



REPUBLIC OF KENYA



**Republic v Mutungwa (Criminal Case 127 of 2017)
[2025] KEHC 10181 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 127 OF 2017**

TM MATHEKA, J

JULY 4, 2025

BETWEEN

THE REPUBLIC PROSECUTOR

AND

PHILIP MWEЕ MUTUNGWA ACCUSED

JUDGMENT

1. The accused person Philip Mwee Mutungwa is charged with murder Contrary to Section 203 as read with section 204 of the *Penal Code*. That on 14/4/2017 at Kwale Location, Kiou Sublocation Mukaa Subcounty within Makueni County jointly with others not before court murdered Peter Mumo Mutuku. He was represented by Mr. Hassan. He took plea on 17/1/2018 before C.K Kariuki J and pleaded not guilty.
2. The prosecution called ten witnesses.
3. PW1 Ruth Wambua Mutuku was mother of deceased. She testified that on 14/4/2017 at about 5.30am someone called at her gate and on going to check she found the chief who told her that the nephew to her husband, one Peter Mumo Mutuku had been beaten and was lying on the roadside. He told her that the culprits were Mwee Mutungwa, Tom Kimonde and Kongu Kimonde.
4. She went back inside and informed her mother in law who came out of her house and chief also explained to her. She then left with the chief to the scene. There she found people assisting Peter to sit up and among them was Tom Kimonde. The parents of the 3 suspects were present. They assisted in placing the injured into a motor vehicle . She noted that where he was seated was a pool of blood. She said he told her he had been injured in his private parts. She said he told her that he was injured by the three – she saw injury on his head, and that a bottle had been used to cut him. She told the court that she called his mother. The injured was taken to Kenyatta National Hospital where he died while undergoing treatment.



5. A post-mortem was conducted on 23/4/2017. Mwee Mutungwa – the accused is the one who was arrested. On cross-examination she said she did not witness the assault.
6. PW2 was Elizabeth Mutuku. The deceased was her son. On 14/4/2017 she was called by PW1 and told that her son had been beaten by other youths. They took him to Sultan Hamud Hospital from where he was referred to KNH where he was treated – and they were told that his private parts had been cut. He was admitted in the ward where he stayed for one week, and died. She said that when he was in hospital he told her that it was Mwee and the other 2 who had beaten him. That he told her he had not stolen anything.
On cross-examination she said she recorded what her son told her about those who assaulted him.
7. PW3 Daniel Munyao told the court that he was the chief Kwale Location. He received a call on 14/4/2017 at 4.30am from a neighbour who said that he had found some youth beating another. He was told that Kongu, Tom Kimonde and Mwee Mutungwa were the ones. The reportee said he did not know the victim. PW4 proceeded to the scene – he found the victim lying down – also present were the sister of Tom- Nzilani Kimonde and Wavinya Mwanzia. The chief ran to home of victim and reported to the aunt. they went back there and found the father of Mwee, father and mother of Tom looking for transport to take Peter to hospital – they put him in a motor vehicle that took him to Sultan Hamud Hospital – from where he was taken to Kenyatta National Hospital – where he later died.
8. He said he found a broken beer bottle at the scene and deceased had injuries on face, head, and private parts.
9. PW4 was George Kimwenyi Kamba. He was from a funeral on the material day. As he approached the home of Seraphine Mwasi where he was employed he found Kongu and Tom Kimonde, Mwee beating Peter Mumo. He found Kongu stepping on Peter’s head while Peter was lying on the ground
– Mwee was telling Kongu to stop beating Peter – the parents of Kongu and his sister Nzilani were present. Kongu continued to step on Peter’s head. Kongu’s father tried to stop him in vain. He asked PW4 to pick a stick and hit Kongu to stop him but PW4 refused.
10. He testified that it was Mwee who assisted him to assist Peter and remove Kongu from beating Peter. He saw Mwee take a blood stained piece of broken bottle and throw it away. Mwee and Kongu went to Kongu’s home while Nzilani and Tom remained at the scene. He testified that himself, and the parents of Tom and Kongu went to home of Mwee to report that Mwee had injured Peter. Peter’s cousins came to the scene and Peter was taken to hospital.
11. PW5 Stephen Kioko Kilonzo is the one who rang the chief on the morning of 14/4/2017. He was from a meeting when he came across Kongu Kimonde, Thomas Kimonde and Mwee Mutungwa, the father of both Kongu, Thomas and their sister Nzilani. He saw a person lying down. His trouser was ½ way. He saw that he had injuries, face, head and private parts, there was a broken whisky bottle beside the injured person. He said he saw the father of Tom and Kongu separate them from the person lying down. He learnt later that the said person had died.
12. PW6 Bernard Mida, a Pathologist at Kenyatta National Hospital conducted the post mortem. He testified that the deceased had healing scars over face, left ear, multiple sutures over scalp laceration with jagged edges, puncture wound on left clavicle, scrotal wound septic and getting decomposed – bleeding within brain, raised intracranial pressure cause of death – head injuries due to blunt force trauma. He produced the post-mortem report.
13. PW7 Samuel Kung’u Njoroge was requested to transport the injured Peter to Hospital - he did. He said he was not talking, had injury on face and head.



