



REPUBLIC OF KENYA



KENYA LAW
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**Mwariri v Republic (Criminal Case 78 of 2019)
[2022] KEHC 16057 (KLR) (Crim) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 78 OF 2019**

**LN MUTENDE, J
NOVEMBER 30, 2022**

BETWEEN

CYRUS MAINA MWARIRI ACCUSED

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Cyrus Maina Mwariri, the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the information are that between 12th and June 13, 2019, at Kiwanja area within Kasarani sub-county in Nairobi County, he murdered Kelvin Mburu Nyamu (deceased).
2. To prove the case, the prosecution called fourteen (14) witnesses. PW1 Stephen Kaforo, the father of the deceased received information about his son who had gone missing. Having been away from home he requested his brother, David Chege to find out what had happened. Subsequently, his brother informed him about the motor-cycle that the deceased was riding having been recovered. On June 13, 2019 he went to Ruai Police Station where the motor-cycle was stated to be and returned home. At about 6.00 pm his brother rang and told him that the body of his son had been recovered. He went and identified the body.
3. PW2 David Chege Kaburu, got information about the deceased having gone missing on June 12, 2019. He contacted the owner of the motor-cycle who accompanied him, alongside other BodaBoda riders, PW1 Stephen and Peter. They followed the trail indicated by the mobile tracker that had been installed on the motor cycle, which led them to Utawala, a supermarket, then to a Manyatta. A certain individual volunteered to lead them to Ruai, and, BodaBoda riders from Ruai joined them. They went to a certain plot where they found the motor-cycle. A caretaker at the plot led them to the house of the accused who was alleged to be the owner of motor-cycle, make Boxer, Registration Number KMEJ 371X. Inside the



- house was a lady alleged to be the accused person's wife. A driving licence, identity card, NTSA Card that belonged to the accused were recovered by the police who had joined the team. Some reflector and leather jackets were also recovered.
4. The following day at about 6.30pm PW2 got information regarding a body that had been found at Kiwanja area not very far away from where they resided. He went to the scene only to find his nephew's mortal remains. He notified the police who went to the scene and removed the body to the mortuary.
 5. Upon cross-examination, the witness stated that among those who were searching was a Bodaboda operator who lived on the same plot with the accused, who led them to where they recovered the motor-cycle. That the caretaker at the plot said that there were two (2) individuals at the plot who were engaged in Bodaboda business and the wife of the accused confirmed that the motor-cycle in issue belonged to the accused. The witness could not tell anything peculiar about the reflector jackets and leather jackets that were recovered. Although he
 6. had stated that the reflector and leather jackets were found at the house of the accused, he alleged that they were found at the Manyatta where the tracking device that was installed on the motor-cycle was recovered.
 7. PW3 Stephen Ngero Mungai the beneficial owner of the motor-cycle registration number Kxx xx1 that the deceased was riding learnt of the deceased having gone missing together with the motor-cycle on the June 12, 2019. He checked the mobile tracker device that was installed on the motor-cycle to track the location of the motor-cycle and briefed fellow Boda Boda operators of the whereabouts of the motor-cycle. They went up to the Manyatta. Inside one of the houses was a black cello tape that he identified at what he had used to stick the tracker on the motor-cycle. He identified two (2) identity cards that were recovered from the house in the name of Geoffrey Kinama Mvue and Onesmus Waweru Kimani, a staff identity card for BodaBoda Association in the name of Onesmus Waweru; a mobile phone, a leather jacket and reflector jackets that he identified as having been owned by the deceased. He alluded to the wife of the owner of the house having stated that the motor-cycle belonged to her husband, a second cellphone having been recovered and a driving licence in the name of the accused.
 8. On cross-examination he stated that one of the reflector jackets had been provided by the MP for Kinangop, a jacket that the deceased always wore. That he did not see any CCTV cameras at the flat but he saw CCTV cameras at Tumaini Supermarket, Ruai, where the motor-cycle had been parked for 20 minutes.
 9. PW4 Gabriel Wainaina, identified the body of the deceased to the doctor who performed the postmortem.
 10. PW5 No 8xxx6 PC Chrispinus Abula, an officer appointed under gazette notice No 217 dated December 20, 2012, of scenes of crime, took photographs of the body and motor-cycle which he adduced in evidence together with the report thereof.
 11. PW6 No 8xxx2 Corporal Dennis Riungu linked up with Boda Boda operators who were searching for the motor-cycle and they proceeded to Manyatta Ruai area, to a block of rental houses where they found motor-cycle registration number Kxx xxxX make Boxer. They were joined by Inspector Ndungu of Administration Police who led other officers, therefore, by virtue of his rank, he took charge of the motor-cycle, while Inspector Ndungu moved to search the house. He also took note of motor vehicle registration No Kxx xxxK which was also moved to Ruai Police Station together with the motor-cycle.
 12. PW7 No 7xxx8 PC Robert Mworira of Special Services Unit with other officers tracked the number of the accused and were led to Kigumo, along Thika-Mwingi Road where they arrested the accused, who was riding motor-cycle registration No Kxxx xxxF, a Ranger, black in colour.



