



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL CASE NO 1 OF 2015**

**REPUBLIC**

**VERSUS**

**JOSEPH MALELE MUTISO**

**JUDGMENT**

**INTRODUCTION**

1. The Accused person herein, Joseph Malele Mutiso, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the night of 7<sup>th</sup> February 2015, at Sir Ramson “D” in Taveta Sub-County within Taita Taveta County, jointly with others not before court, he murdered Daniel Mutinda (hereinafter referred to as “the deceased”).

2. On count II, the Accused person herein, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the night of 7<sup>th</sup> February 2015, at Sir Ramson “D” in Taveta Sub-County within Taita Taveta County, jointly with others not before court, he murdered Esther Mulwa (hereinafter referred to as “the deceased”).

3. After considering the evidence and his and the Prosecution’s Written Submissions on the question of whether or not he had a case to answer, on 31<sup>st</sup> July 2017, this court found that a *prima facie* case had been established against him and put on his defence. His case was heard on 8<sup>th</sup> November 2017.

**THE PROSECUTION’S CASE**

4. The Prosecution called a total of seven (8) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code:-

**1. Proof of the fact and cause of death of the deceased;**

**2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused persons; and**

**3. Proof that the said unlawful act or omission was committed with malice aforethought.**

5. The Prosecution’s case was that the Accused person killed the deceased persons, who were his uncle

and aunt after a border dispute. They had previously reported him to the village elders for having assaulted them on 25<sup>th</sup> August 2014. The matter was not reported to the police as it was amicably resolved. A day before the deceased persons were killed, Daniel Mutinda reported to Patrick Lumumba Mathi, the Deputy Village Elder (hereinafter referred to as “PW 1”) that he had been threatened by the Accused person after a border dispute that arose on 7<sup>th</sup> February 2015.

6. The deceased persons’ bodies which were badly mutilated were discovered on the morning of 8<sup>th</sup> February 2015 by Isaac Nyamai, a member of the Catholic Church where they used to attend mass. The deceased persons had no children of their own and so the said Isaac Nyamai used to visit them often. The Accused person came to the deceased persons’ house after their bodies were discovered.

7. A blood stained knife was retrieved from a grass thatched roof of a house in the compound where the Accused person and his father stayed. The house was about thirty (30) metres from the deceased persons’ house. A pair of blood stained trousers and pullover were also recovered in the Accused person’s house.

8. A DNA profile generated from the pair of trousers and pullover belonging to the Accused person matched the DNA profile of Esther Mulwa’s blood. Although the knife that was said to have been the murder weapon tested positive for human blood, it did not generate any DNA profile. Francis Ndivo, who had initially been arrested of the deceased persons’ death was released after the DNA profile generated from his shirt did not generate any profile

9. The Prosecution observed that although no one witnessed the Accused person kill the deceased persons’ on the material date, the surrounding circumstances of the case such as the finding of blood stains of Esther Mulwa in his house and his actions were key to the inference of his guilt on his part. It therefore submitted that he was guilty of the deceased persons’ death and urged this court to convict him accordingly.

### **THE ACCUSED PERSON’S CASE**

10. The Accused person denied having caused the death of the deceased person’s. His case was that no one witnessed him kill the deceased persons and that the murder weapon that was adduced in court did not generate any profile and could thus not be considered to have been the murder weapon.

11. It was also his contention that the person who recovered his clothes was unknown and it could not be ruled out that the said clothes became contaminated with the deceased person’s blood as their bodies were being taken to the mortuary and him to Taveta Police Station.

12. He was categorical that the Prosecution had failed to prove its case against him and that the scanty evidence it had adduced could not be relied upon to convict him. He was emphatic that the burden of proof could not shift to him and thus urged this court to acquit him under Section 215 (**sic**) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

### **LEGAL ANALYSIS**

13. PW 1 testified that the Accused person attacked the deceased persons following a dispute of the border separating their farms and that occurred on 7<sup>th</sup> May 2015, Daniel Mutinda told him that the Accused person had threatened him and his wife that morning. The dispute related Daniel Mutinda’s goats trespassing on the Accused person’s land. He said that the said David Mutinda told him that if he died, the Accused person should be held liable for the same.

