



REPUBLIC OF KENYA



**Republic v Musyoka (Criminal Case E018 of 2020)
[2022] KEHC 12894 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E018 OF 2020**

**A. ONG'INJO, J
JULY 28, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS STEPHEN MUSYOKA ACCUSED

JUDGMENT

1. The accused Francis Stephen Musyoka is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *penal code*.
2. Particulars are that Francis Stephen Musyoka on the 13th day of November 2020 at Tsuma Village Vanga Location in Lungalunga Subcounty within Kwale County in Coast Region murdered Masumbuko Patrick Musyoka.
3. PW 1 a neighbour to the accused and the deceased testified that on 13/11/2020 he passed by accused persons home on his way to the shop to collect money and found he was seated with his mother Monica his uncle Masumbuko – the deceased herein. Peter Musyoka & Martin Ngelenye. He said they were drinking. He said that Martin who was mentally challenged sat aside.
4. That as he left to go to the shop Monica the accused person mother send him for medicine. That when PW 1 came from the shop the accused persons mother told him he should help separate the accused and his uncle as they were quarrelling/fighting. He said that the accused emerged with a panga and he urged the accused to calm down as he drunk. PW 1 managed to take the panga and he took it to the house. That the accused however went round and picked a piece of wood and went where he was. PW 1 said that it was now 8.00pm.
5. That accused told he mother to get into the house and lock as the work was very small. He said the accused and his uncle Masumbuko were exchanging insults and he could hear the deceased person's voice although he could not section as it was by then dark. He said he left and passed by Titus Wambuas



home. He left Wambuas home at 10.00pm. On arrival home his mother informed him that the accused person's mother had gone to look for him.

6. PW 1 said he slept and the following day at 5.00am he woke up to go and graze his cows before he could go to work at Madam Kalimbos place where he had worked with the accused the previous day. That while he was grazing his cows next to accused person's place he saw accused persons mother Monica leave at 6.00pm and he asked why she had gone to look for him.
7. Immediately thereafter the accused went and reported to him that his uncle had cut his hand. That he saw what the accused referred to as a cut was just a laceration. PW 1 told the accused to go back and sleep as he still had hangover. That after he had tethered his animals he passed by the deceased persons houses saw a lot of blood at his door step.
8. That he went and reported to Balozi what he had seen at the deceased door. That he then went to plough and when he passed by accused persons home the accused told him his uncle had died. PW 1 refused to enter the house alone. Accused accompanied PW 1 to go and call Balozi and Chairman and they proceeded together to the deceased persons house and they found he was dead and he body was naked and he had a cut at the back of his head.
9. That police were called and they took photographs and collected the body. PW 1 identified the photographs which were later produced as EXP 1(a) to go. PW 1 said his homestead is separated from the deceased by around. He said the deceased persons home was next to accused persons mothers home.
10. PW 1 said accused person, his mother and the deceased had a lot of squabbles over land as the accused and his mother claimed the same land the deceased was also claiming. PW 1 said he told the accused not go fight with the uncle and he left to go home but the accused told his mother to go into the house as he remained outside saying he was going to finish with Masumbuko immediately. PW 1 identified the panga that accused was armed with and which he snatched from him and took to the house. He also identified the short trouser he was wearing while quarrelling with the uncle.
11. In cross examination PW 1 said Monica & the accused were arrested. He said he didn't know if Monica was a witness. He said Monica didn't tell him reason for quarrel but Francis said he was going to finish Masumbuko. He said he did not know what went on after he left. He said the deceased and the accused fought on the past using sleeks and fist. He said that the accused and his mother Monica had land dispute with the deceased.
12. PW 1 said he didn't see Monica with any weapon and she did not quarrel with the deceased. He said Monica called him to help separate the accused from the deceased. He said the chairman Saidi Howe accompanied him and the accused to Masumbukos house.
13. PW 2 testified that while at their home which is 100metre from accused person home he heard the accused making noise and telling the deceased

“ nitakuua leo” “Mjomba gani wewe nitakuua leo”

PW 2 said the deceased persons home is 10 metres from the home of Monika and the accused. That he went near and heard Monica tell the accused to leave the uncle alone and get into the house. That Monica then took solar lamp she had hung on a tree and entered the house. That he went back to the house to sleep and the next day at 10.00am he went to knock on Monica and found her house was locked but Francis house was not locked.

