



**Republic v Shimuati (Criminal Case 5 of 2004)  
[2023] KEHC 24865 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 5 OF 2004  
PJO OTIENO, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**EVANS MASHETI SHIMUATI ..... ACCUSED**

**JUDGMENT**

1. Evans Masheti Shimuati ('Accused person') is 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 the 10<sup>th</sup> day of December, 2003 at Shihalia village, Lunerere Sub-location in Kakamega South District within Kakamega County, the Accused person murdered Mike Mutayi Mbenji.
2. He pleaded not guilty to the charge and to prove its case, the prosecution called a total of three witnesses.
3. PW1, Morris Alasa Masheti was the father to the deceased and testified that on 9/12/2003 at about 8pm he was in his house where his wife was preparing supper when they had shouts outside. They dashed out and found his son, the deceased, who had a house next to his in the same compound lying on the ground. He stated that prior to this the deceased was at his house some minutes to 8pm and his sister had taken food to him and returned. He claimed that he went outside following the screams and he found the Accused, who was a relative, in the company of one Likami running away. He called them but they told him that they will return in the morning and he decided to go see the deceased and discovered that he had a cut on his private parts. He screamed and the neighbours came. They placed the deceased in a wheelbarrow and took him to a local doctor who gave him first aid and they returned home. After about 15 minutes of returning home the deceased died and the matter was reported at Isulu Police Base. The police were informed that he saw the accused and Likami running away.



4. The police visited the home, saw the body, took photographs and went away then return in the morning when they took the body to Kakamega County Hospital Mortuary. He added that he spoke to the accused and Likami and he identified their voices since they were persons well known to him. He stated that his son lived in Kisumu and had travelled home for a funeral. He was unaware of any grudge between the deceased and Accused and further that he had no grudge against the Accused. He asserted that the next morning after the incident, the Accused did not return as he had escaped. The accused was arrested subsequently and was brought home by the police when he led the police to recovery of a sword.
5. On cross examination he stated that he did not see the accused stab the deceased adding that when he came out of his house the accused and Lukami were nearing the gate and that though there was no moonlight, the moon was appearing and there was light. He further stated that his son died at 11pm and not 4am.
6. On being questioned by the court he stated that the accused was wearing a red t-shirt and a trouser and that he did not see anything else in their body. He further stated that they did not stop when he called them but they talked as they continued to walk. He stated that he identified the t-shirt the accused was wearing since he is always on that shirt.
7. PW2, Dr. Davis Andambi, testified that he conducted an autopsy on the body of the deceased on 15/12/2023 and that externally there was a sign of loss of blood. The body had a stitched wound at the root of the penis and a swollen scrotum. He further stated that the cardio vascular system had cut veins and the genito-urinary system had accumulation of blood in the scrotum and surrounding tissues. He thus formed the opinion that the deceased's cause of death was cardiopulmonary arrest secondary to severe hemorrhage due to a cut artery and vein. He produced the post mortem report as PEXH 1. On cross examination he stated that he did not identify, in the report, the probable weapon used.
8. PW3 No. 58569 Corporal Ibrahim Karanja attached at the Kakamega Police Station testified on behalf of the investigating officer, PC Boniface Nderitu, who had since retired. He relied on statement of PC Boniface Nderitu dated 15/12/2003 in which the officer stated that on 9/12/2003 he received a complaint of an assault case from PW1 and that he proceeded to the scene and found the deceased who narrated to him of suffering injuries inflicted by the accused. The next day the accused was arrested and handed over to the assistant chief one Aggrey Khasia who is since deceased. Acting on the information of the assistant chief, PC Nderitu proceeded to the accused's house where they recovered a sword which had been previously produced as an exhibit but could not be presently traced. On cross examination he stated that the weapon was recovered in the house of the accused but in his absence.
9. On re-examination he stated that from the witness statement the accused was captured to have been at the scene.
10. The evidence of PW3 marked the close of the prosecution case and the court ruled that a *prima facie* case had been established against the accused person and he was thus placed on defence.
11. He elected to give a sworn testimony without calling any other witness. He refuted claims that he killed the deceased and further testified that on the material day he did not go to the home of PW1 and that he was at the homestead of his father. He claimed that 10/12/2003 he heard of the death of the deceased and that he was arrested while herding cows. He stated that his home was about 100 meters from that of the deceased and that the police claimed a knife was discovered at his home while he was in custody which knife was never produced in Court.
12. With both cases closed, parties filed respective Submissions which the Court has had the advantage of reading and appreciating.



