



**Republic v Mulwa alias Kyalo Musau (Criminal Case 11 of 2017)
[2023] KEHC 24867 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 11 OF 2017
TM MATHEKA, J
OCTOBER 31, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL MCSIVA MULWA ALIAS KYALO MUSAU ACCUSED

JUDGMENT

1. The accused person was charged with murder c/s 203 as read with s. 204 of the Penal Code. It was alleged that on the 5th April 2017 at Kambu in Kibwezi Sub County within Makueni County he murdered Simon Musau.
2. Plea was taken Before the Hon Justice C. Kariuki on the 30th May 2017 and the accused pleaded not guilty to the charge.
3. PW1 Felix Mukula Kimilu told the court that on the material date he went to buy vegetables from the deceased's shamba. He found him but he had sold his so he agreed to take the PW1 to where he could buy from the deceased's friend. They were using the PW1's motor bike. They got to a place where the road was bad and the deceased alighted to enable PW1 cross with the m/bike. While he was waiting for the deceased to cross the accused arrived looking drunk and began to abuse the deceased calling him a witch, thief. When the deceased tried to board the m/bike the accused pulled him down and threw him down. The deceased hit the ground with the side of his hip. He saw him try to get up in vain. He left the deceased resting and went to the vegetable garden but while a few meters away he heard the accused telling the deceased I will kill you! He saw the accused pick a stone and throw at the deceased hitting him at the ankle. PW1 went back and pushed the accused away telling him to stop. A crowd had begun to form and the accused walked away. PW1 made the deceased stand so as to try and walk. He took him to the home of the accused parents but they were not bothered. He took him to the AP camp at Kambu they advised him to take him to his home. He took him to his home and left him with



- his wife and son although he was still complaining of pain. The following day PW1 got a call from the AP camp that the deceased had died.
4. On cross examination he denied finding the accused person quarreling with the deceased. He denied that the deceased fell down and got injured. He testified that the police did not ask him to take them to the scene. He said the deceased cried of pain. He said the accused's father was a teacher. He said accused told the deceased not to trespass on his shamba again. He said he told the police that the accused was drunk. He said the deceased told him to take him to his home.
 5. PW2 Jackson Maithya a son of the deceased testified that he had noise on the farm. He found the accused looking and sounding drunk. He was abusing the deceased kiino! Kiino! The deceased was holding onto the m/bike saying that the accused had injured him. He assisted to get the deceased on the m/bike as the accused walked away. He said the accused was drunk.
 6. On cross examination he told the court that he did not record in his witness statement that the accused was drunk. He said that in his statement to the police he said that the two were holding each other with the PW1 trying to separate them. He denied that it was he and the accused who pushed each other He denied that his father told him where he was injured. He said he did not know where the police found the information that his father told him that he had been injured on the left hip. He said that it was not true that the first time he met the PW1 was at home when they met at home when he brought the deceased home but that they had met at the scene. He denied that the scene was on the accused's land. He said he did not attend the postmortem and did not know what killed his father.
 7. On reexamination he restated what he told the court in examination in chief
 8. PW3 Ruth Mbenke Musau told the court that the deceased was her husband. He was 70 years old. She said on the material day PW1 came to buy vegetables and the deceased told him he would take him to the place where he could buy the same. An hour later they returned home and the deceased told her that they go to hospital because the accused had injured him. She said that the deceased was in a lot of pain. They found a boda boda and went to Kibwezi police station and were issued with a note to go to hospital they went to Makindu hospital. He was x-rayed, treated and given medicine and a return date for 24th April 2017. They boarded a Matatu but on the way home his situation deteriorated and when they could not get an ambulance the Matatu took them back to the hospital where they reached ta 6:30pm. By 8:00pm she was told that he had passed on. The Police came and took the body to the mortuary. She said she did not attend the postmortem
 9. She told the court that the deceased told her that he was beaten by Kyalo Musau the accused whom she knew as neighbour she also said that the deceased was asthmatic and was on medication. That he used to work on his farm
 10. On Cross examination she said she knew the accused including his family. That he used to plant his vegetables but she did not know which ones because she never went to his shamba. She said he suffered from asthma and blood pressure.
 11. PW4 told the court that his name was Pato Kaingu from Machinery AP Camp. He testified that on 6th April 2017 some two people went to the AP camp with warrants. They pointed out the accused who was a suspect of murder. They chased him and arrested him as he was running away.
 12. PW5 No. 113502 PC Eric Ogeto of Mtito Andei police station was heard by Ongudi LJ. He told the court that he was standing in for PC Ali who was the I.O. He told the court that they had looked for PC Ali in vain. He said he had read PC Ali's file. That the accused was arrested on the 5th April 2017



