



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC NO. 23 OF 2018

FORMERLY MACHAKOS HCCRC. 16 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS-

SMITH TAMA MULI.....ACCUSED

JUDGMENT

1. **Smith Tama Muli** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63), Laws of Kenya. The particulars are that the accused on 4th day of November 2018, at Nzaai village Muvau location in Makueni sub-county within Makueni county murdered **Vocalist Alexander Mbithi**.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling twelve (12) witnesses. When placed on his defence the accused gave a sworn testimony and did not call any witness.

3. **Pw8 Julius Mwangela Mutisya** is a cousin to the accused person. He testified that on 3rd November 2018 at 8:00 am the accused came to their home to pay him a debt of Kshs.200/=. Later they left for the accused's home where they toured their shamba. They again left for Pw8's home where they stayed upto 1:00 pm, when they left for Kathoka's centre. They lost each other and he returned home at 3:00 pm.

4. At 7:00 pm the accused called him and he went to meet him at a certain club though he did not enter. He did not pay him his money and he returned home. At 11:00 pm the accused arrived at Pw8's home where he spent the night. He slept upto 5:00 am. The next day he learnt of the deceased's death.

5. **Pw2 Albanus Kyalo Daudi** does boda boda business. He stated that on 3rd November 2018 10:30 pm he was carrying jerricans to Hudson Maitha's home on his motorbike when on his way near Nzuwani he met the deceased and the accused talking. On his way back he spoke to both the accused and deceased. The latter appeared drunk. He wanted to take the deceased home but the accused said there were things they were discussing. He learnt of the deceased's death the next morning.

6. **Pw3 Jane Muloko Nicholas** works at a club where she sells alcohol. On 3rd November 2018 the deceased came there at 4:00 pm and left at 5:00 pm. He promised to return after tethering his cows. The accused was among the customers present at the club. The accused also left 30 minutes after the deceased left. They had been talking and chatting while there. None returned after they left. That night at 11:00 pm she received a report of a dead person from their village. She went with her son Kyamanga and be found the dead person to be the deceased.

7. **Pw7 Rhoda Nduku** is the accused's mother. She testified that on the night of 4th November 2018 she was home when the accused came late in the night and was drunk. He asked for food and told her how he had collided with "Katatini" who was a neighbor. He told her they had been drinking at Jane's when Katatini insulted him saying he had been sleeping with her. They fought as a result.

8. The next morning the chief (Pw5) called her and she waited for him. She was met by four people on two motorbikes. She was ordered to board Kyalo's motorbike and they went to her home where they found the chief with other people. She opened her house which was ransacked but nothing was found. She was taken to the scene about two kilometres from her home. There was blood at the scene. She was taken to the police station where she spent three nights as the police wanted the accused.

9. They left for Nairobi with the police upto Dandora where her sister lived, but accused was not there. They then went very early and found him working at a construction site and he was brought to Makueni. No one told her why accused was being looked for. She was released upon accused's arrest. In cross examination she said she was chased away from her home by home people because of this case. She said she did not know what happened to Katatini and she does not know what the accused did.

