



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**CRIMINAL (MURDER) CASE NO.1 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN MUTINDA KYALO.....1<sup>ST</sup> ACCUSED**

**JUDGEMENT**

1. The accused persons, **JOHN MUTINDA KYALO** and **JULIUS NDOLO MATHENGE** were charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the 24<sup>th</sup> Day of December, 2012, at Kathemboni Estate, Machakos Town in Machakos District within Machakos County jointly with others not before court murdered **SAMUEL MWANGI KARANJA**. They denied having committed this offence. A trial ensued and at the close of the prosecution's case, the 2<sup>nd</sup> accused was found to have no case to answer and subsequently acquitted of the charges. The 1<sup>st</sup> accused remained to tender his defence.

2. Mr Mutia represented the 1<sup>st</sup> accused whilst the State was represented by Mr Machogu and later Mr Mwongera.

3. Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **See: Woolmington vs. DPP [1935] AC 462.** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of the accused person. Therefore, the accused person must not be convicted because they have put a weak defence but rather that prosecution's case strongly incriminates him and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime.

4. Prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt:

*i. That the deceased is dead;*

*ii. That the death was caused unlawfully;*

*iii. That there was malice aforethought; and*

*iv. That the accused person directly or indirectly participated in the commission of the alleged offence.*

5. The Prosecution called a total of eight (8) witnesses in an attempt to prove its case. **Pw1 was Sharon Mwikali Maingi** who testified that on 24<sup>th</sup> December, 2012 she was at home and heard her boyfriend outside shout that he did not have money and she went outside and found that the 1<sup>st</sup> accused was holding up the deceased and then the moonlight enabled her see her neighbour, the 2<sup>nd</sup> accused. She told the court that the deceased was already down after having being beaten by the 2 accused persons and she and a Masai carried the deceased to his house whereupon she noticed that the deceased had been knifed. She told the court that the deceased died before he could be taken to hospital. On cross-examination, she testified that she was woken by the noise and recognized the voice of the deceased and when she went outside she saw the deceased being held up by 3 persons. She did not see the deceased being knifed.

6. **Pw2 was Gabriel Wambua Kyalo** who testified that on 24<sup>th</sup> December, 2012 at 2.00 am he was at his house when he heard some noise on the roadside and that Pw1 came out to call her, whereupon they went to the place where the noise was coming and he saw 3 people one called Mutinda or Makanga. He told the court that the deceased was apparently injured thus he together with Sharon and one Masai carried the deceased to his house and noticed that he had blood on his shirt near the chest. They called the police who came and took the deceased.

