



**Sunguti v Republic (Criminal Appeal E119 of 2021)  
[2023] KEHC 27165 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E119 OF 2021  
PJO OTIENO, J  
DECEMBER 18, 2023**

**BETWEEN**

**MARK SUNGUTI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The accused was arraigned in court and charged with murder whose particulars were that on the night of 16<sup>th</sup> and 17<sup>th</sup> May 2021 at Shamberere Sub-location, Shanda location, Kakamega North Sub-county, within Kakamega County murder Peter Sunguti.
2. During the trial the prosecution called four witnesses towards their duty to prove the case against the accused.
3. PW1 Samuel Waluvengo told the court that on the 17.5.2021, he was called by one Jenipher, who was his uncle and worker to the accused and told that the accused, who was a former husband to Jenipher was unwell. The witness went to the home of Jenipher but found her having gone to the scene of the murder. He followed her there and found the body of the deceased lying on the ground. At the home was a large crowd and the police who had arrived kept away people from nearing the body. He however saw and observed that the body had an injury on top of the head.
4. He alleged that when the police asked the accused what happened, he told the police that during the night, he had heard noise while inside his house and that when he came out he saw two people fighting the old man, he did not intervene but went back to his house to sleep. The accused was then arrested and body was recovered to the mortuary.
5. He observed that there were two houses in the homestead, about 200-300 meters apart, and that one belonged to the accused while the other belonged to the deceased.



6. On being cross examined by the defense counsel, the witness told the court that he saw a stick near the body but did not know how the body found itself there. He said the body was not at the door steps of the accused and that even though he was able to see the injury on the head he was unable to see any blood stains.
7. PW2 Zakaria Munupi was a neighbor to the accused and the deceased. He said that during the material night he heard the accused calling out people to come out of the houses at about 2.00 a.m. He did not get out but the next morning at about 6 p.m. his son called Wilson Musiko reported to him that he had gone to the home of the deceased and found him killed. He and the said Wilson decided to go and make a report with the police and on coming back saw the body of the deceased lying on the ground outside his house.
8. He told the court that he came to learn that the accused and the deceased were always at loggerheads and would quarrel every time they were drunk. He was however not able to know what was the basis of such quarrels because the two live alone in the same homestead.
9. Upon cross examination, the witness said that he recorded his statement on a date later than the date the accused was arrested, that he was unable to read nor write and therefore he spoke as the police officer recorded the statement, which he nevertheless thumbs printed. He was however unable to confirm if the statement showed to him by the defence counsel and the thumb print was his. He however confirmed that the was not present when the deceased was being assaulted and that it was Wilson who told him about the death.
10. The third witness was one Wilson Misiko who said to the court that on the material night at about 2.00 p.m. the accused went to his house, called him but he did not open his door. In the morning he decided to go and find out what had happened at the home of the accused where the deceased also lived.
11. At the home, he found the body of the deceased lying on the ground outside the house of the deceased with the right hand broken. The accused was inside the house sleeping. He talked with the accused from outside the house and asked what had happened and the accused did not answer him.
12. He later reported the matter to the police. He called that the accused and the deceased, who were a father and a son would fight every time both were drunk and that he had always advised the accused to respect his father and stop assaulting him.
13. On cross examination the witness told the court that the accused was his cousin who told him that he had fought his father but that his statement did not mention any disagreement between the two. He also said that even though he knew both accused and deceased to have been drunkards, he did not record that in his statement with the police. He however confirmed that he not was with them that day as they went drinking and, on their way, back home.
14. When the accused knocked his door that night, he said, the accused did not tell the witness about the death of the deceased. He also denied having mentioned that the murder weapon was recovered from the scene. He denied being present or knowledge how the attack happened and that his statement was recorded days after the accused had been arrested.
15. The last witness was one PC Charles Ogada, who told the court that he was the investigating officer who was informed about the report of murder by the OCS Kabras police station at about 8.00 a.m. on the 17.5.2021 and directed to take charge of the investigations.
16. He visited the scene in the company of other officers and found a large crowd had formed at the homestead with the body lying on the ground, outside the house. The body had an injury on the head and the arm was fractured. He said that he recovered a stick suspected as the murder weapon. The stick



was broken but had no blood stains. He thus collected the body, the stick and arrested the accused who was then detained as he proceeded with investigations. The investigations revealed to the witness that there had been a running disagreement and that it was the accused who was the person who had inflicted the injuries upon the deceased. He later attended an autopsy examination whose result was that the deceased had died due to injuries inflicted by a blunt object following assault.