14. PW 2 said from accused persons house to the deceased house was 10metre. That he went to the deceased persons houses he found 20 litre jerry can outside the house had blood stained and there was also a lot



- of blood on the ground. That he called out for Masumbuko but there was no response and he went to Chairman to seek help. He said the Balozi was Muthoka. He reported that the accused and the uncle had commotion the previous night. That PW 2 & Balozi Muthoka went together to Chairmans place & Balozi reported what had transpired at Masumbukos home.
15. In company of Balozi & Chairman they proceeded to the deceased persons home. That which they called and there was no response they decided to enter the house and fed Masumbuko the father of the deceased and Monica the mother of the accused.
 16. PW 2 said he was with Kitili the Incharge of Balozis when they came from Chairmans home they were the 1st to enter the deceased persons house. PW 2 said that the accused and his mother fought with the deceased frequently and that one month prior to the murder the deceased took a cane and assaulted the accused persons mother. He said that their fights were always violent. He said that the rungu produced in court was recovered 2 steps from Masumbukos house.
 17. PW 3 Musyoki Masumbuko the only surviving child of the deceased testified that her aunt the accused persons mother and the accused wanted his father to vacate the land and they could fight over the land dispute and insult each other. He said the land belonged to his grandfather who died. He said whenever he stayed with his father over the weekends he witnessed fights between him and the accused and the mother. He said 2 of his siblings went with his mother to Tiribe in Tanzania. That the mother went back to her parents place following the aunt's utterances, lying dead on the bed facing down and the body was naked. He said the deceased had a cut at the back of the head.
 18. That on coming out he saw Monical return carrying palm wine on her head and when asked where Masumbuko was he said he didn't know. That she also said she didn't know where her son was. That members of the public who had gathered interrogated the accused persons mother and that is when the accused emerged from his house and together with the mother they were forced to enter Masumbukos house and say where he was. That they came out and said Masumbuko was dead.
 19. That Assistant Chief went to scene and police also went to the scene and took photographs. That a rungu suspected to have been used to kill the deceased was recovered. PW 2 identified short trouser produced in court as belonging to the accused. He said the accused and his mother were arrested and taken to police station as the police collected the body and took to the mortuary.
 20. PW 2 said the accused his mother and the deceased caused commotion quarreled and habitually fought as the deceased had land dispute with the sister who was accused persons mother. That the land had lemon trees and it belonged to. That on 14/11/2020 while he was in Likoni Nancy Karuki whom he had visited in Likoni told him his father had been killed by Monica and her son Francis.
 21. He travelled home and on arrival found blood at the door, on the mattress and under the bed. He said he found the father's ID Card on the floor and certification and solar lamp were missing. He said he found the fathers body had been taken to Kinango Hospital Mortuary. He said that police searched accused persons house and recovered a blood stained panga under the mattress and it had fresh blood.
 22. PW 4 Martin Mainge Joseph testified that on 13/11/2020 he arrived home at 9.00pm and his wife told him that accused persons mother had gone to look for Simon his younger brother but Simon was not at home. The following day when he met Simon at their mother house at 9.00am. Simon told him that Francis mother told her that Francis had fought with his uncle and that the uncle had not come out of the house. That at about mid-day Francis went and told him that he had found Masumbuko dead on his bed and he had excretal on himself.
 23. That Francis mother also went to him and they wanted him to accompany them but he said he had to go in company of his colleagues. That he looked for Balozi Muthami and village Chairman Saidi