13. PW8 No 1xxx5 PC Rodgers Kibet Samoei of Special Crime Prevention Unit was assigned duties together with PW7 and other officers of effecting arrest of the accused which they did.
14. PW9 John Mburu Kimemia, the deceased's neighbour saw him last on June 12, 2019. Two (2) days later he learnt of his demise. He identified the body to the doctor who performed the post mortem.
15. PW10 Joseph Kamau Kaburu was informed about the deceased having gone missing by his mother on June 12, 2019, thereafter as he was going to work, he saw people having gathered at Kiwanja area. We went to check on what was happening only to find that the body of deceased.
16. PW11 No 2xxx2 Inspector Phares Ndungu got the report from PW2 about the deceased who was missing, and, that they were following a tracker that had led them to his area of jurisdiction. He joined the group that was searching for the motor-cycle and the mobile tracker led them to Githunguri – Ruai area, where they found the tracking device inside one of the rooms/houses that were constructed with iron sheets. They also recovered two (2) Identity cards that bear the names Geoffrey Kinama and Onesmus Waweru; and a staff identity card in the name of Onesmus Waweru; and a cellphone.
17. Thereafter, they were led to flat at a residential area, an apartment where they found the Boxer motor-cycle registration No Kxxx xxxS. They were led to house No 10A located on 1st floor. They searched the house, recovered three (3) reflector jackets a leather jacket ordinarily worn by motor-cycle riders; NTSA identity card for Cyrus Maina, the accused; assorted motor-cycle parts and a side mirror; Driving Licence in the name of the accused; and, the wife of the accused allegedly told them about their motor-cycle that was outside and a motor-vehicle, vitz registration No Kxx xxxK. They caused the motorcycle and motor-vehicle to be towed to Ruai Police Station.
18. PW12, Dr Peter Muriuki Ndegwa, a pathologist conducted a post mortem on the body of the deceased and concluded that the cause of death was severe cranecerebral injuries due to blunt force trauma consistent with assault.
19. PW13 Lilian Wahito Gaitho, the owner of motor-vehicle Kxx xxxK toyota vitz had entrusted it with the accused to carry on a taxi business on her behalf.
20. PW14 No 4xxx4 Corporal Jackson, the investigation officer visited the scene where the body of the deceased was found and collected items that were recovered from Ruai Police Station. After the arrest of the accused he caused him to be charged.
21. When placed on his defence the accused denied knowing the deceased, but, admitted having known Onesmus Waweru that he referred to as his first cousin. He stated that Onesmus requested to park his motor-cycle at their plot. That he used to operate the motor-cycle as a BodaBoda, he therefore requested to leave it as he rested at his friend's place since his house had been locked for non-payment of rent. That his child was unwell therefore he took the child to Kahawa Wendani Hospital and when he returned without confirming if his cousin had taken the motor-cycle, he left on a BodaBoda to go and get some items that his wife and child needed.
22. Further, that he was not aware if the motor-cycle did not belong to his cousin and he did not even see the motor-cycle as he simply allowed Onenmus to park it at their place of residence. Subsequently, he was arrested on November 11, 2019, and allegations were made that he had killed people whose bodies' images were shown to him. He denied having killed the deceased or having stolen his motor-cycle. He alluded to having been rang by his daughter who informed him that she had been taken to the Ruai Police Station alongside her mother (his wife). That he went to the plot and only found the caretaker. His wife and daughter were released and he was not summoned to go to the police station for allegedly



