



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Shilindwa (Criminal Case 11 of 2015)
[2025] KEHC 1563 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 11 OF 2015
SC CHIRCHIR, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES OMULEMIRE SHILINDWA ACCUSED

JUDGMENT

1. James Obulamire Shilindwa (the accused), was charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge were that on 22nd day of December, 2014 at Emukoye village, Muyundi Sub location in Butere District within Kakamega jointly with others murdered George Mukolwe Omusula (deceased).

Prosecution's Case

2. The 1st Witness was the deceased's father. At about 10.pm on 22/12/2014 he heard the deceased asking for water. He went out. He found the deceased near a church in his compound. He was lying on his back. He was tied on the hands , legs and private parts. He did not witness the attack.
3. On cross -examination he stated that the deceased told him that had been beaten by form, Obulemire and Saitoti. He further stated that the deceased had his home elsewhere but he was brought to his compound.
4. PW2 was the Pathologist. He was presented a report done by his then colleague, one Dr Florence Anyere. He was conversant with her hand writing and signature.
5. He told the court that the autopsy was conducted on 29/10/2014. Two people identified the body. On examination it was observed that the body was soiled, it had bruises on almost every part of the body, including left cheek, left eye, lower back, buttock, both hands, knees and both legs. Internally ,



- the brain was swollen, and there was bleeding into the brain. The doctor formed the opinion that the cause of death was head injury. The post mortem report was produced. (Pexb .1).
6. PW3 was a member of the community policing. On 13/2/2016 at 9.30 am he was notified by DCIO, Butere about the incident and the people who were considered suspects. He was directed to the accused's house, he went there and arrested him. The police came for the accused. He confirmed to the court that the person he arrested was the one at the dock. He knew the accused prior to the arrest.
 7. PW4 was the chairman of the community policing. He accompanied PW3 to go and arrest the accused. They found the accused in his house. He confirmed that the person they arrested was the one in the dock. He did not know both the accused and deceased before.
 8. PW5 was in his house on the night in question. He stated that the time was about 9 pm. He heard a voice from outside, the voice was that of the deceased. He went out and saw the deceased. He was lying outside his house. He was surrounded by forum, Jane Akhungu, James Obulemere, Pamela Shilindwa and others. There were more than 6 people. Those are the ones he could identify. He could only see one in court, he stated. He went closer to them and stood about a meter away. He asked them why they were beating the deceased. He got no answer, but Form and Pamela told him to continue asking questions and stated moving towards PW5 . The witness retreated and went back to the house. Later, he heard some wailing coming from the direction of the church and went to check. At the scene he found Fredrick Omusula and Asmin Atemba. The deceased was also there . His hands and legs were tied. When he had earlier seen him, he was not tied. Fredrick and Asmin did not have weapons.
 9. On cross -examination ,he stated that the deceased was a brother to his father. He stated that the people in the scene were Jane, Forum, James and Saitoti; that Pamela Acheing is also called Pamela Shilindwa and that it is Forum who had threatened him earlier. Both Pamela and Forum spoke to him but on different intervals.
 10. It was dark, but stated that he knew the people he saw as he was standing close to them. The attackers were armed with whips and “pangas”. The accused had a “rungu”. The village elder was called Ohemasai and that Forum and Saitoti were his children. He further stated that he went back to his house when he was threatened and that about 30 minutes later ,he heard the wailing. That the deceased was then in a different location from where he had initially found him. He has never seen Jane, Forum and Saitoti since the incident.
 11. PW6 told the court that he too responded to the commotion outside. He heard the deceased saying he is being beaten and killed. He found the deceased outside ,Forum, Jane Akhungu, George, Saitoti and Henry Obulamire were also there, He described them the “Nyumba Kumi” people. He found them holding and beating the deceased. They had whips. He asked them to release him and they did. About 3 hours later, he was woken up and told that the deceased had died. He went to the home of Fredrick Musula Mukolwe (PW1) and found the deceased there. He was dead. The body was a kilometer away from where he had earlier found the deceased being beaten. In the first scene he had had a torch so he could identify the persons he saw, he stated.
 12. On cross- examination, he told the court that Jane Akhungu and Saitoti were in “Nyumba Kumi”. He stated that without the help of a torch he could not have identified anyone. He further stated that the village elder then was Obulumire Opande, he was from his family and that Forum and Saitoti were children of the village elder. The deceased was his step brother. He further stated that Forum and Saitoti fled from the scene. He could not tell who killed the deceased but he found the aforesaid persons holding whips.



Defence Case

13. At the close of the prosecution's case, the accused was put on his defence and he gave unsworn statement. He told the court that on the material evening, he was called by one Alex Omuseli to take his motorbike to deceased's house. There he found Jane Wakhungu, Alex Amesonga and one other person by the name Rose. They asked him to take the deceased to the place where he had hidden the items but the deceased refused to board the motorbike. He was told that the deceased had stolen children's clothes, belonging to Ansentis children. He further stated that another person by the name Nandwa, arrived and he and Anzent started beating the deceased. He went back to his house. He later heard screams from the deceased's father home. He went there and found that the deceased had died. He stated that he saw said Nandia and Asent carrying the deceased who had by then collapsed. He blamed Nadia and Ascent of beating the deceased. He denied killing the deceased. He did not call any witness.

Accused's Submissions

14. The accused submits that the prosecution's case is circumstantial and the circumstance is that the accused was found in the scene. He states however, that his presence on the scene did not indicate is culpability; that the circumstances from which the inference of getting sought to be drawn were not firmly established. The accused finally submits that it is evident that the people who escaped were the ones culpable.
15. The prosecution did not file any submissions.