- Kuru and they accompanied Francis to Masumbuko house where they found he was dead. PW 4 made phone call to Assistant Chief who went to scene in company of Balozi Mkuwe Muthoki and 2 police officers. That officers from Lungalunga went to scene and took photographs and they also recovered a rungu which had blood stains. The body was collected and accused and his mother were also arrested.
24. That on 15/11/2020 police went back to scene and searched accused persons house and recovered blood stained panga. He said that the short trouser the accused was wearing when he went to make a report to him had blood stains and it was recovered. PW 4 said that the panga was recovered under the bed in accused persons are roamed house. PW 4 said it is Francis sister who was at home when Francis and the mother were arrested.
 25. PW 5 – Irene Furaha Mwaringa – Government Analyst Mombasa branch testified that P.C. Francis Kinyanjui from DCI Lungalunga went to Government Chemist Lab on 27th November 2020 with exhibits forwarded vide a memo form seeking that they ascertain whether the DNA from blood stained black striped pain of shorts and blood stained piece of wood as well as blood stained panga matched the DNA profile from blood sample taken from the deceased. That after examination it was established that the blood stains on the panga and piece of wood and blood stains on black striped pain of shorts generated DNA profile of a man that matched the DNA profile from the blood sample of the deceased. She produced the DNA report – Ex. P2.
 26. PW 6 Dr. Kitsero Jumba Kalume produced postmortem report prepared by Dr. Gathendu on 11th November 2020 in reference to the body of the deceased herein. Dr. Gathendu formed the opinion that death was caused by severe head injury with severe brain injury and massive right hematoma ExP7 – Postmortem report.
 27. PW 7 P.C. Mwirumi Musabi of scenes of crime Kwale testified that on 9th April 2021 P.C. Francis Kinyanjui of DCI Lungalunga took to him photographs which were accompanied by exhibit memo from and he was required to certify then and after scrutinizing them he did certify them and issued a certificate on 9/4/2021. PW 7 produced the photographs – EXP 1 (a) to go. He also produced exhibit memo form and certificate as exhibits Ex P 8 7 9. PW 7 said he was not present when the photograph were taken.
 28. PW 8 P.C. Francis Kinyanjui testified that on 14th November 2020 at 3.00pm the DCIO Lungalunga Madam Debora informed him of a report of murder that had been committed in Tsuini village. In companying of Inspector Debora they proceeded to the scene together with P.C. Rotich and the police driver. They found a crowd had gathered and Area Chief told them what had transpired to the effect that there was a fight between the accused and the deceased the previous day and that the following day it was discovered that the accused persons uncle had been killed.
 29. PW 8 said the deceased persons body was in a grass thatched house which door was a jar. He said there was also blood outside the door of the subject house that was dry. That there was also blood stains on a ferrycan that was outside the deceased persons house. They found the deceased body lying on the bed on its abdomen and goats were still in the sitting room. He said there were 2 visible injuries at the back of the head and there was blood on the bed and under the bed. He said that they found the deceased had been covered with a sheet which they removed and found he was naked. That besides the bed was a blood stained wood.
 30. PW 8 said he learnt that PW 1, Stephen Makau had restrained the accused from cutting his uncle with a panga the previous evening. PW 8 said the accused persons house to deceased persons house is 70metre apart. He also said that the deceased and accused persons mother had a land dispute and that she was at home during the scuffle and she incited the son against her brother the deceased herein.