13. It is the Submission of the Accused that the Prosecution has failed to prove beyond reasonable that it was the Accused who killed the deceased for the reason that;
  - a) PW1 testified that on the material time he was at home with his wife Jennifer and his child yet none of them gave evidence to corroborate his testimony;
  - b) PW2 testified that the probable weapon used to inflict injuries on the body of the deceased resulting in his death was a sharp object yet he failed to indicate this in the autopsy report;
  - c) the testimony of PW3 that the deceased made a dying declaration to one PC Nderitu was hearsay and that though PC Nderitu though alive but retired he was never called to testify and lastly that the alleged murder weapon was recovered in the absence of the accused and the same was not produced in court as an exhibit.
14. He thus prays that he be acquitted and charge dismissed.

### **Submissions by the State**

15. For the Prosecution, Submissions begins by stating that this being a re-trial ordered by the Court of Appeal it was difficult to get all witnesses. However, that notwithstanding, it is submitted that there was sufficient proof for the offence of murder against the Accused in that PW2 produced a post mortem report which confirmed the death of the deceased which death was ascertained to have been due to an act of the Accused. PW2 testified that the deceased died due to cardiopulmonary arrest secondary to severe hemorrhage due to a cut of the artery and vein around the penis. On the element of whether the accused was properly identified as the person who caused the injuries on the deceased which resulted in his death, it is submitted that it was the testimony of PW3 that the deceased made a dying declaration to the initial investigating officer and told him that it was the accused who had assaulted him. They argue that by consent the defence allowed the current Investigating Officer to rely on the statement of the initial Investigating Officer as evidence in this matter. The dying declaration is said to have been corroborated by the evidence of PW1 who saw the Accused and another running away from the direction of the Accused's house. It is contended that PW1's evidence places the Accused at the scene of the crime which evidence the defence had not controverted. The Prosecution consider it suspicious manner in which the Accused conducted himself by running away and promising to come the next day which he did not. *Musili V Republic* (1991) eKLR was cited for the proposition of the law that suspicious conduct may corroborate other independent evidence on record.
16. On the element of whether the actions of the accused were actuated by malice, the prosecution submits that the accused person cutting the deceased's penis and causing him to bleed to death is the kind of assault that must have been intended to cause death or grievous harm to the deceased hence inference malice was established.

### **Analysis and Determination**

17. In every case of murder for the prosecution to earn a conviction, all the ingredients of the offence stipulated at section 203 of the *penal code* ought to be proved beyond reasonable doubt. The issues or ingredients are; the fact of death of the person alleged to have died; that the death was caused by the unlawful acts of commission or omission by the Accused and that in committing the acts of commission or omission, the Accused was actuated by malice aforethought.



### **Whether Mike Mutayi Mbenji is deceased**

18. The death of Mike Mutayi Mbenji was confirmed by PW1, his father and PW2, the doctor who conducted a post mortem on the body of the deceased and produced a post mortem report to that effect which was marked as PEXH 1. Even the Accused did not contest that fact of death. It was thus not a disputed matter and the Court find it proved beyond reasonable doubt.