14. PW8 was Dr. Midia again
15. PW9 Thomas Mutunga Kimonde testified that was from work on 14/4/2017 at 4.00am. In torch light he saw 2 people ahead of him – Mwee and Mumo who was lying on the ground. He was bleeding from head, hands, leg. He asked the person lying down who he identified as his friend Mumo what had happened. He told him that he had been beaten by his (PW8's) brother Francis and one Mwee. He testified that he rang the chief who called his sister one Florence, and when she did not pick he rang his father who came to the scene – and called PW7 – Njoroge. They took Mumo to Sultan Hamud hospital but the doctors were on strike so they took him to Kenyatta National Hospital where he stayed for one week then died.
16. On cross-examination he said the deceased was his friend – and when he spoke to him at the scene, he told him that it was Mwee & Francis Kongu his , PW8's brother who had assaulted him and he spoke to him at the scene, he told him that it was Mwee and Kongu PW8's brother who had assaulted him. He said he did not find the accused or his brother holding any weapon. He said his brother Kongu disappeared after the incident.
17. PW10 NO. 59086 CPL Richard Lang'at, the Investigating Officer. He said he learnt that the deceased was being beaten on allegation of stealing Tom Kimonde's phone. He also learnt that the deceased was assaulted with a broken alcohol bottle and sustained injuries to face, head and private parts. The accused was sighted at Salama on 8/10/2017, and investigating officer sent officers to arrest him, which they did and took him to Sultan Hamud Police Station and later to court where he was charged.
18. The prosecution closed its case and the accused was put on his defence. In his defence he made a sworn statement of defence. He denied the offence. He told the court that he did not know the deceased Peter Mumo. He said on the material night he was from work when he came across 2 brothers beating the deceased. They told him that he had stolen a phone from Thomas. Kongu said that Peter had not only stolen the phone from Thomas, he had also broken his tooth. He said he told the 2 brothers to leave Peter, take him to police station but they did not listen. They continued to beat him, he, accused person pulled Thomas away and screamed for help and that is when PW4 came. The father and sister of Kongu came to the scene and told Kongu to stop. The father of Kongu gave his walking stick to PW4 to hit Kongu with so that he could stop the beating. That is when Kongu left Peter alone. They took Kongu and tied him up and took him to his home while the others took deceased to hospital.
19. The accused was put on his defence. He said he did not know the Peter Mumo. He testified how he spent the who day of 14/4/2017 working and when going home at night he found 2 brothers beating the deceased Kongu and Thomas Kongu was saying that Peter had stolen the phone of his brother Thomas and broken his brother's tooth. He told them to leave him and take him to the police station. They continued beating him and he jumped and pulled Thomas away. He screamed for help and that is when PW4 came to the scene. He helped to separate them – but Kongu insisted on beating Peter – the father and sister came to scene and told him to stop. The father of Kongu even gave PW4 his walking stick to beat Kongu so that he could stop – Kongu stopped and they took him away from the scene leaving Thomas. Accused went home and told his father that Kongu and Thomas had beaten Peter. His father also went to the scene. He said he told Kongu and Thomas to report to police but they disappeared. He himself he went to Sultan Hamud Police Station, and reported what he had seen, what he had done. He went home and back to work- He went home and began to work on his father's matatu from July.
20. On 8/7/2018, while at Salama, the uncle of Peter approached him and asked him where the people who assaulted Peter were. He told Peter's uncle not to ask him. The next thing he saw police officers