10. **Pw4 Nicholas Mutui Mui** was with his brother on a motorbike heading home on 3rd November 2018 at 11:00 pm when they saw an injured person on the road. They rushed home and informed their father **Pw1 John Muya Ndiku**. They all returned to the scene with a neighbor Jane Loko and identified the injured person as the deceased. Pw1 called and informed **Pw5 Gregory Mbindyo Musyoki** the senior chief who informed the OCS Makueni police station.
11. Pw5 said they found the deceased wearing shorts and a jumper jacket and his head was full of blood. The next day he went to Pw7's home and while there the accused called Pw7 using the deceased's mobile number. That the deceased's brother identified it. He said Pw7 told them that the accused had told her the previous night that he had assaulted the deceased.
12. In cross examination he said when he saw the body he was not able to say what had happened to it.
13. **Pw6 Shadrack Musyoka Munyoki** and **Pw11 Richard Kasyoki Munyoki** brothers of the deceased identified the body for postmortem. Pw6 further stated that while at Pw7's home the accused called his mother (Pw7) and he heard their conversation. On checking the phone he saw it was the deceased's Airtel number that was used to call. He immediately informed the chief Pw5 who took Pw7's phone. He identified the deceased's Techno phone (EXB1).
14. **Pw9 Kyalo Mwasa** identified EXB1 as the deceased's phone saying its him who had identified it for him to buy it in Wote. He first saw it with the police after the deceased's death.
15. **Pw10 No 63937 Sergeant Samuel Mbat** of scenes of crime was at Nzaai village with other officers at the scene of murder. It was along a feeder road and there were blood stains. He took four photos there. They went to the deceased's home where they took six more photos. There was some disturbance in his sitting room and bedroom. He later had the photos printed and he prepared a certificate. The officer is gazetted vide gazette notice No. 4562 of 7th July 2003. He produced the photos as EXB2a – m and certificate as EXB2n.
16. In cross examination he said there was a blood stained Kaunda suit at the deceased's home outside the house.
17. **Pw12 No. 64606 Corporal Paul Maina** is the investigating officer. He testified that on 4th November 2018 he was in the office at DCI Makueni when he learnt of the murder of Alexander *alias* Kathatini at Muthaani area. They went to the scene and got information of a young man who had been drinking with the deceased. The young man had disappeared. There was blood on the ground and an injury on the deceased's head. No weapon was recovered.
18. The police used Pw7's phone to trace the suspect who was arrested. Pw7 had told them that the accused came home with a phone (EXB1) which was not his. He was arrested in Dandora on 7th November 2018. The accused took them to where he had sold the phone in Machakos. The deceased's brothers identified the phone (EXB1).
19. The postmortem report by Dr. Makau was produced by the witness with the consent of both counsel as EXB3. The cause of death was the blunt injury on the head.
20. In cross examination he said EXB1 was recovered in Machakos after the accused led them there. The person who had the phone was not a witness herein and Pw12 could not tell if the deceased had sold the phone. He said the accused told him he hit the deceased's head severally on the floor.
21. In his sworn defence the accused testified that from 2015 he was not in good books with his mother (Pw7) because she used to sell his things without his permission. On 4th November 2018 he left Nairobi for home and on arrival he found Pw7 had sold his remaining cows. On being asked she started abusing him and went to call nyumba kumi fellows who came and beat him but he managed to run away. He was warned against returning home so he went to pungwani bar and took alcohol. The deceased came there and started drinking and left at 6:00 am.
22. He continued drinking and moved to "Thome bar" where he drunk upto 10:00 pm. He then went to his cousin's to sleep. He left for Nairobi the next day for fear of the nyumba kumi people. He was arrested three days later and taken to Wote police station where he found somebody arrested with the deceased's phone. He was informed that this person would be his co-accused only for him to be released and accused charged. That person should have been made to explain the deceased's death. He denied the charge.
23. In cross examination he said he used to buy things and leave them at home. He did not know where the deceased had come from when he found him at the bar. He denied having been insulted by the deceased. He denied assaulting the deceased and or selling his phone or using his phone to call his girlfriend. He denied having confessed anything to Pw7 nor even going home after the bar.
24. Mr. Kioko for the accused filed written submissions. He has submitted that the phone EXB1 was allegedly found with a person who was never called as a witness. It was also not electronically analysed for data communication. Counsel further submitted there are photos (EXB2a – m) and yet the scenes of crime officer never explained why he took photos at the deceased's home. He was also not able to explain who removed the clothes the deceased was wearing. It's his submission that the accused gave a detailed defence.
25. Counsel set out the ingredients to be proved in a case of murder as set out in the case of **Anthony Ndegwa Ngari –vs- Republic (2014) eKLR**. There is no dispute on the fact of death of the deceased. He referred to the postmortem report EXB3, and the evidence of Pw1, Pw3, Pw4 Pw5 and Pw11.
26. Counsel further submits that no one saw the person who killed the deceased. What was adduced in court is therefore circumstantial evidence. He has referred to section 111 of the Evidence Act and the following cases to explain what circumstantial evidence is:

- **Milton Kabui & 4 Others –vs Republic (2015) eKLR**
- **Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990 (UR)**

27. Referring to the evidence of Pw2 and Pw3 he submits that this is not sufficient proof to form the basis of a conviction. That the said evidence does not form any continuous chain.

28. It's his submission that whatever Pw12 alleged to have been told by the accused cannot amount to a confession. He refers to section 25A of the Evidence Act Rule 4 of the Out of Court Confessions Rules 2009 and submits that the same were not adhered to by Pw12 and no written or recorded confession was presented to this court as evidence. On this, he refers to the case of **Titus Ngamau Musila Katitu -vs- Republic Criminal appeal No. 124 of 2018 (2020) eKLR** in support of his contention.

29. He urges this court to find that the circumstances herein are not of a definite tendency unerringly pointing towards the guilt of the accused – **Bhatt –vs- Republic (1957) E.A 332**. He argues that there is reasonable doubt that the accused did the unlawful act which caused the death of the deceased which constitutes the “*actus reus*” of the offence.

30. On malice aforethought counsel has referred to the cases of

- **Roba Galma Wario –vs- Republic (2015) eKLR**
- **Nzuki –vs- Republic (1993) KLR 171.**

and submits that no evidence of malice on the part of the accused was adduced. That there was no evidence to show what caused the head injury of the deceased. He therefore urged the court to find the accused not guilty an acquit him.