### **Did the accused kill the deceased?**

19. From the evidence tendered by the prosecution witnesses, it is clear that none of them saw the accused or any other person kill the deceased. The prosecution's case is hinged on the evidence of PW1 that he saw the Accused and another exit his homestead and that he spoke to him and an alleged dying declaration purportedly made by the deceased to the initial Investigating Officer by the name of PC Nderitu.
20. On the evidence of PW1, the Court is satisfied because it was not controverted, that the witness saw and spoke to the Accused and his companion, the two were his relatives and persons well known to him. His was evidence of recognition by appearances and voice hence it matters little that it was at night with little moonlight. The question of the aid to vision would be important if the recognition was only by sight but here it was by voice. I find that evidence to be credible.
21. On the law on dying declarations, the same is coded in section 33(a) of the *Evidence Act* which provides;
- “When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”
22. The Court in *Philip Nzaka Watu vs Republic* [2016] eKLR interpreted the application of the provision to the effect that;
- “... a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”
23. The events leading up to the death of the deceased as narrated by PW1 was that on realizing that the deceased had been stabbed on the penis, he took him to a local doctor who stitched him and they returned home and the deceased passed on a few minutes later. It was after the death of the deceased that he reached out to the police and the police arrived at the scene to find the body of the deceased. This then begs the question on how the PC Nderitu, the initial Investigating Officer, got the dying declaration of the deceased. The alleged declaration presents a grave inconsistency with the evidence of PW1 and PW3. The effect of inconsistency is to reject the evidence on the dying declaration as was



observed in the case of *Twehangane Alfred v Uganda* Crim. App. No 139 of 2001, [2003] UGCA where the Court held as follows;

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

24. Here the evidence presented by PW3 is not only a contradiction of that by an eye witness but equally lacking in credibility. It is rejected as untrustworthy.
25. PW1 further narrated on the circumstances leading up to the death of the deceased by stating that following the screams he saw and spoke to the Accused and Likami who were running from the house of the deceased. The Accused has refuted claims that he went to the home of PW1 the material night and stated that he was at the homestead of his father which was about 100 meters from the home of PW1. He claimed that if at all PW1 was in the company of his wife and children at the time they ought to have been called to testify.
26. The Court believes the evidence of PW1, considers the failure to call his wife and child as witnesses not to be fatal and finds that the Accused was indeed at the scene. The Court discounts the assertion by the Accused that he was at his father’s home which neighbours with PW1 but did he not hear of the screams of PW1. The Court find the account of the Accused on his whereabouts on the material night to be incapable of belief. Indeed, if he intended to rely on the defence he needed to prove same by availing independent evidence. He did not.
27. The above analysis leaves the case for determination on circumstantial evidence whose principles are well settled to be that;

“...the guilt of an Accused person can be proved by either direct or circumstantial evidence. Provided the circumstantial evidence exists which enables a Court to deduce a particular fact from circumstances or facts that have been proved. It has equally been observed by Courts that at times circumstantial evidence is often the best evidence.” See *Ahamad Abolfathi -vs- Republic* [2018] eKLR and *R -vs- Taylor, Weaver and Donoran* [1929] CR App.

28. The conditions for the application of circumstantial evidence in order to sustain a conviction has been settled since *Abanga alias Onyango v. Republic* CR. App No. 32 of 1990(UR) to be that such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those 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.
29. That the Accused was spotted by PW1 running from the house of the deceased and immediately the deceased being discovered having suffered a stab wound on his penis points to the guilt of the accused and proves that it was him in the company of Likami who stabbed the deceased and no one else. The second set of circumstances pointing to his guilty is the fact that being a neighbor to PW1, he was no where when the police visited the home twice and only came to know about the death of the deceased while herding cows. The Court find the conduct suspect and entertains no doubt that it was the Accused who killed the deceased.



30. It remains a scientific fact that not even the devil can read the mind of a man in the present and past. The East African Court of Appeal in *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 set out the circumstances under which malice aforethought as a state of mind can be inferred to be: -
  - a. The nature of the weapon used (whether lethal or not).
  - b. The part of the body targeted (whether vulnerable or not).
  - c. The manner in which the weapon is used (whether repeatedly or not).
  - d. The conduct of the accused before, during and after the attack.
31. PW2 testified that in examining the body of the deceased, it had a stitched wound at the root of the penis and a swollen scrotum. He further stated that the cardio vascular system had cut veins and the genito-urinary system had accumulation of blood in the scrotum and surrounding tissues.
32. To this Court, the targeted area of the body of the victim and the force employed imputes that the attacker intended that his action leads to nothing less than grievous harm. That in law infers malice aforethought. The Court thus finds that the Accused was accentuated by malice aforethought.
33. In conclusions, the Court finds the accused person guilty for the offence of murder as charged and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