31. PW 8 said they found the accused had already been apprehended and locked inside the house where the deceased body was together with this mother. PW 8 said the accused was wearing a black vest and black pair of shorts that had white stripes that also had blood stains.
32. The accused and his mother were arrested and the body also collected and taken to the Kinango Hospital mortuary and suspects taken to Lunga lunga police station. PW 8 testified that on 15/11/202 they went back to the scene and recovered blood stained panga in accused persons house. That statements were recorded and on 17/11/2020 the son of the deceased and Simon Makau a counsins to the deceased accompanied police to the mortuary where they identified the body and post mortem was done.
33. PW 8 also forward exhibits recovered to Government Chemist and examined was done & DNA Report prepared – Exp. PW 8 produced the panga pair of short trouser and piece of wood as exhibit Exp 5, 3 & 4. He also identified photographs that were taken from scene and which were certified by scenes of crime officer and produced Ex P1(a) & (g).
34. In cross examination PW 8 he said PW 1 saw the accused person assault the deceased and he prevented the accused from following the deceased to his house. He said they arrived and found the accused had been apprehended and detained in the deceased house. He said that no one told the accused to turn the body of the deceased and that the body had not been tampered with.
35. He said they didn't enter the accused persons house the 1st day and they returned to scene the following day and searched accused persons house. He said at the time of search the accused and his mother were at the police station. He said the blood stained piece of wood was recovered besides the bed inside the deceased persons house on the day the body was collected. He said finger prints analysisist was not done on the panga. He also said the accused and his mothers houses are close to each other and both were grass thatched.
36. He said the wife of the accused was at home and the 2 houses were not easily accessible. PW 8 said they didn't go with accused back to the scene as members of public wanted to lynch him. He said he informed the accused they were going to search was house. He said that DPP advised that the accused be charged but not his mother. He said that the piece of wood that the accused person picked after PW 1 had taken away the panga is the one that was found in the deceased person's house with blood stains. PW 8 said that the accused person's mother refused to testify against her son.
37. In re-examination, PW 8 said that the Area Chief and Nyumba kuni elders apprehended the accused and detained him in the deceased persons house to secure his life as members of public had surrounded his house. PW 8 also said that there was no possibility of a panga being taken from the deceased persons house to accused persons house. He said he was in company of Corporal said and PC Ochieng when they went to conduct search.
38. When accused was placed on defence he gave sworn statement and said that on 13/11/2020 he worked at Madam Kalimbos farm together with PW 1 AND he left at 6.00pm. That he was paid 600/= and PW 1 was given a bicycle to go and took for change and give him 100/=. That PW 1 went to the shops to look for change and took to him 100/- and then returned the bicycle as he went home to rest. That on 14/11/2020 PW 1 went to his house to call him. That PW 1 was with Mutiso Katengele and Beuchi Mgalla. That they told him they had called his uncle and he didn't respond and that he was ill and he should go with them to check on him. That he got out and accompanied the 3 to his uncles house. That he found blood outside the house and the 3 people forced him to go into the house.
39. That he asked whether anyone had entered the house and they told him it was Mutiso and Beuche who had entered the house together with Simon in the absence of Chairman. The accused said he



- accompanied the 3 to PW 1's brothers home known Balozzi Martin Joseph Makau and reported what he had seen. That Martin asked if accused persons mother was at home but he told him she had gave to Chuini to demand for her money.
40. That he was send to go and bring his phone and call his mother then relatives to Martins house. That he called the mother and told her what had happened and the mother told him to wait for her at Balozis home. That at mid-day his mother arrived at Balozis home and the chairman was also present. That they then proceeded to their uncles house and found Chief Abdalla Khaima had also arrived on his motorbike. The accused said that the woman who had leased a house from his uncle was interrogated whether he saw anyone enter the deceased person's house and she said she didn't see anyone and her statement was not recorded.
 41. Accused said her mother asked for police to be called and police went to the scene and processed the scene and interrogated him and he said he had not quarreled with the deceased and they didn't know what happened. That he and his mother and police entered the deceased persons house and found he was lying on the bed facing down and there was a cut on his head and he was still bleeding. That the police told him to cover the body with a sheet which had blood stains. He said that the 3 people who woke him up said they entered his uncles house at 6.30am before waking him up.
 42. That the deceased body was collected and he and his mother escorted the body to the mortuary at Msambweni. Accused said that they didn't lock their houses and Chairman was instructed to make sure they were secure. He said they knew they would return home after escorting the body to the mortuary but when they got to Lungalunga they were placed in cells & body taken to mortuary.
 43. That the next day at 11.00am in a police officer went to the cells and told him to remove his pair of short trouser. That the next day he was taken to Msambweni Court where he learnt that they were suspects of murder. Accused said he didn't attack his uncle and that PW 1 – Simon didn't go to their home as he should have reported to Chairman.
 44. He said on the material day the deceased was not at their home when PW 1 took to thim 100/=. He said Madam Kalimbo is their closest neighbour and that PW 1s hme is 1.5km away. He said Muthoka home is also 1.5km away and the deceased persons house is 70m from his house. He said that the deceased gave Mama Barnaba a room adjacent to his house and they shared the same wall. That Madam Kalimbo and Mama Barnaba are the ones who could see if anyone entered Masumbukos home.
 45. Accused said Mama Barnaba disappeared after speaking to a Taita police officer and that Madam Kalimbo was not interrogated. He said if he had a land dispute with this uncle the chief would have known. Accused said the blood stain on his trouser came from the bedsheet that was used to cover the body of the deceased. He said he was told to use the bedsheet to cover the body of the deceased and when the body was being transported he sat next to the body.
 46. Accused said that he learnt that a panga and rungu had been recovered when he was in court and was not aware that police went back to his house and he didn't leave anyone in his house. Accused person said that PW 1 fabricated him because he took and married his wife. Accused said that if he committed murder it is Madam Kalimbo and her husband as well as Mane Barnaba who could have known & ought to have seen.
 47. In cross examination the deceased said that Isaack Mutiso is the one who killed his uncle as he was the 1st to enter the deceased persons house. Accused said that no witness said that he was told to cover the deceased body with a bedsheet. He said that his advocate didn't cross examine Simon- PW 1 concerning grudge with the accused over his wife. He said no witness testified as to his relationship with PW 1 or even PW 1's wife. Accused said Mwanasiti whom he allegedly snatched from PW 1 was not his witness.



