



REPUBLIC OF KENYA



KENYA LAW
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**State v Mustafa (Criminal Case E014 of 2021)
[2025] KEHC 6485 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E014 OF 2021**

A MABEYA, J

MAY 23, 2025

BETWEEN

STATE PROSECUTION

AND

MZHAMIN NOOR MUSTAFA ALIAS MZAE ACCUSED

JUDGMENT

1. The Accused is charged with the offense of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence as per the Information dated 29/4/2021 are that on the 21/3/2021 at Plainland Hotel, Kondele area in Kisumu Central sub-county within Kisumu County, the accused murdered Kennedy Onyango Ndeda.
2. The accused denied the offence and the prosecution paraded 10 witnesses at the trial to establish prove its case.
3. Pw1, Salvine Cheruto Katukoi, a Senior Government Analyst based at Kisumu Government Chemist testified that, on the 31/3/2021 he received an exhibit memo escorted by PC Sabula Everlyne of DCI Kondele, a soil sample in a brown envelope 'A', an orange/black collar T-shirt in a bag 'B1' and 'B2', five sterile swabs with red stains 'C', 'D', 'E', 'F' and 'G' and a green facemask marked 'H'.
4. That on the 16/4/2021, he received finger nails sample of the deceased Kennedy Onyango Ndeda and on the 27/4/2021, he received a buccal swab of the accused marked 'B1' and 'B2'. He testified that the said samples were heavily stained with human blood; that the soil, item 'A' and facemask 'H' were moderately stained with blood of human origin and that the swabs items C, D, E, F and G tested positive for human blood.
5. That on 25/5/2023, he did the forensic analysis and concluded that the DNA profile generated from the soil 'A', T-shirt 'B1, Trouser 'B2' and the facemask item 'H' and the swabs C, D, E, F, G all matched



the DNA profile generated from the nails of the deceased Kennedy Ndeda. He produced the Report as PExh1(a) and the Exhibit Memo as PExh1(b).

6. In cross-examination, he told the Court that a delay in getting the samples cannot change the results of the examination as long as the samples are okay. That in the present case, the samples were dry so they were not affected by the delay. He further testified that the accused's DNA profile did not match with any samples presented for analysis.
7. Pw2, No. 97529 PC Benard Kiplagat Serem attached to Crime Scene Investigations, Kisumu County and gazetted vide Gazette No. 5548 of 31/7/2015 as Crime Scene Investigations Personnel testified that on 22/3/2021, at about 9.30 hours, he was requested by IP Willis Ongele of Lolwe Police station to document a scene near Kondele Primary School.
8. That at the scene, he found a body of a male adult in an orange T-shirt lying beside the road and that he took 3 photographs at the scene. He collected soil samples containing blood marked 'A' and swabbed blood stains from the said scene – soil and marked it C, D, E, F and G and handed them over to the Investigating Officer. He took 2 photographs of the general view of the hotel, 2 photographs of a closer view of blood stains and that he signed the certificate of electronic evidence as required by law. He produced the 7 photographs as PExh2(a) – (g) and the Report and Certificate as PExh2(h).
9. Pw3, Amos Makokha Nyongesa who worked with the deceased at Egypso Telecommunications Company testified that on the 20/3/2021, he was in Malaba when he received a call from his manager at 1pm to go to Kisumu. He called the deceased who informed him that he was in Sondu but later called him and told Pw3 that he had arrived in Kisumu.
10. That the deceased identified a guest house and where the two decided to lodge. The following morning, they proceeded to Dago for work and returned at 2pm and they went on their separate ways. Pw3 returned to the hotel at 9.20pm and as he parked his vehicle, he saw two people standing about 10 metres away with one holding the other by the collar and hitting him.
11. That the person holding the other by the collar rammed the latter's head on a pillar three times at which point, a lady standing nearby screamed saying 'wooi umeua'. As the assailant picked up the victim in an attempt to hit him, that lady restrained him. That he, Pw3, proceeded upstairs to call the deceased but the deceased was not responsive in person or on the phone. He then returned downstairs and as he passed the victim who had been assaulted, he called the deceased's phone and noted that the victim's phone was ringing and that is when he realised that it was the deceased.
12. Pw3 then put the deceased in his vehicle and in the company of two other people, a lady and man, drove off to seek help for the deceased. However, as it was during the curfew period, they were stopped by the police. At that time, the deceased managed to get out of the vehicle and disappeared into the night whereby Pw3 drove back to the hotel in search of the deceased.
13. That the following day, 22/3/2021, he got news to proceed to Russia Hospital where he identified the deceased in the company of the deceased's brother.
14. In cross-examination, he stated that he did not immediately recognize the deceased as one of the individuals who were in a duel and that he could not tell the reason for the duel. That he saw the individual in the duel with the deceased as he passed by him.
15. Pw4, Elizabeth Osodo, a hotel receptionist testified that in 2021 she worked at Plain Land Hotel next to Action Patel. That on the 21/3/2021 at about 9pm, the deceased who was a customer at the hotel and two other men and a woman were drinking alcohol when she heard screams and on proceeding to where the screams were emanating from, she found the deceased lying down.



