recovered a National Identity Card for the deceased.
9. PW4 and PW5 arrived together at the scene alongside officers from the Scenes of Crime. They were led by officers from the Gituamba Police Post. They found the body at site and the scene was processed. The body was collected and they also picked the injured men from the police post. The police took the body of the deceased to the Kitale County Hospital Mortuary whereas the two injured men were taken to Kitale Police Station.
10. PW2 later handed over the knife and the Identity Card to PW5.
11. PW5 organized for and a post mortem examination of the body of the deceased was conducted on 17th January, 2020 by PW1 at Kitale County Hospital mortuary by PW1.
12. PW1 found a penetrating stab wound on the right stellar border near rib 9 measuring 6cm in length. The injury ran through the lung and also cut through the liver. PW1 formed the opinion that the cause of death was a penetrating stab wound through the chest secondary to assault. He filled in a Post Mortem Report which was produced in evidence.
13. The accused were then led to Moi Teaching and Referral Hospital where they were mentally assessed and found fit to stand trial.
14. On completion of the investigations, PW1 recommended that the accused be jointly charged with the murder of the deceased. The accused were eventually arraigned before Court where they were accordingly charged.
15. When the prosecution closed its case, the Court found that each of the accused had a case to answer. They both gave sworn testimonies. The accused were related. The 2nd accused was an in-law to the 1st accused. They recalled taking the local brew, chang'aa, together on 30th December, 2019 as from 11am and continued to the evening. Since they partook the brew in large quantities, they blacked out and came back to their senses while in police cells. They denied any knowledge of having been assaulted by a mob injustice and could not recall having any injuries at the police station.
16. They strenuously denied killing the deceased whom they both denied knowing him.



17. After close of the defence cases, parties were directed to file and exchange written submissions. Both complied.
18. Learned Counsel for the accused, Mr. Majanga, argued that the prosecution had failed to discharge its burden of proof to the required standard to establish that the accused murdered the deceased. Several decisions were referred to in disproving the circumstantial evidence on record. He urged this Court to acquit the accused.
19. The prosecution argued that the evidence on record was sufficient to connect the accused with the death of the deceased. Several decisions were also referred to.

Analysis:

20. 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.
21. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

22. 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).
23. 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 lifeless body of the deceased. The body was later collected by the police, taken to the mortuary and an autopsy carried out.
24. The second way in which the death of the deceased was proved was through the evidence of PW1 who conducted a post mortem examination on the body of the deceased and prepared a Post Mortem Report.
25. PW1 concluded that the deceased's cause of death was a penetrating stab wound through the chest secondary to assault.
26. This Court, therefore, finds and hold that the death of the deceased and its cause were proved to the required standard.

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

27. In this matter, there was no eye-witness account on what exactly happened until the deceased died. According to the police, they learnt that the accused had jointly attacked and stabbed the deceased with a knife.
28. The police, however, admitted their inability to avail those who had witnessed the fight and the eventual stabbing of the deceased since most of them, if not all such witnesses, had relocated to unkonwn places.



29. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -
- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
 - (ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
30. The foregoing principles were set out in the locus classicus case of *R -vs- Kipkering arap Koske & Another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic* (2013) eKLR, *Musii Tulo vs. Republic* (2014) eKLR among many others.
31. The Court of Appeal in *Musii Tulo* (supra) in expounding the above principles expressed itself as follows:-
4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R* (1958) EA 715 citing with approval *Teper v. R* (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
32. Further, the Court of Appeal in *Sawe- Vs- Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -
- 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 of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....
33. Returning to the case at hand, the totality of the prosecution's evidence pointed to the fact that the accused were not culpable for the death of the deceased.
34. According to PW5, it seems that the only evidence that connected the accused with the death of the deceased was that they were suspected to have killed the deceased by members of public who beat and injured them and that is why the police found the accused lying unconscious next to where the deceased. However, no single witness attested to those facts.
35. This Court is not, therefore, persuaded that the prevailing circumstances in this matter taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.



36. This is a case where the evidence adduced against the accused boils down to the suspicion that the accused killed the deceased because they were found lying unconscious next to the deceased. However, as was held by the Court of Appeal in *Sawe –vs- Rep* [2003] KLR 364: -

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

37. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court 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.

38. A similar view was expressed by the Tanzania Court of Appeal in *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -

Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

39. Therefore, whereas there may be some suspicion that the accused may have been involved in the death of the deceased, that suspicion alone, however strong, cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.

40. The prosecution, therefore, failed to prove that any of the accused was responsible for the death of the deceased in any way whatsoever.

Disposition:

41. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused are found not guilty of the murder of the deceased.

42. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the Criminal Procedure Code. They are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Majanga, Learned Counsel for the Accused.

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

