



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRC NO.166 OF 2017**

**FORMERLY MACHAKOS HCCRC. NO. 08 OF 2015**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**ESTHER NDUKU MUTUA.....RESPONDENT**

**JUDGMENT**

1. **Esther Nduku Mutua** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the night between 14<sup>th</sup> and 15<sup>th</sup> January 2015 at Kiteini village, Ulu location in Mukaa sub-county within Makueni county jointly with others not before court murdered **Francis Kioko Mutungi**.

2. She pleaded not guilty and the case proceeded to full hearing, with the prosecution calling ten (10) witnesses. Pw9 **Dennis Mutuku Muema** is a nephew to the accused and he lived at her home taking care of her goats. It's his evidence that on 14<sup>th</sup> January 2015 at 4:00 pm he was at the accused's home when the deceased who was the accused's brother in law came there. He came while drunk and a quarrel ensued between him and the accused.

3. The deceased went away but returned at 9:00 pm. The accused asked him if he had returned and he said "yes". The accused, deceased and Pw9 were all in the accused's house. The accused then told the deceased she would beat him and she took a rungu and did just that on the head and he fell down. She called someone on phone and the person came. They pulled the deceased to the railway. He did not go with them.

4. Pw9 explained that the next morning the village elder (Pw1) came and told him what he had seen. That's how he knew they had taken the deceased to the railway. It is his evidence that the accused returned after taking the deceased away. They did not talk despite her calling him. After Pw1 came he left with the accused and Pw9 for the railway and they saw the body. He said the accused had asked him to assist her pull away the deceased but he refused.

5. In cross examination he said when the deceased came he was drunk and was staggering. He added that the accused and deceased lived on the same compound. Besides being drunk he was also threatening her. He was always drunk whenever he passed by the accused's house. He did not know if the deceased died there and there. He did not know how the deceased reached the railway. He did not know where the accused had been taken after the house. He never notified or called any neighbor.

6. Pw1 **Zakayo Kavisu Mulele** the village elder was attracted to the scene on 15<sup>th</sup> January 2015 7:30 am. He went there and saw the dead body. He saw a trail of an object having been dragged which him and others followed. It led them to the house of the accused. He asked Pw9 about it and all that he said was that the accused and deceased had quarreled that evening.

7. In cross examination he said when he went to the accused's home he found her with her mother-in-law (Pw5). There was no problem and he had not heard of any problem between them. He said Pw9 never told him the cause of the quarrel between the accused and deceased.

8. Pw3 **Augustus Mukima Kiio** is the assistant chief. He was informed of the incident by Pw1 by phone as he headed to the DC's for a meeting. He reported the matter at Salama police station which contacted Makindu railway police station. He did not visit the scene.

9. Pw4 **Julius Ndivo** is a brother to the deceased. He received a report of the incident on 15<sup>th</sup> January 2015 at 9:00 am. He went to the scene and saw the crushed body. He found Pw1 at the scene and together they followed the trail of dragging upto accused's home. He was categorical that Pw9 (**Dennis Mutuku**) told them that the accused killed the deceased. The accused was then at the railway line two (2) kilometres away.

10. Police officers came and also followed the trail of dragging upto the accused's home. They saw blood outside the accused's house. Pw9 showed them the murder weapon and also told them how the accused had burnt the deceased's clothes and had Pw9 drop them in the toilet. The same plus shoes were retrieved from the toilet. Accused was later arrested.

11. In cross examination he said he saw blood at the accused's house plus the club used to kill the deceased. The club had blood on one side. He had never heard of a problem between the accused and deceased but he heard one time they had quarreled.

12. Pw5 **Anna Kavengi Mutungi** is the deceased's mother and mother in-law to the accused. She confirms having seen the deceased on 15<sup>th</sup> January 2015 at 6:00 pm. He appeared drunk and she heard him tell the accused "*I don't like you*". She heard noises from them as they traded insults.

13. The accused went into the house and came out holding a club which he pointed out to the deceased saying;

"If you fail to kill me today, I will kill you today."

The two i.e. accused and deceased walked towards each other. She intervened and held the deceased whom she pushed away and he left. The accused went to her house.

14. She did not hear of anything until the next morning when the accused told them of the body on the railway line. Soon thereafter, Pw1 came and they left for the railway. She saw the dragging trail as they went. The deceased's body was in pieces with a bluish shirt without a trouser and shoes. She had never heard the accused and deceased quarrel save for this day.