- in Kambu by APs. That a case of assault had turned into a murder case. It was alleged that the accused had pushed the deceased. That a postmortem was conducted on the 11th April 2017.
13. PW6 Dr. David Kasanga was heard by Dulu J. He testified on behalf of Dr. Mohamed who conducted the postmortem. He said the external appearance of the body was normal. However internally there was a collapsed right chamber of the heart and enlarged liver. He said the report said cause of death was cardiac arrest but he was of the view that it was heart attack in the right chamber of the heart. On cross examination he told the court that enlarged liver could have been caused by anything but the collapsed right chamber of the heart must have been due to massive heart attack.
 14. Justice Dulu made a finding that the accused had a case to answer and directed that he be put on his defence.
 15. I heard the defence case on the 26th July 2023.
 16. In his defence the accused person made a sworn statement and told the court that his name is Samuel Masiva Mulwa alias Kyalo Musau. He told the court that the charge was not true. He said that just four months before the incident he had bought his land. The deceased was his neighbour. On the material day he was irrigating his farm when the deceased trespassed through. The deceased told him that there had been a path through the shamba. That he told the deceased that it was now his farm and he had now planted his things there. He said the deceased walked away while making noise. They exchanged words, they were quarreling. The deceased walked away while he went on with his work.
 17. He testified that he never saw the PW1 that day, he denied throwing the deceased or pushing him to the ground or hitting him with a stone. He also testified that he never saw the son of the deceased at the scene, he denied insulting the old man using vulgar words. He said he learnt of the death of the Mzee two days after the incident. He said he was accused and arrested at Kambu where he had taken some produce.
 18. On cross examination he denied that the deceased had passed through his farm while on a motorbike. He denied that he had tried to buy produce from his farm.
 19. Thereafter parties filed submissions.
 20. The state did not wish to file any submissions.
 21. For the accused person it was submitted that the prosecution had failed to prove the charge beyond a reasonable doubt. Counsel for the accused cited Lord Denning in *Miller v Minister of Pensions* [1947] 2 ALL ER 372, 373 where it states” if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
 22. It was submitted that the evidence that was given by PW1 described the incident and it was evident that the deceased did not sustain any visible injuries despite being said that he was complaining of pain. The PW1 stated that he complained of injury in the hip and on the ankle, while his wife told the court that the deceased’s ankle was broken. This was juxtaposed with the evidence of the pathologist where he stated that there was no sign of trauma or injury. That the cause of death was death was unrelated to any alleged physical injury or trauma.
 23. Counsel submitted that under s. 203 of the Penal Code the elements that require to be proved are proof of death, cause of death, proof that death was caused unlawfully, and by the accused person. It is submitted that the elements of proof of and cause of death were established. However, the prosecution



placed evidence before court that the deceased passed on from natural causes. Counsel relied on *Elizabeth Waitiegeni Gatimu v Republic* [2015] eKLR where the court stated

To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge

24. Counsel also cited *Ouma v R* [1986] KLR 619 on the proposition that the case for the prosecution must be weighed together with the case for the defence and any doubt is a benefit to the accused. That the court “must satisfy itself the prosecution had by its evidence left no reasonable possibility of the defence being there. If there is doubt, then the benefit of that doubt goes to the accused person”
25. I have carefully considered the submissions, the authorities cited and the evidence on record.
26. It is now settled that the offence of murder is proved through the prosecution establishing that a person died, his death was unlawful, his death was caused by the accused person, and he did so with malice aforethought. In this case it is not in doubt that the deceased died. That evidence was given by the son and the wife to the deceased together with the pathologist who produced the post mortem report.
27. The cause of death was established by the pathologist who told the court that the deceased died from cardiac arrest. The accused admitted to an altercation with the deceased. He denied physically manhandling the deceased but PW1 was present and he testified to witnessing the same.
28. The question is whether the prosecution was able to connect the said cardiac arrest to the alleged altercation between the deceased and the accused person. From the evidence of PW1 the deceased complained of pain in the hip. The accused threw a stone which hit him in the ankle. At the postmortem the body did not have any physical injuries. How then can the cardiac arrest be connected to this incident? It was the duty of the prosecution to call evidence that would connect the incident that happened between the deceased and the accused to the death. The doctor who testified firstly had a problem with the conclusion drawn by his colleague who filled the postmortem form. Secondly he did not attribute the death to anything related to the alleged incident. The swollen liver and the collapsed left heart chamber were not connected, by the pathologist to the incident with the accused.
29. Hence the prosecution proved that the deceased died but proceeded to place before the court evidence that indicated that death may have resulted from a natural cause- some disease of the heart and the liver creating doubt that the accused may have caused the death.
30. In the circumstances the ingredient of murder that death was unlawful is not established. It is also not established that death was caused vide malice aforethought. It is not even a case of circumstantial evidence as there is nothing to connect the accused person before court with the death other than the alleged physical injuries which, injuries were not even observed by the pathologist.
31. I find that the prosecution failed to prove the charge of murder c/s 203 as read with s. 204 and 206 of the same code is not proved to the required standard.



32. The charge is dismissed, and the accused person is acquitted under s. 215 of the *Criminal Procedure Code*.

DATED SIGNED AND DELIVERED THIS 31ST OCTOBER 2023

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MUMBUA T MATHEKA JUDGE

Accused present

Mwiwa CA

Makundi for accused

Tanui for State