14. Thomas Mboya Mbero (hereinafter referred to as “PW 2”) confirmed having rushed to the deceased persons’ house on the morning of 8<sup>th</sup> February 2015 after news reached them that they had been killed. He observed that the deceased persons had been badly mutilated.

15. William Mumo Mulwa, Esther Mulwa’s younger brother (hereinafter referred to as “PW 3”)

identified her body and that of her husband Daniel Mutinda at the Taveta District Hospital. He testified of having seen stab wounds on their bodies which was corroborated by the Chief of Njukini Location, Justus Musembi Mackenzie (hereinafter referred to as “PW 4”). PW 4 also confirmed having presided over a dispute between the Accused and the deceased persons.

16. No 81060619 Senior Sergeant Isaack Hassan (hereinafter referred to as “PW 5”) stated that when he got to the scene of the incident, in the company of other police officers, they entered and searched the Accused person’s house. They found a blood stained trouser and a blood stained pullover. The trouser was found hidden under the bed. He said that a knife which was retrieved from the grass thatched roof of a house in the compound. He confirmed having seen the knife that was retrieved by Corporal Hussein Kona Kona during the search. His further evidence was that the deceased persons, the items and the Accused person were all loaded in the same police vehicle.

17. The Government Analyst, George Lawrence Ogunda (hereinafter referred to as “PW 6”) adduced in evidence, the Report of Government Analyst dated 9<sup>th</sup> June 2015 and concluded that the DNA Profile generated from the Accused person’s shirt matched the DNA profile in the sufuria cover and blood swab from Esther Mulwa. Notably, the knife did not generate any profile. However, he was emphatic that the knife could not be ruled out as having been the murder weapon as it tested positive for human blood after the Kastle Meyer test was conducted.

18. No 100250 PC Richard Kirui (herein after referred to as “PW 7”) corroborated PW 6’s evidence that they recovered a knife in the grass thatched roof of a house where the Accused person’s house was. He was emphatic that the items that were recovered in the Accused person’s house were placed in the front seat of a different vehicle which ferried the Accused while the deceased persons’ bodies were ferried to the mortuary in a different police vehicle.

19. Dr Omar Lewa (hereinafter referred to as “PW 8”) adduced the Postmortem Reports dated 11<sup>th</sup> February 2015 on behalf of Dr Oyoo. He gave the cause of death of Daniel Mutinda as having been due to loss of brain signals to the rest of the body system and severe spinal cord injury following penetrating wounds leading to multiple organ failure. Daniel Mutinda had a fracture of cervical vertebra failure. In respect of Esther Mulwa, the cause of her death was given as having been due to severe bleeding following multiple cut wounds on the body and severe injury of the right jugular veins and right ascending carotid artery.

20. The offence of murder is defined as follows by section 203 of the Penal Code:-

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

21. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

**i. The fact of the death of the deceased.**

**ii. The cause of such death.**

**iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused persons,**

**iv. Proof that said unlawful act or omission was committed with malice aforethought.**

22. Malice aforethought is defined in Section 206 as follows:-

**“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

23. In the case of Libambula vs Republic (2003) KLR 683, the Court of Appeal stated:-

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”**

24. On the fact of the deceased persons’ death there can be no doubt about this as all the Prosecution witnesses testified to the fact. Ingredients (1), (2) and (4) of the offence of murder had been proved herein. What remained for determination was whether or not the deceased persons’ deaths were as a result of the Accused person’s action or omissions. Indeed no one witnessed him kill the deceased persons. This case was thus based on circumstantial evidence.