At the close of defence case the accused was given time to file submissions. Submissions were filed on 28th April 2022.

48. The accused persons counsel submitted that there was no dispute that Masumbuko Patric Musyoka died but there was no direct evidence linking the accused to the murder. It was submitted further that what is left for the court is to interrogate circumstantial evidence and make a finding if it meets the legal threshold.
49. According to defence doubt was created in the whole sequence of events or even critical witnesses were left out by the prosecution. It was the defence conclusion that the prosecution evidence fails to give a commanding inference on the guilty of the accused and it cannot be safe to convict the accused based on such evidence and the doubts raised should be resolved in favour of the accused. The holding in Pius Arap Maina vs Republic was relied upon by the defence which urged that any evidential gaps in the prosecution's case raising material doubts must be construed in favour of the accused person. The court was urged to find that the prosecution failed to discharge its duty and the accused should be acquitted.
50. Having considered the evidence on record for the prosecution and the accused persons defence as well as submissions. It is apparent that the fact Masumbuko Patrick Musyoka the uncle of the accused died is not in dispute.
51. From the evidence of all prosecution witnesses the accused and the postmortem report it is obvious that the deceased persons death was caused by an unlawful act.
52. The deceased was found to have died on his bed and his hand a cut at the back of his head. The postmortem report produced showed the injuries observed during examination as of the body of Dr. Gathendu namely:-multiple with bleeding been skull & brain tissue lacerations on the skull and scalp, minor defence wound on the palms, multiple cuts & stabs both shallow and deep with sharp object. It was also observed that the deceased had massive right sided haemothorax secondary to penetrating injuries. The injuries inflicted on the deceased were fatal from the postmortem report same must have been inflicted by use of a sharp object.
53. The issue in dispute is whether the prosecution proved beyond all reasonable doubt that it is the accused who committed the unlawful act that caused the death of the deceased.
54. From the evidence of PW 1 he had worked with the accused at Madam Kalimbo's farm on 13/11/2020 and in the evening he passed by accused persons home on his way to the shop to get change and he found the accused, his mother his uncle the deceased and one Martin were drinking palm wine. That the accused persons mother told him to buy for her medicine from the shop.
55. That on return the accused persons mother requested him to restrain the accused from assaulting the uncle. By then the accused was armed with a panga which he took and put in accused persons house. The accused person however picked a piece of mould and instructed his mother to enter the house and lock so that he could finish the deceased whose work was something very small.
56. PW 1 decided to go home when the accused refused to heed to his caution. The accused said that PW 1 framed him because he had taken his wife Mwanasiti. The accused and his wife advocate did not however bring the issue of grudge between him and PW 1 in cross examination.
57. PW 2 also said he heard the accused making noise and threatening that he would kill Masumbuko that day. That he uttered words to the effect,

“Mjomba gani wewe?”