Analysis and determination

31. The prosecution did not file any submissions electing to rely on the evidence on record. Murder 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 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;***

32. For the charge of murder to be proved there are three ingredients which must be established. These are:

- i. Proof of the fact and the cause of death of the deceased.
- ii. Proof that the death was the direct consequence of an unlawful act or omission by the accused (*actus reus*)
- iii. Proof that the said unlawful act or omission was committed with malice aforethought (*intention/mens rea*).

See **Anthony Ndegwa Ngari –vs- Republic** (supra)

33. There is no real dispute as to the fact and cause of the deceased's death. The witnesses Pw1, Pw3 – Pw6, Pw8, Pw9 – Pw11 and Pw12 have all confirmed having seen the body of the deceased.

The body was identified to the doctor for post mortem by Jones Kametu Munyoki and Pw11. The cause of death was shown as severe head crash injury with mangled skull bone – caused by a heavy blunt object (EXB 3).

(ii) Proof that the death was the direct consequence of an unlawful act or omission by the accused (*actus reus*)

34. There is none who seems to have witnessed the killing of the deceased person. The evidence before this court is purely circumstantial. The court will now have to consider all the circumstances in this matter to see whether they irresistibly point at the accused and no one else as the person who killed the deceased.

35. In the case of **Republic –vs- Taylor Weaver & Donovan (1928) 21 Criminal Appeal R20** 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.”

36. Further in **Teper –vs Republic (1952) AC at page 489** 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.”

37. In **Sawe –vs- Republic (2003) KLR 364** the Court of Appeal stated the following:

(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.

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

(5) In a case 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.

39. Bearing in mind the principles enunciated in the above decisions and many others I now wish to analyse the circumstantial evidence on record. Pw3 **Jane Muloko Nicholas** works in a club/bar she owns. It was her evidence that on 3rd November 2018 at 4:00 pm the deceased came to the club. The accused was among the other customers at the facility. The deceased left at 4:30 pm – 5:00 pm promising to return after tethering his cows. He never returned. Meanwhile the accused left 30 minutes after the deceased’s leaving.

40. Pw7 who is the accused’s mother said on the material night the accused came home so drunk and asked for food which she gave him. He told her how he had collided and fought with the deceased after he told him he had been sleeping with her. The accused then left. The next morning she was taken away by the chief and others and that’s when she learnt of the deceased’s death.

41. It was Pw2’s evidence that he had met the accused and deceased twice near Nzuweini. On 3rd November 2018 at 10:30 pm and thereafter. He offered to take the deceased home on his motorbike but the accused told him there were things they were discussing and he should just go home. Besides that he did not notice anything unusual save that the deceased appeared drunk.

42. The charge sheet shows that the murder took place at Nzaai village of Muvau location. Pw2 met the deceased near Nzuweini. There is no evidence to show whether Nzuweini is in Nzaai village or how far the scene was from Nzuweini.

43. The accused’s cousin **Pw8 Julius Mwangela Mutisya** said he had interactions with the accused in the course of the day on 3rd November 2018. They met at a certain club at 7:00 pm and at the accused’s request he took him his phone for cash transfer purposes. On reaching there the accused asked him to go back home and wait for him there. The accused eventually arrived at Pw8’s home at 11:00 pm and slept upto 5:00 am. He did not explain what he did or where he went.

44. This evidence is in contrast with that of **Pw7 Rhoda Nduku** the mother of the accused. She said the accused came to her house on 4th November 2018 late in the night, and was drunk to the extent that he fell on the mattress, and after eating he left. Its therefore not clear first of all whether the accused was at her house on the night of 3rd or 4th November 2017.

45. The evidence she gave is in respect to the night of 4th November 2017 and not 3rd November 2017. All the witnesses have talked of the night of 3rd November 2017. Infact Pw1, Pw3 Pw4, Pw5 Pw8 are specific that they saw the deceased’s body on the night of 3rd November 2018.

46. The charge sheet gives the date of the killing as 4th November 2017. The prosecution never sought for any amendment of the charge sheet or information to conform to the evidence adduced.

47. Pw7 said the accused was so drunk that night. Pw8 who allegedly slept with him in the same bed, did not make mention of the smell of any alcohol and/or his state of soberness. On the other hand Pw2 who said he met the accused and deceased on the road was very specific that it is the deceased who appeared drunk. He talked to them and the accused responded to him. It is therefore clear that the evidence of Pw2, Pw7 and Pw8 is not consistent on the accused’s state of soberness on the date in issue.