- who arrested him and took him to Salama Police Station. He denied the offence – he said that he went there as a good Samaritan to assist the deceased.
21. On cross-examination he said that he found – both Thomas and Kongu beating the deceased at 10:00pm He told the court that he did not run away – and was just going about his normal duties before he was arrested.
 22. Upon the defence closing its case counsel for accused Mr. Hassan filed submissions.
 23. He relied on *Republic v Nicholas Onyango Nyolo* [2014] eKLR the court stated the critical elements of the offence of murder thus:-
 - a. Proof of the fact and the cause of death of the deceased.
 - b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence.
 - c. Proof that the said unlawful act or omission was committed with malice after-thought which constitutes the “mens rea” of the offence.
 - d. In *Peter Mwangi Mwangi Kariuki v Republic* [2015], where the court observed that:
 - e. “...Thus the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose. It is clear the legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution. The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt...”
 24. That there was no direct evidence against the accused person and that PW4 testified that he saw the accused person separating the fight. PW4 testified that it was Kongu who was stepping on Peter’s head, and that he never saw the accused person beating the deceased. Further that there was inconsistency in the case for prosecution with the Investigating officer claiming that the chief was an eye witness yet the chief who was PW3 said he found Tom Kimonde at the scene.
 25. In conclusion he submitted that the defence had discredited the evidence of the prosecution. The defence had made out a case with consistent testimony. In conclusion he submitted that:
 - i. The prosecution had not satisfied the ingredients of the preferred offences.
 - ii. The prosecution had not discharged its legal and evidential burden of proof.
 - iii. The prosecution had not proved its case beyond reasonable doubt.
 - iv. The prosecution case should fail and the accused acquitted.
 26. I have carefully considered the evidence and the submissions. The only issue for determination is whether the prosecution has proved the charge against the accused beyond a reasonable doubt to warrant the conviction of the accused.
 27. There is no doubt that the Peter Mumo died. According to the post-mortem report the circumstances of death are described thus :-



The deceased person died while he was undergoing treatment at Kenyatta National Hospital, where it was being alleged that he was confronted by known people and was knocked with a stone on the head and have several deep cut on the head and deep cut on the private part and also a cut on the lower abdomen. Please ascertain the cause of the death.

28. The injuries were set in detail thus: -

Genito – Urinary System Scrotal healing wound, Septic with necrotic areas. Rt Kidney 155g/surrounding fat haemorrhages. Lt Kidney 170g Kidney parenchymal haematoma.

Head

Subgaleal heamotama 27x20cam, generalised subdural haemorrhage, features of increased ICP, No fracture base of skull, Brain weight 1355g

29. The cause of death was head injury following the blunt force trauma. Hence death was clearly from an unlawful cause.

30. The next question is who did it?

31. According to the prosecution case ,PW1 arrived at the scene and found when Peter was already injured and Tom PW9 was among those assisting him to sit up and the parents of Tom & Kongu and Mwee were present. The only thing Peter told her at the scene is that he had been injured in his private parts; and that while at the hospital, she said he just kept saying that he had been badly injured – PW1 left him with his mother PW2 said that when she was with him in hospital, he told her the three suspects beat him. However this evidence is not supported by that of the eye witnesses

32. PW3 began by saying he received a report from a neighbour that he found some youths beating the deceased:- and named Kongu , Tom and Mwee. However, the same caller proceeded to tell him that when he got close enough – Tom was just standing there – and, Kongu was the one beating the deceased, Mwee was telling Kongu to stop beating the deceased. The eye witness is that Kongu was stepping on Peter all over his body even in the presence of witnesses including his own father, his sister PW3, Mwee – to the extent that his father asked PW4 to hit Kongu so that he would stop beating Peter. That the accused assisted to separate them Kongu from the deceased.

33. PW4's testimony was also that when he checked on Peter in Hospital Peter told him that Kongu had castrated him – he said that Peter also mentioned Mwee and Tom – However it is clear from his testimony that he witnessed Kongu assaulting deceased and what Peter told PW4 implicated Kongu specifically – and there is proof that Peter had an injury to his scrotum, which the post-mortem report said was already decomposing. It was clear from his testimony that he saw Kongu beating Peter. He saw Kongu step on Peter. He saw Mwee telling to Kongu to stop – in the same breath, he said that Peter told him that Kongu castrated him.

