



**Republic v Mulupi & 2 others (Criminal Case 57 of 2015)  
[2025] KEHC 4408 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4408 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 57 OF 2015**

**AC BETT, J  
APRIL 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BONIFACE MULUPI ..... 1<sup>ST</sup> ACCUSED**

**ALEX MULUPI ..... 2<sup>ND</sup> ACCUSED**

**LEWIS MULUPI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The Accused persons, Boniface Mulupi, Alex Mulupi and Lewis Mulupi were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars being that on the 25<sup>th</sup> and 26<sup>th</sup> August 2015 at Lunyu village in Manda Sub-location they jointly willingly and unlawfully murdered one Charles Shitemu Juma.
2. The Accused persons pleaded not guilty to the offence and the case proceeded to hearing in which the Prosecution called six witnesses.
3. PW1, Alfred Juma Shitemi recalled that on 25<sup>th</sup> August 2015 at 8.00 a.m., he was taking tea at home while his wife was working near the deceased's house. A child was sent to call the deceased to take tea but the deceased was found with a rope on his neck. PW1's daughter Grace, who had gone to call the deceased, and his wife informed him of the discovery. He went into the house and confirmed that his son had died. He observed that the deceased had a rope on his neck which rope was from a net and ran upto the beam of the roof. He further observed that the deceased was kneeling down and had a cut on the side of the cheek and on his head. PW1 stated that he called the Chief and the Chief advised him not to disturb the scene.



4. PW1 further recollected that the Assistant Chief came and told him that the deceased had reported to him the previous night that the three Accused persons and their mother Grace had assaulted him when he had gone to ask for his phone from Alex Mulupi, the 2<sup>nd</sup> Accused. The report was that the deceased had given his phone to the 2<sup>nd</sup> Accused to charge but the 2<sup>nd</sup> Accused had removed its battery and put another one therefore leading to the dispute. According to PW1, the Assistant Chief told him that he advised the deceased to report to him in the morning, and that Grace and her children had also gone to his home at night and he told them to report in the morning. The witness said that he knew the Accused persons as they are family members and live about 1Km away from him.
5. PW1 further recounted that the police came and collected the body of the deceased after taking photographs of the scene. The body was taken to Webuye District Hospital and the suspects were arrested as the body was being taken to the mortuary.
6. On cross-examination, the witness said that what he mentioned concerning the Assistant Chief were not in the statement neither were Alex Mulupi and Boniface.
7. PW2 was Anjela Kambua Shisutia who stated that on 25<sup>th</sup> August 2015 at about 8.00 p.m., she was asleep in her home when she heard shouts. She and her husband Fedha who is the Assistant Chief got up and went out. They found the three Accused persons and Grace beating Charles. Charles was saying that he wanted his phone that he had given to Alex. The witness said that they told them to go and come back in the morning.
8. PW2 further narrated that Charles complained that the people had injured him. He was bleeding from the back of the head. He requested for a letter to go for medical treatment. Her husband advised him to go and come back in the morning. They all went away and the next morning at about 10.00 a.m., her husband received a phone call that Charles had passed away. She then went to Charles home where she found the body as narrated by PW1. PW2 said that she had known the Accused persons for more than fourteen (14) years as they were her in-laws. She stated that she had no differences with them.
9. PW3, Omoyo Masafu testified that on 25<sup>th</sup> August 2015 at 8.00 p.m. he was at his home alone when he heard shouts at his gate. He went there and found two children quarrelling. He knew them, it was Bonny and Charles. Charles was demanding his phone from Bonny. They were holding each other and punching. He separated them and advised them to go to the Assistant Chief and they went away. The next day at midday, he heard that Charles had died.
10. PW4 was Fedha Chisutia who was the Assistant Chief Monda Sub-location and husband to PW2. He recalled that on 25<sup>th</sup> August 2015, he was at home when he heard noises outside. On going out, he found Alex Mulupi, Lewis Mulupi, Charles Shitemu and Grace Barasa. They had different complaints. Charles claimed that sometimes back he had given Alex Mulupi his phone battery for charging and it got lost. Alex complained that Charles had threatened to cut him with a slasher. Charles complained that Boniface Mulupi had assaulted him. According to the witness, Charles had blood stains on the front of his top clothes. He told the persons to meet him at the office the following day and they went away.
11. PW4 said that the following day he received a call from the village elder that Charles had died. He went to the scene and found Charles' body kneeling on the ground with a mosquito net rope around his neck. The body was next to the bed. He phoned the OCS Malava and the police came, took the body to Webuye district hospital.
12. PW4 said that the Accused persons are brothers and that his father and their father are brothers.