15. In cross examinations she confirmed that the deceased was drunk from his way of talking. She heard no noise after the deceased left the compound. It was the first time he heard him say he did not like the accused. At the railway line the accused was shocked.

16. Pw6 **Dr. Emmanuel Loiposha** produced a postmortem report (EXB1) done by **Dr. Musyoki Patrick**. The body of the deceased was almost completely crushed from chest level to pelvic level. The cause of death was cardio-pulmonary collapse following severe crush injury. A death certificate No. 732077 was issued.

17. Pw7 **Peter Kiio Kiio** is a brother to the deceased. He was on 15<sup>th</sup> January 2015 at 7:30 called and informed of the incident. He went to the scene and found the deceased's body in pieces. They saw a line which they followed upto the accused's home. At the home they met Pw9 who told them what had happened the previous night.

18. He told them that after the quarrel and late in the night the accused woke him up and took him to a scene, a distance from home where they found the deceased lying without clothes i.e. shirt, trouser and shoes. He called the deceased who responded very faintly. The accused wanted him to assist her take the body to the railway. He refused and somebody whom he did not identify came and Pw9 ran away.

19. It is his evidence that Pw9 told the police what he had told them. That when the accused was asked she admitted and showed them the rungu she had used to hit the deceased with. A pit latrine was broken into and retrieved from therein was a trouser (jeans) and shoes which he identified.

20. In cross examination he said his home is 20 kilometres from the accused's home. He confirmed that he was told most of the things he had told the court. He also said the accused was at the railway line and never tried to disappear. He had not seen the deceased to know what he wore before his death.

21. Pw10 **No. 237056 I.P Regina Mbaluka** did not undertake any investigations in this case. She produced piece of wood (EXB2, partly burnt sandals (EXB2); partly burnt blue jeans (EXB3) sketch map (EXB5). In cross examination she confirmed having not interrogated the witnesses. There was no report of fingerprints on the wooden stick and no scenes of crime officer visited the scene.

22. When placed on her defence the accused elected to make a sworn statement. She denied committing the offence. She said she was a business lady and on 14<sup>th</sup> January 2015 she was at home alone in the evening, resting when she heard someone in the house. She found it was the deceased. She was shocked to see him. He removed a knife and ordered her to remove her pants. She told him not to kill but that they should talk slowly slowly. In the process their goats entered running which made him run outside. She got a chance to leave the house. Pw9 was behind the goats and he removed them and locked the house.

23. She testified that after this, the accused returned and she explained to Pw9 what the accused had come and done. The deceased denied it and a quarrel ensued. Pw5 heard it and intervened. She explained to Pw5 what the accused had come and done. He again denied it. Pw5 lectured him and he left. At 9:00 pm, Pw9 informed her he wanted to go and sleep. They walked out together as she went to relieve herself. As she closed her door upon returning she felt her dress being pulled from behind. On checking she found it was the accused who was so drunk.

24. She shouted Pw9's name and he came. He asked him what he had come back for and he said he had come to sleep with her no matter what. Pw9 separated them. She was embarrassed and pulled a piece of firewood with which she hit the deceased in between the shoulders and he fell down and said he would sleep there. She requested Pw9 to assist her take him to his mother but he refused. She held him and dragged him to the fence and Pw9 saw all this.

25. She denied beating the deceased to the point of bleeding. The next day she woke up to do her work. At 8:30 am Pw1 and Pw5 came to her house. Pw1 told them of a person crushed along the railway line. The three (3) of them went there and found many people. They found a

man's crushed body in ten pieces. Pw5 identified it as her son's body (*deceased's*).

26. In cross examination she said she collided with the deceased several times as he used to chase away her children in her absence. On the material day he wanted to sleep with her twice and Pw5 and Pw9 were in the know. When she hit him he never bled and was talking. She dragged him alone for about 20 metres. She said from her home to the railway line is 30 metres. She denied taking him to the railway line.