16. She testified that the deceased, who was bleeding from the face, was walking and talking at the time. He was eventually driven off in the company of a driver who she established was his colleague as well as one Steve and his wife.
17. PW5, Judith Anyango Ogawa, the proprietor of Plain Lands Hotel testified that on the material day, she left the hotel at about 9pm and proceeded home. But when she got home, she found 10 missed calls from her receptionist, Cecilia and one Steve Kerogo.
18. She called Cecilia who informed her of what had happened and that the following day, she learnt from Cecilia that the deceased had been found dead near Migosi Primary School. It was her testimony that on the material night, she left 4 people drinking, one of them who was 'Mzae', the accused herein. In cross-examination, she testified that she knew the accused as he was a regular customer of the hotel.
19. Pw6, Julius Oningu, a watchman at Kondele Primary School testified that on 22/3/2021 at about 1am, he saw someone emerging from the fence crawling with a sheet and lighting his phone torch. The person was bleeding all over and was unresponsive. He left him at the scene and went to report the same at the police who told him to go back and ensure the individual's phone was not lost.
20. He stayed with the bleeding man in school till the following morning when a teacher informed him to take him out of the school as exams were to be carried out. He therefore placed him outside the fence. The person died at 8am and he reported the same to the police.
21. Pw7, Nicholas Ndeda testified that the deceased was his son. He received a report of the death of his son on 22/3/2021. On 7/4/2021, he identified the body for postmortem, removed the same on 9/4/2021 for burial on 10/4/2021.
22. Pw8, George Were Tala testified that he used to work as a security guard at Plainlands Hotel. On the material day, they had revelers who were drinking till about 9pm. At about 10pm as he was opening the gate for a customer, he heard the receptionist scream. He went to the scene and found a customer, who was a resident, lying down bleeding. On inquiring as to what happened, he received no satisfactory answer. He never witnessed any scuffle.
23. They tried to lift the customer but he was unconscious. That injured customer was taken away to hospital by another customer, who however, returned shortly stating that the injured customer had escaped from the vehicle. The following day, he learnt that the injured customer had been found dead at Kondele Primary School.
24. Pw9, Dr. Ombok Lucy, a medical officer from JOOTRH produced an autopsy report carried out on the deceased by one Dr. Eddy Owuor. He told the Court that postmortem was carried out on 7/4/2021. The body was of an adult African male of about 35 years. Externally, there was a bruise and 2cm stab wound on the head between the upper and middle part while internally there was massive bleeding in the head. The other systems were normal.
25. That the conclusion was that the cause of death was due to severe head injury due to a blunt force trauma secondary to assault. A sample of the left thumb nail was taken. The report was produced as PExh3.
26. In cross-examination, he stated that if the deceased fell due to drunkenness, it would have been expected that injuries would be on the back or front of the head. But in this case, the injury was on the upper part of the head.
27. Pw10 No. 88502 Sergeant Everlyne Sabula, the Investigating Officer, testified that she was requested to proceed to the scene of crime on 22/3/2021. She found the body already removed to JOOTRH.