Analysis & Determination

16. For the prosecution to secure a conviction for offence by murder, it must prove: the death of the deceased and what caused it; that the person charged was responsible for the death of the deceased through either the aids of omission or commission, and finally that there was malice aforethought. (Ref. S.203 of the *Penal Code* and the decision of the court in *Antony Ndegwa Ngaira Vs Republic* (2014) eKLR.)

The Death of the deceased

17. The pathologist testified and produced the post-mortem report (Pexb 1). He formed the opinion that the deceased died due to subdural bleeding, secondary to head trauma, caused by a blunt object (s). The post mortem report indicates that the body was identified by Maurice Omukuba and Philip Shilindwa, both described as brothers to the deceased. Thus, the fact of death of the deceased and its causes was proved.

Whether the accused caused the death of the deceased

18. The accused has submitted that the prosecution's case is purely circumstantial. I disagree. Whereas it is true that it is largely circumstantial, there was also direct evidence. PW6 told the court that when he arrived on the scene, in response to the screams by the deceased he found the Accused, George, Saitoti, Forum, Jane Akhungu and Herny Obulemire holding and beating the deceased. A few hours later, the deceased had died.
19. On cross- examination, he told the court that some of the attackers , namely; Jane Akhungu and Saitoti were "Nyumba Kumi" Members ("Nyumba Kumi" meaning "ten houses" is an administrative outfit formed by the Government to take care of security matters a given number of houses, usually



- ten). Although it was dark. He told the court that he had a torch. They had whips. Thus this witness witnessed the attack on the deceased.
20. The other available evidence is circumstantial . This was given by PW5. He told the court that when he came out he found about 6 people surrounding the deceased, who was lying on the ground. He questioned the people but he was threatened so he went back to his house. When he next saw the deceased his hands and legs were tied and he had died.
 21. In the case of *Mohammed & 3 Others v Republic* [2005] 1 KLR 722 the court defined circumstantial evidence as follows: “Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a 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 by the one proposed to be proved.”
 22. In *Sawe Vs. Republic* [2003] KLR 364, the court set out the prerequisite conditions before guilt can be inferred . It held as follows: “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”
 23. The circumstances were that they were surrounding a person who had been injured. They were holding whips and “rungus” The accused herein was one of them. The witness query as to why they were beating the deceased was met with a retort: “continue asking questions” before he was threatened. The next time the deceased was found was dying . his legs , hands and private parts were tied.
 24. The defence has argued that the mere presence of the accused on the scene would not warrant him being termed as the one who inflicted the fatal blow that caused the death of the deceased.
 25. However, the accused was charged with others not before court. It is a question of common intend. The group had a common intention. It mattered not whether he was the one who inflicted the fatal injury. What matters it that he was in the group. The two witnesses (PW5 and PW6) testified that the accused was present. Section 21 of the *Penal Code* provides as follows; “When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of such purpose an offence is committed of such a nature that its commissions was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.
 26. It also emerged from the evidence that when PW1 and PW2 last saw the deceased alive was when he was with the accused and his accomplices. The next time they saw him he was tied on his legs and feet and had died. It was upon the accused to explain what happened to the deceased. This is informed by “The theory of the last seen”
 27. The theory of the last seen was explained in the case of *Chiragu & another v Republic* [2021] eKLR as follows : “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.....”



28. I have considered the accused's defence. He denied participating in the beating; that he was simply called to go and take the deceased to show the others where the deceased had allegedly kept the stolen items. I find his evidence implausible. In any event, he placed himself in the scene and therefore lent credence to PW5 and PW's evidence to the effect that the accused was among those who were attacking the deceased.
29. Further at this point it is important to remember that the accused gave an unsworn statement. There was nothing wrong with that as it is a right reserved for accused persons under Section 211 (1) of the *Criminal Procedure Code*. However such unsworn statement carries less weight compared to sworn evidence (See *Amber Ray Vs Republic* (1079) KECA 6 (KLR)).
30. Am satisfied that the prosecution has proved, beyond reasonable doubt, that the accused took part in the killing of the deceased.

Malice Aforethought

31. In the case of *Daniel Muthee v Republic* Criminal Appeal No. 218 of 2005 (UR) the court of Appeal while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”

32. According to the pathologist the injuries were extensive, they covered almost the entire body. The fatal one was the one inflicted on the head. It was caused by one or more objects. Further according to PW5 and PW6 the deceased's hands and legs were tied. It was meant to prevent the deceased from defending himself in any way. The deceased must have known that the attack on the head was likely to cause grievous injury or death to the deceased. I am therefore satisfied that malice aforethought in terms of Section 206 (b) of the *penal code* was proved.

Motive

33. From the unsworn statement of the accused, it emerged that the deceased had been accused of theft of some items. It also emerged from the evidence that some of the attackers were Nyumba Kumi members, a group who are otherwise entrusted with maintaining law and order on matters security. But it is apparent that they became overzealous execution of their duties and abused the authority given to them. Whatever the reason however, it is now settled, that motive is not an ingredient of the offence of murder.
34. In conclusion, it is my finding that the prosecution has proved the offence of murder under Section 203 as read with Section 204 the Penal as against the Accused herein and I hereby convict him as charged.

DATED, SIGNED AND DELIVERED AT ISIOLO VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY, 2025.

S.Chirchir

Judge.

In the presence of :



Godwin Luyundi- Court Assistant

The Accused-in person

Ms. Kagai- for the State.