27. In re-examination she said the deceased was a nuisance to everyone when drunk. She however used to take care of him.

28. M/s Mbuvi for the accused filed written submissions arguing that the prosecution case was based on circumstantial evidence, and the element of motive was not established. She cited the case of **Mohammed & 3 Others –vs- Republic (2005) I KLR 722** where the court in explaining what constitutes circumstantial evidence said:

**“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.”**

29. She set out the elements to be proved in a murder to be as follows:

- a. That the deceased, Francis Kioko Mutungi is dead.
- b. That his death was unlawfully caused.
- c. That in causing death the accused had malice aforethought.
- d. Finally, that the crime of murder which occurred was occasioned by the accused.

30. It is her submission that death and its cause were proved by Pw6 who produced the postmortem report (EXB1) showing the cause of death to be cardiopulmonary collapse following severe crush injury. Counsel submits that the only issue in dispute is whether the said death was caused by an unlawful act of omission or commission on the part of the accused person.

31. It is counsel's submission that evidence of surrounding circumstances to a crime is the best evidence. In **Neema Mwandoro Ndurya – vs- Republic (2008) eKLR** the Court of Appeal cited with approval the case of **Republic –vs- Taylor Weaver & Donovan (1928) 21 Criminal Appeal R 20** where the court stated thus

**“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”**

32. She adds that caution must always be exercised while dealing with circumstantial evidence as was held in the case of **Teper –vs- Rep (1952) AC at page 489** where the court stated:

**“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

33. She submits that Pw1, Pw2, Pw3 and Pw4 all gave hearsay evidence as they each found the deceased's mutilated body on the railway line. They however agreed that the accused was with them at the scene and was equally shocked as them to see the mutilated body. Pw5 gave similar evidence on that.

34. On the key civilian witness (Pw9) counsel submits that the prosecution failed to establish the status of the deceased when he fell down, whether there was another person in that house that evening, what caused the deceased's death, the distance from the railway line to the deceased's house, point where deceased died etc. Unanswered are how drunk the deceased was, at what point he passed on, who the other person Pw9 talked about was, whether the deceased was able to walk to the railway line or not.

35. Counsel further contends that at no point did Pw9 mention the presence of Pw5 (*Anna Kavengi*) on the evening of 14<sup>th</sup> January 2015. It's her submission that Pw9's evidence is marred with a lot of doubts as to what really happened. There was evidence that the deceased had a tendency of disturbing the accused person, and yet intent on the part of the accused was not established.

36. She points out that Pw9 ought to have identified the clothes and shoes produced in court as having been worn by the deceased on the material night. In conclusion she contends that there are various *lacunas* in the prosecution case thus breaking the chain in the circumstantial evidence. She urges the court to find that the prosecution has failed to prove its case to the required standard.

37. The prosecution did not file any submissions having elected to rely on the evidence adduced. This is now the case before this court for determination.

## **Analysis and determination**

38. Murder with which the accused is charged is defined under section 203 of the Penal Code as

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.**

Malice aforethought is defined under section 206 of the Penal Code as:

- 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.**

39. It therefore follows that for a charge of murder to be proved the following elements must be established:

- i. The fact and cause of death.
- ii. That an unlawful act of omission or commission was committed by the accused (*actus reus*)
- iii. The unlawful act was accompanied by malice aforethought (*mens rea/ intention*)

40. In a criminal case, the prosecution always has the burden to prove its case beyond reasonable doubt, save where there are admissions by the accused person. I now move to analyse the evidence adduced in this case to determine whether the prosecution proved its case against the accused person to the required standard.

#### **Fact and cause of death**

41. The deceased's mutilated body was found lying on the railway line at Ulu location. The body was identified by his mother Pw5, Pw4 and Pw7. The post mortem conducted by **Dr. Patrick Musyoki** (EXB1) showed the cause of death as cardiopulmonary collapse following severe crush injury. Even in her submissions, M/s Mbuvi stated that there was no dispute on this issue. I am satisfied that the fact and cause of death have been satisfactorily proved.

#### **Whether the commission or omission causing death was by the accused.**

42. The most intriguing question in this case is how the deceased met his death and who did it. There is no witness who witnessed the killing of the deceased. The evidence before this court is purely circumstantial. The surrounding circumstances in this matter must therefore be carefully explained to see if they lead to none other than the accused person as the one who killed the deceased. In the case of **Sawe –vs- Republic (2003) KLR 364** the Court of Appeal outlined how circumstantial evidence should be handled. It held as follows:

- 1. 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 hypotheses than that of his guilt.**
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

43. In the later decision of **Nzivo –vs- Republic (2005) I KLR 699** the Court of Appeal held:

**(5) In a case of dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.**

44. There is no dispute that Pw5, the deceased, accused and Pw9 lived on the same compound. Pw5 was the mother to the deceased and mother in-law to the accused person, while Pw9 was a herds' boy to the accused person. There was no evidence or even a sketch plan produced to show how far apart Pw5, the deceased and accused lived. A sketch plan was produced (EXB5) showing the scene of incident. No scenes of crime officer visited the home of Pw5, accused and deceased and it is not even stated how far the accused's house was from the railway line.

