



**Republic v Mwolyo & another (Criminal Case 15 of 2017)
[2022] KEHC 11657 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 15 OF 2017**

RK LIMO, J

MAY 26, 2022

BETWEEN

REPUBLIC PROSECUTOR

AND

MONICAH MWOLYO 1ST ACCUSED

KILO MWOLYO 2ND ACCUSED

JUDGMENT

1. MONICAH MWOLYO & KILO MWOLYO the 1st and 2nd accused respectively are both charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that on 22nd August, 2017 at Mbusyani village, Kisasi within Kitui County they jointly murdered Mwolyo Komu.

2. Both accused denied committing the offence and the prosecution have presented a total of nine witnesses to prove their case.
3. Kavutha Muema (PW1) testified that on 22nd August, 2017 (hereinafter to be referred as the material date for ease of reference) she was informed of some screams from Mwolyo’s (deceased) home by her aunt Tabitha (PW2) and that she followed her heading to the deceased’s home. She added that when she reached the homestead she found her mother Kasyoka and Stanley Mwendwa knocking the door but no one was responding. She testified that as they were contemplating calling the Chief, the door opened and both the accused persons emerged from the house and that her mother asked them why they had locked themselves in and failed to open when they were knocking. She added that they reportedly replied that they had been shocked on what they had seen inside the house. She testified that people then went inside the house and found the deceased dead and that though she did enter that house herself, she later saw the body of the deceased being removed therein and taken away. She added that the deceased used to stay alone in that house.



4. Tabitha Mboya (PW2) stated that she woke up at around 5.00am on the material date to look for her cows which had strayed. She stated that as she was doing, so she heard screams coming from the home of the deceased of a man saying “Monica is killing me; Kilo I am being killed by your mother”. She stated that she lived about 150 meters from the home of the deceased. She added that she went and told her husband what she heard and after telling him, she went to PW1’s parent’s home and informed them as well. She stated that she walked for about 30-40 minutes before she reaching the homestead of the deceased. She also stated that she knew the 1st accused used to live in Nairobi while the 2nd accused lived in the homestead with the deceased.

She added that she was at the fence towards the deceased’s home when she heard the deceased say he was being killed. She however conceded she was unable to see who was killing the deceased.
5. Kasyoka Muema (PW3) the sister to the deceased stated that PW2 went to her home on the material day at about 7:00-7:30am and told her to go and rescue her brother who was screaming saying that he was being killed by the 1st accused. She stated that she proceeded to her brother’s home in the company of her son Muema and when they arrived, they found the gate locked and they entered the compound through the fence. She added that after waiting outside the house for about five minutes, the 1st and 2nd accused emerged from the house and the 1st accused informed her that she was shocked as her son had informed her that her husband had been shouting. The witness stated that the 1st accused lived in Nairobi while the 2nd accused lived in the homestead with the deceased. She added that the Area Chief later came and so as the police but by that time the deceased had already died
6. Joel Muli (PW4) indicated that he went to Kitui Mortuary on 1st September 2017 and identified the body of the deceased to the pathologist before he performed a post mortem.
7. Jackson Muli Komu (PW5) indicated that he accompanied PW4 to Kitui mortuary and participated in identification of the body of the deceased to the pathologist before he performed a post mortem.
8. Stanley Mwendwa (PW6) a son to the Kasyoka Muema (PW3) testified that on the material date, his mother (PW3) woke him up and reported to him that Tabitha Mboya (PW2) had alerted her about screams from the deceased’s house. He stated that he accompanied his mother to the home of the deceased and when they arrived they called out for someone to open the gate for them but there was no answer. They decided to jump over the fence and when they got into the compound, they found the door to the main house closed but the door to the 2nd accused’s house was open. He added that they continued calling out for someone to open the door to the main house and after waiting for a while the two accused persons’ emerged from the house and that the 1st accused told them that they did not know what to do because the deceased was ill. He stated that the 1st accused lived in Nairobi and that he was not aware that she had come back home to the deceased. He stated that the Area Chief was called as well as the police and the body of the deceased was taken to the mortuary.
9. Maluki Miano (PW7) the Area Chief Mbusyani Location stated that he was called by a person who asked him to go to the home of the deceased as he had heard noises coming from the homestead. He stated that he called an administration police and asked them to go and verify what had been reported and that the police officer called him later and told him about the death of the deceased. The Chief stated that he went to the scene at around 9.30 am on the material day and found that the body had not been removed, and on observing it, and stated that he saw fresh blood on the face of the deceased. He stated that he also observed an injury on his head. The witness referred the court to a photograph of the deceased marked for identification as PMFI1-A &B. He also stated that there were no signs of forced entry in the house. In cross-examination, the witness stated that he was aware that the deceased operated as a shylock businessman and that he had dealt with several people who had issues with the



