



**Republic v Musee (Criminal Case 7 of 2017)
[2022] KEHC 13661 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 7 OF 2017**

RK LIMO, J

SEPTEMBER 26, 2022

BETWEEN

REPUBLIC APPLICANT

AND

MALIA MUSEE RESPONDENT

JUDGMENT

1. Malia Musee, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
The particulars presented are that on March 30, 2017 at Kyamatu village, Mutitu Sub-County within Kitui County, the accused murdered Manzia Musyini.
2. The accused person denied committing the offence and the prosecution has called 8 witnesses to support their cases. The prosecution's case is mainly based on direct evidence. Below is the summary of the witness account about the incident.
3. Michael Nguni (PW1) testified on March 30, 2017 at around 10:30 am he was notified by one Mwendu that her father, the deceased herein had been injured. He added that he that the deceased had an injury on the head that was bleeding and that the hands had been injured as well. He added he was in the company of others rushed to Kyamato hospital where the deceased was pronounced dead on arrival at the hospital. He further identified a walking stick next to where the deceased laid when he arrived at his house.
4. The witness further added that the accused used to have mental problems but he could not tell if she suffered from the episode at that time.
5. Elijah Musee (PW2), a son to the deceased and husband to the accused testified about identification of the body of the deceased. He testified that he was called on April 12, 2017 to the mortuary to identify



- the deceased before postmortem examination. The witness confirmed that he identified the body of his late father. He testified that he only came to know about her wife's mental state after the incident and after she had been taken to Mathari for mental assessment.
6. Sera Kambua Musee (PW3) a minor aged 14 years old, testified that there was a child found dead by the deceased and that she was told to leave but as she was leaving, she found the deceased being attacked by her mother, the accused herein. She recalled seeing her mother hitting the deceased with a walking stick. She stated that the deceased was attacked with his own walking stick, which walking stick, she identified in court. She stated that the deceased was later taken for treatment. She recalled being with one Kasyoka at the scene at the material time.
 7. Kasyoka Kamwene (PW4) on her part testified that he was informed about the incident on March 30, 2017 and when he proceeded to the scene, he found her father injured. She also confirmed that there was a child belonging to the accused who had died the previous day.
 8. Ngui Musyimi (PW5) also testified and corroborated the evidence of PW4 regarding the demise of a child belonging to the accused and that as he was going to the homestead to find out, he heard screams and hurried there where he saw the accused assaulting his father-in-law (the deceased herein). Using a walking stick the witness stated that when the accused saw him, she threw away the walking stick.
 9. The witness further testified that he sent Kambua to call Mwendu Kasyoka with a view to taking the victim of the attack to hospital adding that, the deceased was bleeding from the injuries sustained when he was taken for treatment.
 10. PC Jin Michael (PW6) testified that while at work at Kyamatu AP Post on March 30, 2017, an old man by the name Ndula, a brother to the deceased reported that the deceased had been assaulted by the daughter in law (the accused herein) and that he had been rushed to dispensary. The officer testified that he called Zombe Police Station and rushed to the dispensary where he found the deceased dead. He proceeded to the home of the deceased and recovered a blood stained walking stick and found the suspect whom she arrested and took her to the AP camp and later to Zombe Police Station.
 11. Dr Dennis Nyariki (PW7) testified on behalf of Dr Kiatu, the doctor who performed autopsy on the body of the deceased and had gone back to school for further studies at the time of this trial. Dr Nyariki stated that he had worked with Dr Kiatu for one year and was familiar with his handwriting and signature. The doctor testified that the doctor's finding on the body of the deceased were as follows: -
 - a. On the frontal region of the head-depressed fracture wound measuring 4cm.
 - b. Laceration on the right eye and ear.
 - c. Abrasion on the left hand.
 - d. Multiple abrasions on the knee and right foot.The doctor also discovered a clot on the coronary artery and wound on the skull. In his opinion the deceased died of heart attack caused by severe head injury.
 12. PC Simon Nyongesa (PW8) stepping in for investigation officer Geoffrey Wambua who had retired and had investigated the case, testified and tendered the statement made by the said officer as P Ex 3. He also tendered the walking stick which was the murder weapon as P Ex1.
 13. When placed on her defence, the accused denied committing the offence. She testified that it took time for her to take plea in this case because she was found to be mentally unfit to plead upon mental examination. She stated that she only came to realize about her mental state when she was examined



and told she was unfit to plead. She testified that she had not differed with the deceased who was her father in law because he had not wronged her and had lived well with him.