45. Pw1 **Zakayo Kavisu Mulele**, Pw3 **Augustus Mukima Kiio**, Pw4 **Julius Ndivo**, Pw5 **Anna Kavengi Mutungi**, and Pw7 **Peter Kiio Kiio** told the court that they trailed some dragging from the railway line which ended at the accused's home. According to Pw1 who is the village elder, Pw3 and Pw4 who are brothers to the deceased, and Pw5 who is their mother, said there was a trail of dragging which they followed whether physically or with the eyes, and it led them to the accused's home. The said dragging trail was not explained to the court that took their evidence. What were they really following? Pw3 said he remained at the railway line, and so did not go with them.

46. On the other hand, Pw7 **Peter Kiio Kiio** also a brother to the deceased stated this at **page 33**

“The assistant chief present suspected the body had been brought there as there was a line of blood. We followed it upto the deceased's home.”

Further on he says:

“We went back to the railway. Police came and we accompanied them tracing the blood upto the deceased's home”.

49. This evidence of Pw7 shows that there was a trail of blood they were following and even police officers saw it and followed it with them. There is no police officer who testified to having traced any blood to the accused's home. Secondly Pw1, Pw3, Pw4 and Pw5 who say they saw or followed the dragging trail did not mention seeing any blood trail. So what is it that they followed?

48. Pw4 again still on the issue of blood states this in his evidence at page 18

“Police officers came at the scene and they followed the trail. We followed them upto Esther's home. We saw blood outside Esther's house”

Further on at page 19 in cross examination he states:

“I saw blood at Esther's home. I don't know what had been dragged. I don't know the source of blood. I saw the club which had blood on one side.”

49. Pw4 seems to be the only witness who saw blood on the drag trail and at accused's house/home. There is no other witness who mentions this. Further no police officer came to testify on this. Pw4 does not even say what part of the accused's house or home had blood. Did the police officers ever see this blood? There is no answer to this.

50. Besides Pw4 there is no other witness who saw blood on the club (EXB2). If indeed there was blood on the club, which was taken by the police officers it would have been sent to the government analyst for examination. Nothing was sent to the government chemist for analysis. My finding is that there was no blood on the club (EXB2).

51. Pw7 said much about what Pw9 apparently told him and others including the assistant chief (Pw3) who was NEVER at the scene with them. This is what he states in his evidence at page 33

“At the home we found a young man who had been employed by Esther. He is Dennis. We talked to him. He told us that Kioko had come there at around 4:00 pm while drunk and he disagreed with Esther. That Kioko's mum separated them and Kioko left. Later Dennis was woken up by Esther. He woke up and left with Esther up to the scene some distance from the home.

They found Kioko lying down without clothes, i.e. shirt, trouser and shoes. He called Kioko and he responded very faintly. He said Esther wanted Dennis to assist her take the body to the railway. He refused and some person came. Dennis then ran away. he did not identify the person.”

52. Pw9 **Dennis Mutuku Muema** testified before this court on 4<sup>th</sup> October 2019. What he told the court is so different from Pw4's and Pw7's evidence. Pw4's evidence which is hearsay would only have been admissible and of value if it was in line with the primary evidence of Pw9 himself.

53. Pw9 testified that the accused beat the deceased and he fell down. She then called someone on phone and the person came and they pulled the deceased to the railway but he did not accompany them. This is a loaded statement which was reduced to nothing via the cross examination where he stated:

“I do not know if Kioko died there and there. I do not know where they took him from the house. I don't know if he missed his way and went to the railway. I never heard anything after they left. I do not know how Kioko reached the railway.”