34. PW5 did not witness the beating – but arrived when the deceased had already been beaten.

35. The evidence of PW9 Thomas Mutunga Kimonde introduced a different scenario on circumstances of the offence. He said that he saw the accused and his brother Kongu, and one person on the ground, who had injuries, and who told him that Accused and Kongu brother had beaten him.

36. He said he was the one who rang the chief, then rang his father who came to the scene – he said the deceased told him it was Mwee and Francis who beat him.

37. It is noteworthy that he did not tell the court that he saw the accused person or his brother actually beat the deceased – yet according to him, he was the one who arrived first and the scene. He said he saw the



- 2 standing, while Peter was on the ground. It is possible he was first at the scene or he was with accused and his brother and that he was involved with the beating or that he was found with his brother by the accused beating the deceased because the deceased had stolen his phone. These scenarios are numerous.
38. PW1 said that the PW9 was among the suspects of the assault – but she found him assisting the deceased when the chief arrived at the scene, he found PW9 and his parents and sister, and father of accused – all were looking for transport to take the victim to hospital. PW4 found the three Tom, Mwee and Kongu at the scene – Kongu was the one beating the victim, stepping on him, Mwee was trying to stop him and the chief did not find Mwee at the scene because he and PW4 had taken Kongu away.
 39. The only eye witness of who assaulted Peter told the court that it was Kongu the brother of PW9 was beating Peter, stepping on him, and that the accused herein was separating the fight. .
 40. The accused’s persons statement of defence is corroborated by evidence of PW4 – that the people who had any reason to beat Peter were the Kimonde brothers. Peter’s mother told the court that Peter told her that he had not stolen anyone’s anything, meaning that he had been accused of stealing and that was the basis for the attack upon him.
 41. It is noteworthy that the Kimondes did not mention this issue at all. It is evident that the Kimonde’s brother had a reason to assault Peter on the allegation that he had stolen from PW9 – the Kimondes avoided this issued completely but it is evident form the testimony of the mother of the deceased - that the alleged theft was an issue. His mother testified that the deceased told her that he did not steal anything from anyone.
 42. The accused person’s defence raises reasonable doubt about his alleged participation in the beating of the deceased. An eye witness clearly witnessed Kongu step on Peter, his head, all over his body - and he had to be forcefully removed from beating Peter.
 43. The other question is whether the deceased made dying declaration? The record shows that PW2 said that he was beaten by three people – Mwee, PW9 and Kongu. The testimony that PW9 and accused person also assaulted him is taken away by eye witness of who saw Kongu cause the injuries that caused the death of Peter.
 44. The kind of injuries all over his body on the face of court are reflective of a person over whom a grown man had stepped on - The pathologist recording the appearance of the body recorded the following;
 - No palour no cyanosis, healing scars over the face with roepitheliation occurring more on the left side.
 - Left external ear cut wound 3 cm, with dry blood surrounding
 - Multiple sutures over the scalp on the (L) side all together measuring 10cm, lacerations with jagged edges.
 - Wide upread healing body abrasions over shoulders, (R) & (L) flanks. Punctures wound 2cm ragged edge over lateral 1/3 of (L) clavicle central line? Healing abrasions over the back lateral rib areas (lumbar)
 - Scrotal wound, septic bilateral
 - On further examination he recorded; Genito – Urinary System
 - Scrotal healing wound, Septic with necrotic areas. Rt Kidney 155g/surrounding fat haemorrhages. Lt Kidney 170g Kidney parenchymal haematoma.
 - Head



Subgaleal hematoma 27x20cm, generalised subdural haemorrhage, features of increased ICP, No fracture base of skull, Brain weight 1355g

45. The extent of the injuries corroborates the eye witness evidence that Kongu stepped all over the deceased's body.
46. Ultimately, I find that the prosecution established that deceased died – they established the cause of death, they also established that one Francis Kongu who is at large had caused the injuries that caused the death of Peter.
47. It is noteworthy that all this time no effort has been made to bring Francis Kongu Kimonde to book. It is the duty of the prosecution and the police to bring this person to face the law.
48. Otherwise there is doubtful evidence as to the participation of the accused. Hence – the accused person gets the benefit of that doubt. The charge of murder is dismissed and the accused is acquitted accordingly.
49. Accused is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH JULY 2025 MUMBUA T MATHEKA

JUDGE

CA Chrispol Accused present

Mr. Hassan for the accused Mr. Kazungu for state

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-07-07 18:35:09

THE JUDICIARY OF KENYA

