



**Republic v Mukoya (Criminal Case E008 of 2022)  
[2023] KEHC 25727 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E008 OF 2022  
WM MUSYOKA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MATTHEW WAKULWA MUKOYA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Matthew Wakulwa Mukoya, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, cap 63, Laws of Kenya, the particulars being that on 13<sup>th</sup> August 2022, at Nduru village, Bukhalarire Sub-Location, Marachi Central Location, Butula Sub-County, within Busia County, he murdered Philip Oduori Majwanda.
2. 5 witnesses testified for the Republic.
3. PW1, Elizabeth Anyango Okoyo, was the local village elder. She got information on 13<sup>th</sup> August 2022, that someone was being assaulted at the home of the accused. She went there, and found the place quiet. She was shown where the deceased was, at a kitchen, injured. He was naked, save for a T-shirt, and had cuts on his head and face. She went to the home of the deceased, to inform his mother, and they went back to the scene. She made a report to the local police post. PW2, Nickson Omondi Majwanda, was a brother of the deceased. He was informed of the incident, by PW1, and rushed to the scene. He, and others, took the deceased to hospital, via the local police post. He said that the deceased was not a thief. PW3, Dr. Nabuya Dancan, was the pathologist, who conducted autopsy on the body of the deceased. He noted multiple soft tissue injuries and lacerations on various parts of the body. He opined that the cause of death was severe head injury, due to sharp force trauma. PW4, No. 101839 Police Constable Wycliffe Muganda Opati, received a report of the incident, and re-arrested the accused from the individuals who had made the report. He visited the scene, saw blood stains and took photographs. PW5, No. 81927 Police Corporal Geoffrey Njeru, was the investigating officer. He stated that the



- accused had confessed to him that he had found the deceased having sex with his wife, but he did not record the confession.
4. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 17<sup>th</sup> July 2023. The defence hearing happened on 9<sup>th</sup> October 2023, before me.
  5. The accused testified as DW1. He stated that on the material day, he travelled home to see his mother, who was said to be ill. He arrived at the home of his mother between 9.00 PM and 10.00 PM. He found a crowd there, of people praying for his mother. Marygoretti, a neighbour, then came, and said there was noise at his home. He rushed there, and found a crowd around a person who was said to be a thief, beating that person. He was not able to identify any of the people on the scene, except for PW1, who identified the alleged thief. She left and later came back with relatives of the alleged thief. He then went to make a report at the police station, and was locked up. He said that he arrived at the scene after the thief had already been beaten. He said his wife was away, but the children were present. He denied killing the deceased, on account of him having sexual relations with his wife. Marygoretti Nabwire testified as DW2. She said that on the material night, she heard screams from the home of the accused, children raising alarm, over a thief. She rushed to the village elder, PW1, and informed her. PW1 was at the home of the mother-in-law of DW2, where the accused was also. The accused rushed to his home, followed by PW1, but DW2 did not follow them. She said that she recorded a statement with the police, but when confronted with her statement, she recanted it. She said that she was ready to testify as a prosecution witness, but the police did not allow her to. Dishon Wesu Barasa testified next. He was in nyumba kumi. He said that he heard noises from where a person was being beaten, saying he was a thief. He was among those who took the deceased to the health centre, upon being so directed by the police. He said that he did not identify the persons who were at the scene, except for PW1. He said that he witnessed the beating.
  6. The parties submitted in writing.
  7. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, it was with malice aforethought.
  8. On whether the deceased died, I have the evidence of PW1 and PW2. PW3 conducted autopsy on the body of the deceased, and produced the post-mortem report. PW4 and PW5 were police officers, and they saw the dead body, one at the hospital, and the other at the mortuary. The cause of death was said to be severe head injury, due to sharp force trauma. None of the witnesses saw the accused assault the deceased. The contest, therefore, is on who caused the fatal injuries, and whether he or they had malice aforethought.
  9. So, who did it? As indicated above, none of the prosecution witnesses testified to seeing the accused assault the deceased. All those who claimed to have been at the scene, said they got there after the deceased had been beaten. PW1 testified that a report was made to her of the incident by DW2, who informed her that the deceased was being beaten at the home of the accused. DW2 had recorded a statement with the police, but she did not testify for the Republic, instead she testified for the defence. Whereas she conceded that she was the one who informed PW1 about the incident, she asserted that she never went to the scene at any time. When PW1 got to the scene, the assault had already happened, the deceased was already badly injured, and she said she did not see the person who hurt him. PW2 came to the scene also after the assault had happened. The report to the police was made after the assault, after the deceased had been taken to hospital, and so PW4 and PW5 arrived at the scene long after the assault. DW3 was nyumba kumi, who worked together with PW1. He was at the scene with PW1. He said that he witnessed the assault, but by individuals that he was not able to identify. So, there is no direct evidence on who injured the deceased. There is no direct evidence of complicity on



the part of the accused, for none of those who testified said that he was seen beating the deceased, or doing anything to him. PW5 said the accused had told him, during interrogation, that he had found the deceased making love to his wife.

10. In the absence of direct evidence, the involvement of the accused in the killing can only be on the basis of circumstantial evidence. What were the circumstances? The deceased was found badly injured at the home of the accused. PW1 said that she saw the accused at his home, when she visited, and found the deceased there gravely injured, and she said that she even spoke to the accused. However, beyond that, she had nothing else to tell the court which could link the accused to the grave injuries that were suffered by the deceased. PW2 also went to the home of the accused, but he did not see the accused. DW2 said that she did not go to the scene at all. DW1 said he found the deceased being beaten, and so did DW3. DW3 said that he did not see the accused at the scene. Indeed, according to him, the only person he was able to identify was PW1. From the material on record, the circumstantial evidence is incredibly weak, for other than the deceased being found injured at the home of the accused, there was no evidence that the accused was responsible for those injuries. No forensic evidence was presented, which would have connected the accused to the death.
11. It would appear that the case by the prosecution is founded on suspicion, that the accused found the deceased in flagrante delicto with his wife. The accused did not allude to that. PW1 hinted it, and PW5 suggested that the accused had said so to him. The suggestion would be that the accused found the deceased in a compromising situation with his wife, and beat him senseless, and he eventually died of his injuries. That would suggest motive and intention. However, no evidence was led on that by any of the witnesses, other than the hint and mention of it by PW1 and PW5. Suspicion cannot be basis upon which to found a conviction. There ought to be either concrete evidence, or strong circumstantial evidence.
12. In view of everything stated above, I do hereby, find the accused person herein, Matthew Wakulwa Mukoya, not guilty of the offence of the murder of Philip Oduori Majwanda, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I, accordingly, acquit him, under section 306 of the *Criminal Procedure Code*, cap. 75, Laws of Kenya.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27<sup>TH</sup> DAY OF NOVEMBER 2023**

**WM MUSYOKA**

**JUDGE**

*Mr. Arthur Etyang, Court Assistant.*

*Advocates*

*Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.*

*Mr. Omeri and Mr. Olaka, Advocates for the accused person.*

MR. ARTHUR ETYANG,

COURT ASSISTANT.