- killing. That the caretaker and his neighbour in house No 11A recorded statements but were not called to testify. And, having been told that the riders wanted to lynch him, he went to his home.
23. In submissions at the close of the defence case, the learned defence counsel, Mr Jumba submitted that none of the witnesses demonstrated malice on the part of the accused in the form of planning or pre-meditation with intent to kill. That the accused was before court by virtue of the deceased's motor-cycle having been at the premises where the accused lived but he rendered an explanation that it was parked there by his cousin Onesmus Waweru. That the motor-cycle which had a tracker was traced at a house where several identification documents belonging to Onesmus Waweru were found but investigations did not unearth that particular individual and no charges were preferred against him.
24. That evidence adduced raised suspicions which could have been eliminated through investigations. In this regard the case of *R v Hellen Akoth Ochieng* criminal case No 6 of 2020 (2021)eKLR was cited where Kiarie Waweru J. stated that:
- “The prosecution did not adduce evidence to show how the accused was involved in the death of the deceased herein. It is as if they expected her to prove her innocence. She had no legal obligation to do so. She was arrested and charged on suspicion. The Court of Appeal in the case of *Sawe v Republic* [2003] KLR 354 said:
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”
25. That the prosecution failed to demonstrate responsibility on the part of the accused for the death and cause thereof, and, that it was done with malice aforethought; and that forensic analysis of the phones triangulation of signals was the least that would have been expected from investigations.
26. Despite having been given the opportunity, the prosecution failed to file submissions.
27. Section 203 of the *Penal Code* provides thus:
- Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
28. Therefore, issues for determinations are:
- i. Whether death occurred. Whether the unlawful act or omission which caused the death was by the accused.
 - ii. Whether the unlawful act or omission which caused the death was by the accused.
 - iii. Whether the act/omission was caused by malice aforethought.
29. This being a criminal case, the prosecution is duty bound to tender evidence in support of the allegations put forward. It is expected to prove each and every element of the information beyond reasonable doubt.
30. Mortal remains of the deceased were found at Kiwanja area. Scenes of crime personnel took photographs of the body. Ultimately his relatives identified the body to the doctor who performed the post mortem. Dr Ndegwa confirmed death that occurred and made a report thereof. This was proof of death which is not in doubt.
31. The body of the deceased was found in a bushy thicket some thirty meters away from a feeder road at Kiwanja area.



Photographs taken showed obvious multiple wounds on the forehead while the whole forehead was extensively injured. Dr Ndegwa opined that injuries sustained were no defense injuries. The cause of death was due to assault. This means that the deceased was attacked physically, which was an act in breach of the law.

32. Section 206 of the *Penal Code* provides thus:

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;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

33. In the case of *Ernest Asanii Bwire Agang'a alias Onyango v R* CACRA No 32 of 1990 the court held that:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

34. The individual who occasioned the blunt force on the person of the deceased had an intention to cause death which occurred. This unlawful act was committed with malice aforethought

35. There was no eye witness to the act that resulted into the demise of the deceased. There having been no direct evidence, what is to be relied on is circumstantial evidence. In the case of *Joan Chebichi Sawe v Republic* (2003) eKLR it was stated that:

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

36. Evidence that tends to connect the accused with the offence was the fact of a motor-cycle the deceased was riding that was stolen having been found on the plot where the accused resided; His conduct of having disappeared until he was traced at Kigumo after being tracked by Intelligence Services and arrested some five (5) months later. The question to be answered is whether his action that remains unexplained was relevant in the circumstances to make this court return a verdict of guilty?