13. On cross-examination, PW4 said that the group was shouting when they came but left peacefully and he saw blood stains on the deceased clothes and small injuries on the left hand. He further stated that the deceased was a son to this Uncle.
14. PW5 was Dr. Simon Kisaka who was based at Webuye District Hospital. He recalled that he performed an autopsy upon the body of Shitemi Juma. On examination, he found that the deceased had a small superficial wound on the occipital region which was about 1cm in length. There was a circular mark on the neck and internally, the lungs were reduced in size. The other systems were essentially normal and he formed the opinion that the cause of death was asphyxia due to strangulation.
15. PW5 was the Investigating Officer who took over from the initial Investigating Officer who is since deceased. He recounted the statement of the deceased investigating officer and produced the signal confirming the death of the said Investigating Officer. He also produced as P.Exh.3, a panga which was suspected to have been used in committing the offence as well as a photo of the scene.
16. On cross-examination, PW5 said that there was no evidence from the autopsy that the deceased was assaulted nor was there any evidence as to who placed the rope/mosquito net on the neck of the deceased.
17. At the close of the prosecution's case, the court found that the Accused persons had a prima facie case and therefore placed them on their defence.
18. At this point, the prosecution successfully sought to withdraw the charges against the 3<sup>rd</sup> Accused who had escaped from Juvenile Remand and had never been re-arrested. The case had proceeded in his absence and the court allowed the prosecution to withdraw its case against him and an amended Information was admitted and substituted with the earlier information. The remaining two Accused persons took a fresh plea and once more, pleaded not guilty.
19. The Accused persons gave unsworn statements and did not call any evidence.
20. The 1<sup>st</sup> Accused stated that on 25<sup>th</sup> August 2015, he was at home when he heard screams at around 8 p.m. He woke up and went to check and found the deceased screaming on the road near his house. Fedha Chisutia (PW4) who is the Assistant Chief also woke up and so did Omoyo Masafu (PW3). PW4 asked the deceased what was going on and the deceased complained that he had been provoked. PW4 advised the deceased to go home until the next morning wherefore he left for his home which was about 500 metres away. Everyone dispersed and the 1<sup>st</sup> Accused went to his house to sleep. The next day, he woke up to his normal duties only to be fetched from his house by the brothers to the deceased who informed him that the Chief was calling him. At the Assistant Chief's office, he was arrested and taken to Malava Station where he was arrested and later charged.
21. The 2<sup>nd</sup> Accused denies killing the deceased. His defence was similar to the 1<sup>st</sup> Accused's and he basically reiterated what the 1<sup>st</sup> Accused said save to add that after his arrest, he was kept in custody for 14 days during which he was tortured and forced to sign a document whose contents he did not know.
22. For the offence of murder to be established beyond reasonable doubt, the key elements to be proven are as follows:-
  - a. That the person alleged to be murdered is indeed dead.
  - b. That the death was caused by an unlawful act or omission.
  - c. That the Accused was responsible for the unlawful act or omission.