Mtakuua leo. Nitakufira leo. Mshenzi wewe”.

58. This was almost the same time that PW 1 had left the accused and the deceased persons home. PW 2 said he heard the accused persons mother telling him to get into the house and leave the uncle alone. If it was time that PW 1 framed the accused because of alleging grudge then no reason has been given why the 2nd prosecution witness would have framed the accused. It is accused who was last heard quarreling and baying for the deceased persons blood and the following day the deceased was found dead.
59. On the material night the accused persons mother went looking for PW 1 at their home but didn't find him as he had passed by Titus Wambuas place and remained there until 10.00pm. According to PW 1 the following early in the morning when he went to graze his cattle the accused person mother told her that the accused had fought with his uncle and Francis also came from his house and told him that Masumbuko had cut his hand and he told him that was just lacerations. Later accused told PW 1 that his uncle had died & PW 1 accompanied him to Balози who called the Chairman and together they proceeded to deceased house and found he had died.
60. The scuffle between the accused and the deceased was known to Balози and the Chairman and when Balози accompanied PW 1 to the deceased home and called him out and he didn't respond they entered and found he was lying dead on the bed and the body was naked. This was at 10.00am long after the accused persons mother had told PW 1 that he had fought with the uncle and the accused also told PW 1 that the uncle had injured him.
61. PW 4 also testified that on 15th November 2020 the accused went to report to him that he found Masumbuko had died on his bed and soiled himself. That Francis mother also went to him and they wanted him to accompany them to the deceased persons house but he declined and insisted he had to go with his colleague Balози Muthami & Saidi Kuru the village. That at scene they found Masumbuko had died and they called Area Chief who arrived with Incharge of Balози known as Muthoka together with 2 police officers. The evidence of PW 1, PW 2 & PW 3 irresistibly point to no other conclusion other than that the accused committed his uncle brutally.
62. PW 3 said he saw accused persons pair of short had blood stains as he was boarding the police vehicle and there was no cross examination as to how his trouser got the blood stains ad the only conclusion that could be made is that he got stained when cutting the deceased. PW 8 also said no one told accused to turn the body of the deceased and therefore the blood stains on his pair of shorts occurred earlier.
63. PW 5 Government Analyst found that the blood stains on the pair of shorts was human blood of a male and that its DNA profile matched that of the deceased. Similarly the stick/rungu recovered from the deceased house had blood stains which profile matched that of the deceased.
64. The accused said that he had snatched PW 1's wife and that is why PW 1 testified against him. However when PW 8 – the Investigating Officer said that blood stained panga was recovered from his house on 15/11/2020 I the presence of his wife & other officers CPL Said & P.C. Ochieng the accused denied having left his wife or anyone in the house. No reason was given why PW 8 or any other witness would have contaminated the panga with the deceased person's blood so as to implicate the accused person.
65. This court finds that the evidence of PW 1, PW 2 & PW 3 as well as the forensic examination conducted by PW 5 & PW 8;s investigations directly implicate the accused person with the offence of murder for which this court finds him guilty and he is consequently convicted under Section 322(2) of Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF JULY 2022

HON. LADY JUSTICE A. ONG'INJO



JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Ngiri for State

Mr. Motuka Advocate for the Accused - Present

Accused – Present in person

Hon. Lady Justice A. Ong'injo

Judge

Mr. Ngiri

We don't have previous records.

Hon. Lady Justice A. Ong'injo

Judge

Order

Mention - 15/09/2022 for Victim Impact Statement, Mitigation and Sentence. Copy of judgment and proceedings to be supplied to accused person.

Hon. Lady Justice A. Ong'injo

Judge

29/07/2022