14. She testified that she only came to know about the death of her father in law after being charged in court.
15. After the conclusion of the trial both the defence and the prosecution opted not to file final submissions and left the matter to be determined by this court.
16. This is a case of murder. The accused is charged with the murder of her father in law namely Mwanzia Musyimi (deceased) contrary to section 203 of the Penal Code, section 203 of Penal Code which provides;

‘Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.’

17. There are 3 crucial elements in the charge which must be proved to the required standard for it to be sustained.

They are: -

- i. Fact of death & its cause.
- ii. Actus reus-That the accused by his/her action caused the death of the deceased.
- iii. Malice aforethought.

18.

- (i) Fact of death. There is no contest in this case that the deceased Mwanzia Musyimi died on March 30, 2017. The evidence tendered by Elijah Musee (PW2) who identified his body before autopsy was carried out, corroborates the evidence. Dr Dennis Nyariki (PW7). The deceased died and his death was caused by severe head injury that caused him to have a heart attack. The post mortem report produced as P Ex 2 by the doctor is testimony to the fact of death.

19.

- (ii) Actus reus.

The evidence given by 2 eye witnesses Sera Kambua Musee (PW3), a daughter to the accused and Ngui Musyimi (PW5). Their evidence collectively directly links the act causing the death of the deceased in this case to the accused. The two witnesses testified that they saw the accused assaulting the deceased using a walking stick that belonged to the deceased. That walking stick was tendered by PW8 as P Ex 1. The walking stick or the murder weapon for that matter was duly identified by PW3 and the AP Office (PW6) who went to the scene after the incident and recovered it at the scene.

20. The accused denied committing the offence but the evidence tendered by the prosecution is overwhelming. This court finds that the element of actus reus has been proved against her beyond doubt.

21.

- (iii) Mens rea

There was no evidence tendered showing if the accused had differed with the deceased. There is a mention that she had lost her child that morning at around 4 am. It is however difficult to



show if she connected the demise of her child to the deceased because there is no clear evidence tendered to that effect.

22. The accused has made a vain attempt to explain her action by suggesting that she could have been mentally sick at the time and could not comprehend the consequences of her action but I do not find any medical report showing that at the time the offence was committed, she suffered from some mental incapacity. There was no positive evidence from her either blaming her action to her mental state.
23. There is no doubt from injuries suffered by the deceased that the person who assaulted him intended to cause harm to him. I have however, keenly considered the evidence tendered by PW6, the police officer who went to the scene after the incident was reported. He testified that when he reached at the home of the deceased, he found the accused leaning on the wall looking 'shaggy and dirty'. The officer stated that he greeted her but she did not respond.
24. The statement made by the investigation officer Geoffrey Wambua, also indicates that the accused was mute when she was interrogated on March 30, 2017 at Zombe Police Station and that his attempt to get a statement the following day on March 31, 2017 was also in vain because she was not talking. He testified that on April 6, 2017 he escorted her to Kitui Level 4 Hospital where a doctor recommended her for treatment at a mental hospital.
25. I have further gone through the medical report dated May 2, 2017 by Dr Ngugi Gatere, a consultant psychiatrist who opined in his report that the patient (accused) was mute and never answered questions and had poor eye contact which was in his view indicative of mental illness.

It is therefore, quite possible that despite the fact that the family including her husband (PW2) had not noticed her mental illness, she was mentally unwell and may have been in that state for a while. The demeanor described by PW6 was not that of a normal person.

26. This court based on the evidence tendered finds that though the accused caused the death of the deceased, she was unaware of the consequences of her actions due to her mental state at the time. There is no evidence indicating that she harbored ill motive and the inference that could otherwise be drawn under section 206 of the Penal Code is negated by her mental state at the time.

In the premises, I find that the prosecution has not established the criminal element of mens rea without which the charge of murder cannot stand. She is not guilty of murder and is hereby acquitted. The accused be released, but in view of her mental history, I will direct that she be released to go home only upon certification by a psychiatrist that she has sufficiently healed to pose no danger to the family and the society.

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

HON JUSTICE RK LIMO

JUDGE