54. Pw9 in his responses in cross examination cancels what he said about the accused and another taking the deceased to the railway. Did he (Pw9) tell the investigating officer about the phone call made and the person who allegedly came? If he did what was so difficult in the police taking the accused's telephone number and getting her call data from the service provider? This would have assisted them identify the person the accused called that time of the night and organize for an identification parade since Pw9 claimed not to know his name.

55. In her sworn defence the accused admitted having been visited twice by the deceased on that day i.e. 6:00 pm and 9:00 pm. Pw5 who is the deceased's mother confirms the first visit and says there was a quarrel between the accused and deceased until she had to intervene and

pushed away the deceased who then left. Pw9 has also confirmed the first visit, and second visit.

56. It is accused's defence that on both occasions the deceased came while drunk and was staggering. Besides that, he was demanding for sex from her and even threatening her. Pw9 has equally confirmed that the deceased was drunk and was also staggering when he came and that he also threatened the accused. Pw9 did not state the nature of the threats. One of the things Pw5 heard the deceased tell the accused was that "he did not like her". It is not stated what more he said.

57. What followed after the threats was the striking or beating. According to Pw9 and the accused it was just once and the deceased fell down. Pw9 said the deceased was hit on the head while the accused says she hit him in between the shoulders. This brings the court to the crucial question which is:

**i. When did the deceased die and what caused his death? Was it the striking by the accused or the crushing by the train?**

58. Pw9 who was present during the incident said he did not know whether the deceased died there or there. The accused says the deceased was not injured not even to the extent of bleeding. She says she pulled him to the fence and left him there. Pw9 did not bother to follow and see what happening nor even notify Pw5, who was on the same compound with them. Pw5 said she never heard any noises that night.

59. The postmortem report (EXB1) shows the cause of death as cardiopulmonary collapse following severe crush injury. In cross examination the doctor (Pw6) said this finding is disputable. Going by the postmortem report the cause of death was a result of the crush and not the strike/beating by the accused.

60. Then the next question is who took the deceased to the railway line? Pw9 who appeared to have been the origin of the narrative that it is the accused who took him there denied all that in cross examination. The evidence of Pw7 on this was all hearsay with no backup at all. It's not clear whether the deceased was carried to the railway line, dragged there as alleged or he walked there in his drunken state.

61. Pw4 testified that Pw9 had told them that the accused burnt the deceased's clothes which he threw in the toilet. The same were retrieved from the toilet after it had been broken down. Pw7 testified on the retrieval of the clothes. A jeans trouser and a pair of sandals were produced as EXB 3 and 4. Pw9 never gave any evidence in respect to this allegation of the burning of the deceased's clothes and him throwing them into the toilet. Secondly Pw5 and Pw9 at no point identified these items EXB3 and 4 as what the deceased was wearing on the material night.

62. This witness called Dennis Mutuku (Pw9) who could have assisted the court if he was sincere turned out to be unreliable. He blew hot and cold, and this did not help the prosecution. In the case of **Kiilu & Another –vs- Republic (2015) I KLR 174** the Court of Appeal stated this of such a witness;

**(4) The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

63. I find Pw9 to have been such a witness whose evidence cannot be relied on by this court. It is true the accused and deceased had a confrontation that day. Accused is a married woman. She had her own house which the deceased who was unmarried kept coming to while drunk.

64. When he was chased away by his mother (Pw5) he was drunk and was staggering. He returned at 9:00 pm still drunk and staggering/and hurling insults and threats to the accused. It is not very clear where he went to thereafter. The alleged drag trailing is neither here nor there. The presence of blood on the drag trail, home of accused and on the club (EXB2) is neither here nor there. These are assertions by ONLY Pw7 and are not supported by any other evidence not even that of the investigating officer.

65. The accused was the first suspect because of what had happened between them earlier on. Proper investigations needed to be carried out and that was not done. The evidence on record does not irresistibly point at the accused alone and nobody else as the person who killed the deceased. The evidence does not meet the test for circumstantial evidence which can be relied on to found a conviction.

66. Secondly suspicion alone can never be the basis of a conviction. In **Sawe –vs- Republic (2003) KLR 364** the Court of Appeal stated this on suspicion of a suspect.

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

67. After analyzing all the evidence and the law I have come to the conclusion that the prosecution has not proved its case to the required standard of beyond reasonable doubt. For my part I find the accused not guilty and acquit her under section 322 (1) Criminal Procedure Code.

68. She will be set free unless lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 30<sup>th</sup> day of July 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**