17. He produced the autopsy report as well as two witness statements recorded by the two people who identified the body for purposes of autopsy. His attempt to produce the stick recovered from the scene and suspected to have been the murder weapon was objected to and the objection was upheld by the court that the stick was never produced.
18. On cross examination, he told the court that at the homestead he found three houses two of which were occupied by the accused and the deceased and that nobody else lived in the compound. He termed the entry in the investigations diary that indicated that it was the accused who reported the matter to the police as a typing error and that even though the document spoke of two people having been escorted for mental assessment the second person was not connected to this case.
19. On the information about constant quarrel between accused and the deceased, the witness told the court that only Wilson Misiko spoke to him about such quarrels. He contended that even though the deceased had a cut wound on the head, the stick suspected to have been used to assault him had no blood stains.
20. With, the evidence of the investigating officer marking the close of the prosecution's case, the prosecution sought to rely on the evidence on record without offering any submissions while the defence counsel sought to file written submissions. As at the time of preparing this ruling, no submissions had been filed.
21. The failure of counsel to file and offer submissions does not lessen the court's obligation to evaluate the entire evidence and to establish whether the prosecution has discharged its mandate to establish a prima facie case against the accused so that he is called upon to rebut the presumption created by the prosecution's evidence.
22. Upon exhaustive examination of the evidence on record, it becomes obvious that there was no direct evidence on who assaulted the accused person. The evidence however point to the fact that the deceased body was found lying on the ground within the homestead shared with the accused. It is also alleged that the accused was calling out people, including PW3, to come out but none of the witnesses told the court why he need them to come out. Infact, PW3 said that while the accused knocked his door that night, the accused told him nothing about the deceased and that he did not even open the door.
23. In the opinion of the court, the evidence on record is purely a circumstantial which itself could be the best evidence, where it irresistibly points at nothing else but the guilt of the accused.<sup>1</sup>
24. For it to suffice for grounding a conviction, it must not be just any sentilla of evidence nor can a discredited corpus of evidence suffice. The court must be satisfied that there exist no other co-existing circumstances which would destroy the inference of guilt.<sup>2</sup>
25. When applied to the facts paraded by evidence in this matter, the evidence is incoherent and leaves every doubt as to who occasioned the evidence said to have led to the death.

<sup>1</sup> *Musoke -vs- Republic* [1958] EA 715

<sup>2</sup> *Same -vs- Republic* [2003] KLR 354



26. While there was an insinuation that both accused and the deceased were drunkards who would fight while intoxicated, nobody saw or heard about the fight that evening or indeed during the night. In addition, while the witness spoke of a cut wound on the head and a broken hand, the autopsy report produced by consent did not disclose any cut wound nor fracture but only lacerations and contused wounds on the scalp, forearms and the legs. Those two scenarios create doubt that must be resolved in favor of the accused.
27. There is thus no connection of the injuries that could have led to the death with the accused. It is however very likely and probable that the accused, who heard the deceased make noise outside his house, came out and allegedly saw the people fight the deceased but opted not to do anything over an attack on his father, could have had a hand in the assault. However, strong suspicion may be, it cannot be the basis of a conviction on a criminal case leave alone the very serious offence of murder. It is indubitable that suspicions however strong cannot found a conviction of a foregoing discovery.
28. As a consequence, while the death is not in doubt, there is no evidence that the accused was the perpetrator of the assault upon the deceased just as there is no evidence that the accused in inflicting the injuries was accentuated by malice afterthought.
29. Without the connection between the accused and the murder, it would be against the law to call upon the accused to defence himself as no presumption of guilt has been created by the evidence on record.
30. In conclusion, the court finds that no prima facie case has been proved against the accused person as to merit him being called to rebut. He is thus found not guilty and is acquitted in accordance with Section 306 of the Criminal Procedure Code. Let the accused be released forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**PATRICK J O OTIENO**

**JUDGE**