- She interviewed the security who were at the scene. A trail of blood was found at the scene and she recovered a stained green facemask.
28. She carried out investigations and recorded witness statements of various individuals. She established from one of the deceased's relatives that the deceased, the accused and others were drinking at Plainlands Hotel when a confrontation arose between the accused and the deceased. That the accused held the deceased by the neck and hit him 3 times on the concrete pillar and that the deceased bled profusely. She testified that the concrete pillar was blood swabbed.
 29. She witnessed the postmortem on 7/4/2021 and on 16/4/2021, the accused was arrested at Lolwe Estate. She produced the green facemask as PExh4, blood-soaked soil sample as PExh5, black Khaki trouser as PExh6 and an orange T-Shirt with blood soaked black collar as PExh7.
 30. In cross-examination, she denied that in her investigations, she ruled out the possibility of the injuries having been occasioned by the jumping out of the vehicle.
 31. When placed on his defence, the accused testified as Dw1 and denied killing the deceased. He admitted to being at Plainlands Hotel on the material date. He sat with his friend one, Jeremiah throughout the time they were there. That there was a drunk individual who was going from table to table leading to the watchman being called to get him out. That he and Jeremiah left the hotel at about 10pm and that he parted ways with Jeremiah. That he was arrested 3 months later. He denied knowing the deceased.
 32. D2, Jeremiah Nyambogo testified that he was with the accused on the material day at Plainlands Hotel. That there was an individual staggering and disturbing revelers chasing those seated. They called the watchman who came and kicked the character out of the restaurant. He testified that he left the hotel at about 10.20pm.
 33. In cross—examination, he told the Court that he found the accused at the hotel and that the accused would be lying if he told the Court that it is the accused who found him in the hotel. He testified that there was nothing peculiar that happened at the hotel.
 34. I have considered the evidence on record. The accused is charged with an offence of murder. The onus was on the prosecution to prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are: -
 - a. the fact of death;
 - b. the cause of death;
 - c. that the death was caused by the wrongful act or omission of the accused; and
 - d. that the act or omission of the accused was malice aforethought as defined under section 206 of the *Penal Code*.
 35. I have examined the evidence by the prosecution witnesses. There's no doubt about the deceased's death. The same is confirmed by the testimonies of all prosecution witnesses. Pw2, Pw3, Pw6 and Pw10 testified of seeing the deceased's body at the scene where it was recovered. Pw7, the deceased's father testified that he identified the deceased's body to the doctor who carried out post-mortem on the body.
 36. Accordingly, I am satisfied that the prosecution proved this element to the required standard.
 37. The second element is the cause of death. Pw9, Dr. Ombok Lucy, a medical officer from JOOTRH produced an autopsy report carried out on the deceased by one Dr. Eddy Owuor. He told the Court that postmortem was carried out on 7/4/2021. Externally, there was a bruise and 2cm stab wound on



the head between the upper and middle part while internally there was massive bleeding in the head. The other systems were normal.

38. That the conclusion was that the cause of death was due to severe head injury due to a blunt force trauma secondary to assault. The report was produced as PExh3. I am satisfied that the cause of death was severe head injury secondary to a blunt force trauma resulting from assault.
39. The third element is whether, the cause of death was as a result of the wrongful act or in-action of the accused. Pw3 testified that, on the material night, he saw two individuals in a scuffle. That the assailant had held the victim by the collar and banged his head against a pillar 3 times after which the victim collapsed. The assailant attempted to continue with his attack on the victim but was stopped by a lady who screamed whether he wanted to kill the victim.
40. Pw3 identified the accused as the assailant since there was a security light illuminating the scene and as such he could clearly see the accused who passed by him when he left the scene. Pw5, Judith Anyango Ogawa, the proprietor of the Plainland Hotel testified that on the material night she had left 4 people drinking at the premises one of whom was the accused person who her regular customer.
41. The accused denied committing the offence. He admitted being at the scene. He also denied being with the deceased as stated by the prosecution witnesses. He stated that the deceased was drunk, staggering and causing commotion at the bar. That he was removed from the bar by the watchman. The accused's testimony was corroborated by that of his witness, Dw2.
42. The accused was placed at the scene of the murder. Pw3 testified how he saw the accused hit the deceased's head against a pillar. He saw and identified the accused as the assailant. The injuries he attributed to the assault were consistent with Pw9's testimony on the results of the postmortem. The cause of death was attributed to severe head injury due to blunt force trauma secondary to assault. Pw9 ruled out the possibility of the deceased's injuries arising from any fall.
43. On the accused's defence that the deceased was a nuisance who was thrown out by the hotel's watchman does not displace the evidence of the prosecution. The watchman who allegedly threw out the deceased from the bar as stated by the accused testified as Pw8. He was not questioned about the deceased having been drunk and disorderly as stated by the defence.
44. In the circumstances of this case, it is the Court's view that the accused's defence failed to displace the evidence of the prosecution as to how the deceased met his death.
45. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased's death.
46. Finally, on the question of whether there was malice aforethought on the part of the accused. Section 206 of the [Penal Code](#) defines Malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving any one 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 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;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

47. In *Joseph Kimani Njau v R* (2014) eKLR, the Court of Appeal held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i. The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- ii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed ...”

48. In the present case, Pw3 testified that he saw the accused bang the deceased’s head against a pillar. The postmortem report produced by Pw9 revealed that the cause of death was severe head injury due to a blunt force trauma secondary to assault. Pw9 also noted that there was massive bleeding in the head. The accused must have intended to cause the deceased grievous harm by knocking his head against a pillar.

49. In the circumstances, I am satisfied beyond reasonable doubt that malice aforethought on the part of the accused was proved.

50. Accordingly, the Court finds that all the ingredients of the offence were proved by the prosecution beyond any reasonable doubt. The Court therefore finds the accused guilty of the murder of the deceased and convicts him accordingly.

It is so held.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