- deceased but was also aware that those issues had been resolved amicably. He also stated that he was aware of the separation between the 1st accused and the deceased, he however stated that the 1st accused would come and visit the deceased.
10. Dr. Edward Kaitto (PW 8) testified and produced a post mortem report prepared by his colleague Dr. Mwinzi who he informed the court was away undertaking his master's degree outside the country. He stated that the report indicated that the deceased had four bruises on the head, forehead and chin. He had lacerations noted on the posterior aspect of the neck extending all round from the right posterior triangle of the neck to the left posterior triangle of the neck. He also had a cut wound noted at the right anterior triangle of the neck measuring 2 cm. The cause of death was indicted as strangulation. The doctor indicated that the deceased's right lung was bluish in colour indicating that there was no gaseous exchange. The report dated 31st August 2017 was produced as PEXH 2.
 11. CPL Lloyd Njue Muchiri (PW9) told the court that he was called to the scene on the material date and he went there in the company of his colleague. He stated that by the time they arrived there, members of the public had already gathered. He stated that he did not observe any injuries on the body of the deceased, or see any blood stains. He also stated that they did not take any photos and that he was not aware of the photos that were produced in court. He stated that the two accused persons were arrested after it was established that the deceased died from strangulation. He stated that from his investigations, he learnt that the 1st accused and the deceased had separated following disagreements between the two. He also stated that he was informed that the deceased was a shy- locker but he could not confirm the information. He observed that there were no signs that the home had been broken into.
 12. When placed on their defence, both the accused denied committing the offence. Monica Mwolyo (DW1) in a sworn statement, stated that the deceased was the husband and that she worked in Nairobi but on the material time he had visited her deceased husband and had spent the night with him. She testified that on the material day, she woke up at 5.30 am that morning and informed her husband that she was going to fetch water from the river. She added that when she returned, she noticed that the chickens were missing as well as her husband so she decided to go inside and look for him inside the house. She testified that she called him but he did not respond. That she found him in bed covered with a blanket, she touched him and noticed that he was cold. She stated that the deceased was not sick and that she had left him alive. She stated that she screamed and her neighbours including PW 3 came to her home. She indicated that by the time she left for the river her son, DW2 had also left the home as he was a boda boda rider. She stated that she had a good relationship with the deceased. In cross examination, she stated that she had been in the homestead for three months as she was unwell. She stated that she did not observe any injuries or blood on her husband at the time.
 13. According to her the deceased did not show any injuries and that the deceased was not sick and she was surprised to find him dead. She confirmed that when she screamed Kasyoka Muema (PW3) and Tabitha Mboya (PW2) and other neighbours responded and went to the homestead.

She added that the two and the neighbours went inside the house and saw the deceased husband. She also stated that she attended the post mortem examination but she was not told what caused the demise of her husband and stated that the cause was hidden from her though she could not say why such information could be withheld from her. She also tellingly stated that her son the 2nd accused was away at the time and that he had left for his boda boda business. She added that the 2nd accused was the only child staying with the deceased at the material time.
 14. Kilo Mwolyo (DW2) the 2nd accused herein, also gave a sworn statement and denied killing his father. He stated that he lived with his father and that his father was the one who bought him the motorbike which he operated for business. He stated that he used to give his deceased father money earned from



operating the motorbike. That on the material day, he woke up at 5.00am and went to work on his motorbike and did not return home until 8.00am. He added that when he got there, he found many people already gathered and his mother informed him that his father had died. He stated that his father's body was covered when he saw him. He also stated that he knew his father operated as a shylock business but he was not aware of anybody who had differed with him from the business.

15. In their written submissions through Counsel, the two accused persons submitted that the prosecutions' case was based on circumstantial evidence. They submit that there were contradictions in the prosecution's case with regards to what the witnesses said on how they entered the deceased's homestead. They add that none of the witnesses witnessed the accused persons murdering the deceased. The defence has also raised an issue with the testimony that there was blood and injuries on the head of the deceased stating that PW7, PW8 and PW9 contradicted each other.
16. They rely on the case of *Republic versus Andrew Mueche Omwenga* 2009 eKLR where the court while reducing the charges against the accused from murder to manslaughter gave the definition of what constituted murder and the importance of taking the accused's person's state of mind at the time of commission of the offence into consideration.
17. They also cite the case of *Republic versus Josphat Kipruto Bett* (9015) eKLR where the court referred to the case of *Ndungu versus Republic* (1985) KLR 487 on reliance of medical evidence to establish the cause of death in cases where the cause is not obvious.
18. They also cite the case of *Solomon Kirimi M'rukaria versus Republic* (2014) eKLR where the principles were laid out by the Court of Appeal in respect to circumstantial evidence that is to say for an inference of guilt to be drawn, the circumstances should point towards the guilt of the accused and that the chain should lead to the conclusion that the accused committed the offence.
19. Finally, counsel submitted that the prosecution had a duty to prove its case beyond reasonable doubt and for this submission relied on the case of *Republic v Derrick Waswa Kuloba* (2005) eKLR
20. The prosecution on its part submits that they have proved all the elements that constitute the offence of murder against both the accused persons. The State submits that all the elements of murder have all been connected to the accused persons and urge this court to find the guilty as charged.