25. To prove a case based on circumstantial evidence, the Prosecution was therefore required to satisfy the test that a negative inference against the Accused person as was set out in the case of Musoke Vs. R (1958) EA 175 where the court cited with the approval the decision in Teper Vs. R (1952) ALL 480 where it was held as follows;

**“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

26. In the case of Erick Odhiambo Okumu vs Republic [2015] eKLR, guided by the holdings in the case of Abanga alias Onyango vs Republic Cr App No 32 of 1990, the Court of Appeal stated as follows:-

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.”**

27. It was evident that there was bad blood between the Accused person and the deceased persons over a border dispute. He had previously assaulted them as was evidenced in the Hospital Attendance Notes dated 25<sup>th</sup> August 2014 that had been alluded to by PW 1. However, there was little or no probative value of these attendance notes as they were not produced as Exhibits in the Prosecution’s Case. They were merely marked for identification. Further PW 1 was also not their maker. Suffice it to state that PW 1 and PW 4 confirmed that they did sit in a panel to listen to a dispute between the Accused person and the

deceased persons. The bad relationship between the Accused person and deceased persons was further confirmed by PW 1 who testified that Daniel Mutinda informed him, a day before he was killed, that if he died, the person who would have to be blamed was the Accused person.

28. Going further, whereas the Accused person argued that it was not known where the clothes that were produced in court were got from, both PW 5 and PW 7 confirmed having been present when his blood stained T-shirt, blood stained trousers and knife were recovered from his house. It was not necessary for Corporal Hussein Kona Kona to have come to court to rehash the same evidence since they were present when the said Corporal Hussein Kona Kona retrieved the clothes and the knife was found hidden in a grass thatched roof. Indeed, under Section 143 of the Evidence Act Cap 80 (Laws of Kenya), the Prosecution has the discretion to decide the number of witnesses it shall call to prove a fact. The Prosecutions failure to call the said Corporal Hussein Kona Kona was therefore not fatal to its case.

29. The Accused person's assertions that his clothes may have been contaminated by the deceased persons' blood while he was being taken to Taveta Police Station was neither here nor there as PW 7 testified that the items that were retrieved from his house were transported in a different vehicle from the one that transported the deceased persons' bodies.

30. In any event, the Accused person never testified that his clothes actually been contaminated with the deceased persons' blood. He only stated that the same could not be ruled out without really saying how this occurred.

31. Assuming his contentions that his clothes were contaminated with the blood of Esther Mulwa were correct, it was inconceivable why a knife had been hidden in the grass thatched roof of the house in their homestead. His blood stained trousers were found under his bed. The fact that the blood of Esther Mulwa was found on his shirt placed him squarely at the scene of the murder.

32. It was not lost to this court that although the knife did not generate any profile, it tested for human blood through a test known as Kastle Meyers. At this point, the burden of proof shifted to him under the provisions of Section 111 (1) of the Evidence Act that provides as follows:-

**“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence..”**

33. Although he seemed to suggest in his sworn evidence that the deceased persons could have been killed by one Lumumba, this appeared to have been an afterthought as he never raised the same while cross-examining the Prosecution witnesses and only came up with the said assertion for the first time during his defence.

34. Weighed against the evidence that was adduced by the Prosecution, this court was persuaded to find that the Accused person's evidence was displaced by that of the Prosecution. Indeed, the blood of Esther Mulwa who was found dead along with her husband was found on his clothes and the fact that he had threatened Daniel Mutinda a day before he was killed along with his wife, pointed to an inference of guilt on his part. His defence did not present any co-existing circumstances that weakened or destroyed that inference. So as to persuade this court to conclude that he had been framed for having caused the

deceased persons death.

35. Accordingly, having considered the evidence that was adduced by the Prosecution and by the Accused person, it was the finding of this court that the Prosecution proved its case to the required standard in criminal cases, being proof of the case beyond reasonable doubt by demonstrating that the deceased persons met their death as a result of unlawful actions or omissions on the part of the Accused person and that the unlawful acts or omissions were committed with malice aforethought on his part.

**DISPOSITION**

36. For the foregoing reasons, the Accused person is hereby found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and this court hereby convicts him accordingly.

37. It is so ordered.

**DATED at NAIROBI this 25<sup>th</sup> day of May 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at VOI this 30<sup>th</sup> day of May 2018**

**F. AMIN**

**JUDGE**

In the presence of:-

Mwinzi holding brief for Muthami for Accused

Miss Anyumba for State

Josephat Mavu– Court Clerk