37. Looking at the law, section 107 (1) of the *Evidence Act* provides thus:



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
38. In the instant case, the prosecution had the legal burden of proving to the satisfaction of the court that alleged facts did exist. The state/prosecution was required to adduce sufficient evidence to support arguments put forth beyond reasonable doubt. This assertion was well captured in the acknowledged landmark case where presumption of innocence was re-considered; *Woolmington v DPP* (1935) UKHL, 1 where the House of Lords stated that:
- “Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
39. This is a case where witnesses played a major role of tracing the motor-cycle that was stolen. They followed the trail that was indicated by the mobile tracker. At the point of reaching the house of the accused they were in company of the police who now took charge of the case. These officers were led to the house of the accused where they found his wife and child as admitted. The accused alleged that when he returned to the house, the motor-vehicle he was using as a taxi and the motor-cycle that had been taken to the plot by his cousin Onesmus had been taken away and that there was information the motor-cycle riders intended to lynch him, therefore, he went to his home.
40. From evidence on record, the body of the deceased was found at Kiwanja area. Although it had obvious injuries, it was not indicated if there were any signs of struggle which was an indication that the heinous act could have been committed elsewhere. The jackets identified as for the deceased per the witness were recovered at Manyatta where the tracking device/cellotape were found. There was also contradictory evidence that some of the items that belonged to Onesmus were found at the stated makeshift Manyatta. This evidence therefore points at Onesmus Waweru as the most important individual who was involved in the incident.
41. In his defence the accused insinuated that the culprit was Onesmus Waweru. To disapprove the allegation in order to discharge its duty, state prosecution witnesses mentioned two (2) important witnesses, the rider who led them to the house of the accused who was alleged to have recorded a statement and the caretaker who told them that the motor-cycle was owned by the accused.
42. In the case of *Juma Ngodia v Republic* (1982-88) 1 KAR 454, the Court of Appeal stated that:
- “The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.”
43. In the case of *Bukinya & another v Uganda* (1972) EA 549 the court stated that:
- “It is well established that the director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the director to call or make available all witnesses necessary to establish the truth, even though



their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success...” (Emphasis mine)

44. The caretaker was a vital witness. This was the most important witness who could have proved the connection between the accused and the motor-cycle. Secondly, the rider who led the witnesses to where the motor-cycle was found was also a key witness. The allegation that the wife of the accused admitted ownership of the motor-cycle was hearsay that was inadmissible. The prosecution therefore, failed to call important witnesses whose evidence would have linked the accused to the crime. Failure to call the two (2) witnesses left the evidence adduced as to the perpetrator of the offence being speculative.
45. Officers who arrested the accused endeavored to prove that the accused was connected with motor-cycle theft syndicate, but, the Prosecution failed to connect him to the death of the deceased. Some cellphones were recovered but no evidence was tendered on the relevancy to this case.
46. From the foregoing, it is apparent that investigations carried out were shoddy. Evidence adduced has left doubts that benefit the accused.
47. In the result the prosecution has failed to prove the case against the accused, therefore, he is accordingly acquitted of the offence of murder.
48. It is so ordered.

WRITTEN, DATED AND SIGNED BY HON. LADY JUSTICE L. N. MUTENDE, THIS 16TH DAY OF NOVEMBER, 2022.

**L. N. MUTENDE
JUDGE**

JUDGMENT DELIVERED BY HON. JUSTICE J. M. BWONWONG'A ON THIS 30TH DAY OF NOVEMBER, 2022.

**J. M. BWONWONG'A
JUDGE**