7. **Pw3** was **Bernard Mutuku Muli** who told the court that on the material day, his boss called him that his cousin had been injured and he thus went to the scene and found the deceased had been injured and that the deceased had mentioned a name "Makanga". It was his testimony that the deceased was knifed. On cross-examination, he testified that when he arrived at the scene, he found the deceased lying by the roadside and he died by the roadside and informed him that he had been stabbed by Makanga. He recognized the Makanga as he had met him at his club and he told the court that he met Makanga carrying something.
8. **Pw4** was **Felista Nduku Karanja** who attended the post mortem and identified the deceased as her son.
9. **Pw5** was **Maryann Karanja** who testified that she attended the post mortem and confirmed that the deceased was her brother.
10. **Pw6** was **Joyce Ngui** who told the court that on the material day the deceased came to escort her to her house and on arrival they found the gate locked and she slept at his house and in the morning she received a report that he had been knifed. On cross-examination, she told the court that she did not witness the deceased being knifed.
11. **Pw7**, **Cpl Wycliff Ashiundu** told the court that on the material day the OCS directed him to go to Kathemboni area because there was a report that someone had been knifed and on arrival he found that the deceased was lying on his bed and was already dead and who had 3 stab wounds. He took the body to the mortuary and after investigations he recovered the murder weapon which was a knife. He recovered a blood stained knife from the house of the 1<sup>st</sup> accused after being directed there by the area chief and he arrested the 1<sup>st</sup> accused. He told the court that he visited Kathemboni Market in the company of the area chief and arrested the 2<sup>nd</sup> accused. On cross examination, he told the court that he arrested the 1<sup>st</sup> accused on 24.12.2012 and that he did not prepare an inventory of recovered items. On re-examination he told the court that the knife was recovered from under the 1<sup>st</sup> accused's mattress and that the deceased's girlfriend called Sharon witnessed the recovery.
12. **Pw8** was **Dr Mutunga** who testified of the post mortem examination carried out on the deceased by Dr Okinyi and the form that was filled on 27.12.2012. The report that was given was that the deceased fell down after being assaulted by persons known to him. The body had a stab wound on the chest and the knife had entered into the muscles of the heart which bled. No other injuries were noted and the opinion was formed that the deceased died of cardiac arrest due to a stab wound to the heart and that the object must have been a sharp object. There were DNA samples taken of the blood that was on the knife. On cross-examination, he testified that the body of the deceased had a stab wound.
13. Thereafter, the 2<sup>nd</sup> accused was acquitted while a prima facie case was found to have been established against the 1<sup>st</sup> accused who was placed on his defence. He opted to give sworn evidence and did not call witnesses. It was his testimony that on 23.12.2012 and 24.12.2012 he was at work then he arrived home at 6 pm where after he went to club one bar and stayed there till midnight. He testified that he walked home and on the way, he met Sharon and Mwangi quarrelling; he heard Sharon demanding for house keys. He told the court that he arrived home and slept, then in the morning he went to work and returned home at 1 pm whereupon police officers while in the company of Pw2 came to his home and demanded his phone and clothes that he used the previous day stating that they would be used as exhibits. He told the court that he was taken to the police station and interrogated by a police officer to whom he confirmed that he met the deceased when he was heading home but did not participate in the murder of the deceased. He testified that he had never disagreed with the deceased neither did he intervene in the fight between Sharon and the deceased. He testified that he did not murder the deceased and that no knife was found in his home. On cross examination, he testified that a blood stained knife was recovered from under his bed. He told the court that he had a dispute with Gabriel because his brother had stabbed him in the neck. He testified that it was possible that he was framed. On re-examination he testified that no knife was recovered from his house; that the shoes that were recovered were his and that Gabriel and Sharon were close and that was why he was being framed.
14. The defence closed its case and the parties were directed to canvass the case vide submissions. Learned counsel for the state vide submissions dated 30.7.2020 submitted that the 1<sup>st</sup> and 2<sup>nd</sup> accused were involved in the murder of the deceased because Pw1 and Pw2 told the court that they saw the accused person leaving the scene where the deceased was beaten. It was submitted that by dint of section 206 of the Penal Code, malice on the part of the accused was proven on the part of the accused as they inflicted injury on the deceased. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> accused were identified as the assailants as they were seen by Pw1, Pw2 and Pw3 leaving the scene. Counsel submitted that the cause of death was established vide the post mortem report. Counsel placed reliance on the case of **Bhatt v R (1957) EA 332**.
15. Learned counsel submitted that the defence of alibi that was raised by the accused was an afterthought that could not shake the prosecution case. This was because a knife and the deceased's pair of shoes were recovered from the 1<sup>st</sup> accused hence establishing motive. Counsel urged the court to convict the 1<sup>st</sup> and 2<sup>nd</sup> accused persons under section 322 of the Criminal Procedure Code because the testimonies of the 8 witnesses in addition to the documentary evidence produced as exhibits proved the prosecution case beyond reasonable doubt.
16. Counsel for the accused on the other hand in placing reliance on the case of **Henry Kiarie Nyambura v R (2014) eKLR** pointed out that the evidence on identification was not safe. Counsel pointed out that there was no evidence that linked the accused to the offence; that there was no inventory of exhibits and there was nothing to link the knife with the murder. It was submitted that the evidence in court is circumstantial that did not meet the threshold for conviction. Reliance was placed on the case of **Musyoka Maingi Nguli v R (2019) eKLR**. The learned counsel submitted that the court should proceed and acquit the accused under section 322 of the Criminal Procedure Code after finding that the case against the accused had not been proven.
17. Having considered the evidence on record and the submissions of the parties, the issue for determination is whether the prosecution proved its case to the required standard. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all save a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of

the defence raised by the accused person.

18. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

19. The post-mortem report on the examination of the body of the deceased as tendered by Pw8 has not been objected to nor controverted. The cause of death was established as cardiac arrest due to stab wound to the heart. The weapon was opined to be a sharp object. This ingredient of the offence was duly proved by the prosecution.

20. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

*“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”*

21. The deceased in this case was found to have died of cardiac arrest due to a stab wound to the heart and the object must have been a sharp object. There was a suggestion by Counsel for the accused that there was no evidence adduced to show that the accused committed the offence. It was upon the prosecution to ensure that the allegation that the accused stabbed the deceased was backed by supporting evidence. At this stage, I find it safe to presume that the death was unlawful.

22. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

23. None of the prosecution witnesses gave direct evidence as to witnessing the attack on the deceased. However, there is certainty as to what was used as the murder weapon. Pw3 alluded to the fact that the deceased mentioned “Makanga” as the one who knifed him. Counsel for the accused took issue with the non-production of the inventory of items recovered despite the fact that the knife was tendered in evidence by Pw7. In this case, the post mortem report presented evidence to the effect that there was a penetrating object that caused injury to the deceased and resulted in intensive bleeding and I agree that the weapon must have been a knife though I am not satisfied with what was tendered in court as Ex 1. Given the presumed force used on the deceased that resulted in massive bleeding as indicated in the post mortem report it can safely be inferred that death was the desired outcome of whoever the assailant was.

24. There was no direct evidence in form of eye witness accounts linking the accused to the crime and there was no available circumstantial evidence that the accused had an opportunity to harm the deceased. I am not satisfied that the evidence of the prosecution identified the actions of the accused though it seemingly suggested that the accused was seen with the deceased, holding his head up; a fact that the accused vehemently denied.

25. In the case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135**, regarding circumstantial evidence the court held that: -

*“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”*

Again, in the case of **Nzibo v R (2005) 1KLR 699** the Court of Appeal held as follows:

**“In a case depending entirely 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.”**

26. The prosecution case suggests that the accused was the one who had an opportunity to kill the deceased because he was seen with the deceased and others. The accused testified that he saw the deceased in a brawl with Pw1, however he just passed them and did not intervene in the fight. On the other hand, the accused made an allusion that he was framed because he had a bone to pick with one Gabriel (Pw2) who was allegedly Pw1’s boyfriend and whose brother had earlier stabbed the accused over some dispute. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. I am not satisfied that the accused was knifed by Gabriel’s brother because there is no P3 form that the accused has tendered to that effect or evidence that he had lodged a complaint to the police.

27. From the evidence on record, I find that other than the accused person, there are other persons who wanted or equally had the opportunity to kill the deceased and in this way leaving the evidence on record not sufficient to point towards guilt of the accused. There is doubt in the prosecution case as regards identification of the accused as the perpetrator. The alleged recovered kitchen knife that was said to have been found under accused’s bed was not taken for DNA analysis so as to establish whether the alleged bleed stains belonged to the deceased. Again the investigating officer failed to explain why the alleged recovered shoes from the accused’s house were not produced as exhibits. Further, the said officer did not prepare and produce an inventory of recovered items duly signed by the accused if at all they were recovered from his house. The said witness admitted on cross examination that he did not capture the issue of recovery of exhibits in his statement. This would then create doubt as to whether the kitchen knife produced was an afterthought. The only evidence adduced is that the accused was seen at the scene and that is as far as the prosecution’s case could go. The circumstantial evidence presented in my view is not strong as to point to the accused’s guilt. There were also other suspects mentioned one of whom has since been acquitted and that a third one

was not traced. There was no direct evidence that it was none other than the accused herein who assaulted the deceased. There is some doubt created and which should be resolved in favour of the accused. The investigations conducted in the case by the investigating officer were rather shoddy to say the least. It is trite law that if doubt is created in the prosecution case then the same ought to be resolved in favour of the accused.

28. Accordingly, therefore, I find that the availed eye witness account and the circumstantial evidence elicited from the testimony of the witnesses has not established the offence of murder against the accused beyond reasonable doubt. There are far too many loose ends to be tied and the facts presented by the prosecution do not lead to an inference of the accused's guilt.

29. In view of the foregoing observations, it is my finding that the prosecution has not established the offence of murder against the accused herein **John Mutinda Kyalo** beyond any reasonable doubt. I find that he is not guilty of the charge and is hereby acquitted of the said charge. He is ordered to be set free unless otherwise lawfully held.

It is so ordered.

**Dated and delivered at Machakos this 29<sup>th</sup> day of September, 2020.**

**D. K. Kemei**

**Judge**