- d. That the Accused had the intent to cause the death or grievous harm of the deceased, or acted with reckless disregard for his life which is, malice aforethought – See Anthony Ndegwa Ngari v. Republic [2014] eKLR.
23. There was sufficient evidence from the prosecution witnesses that the person named Charles Shitemu Juma had died. The death was confirmed by the Doctor who performed the autopsy and issued burial permit No. 784952. He confirmed that the person identified to him as Charles Shitemu Juma had died. It is therefore evident that the death of the deceased was not in doubt.
24. On the second element that the cause of death was unlawful act or omission of the Accused persons, the prosecution sought to rely on the “last seen with” doctrine as enunciated in the case of Musimbi v. Republic [2023] KECA 287 (KLR) where the court stated:-
- “Regarding the “last seen with” doctrine, its applicability has been explained by various courts. For instance, in the Nigerian case of Moses Jua vs The State (2007) LPELR-CA/IL/42/2006 it was held 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.””
25. The prosecution submitted that the Accused persons were last seen with the deceased at around 8.00 p.m. and they therefore bore the responsibility of explaining to the satisfaction of the court what happened to the deceased since the Accused persons had been seen assaulting the deceased and the deceased had complained that the Accused persons had assaulted him.
26. On their part, the Accused persons submitted that the medical evidence was wanting as it said that there was no evidence that the deceased had suffered any bodily injuries inflicted by the Accused. The post mortem report stated that the deceased died of asphyxia and according to the Accused, no evidence was adduced to connect them to the rope that strangled the deceased to death.
27. It cannot be gainsaid that the standard of proof in a criminal offence is “beyond reasonable doubt”, a phrase that signifies a high standard of proof that requires the prosecution to adduce compelling evidence that leaves no doubt in the mind of the court that the person accused of committing the offence did so.
28. In the celebrated case of Woolmington v. DPP [1935] AC 462 pp 481, Viscount Lankey S.C. held as follows:
- “Throughout the web of the English Criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt



of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

29. The evidence was that the deceased was found in his house dead on 26<sup>th</sup> August 2015. There was no evidence to suggest that the Accused persons had followed the deceased to his house the night before. Furthermore, the Doctor who performed the autopsy on the deceased testified and stated that on examination of the body of the deceased, he found a circular mark with indentation around the neck. This mark was definitely formed by the rope that was found tied around the deceased’s neck. The cause of death was confirmed by the Doctor to be respiratory failure secondary to asphyxiation. The only other injury on the deceased was noted to be superficial occipital wound that was not significant.
30. By the end of their case, the prosecution had not produced any evidence that the death by asphyxiation or simply put, strangulation as suffered by the deceased, was caused by a third party. It may as well be that the deceased was the author of his own death. It is common knowledge that suicidal people hang themselves to death using all manner of ropes, including improvised ones.
31. For the doctrine of “last seen with” to apply in respect to the Accused persons herein, it was imperative that evidence was led connecting the cause of death to the unlawful actions of the Accused persons against the deceased. It may be true that the Accused persons assaulted the deceased. However, the injury sustained by the deceased from the assault was said to be a superficial wound on the head. The said wound did not lead to the death of the deceased.
32. No matter how much the prosecution wish the Accused persons to explain how the deceased met his death, it is my view that such an explanation would only be called for if the prosecution had demonstrated that the deceased’s death was caused by injuries to his body which would lead to the inevitable conjecture that since the deceased had been caught up in an altercation with the Accused persons and went away together on the material date at the request of the Assistant chief who asked them to report to him the next morning, then the Accused persons may have subsequently inflicted the fatal injuries on the deceased. However, the cause of death was something that is open to several possibilities, one of them being that the deceased could have committed suicide.
33. The prosecution submitted that the Accused persons defence, which was through unsworn evidence, was the weakest form of defence. However, it must be noted that the prosecution’s case was weak at its best. Being based on circumstantial evidence, the prosecution’s case against the Accused persons should have been such that it unerringly pointed to the guilt of the Accused. The chain of circumstantial evidence was broken once the deceased and the Accused persons left the Assistant Chief’s place. No evidence was led to show that the Accused persons followed the deceased to his house which incidentally was a few meters from his parent’s house, and killed him then stage managed a suicide scene.
34. In the end, I find that there was no evidence that the deceased’s death was caused by an unlawful act or omission. I also find that there was no evidence to conclusively connect the Accused persons to the death, lawful or unlawful.
35. The upshot is that the prosecution failed to prove its case against the Accused persons beyond reasonable doubt and the Accused persons are therefore acquitted.
36. The Accused persons shall forthwith be set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF APRIL 2025.**

**A. C. BETT**  
**JUDGE**



In the presence of:

Ms. Chala for the Prosecution

No appearance for Mr. Momanyi for the Accused

Court Assistant: Polycap