Determination

21 This court has carefully considered the evidence tendered by the prosecution and the defence put forward. It is apparent that the prosecution's case against the accused persons is mainly based on circumstantial evidence. It is true that a charge of murder can be proved by either direct or circumstantial evidence. What matters is the weight of the evidence and existence of some conditions when it comes to circumstantial evidence. What is common in both situations is that the following elements must be established for the charge of murder to be sustained.

- i. Fact of death and its cause.
- ii. That the accused committed the unlawful act which caused the death.
- iii. That the accused had malice aforethought.

(i) The fact of death and its cause

22 The fact of death and the cause are uncontested in this case. The body of deceased was identified by his brothers (PW4 and PW5). The post mortem report was tendered by PW8 (Dr. Edward Kaitto) as P. Ex 2.



The fact of death and its cause was well established by the post mortem examination the deceased died from strangulation which means that this death was deliberately caused by someone or some people who wanted him dead. The body of the deceased also had several other injuries included bruises on the head, chin, forehead. It also had lacerations (on the neck). The post mortem report has listed the injuries well. It is therefore apparent that the cause of death was not natural but caused. The question as to who caused it will be the subject of the next issue for determination.

The Actus reus and whether the accused persons caused the murder.

- 23 The evidence tendered by the prosecution and in particular the evidence of PW2 was material in this aspect. The witness stated that she heard the deceased screaming. ‘Monica is killing me. Kilo I am being killed by your mother.....wui Monica you are killing me.....’”
24. The evidence given by PW2 is corroborated by PW3 and PW1 in respect to the chain of events that led to PW1, PW2 & PW3 rushing to the deceased’s compound or home where they found it locked with both the accused inside. They all reported that the house was locked from inside and that when the accused persons came out, they went in and found the deceased dead. The above circumstantial evidence points to an inescapable conclusion. The accused persons did something to the deceased that made him scream. The doctor’s evidence (P. Ex. 2). Clearly shows that the deceased suffered various injuries and that the cause of death was strangulation. That in my view makes this court infer and safely for that matter that the accused persons were connected with the actus reus.
25. The finding of this court is strengthened by the evidence of the 1st accused. She stated that she had come home from Nairobi and stayed at home for a while which was a bit odd as she worked in Nairobi. What this court found quite telling is when she stated that she attended post mortem examination but pretended that she did not know the results of the autopsy. I saw her she also tried as much as could to exonerate her son (2nd accused and a partner in crime) by stating that she had left earlier for boda boda business. I observed her demeanor in the dock and the manner she was answering questions put to her by the prosecutor. It was evident that she was tense and tried to be evasive even in obvious issues like if she saw that the body of the deceased had visible injuries. Besides this, she also stated that the deceased was alive and well when she left him that morning and that the 2nd accused was the only other person who stayed with the deceased or the only other person in that compound. If she left the deceased alive and well what happened to him? They were the only ones at the vicinity at the time.

The accused persons did not discredit the evidence of PW2 in any significant way and therefore the circumstantial evidence really points at them and only them.

26. In the case of *Abmad abolfathi Mohammed & Anor, versus Republic* [2018] eKLR the Court of Appeal stated;

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence.

It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



27. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, 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 the 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.”

28. In *Joan Chebichii Sawe versus Republic* [2003] eKLR the court of Appeal also observed as follows: -

“before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution...”

29. In light of the above decisions and the evidence tendered, this court finds that from the evidence tendered by the prosecution, it can be inferred that the accused persons participated jointly and together they caused the death of the deceased. The defence put forward by the 2nd accused is certainly a mere denial.

30. Both accused persons as I have observed did not indicate that they had bad blood with PW2.

The 1st accused conceded that when she screamed the first persons to arrive at the scene included PW2. That in my considered view adds credibility to what PW2 told this court. This court is satisfied that the element of actus reus had been established, proved and connected positively to both the accused persons.

(iii) Mens Rea or Malice aforethought

31. The element of malice aforethought can either be proved through direct evidence or it can be inferred as stipulated under Section 206 of the *Penal Code*. That provision states;

32. Malice afterthought is defined under Section 206 of the *Penal Code* as;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—



- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

33. Medical evidence from the post mortem report produced by PW8 indicated that the deceased sustained external and internal injuries that resultantly led to his death. Specifically, the report indicated that externally, the deceased sustained;

four bruises over the head, forehead and chin. He had lacerations noted over the posterior aspect of the neck extending all round from the right posterior triangle of the neck to the left posterior triangle of the neck. He also sustained a cut wound at the right anterior triangle of the neck measuring 2 cm, the head had several bruises noted over the scalp, chin and forehead.

34. The report indicated that the deceased died from strangulation and whoever inflicted these injuries intended to cause death or grievous harm hence malice afterthought as defined under Section 206 of the *Penal Code* has been proved by the prosecution.

35. In short, this court finds that the prosecution's case against both the accused persons has been proved beyond any reasonable doubt. There is evidence from the Area Chief (PW7) which suggests that the 1st accused and her husband the deceased had differed and that could explain why the 1st accused relocated to Nairobi and could only come visiting.

It does appear that the two accused persons for reasons best known to them planned and executed a heinous plan to unlawfully cause the death of their husband and father respectively. They are both found guilty of the offence of murder and are both convicted accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF MAY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