48. Pw7 testified that the accused had confessed to her that he had fought with the deceased. Pw12 the investigating officer also told the

court of some confessions the accused had made to him and the mother. In spite of all this Pw12 as the investigating officer did not arrange for a proper confession to be taken from the accused as provided for under the Evidence Act. Section 25A of the evidence Act provides:

(25)A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief inspector of police and a third party of the person's choice.

(29) No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is –

a) Of or above the rank equivalent to, inspector; or

b) An administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.

49. There is so much that has been said about a silver techno phone (EXB1) having been recovered and linked to the accused. Pw6 testified that on 4th November 2018 while at Pw7's house, the accused called Pw7 and he heard the conversation. He never told the court what the conversation was about. He next stated that on checking Pw7's phone he saw that the number used to call her was the deceased's airtel number which he knew well. He immediately told Pw5 (chief) who was present. It was his evidence that Pw5 took Pw7's phone and also informed the police about it.

50. **Pw5 Gregory Mbindyo Musyoki** confirmed receiving Pw6's information about the number used to call Pw7. He did not however say anything about taking Pw7's phone. Despite claiming to know the deceased's airtel line number, Pw6 did not give out this number to the police and /or the court. If indeed the evidence he gave to the court about the deceased's airtel line number is true there was nothing that stopped the investigating officer from getting the said number and that of Pw7 for call data collection. That would have confirmed whether there was any communication between the said numbers during the period in question.

51. It was Pw12's evidence that in the course of the investigations the accused took them to where he had sold the phone in Machakos. The phone was allegedly sold to a person who could be identified. In cross examination Pw12 made it clear that the person from whom the phone was recovered was not a witness in this case. He also said he could not tell if the deceased had sold the phone to that unidentified seller. It is not clear how the prosecution expected to convince this court that the accused had sold the phone (EXB1) to a person in Machakos when the alleged buyer of the phone was not called as a witness.

52. The alleged buyer was not said to have died. What was so difficult in the investigating officer availing this person in court as a witness, to explain how he was found in possession of a dead man's phone? Without the call data of Pw7's number and the deceased's alleged airtel number and without the evidence of the Machakos phone "*purchaser*", I find the prosecution to have miserably failed to link the accused to the phone (EXB1).

53. The deceased died as a result of "severe head crush injury with mangled skull bone – caused by a heavy blunt object.

54. There was no recovery of the murder weapon whether at the scene or elsewhere. It is also not clear from the evidence on record where the exact scene of murder was. The deceased's body was found somewhere on a feeder road in Nzaai village. According to **Pw10 Sergeant Samuel Mbat** he was shown by PC Katana where the deceased was murdered. He took four photos of the scene (EXB 2a – d). He then went to the deceased's home where he took six more photos (EXB2e – j).

55. According to him there was disturbance in the deceased's sitting and bedrooms. I have looked at the photos (EXB2e – h) which give a picture of the deceased's home. It has 3-4 houses, and its not a very small compound. The photos (EXB2 (1)-3) show the inside of the deceased's house. They capture two rooms which Pw12 said were the sitting and bedrooms. Inside these rooms are clothes, books, papers and other items thrown all over the floor. I agree with Pw12 that there appeared to have been a disturbance in the said house.

56. From the evidence before this court no investigations were carried out in respect to the happenings in the deceased's house. For example, who were the occupants of the other houses on the compound? Was the deceased living alone? How was this scene in the photos linked to the death? There is no evidence on all this.

57. In his sworn defence the accused denied committing the offence. He attributes his troubles to his mother (Pw7) who he alleges used to sell his properties. That she is the one who called the nyumba kumi fellows to come and arrest him. All these allegations were never put to Pw7 and in cross examination. In her evidence in cross examination she said her family has had problems with her and she was chased away because of this case.

58. After analyzing all this evidence the only question this court asks itself is whether the circumstantial evidence herein consistently points at the accused as the person who killed the deceased. Is there any other existing circumstance weakening the chain of the circumstances relied on?

59. From my analysis above the circumstantial evidence does not irresistibly point to the Appellant to the exclusion of all others as the perpetrator of the offence. The accused may have had a confrontation with the deceased but that in itself, without any substantive evidence is not proof that he is the one who killed the deceased. Another loophole is on the issue of the finding of the phone (EXB1). The evidence adduced never linked him.

60. Finally the evidence in the photos (EXB2e – h) was never followed to know who had been with the deceased in his house on the material day and who disarranged his house. He was charged based on high suspicion. In **Sawe –vs- Republic (2003) KLR 364** the Court of Appeal

stated thus:

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

61. The upshot is that the prosecution failed to prove to the required standard that the accused is the one who committed this offence. For my part I find the accused not guilty and acquit him forthwith of the offence of murder contrary to section 203 of the Penal Code. He shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

H. I. Ong’udi

Judge