



**Republic v Musau Alias Kakyalo (Criminal Case 16 of 2020)  
[2024] KEHC 286 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 16 OF 2020  
GMA DULU, J  
JANUARY 12, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DANIEL KYALO MUSAU ALIAS KAKYALO ..... ACCUSED**

**JUDGMENT**

1. The accused person herein, stands charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of offence are that on 14<sup>th</sup> May 2020 at Mbisu Mbyu area Nzau Sub County within Makueni County unlawfully murdered Maula John.
2. He has denied the charge. In attempting to prove their case the prosecution has called nine (9) witnesses.
3. PW1 was Anthony Makau a barber from Emali whose evidence was that on 13<sup>th</sup> May 2020 together with John Mwala (the deceased) were engaged to go and do farm work, and that the deceased proceeded to the place of work earlier.
4. According to this witness, when he arrived near the place of work, he found the body of the deceased with a burning tyre near the house of Pius Muthoka who had engaged them in the work of weeding grass.
5. It was also his evidence that he found a young man nearby herding cows, and he then reported the incident to Pius and Mwalimu and then to Emali Police Station at 9:00a.m.
6. In cross-examination, he stated that on 14<sup>th</sup> while at home a cousin told him that there was work somewhere. He maintained that when he reached Mwalimu's house he found a young man herding cattle, who asked him to see what had happened.



7. He also stated in cross-examination that he found the accused person adding firewood to the fire and that the accused said that the deceased was one of the thieves disturbing people. According to his knowledge Kyalo (the accused) was fine and not shaken at that time.
8. In re-examination, he insisted that he saw a herder who asked him to see what was happening, and he went and found the deceased already dead, but on fire. He reiterated that the accused person added firewood to the burning fire.
9. PW2 John Nzei Mutua testified that on 14<sup>th</sup> May 2020 he had assigned Maula the deceased some work, as he had told him the previous day to clear his compound the next day. In the next morning however, he was called on phone by Mutunga who informed him that someone had been beaten at his compound and he reported the incident to Emali Police Station.
10. He then proceeded to the scene where he found a dead young man and a tyre burning, and many people gathered at about 11a.m. Police were already present and he later learnt that the suspect was his employee Kyalo whom he identified in court.
11. In cross-examination, he stated that he did not find the suspect at the scene. He stated that Mutunga was his neighbour. He stated also that his employee the suspect (accused), was a man who would display a lot of anger.
12. PW3 Josephat Wambua testified that he worked for Mutunga (PW4) and that on 14<sup>th</sup> Ma 2020 at 6:30a.m he prepared his hoe to go to work for PW4 and the deceased passed by. After 5 minutes, he saw man people making noise where the deceased had gone to.
13. He then proceeded there and saw the accused person Kyalo riding a bicycle and PW1 following him. Then PW1 stopped and told the witness that Kyalo had killed his cousin. PW1 then left for Emali and the witness called Mutunga the employer, and informed him about what had happened. He later learnt that the accused person had been arrested. He identified the accused person Kyalo in court and stated that they worked together.
14. In cross-examination, he stated that it was not easy for him to know what happened at the scene. He stated that it was PW1 who talked to him about the incident. He reiterated that the accused person rode on a bicycle as he was chased.
15. In re-examination, he stated that the accused Kyalo took alcohol, muguka and also smoked cigarettes.
16. PW4 Mutunga Mwemu from Emali testified that he was a farmer and that on 14<sup>th</sup> May 2020 he was informed that a death had occurred near his farm compound. He was so informed by Christopher Wambua his worker (PW3). He then phoned John Muli (PW2) and conveyed the information.
17. It was his evidence that he knew the accused person physically and identified him in court. He said that the accused had the habit of passing near his farm.
18. In cross-examination, he stated that it was his employee (PW3) who informed him that the suspect was Kyalo.
19. PW5 was James Mwendwa Wambua whose evidence was that on 14<sup>th</sup> May 2020 at 6a.m he was to herd livestock when he met his friend Kyalo (the accused) who told him that he found a thief at his place of work and hit and killed him.
20. It was his evidence that though Kyalo said that the person (thief) was stealing, he did not say what was being stolen. It was his evidence that Kyalo also did not mention the weapon he used.



21. It was his evidence that shortly after, he met police officers from Emali Police Station at the scene and then proceeded for his business. He also stated that at the scene he saw fire burning at the gate.
22. He noted that a person was on fire and saw only the legs of that person, as he did not go close. He stated that he knew Kyalo for about 3 years. He stated also that Kyalo gave him the information at a distance of about 1 hour walk from the scene, and that he went to the scene with one Musili the Assistant Chief.
23. In cross-examination, he stated that Kyalo gave him the information when he was alone, and initially he thought that it was a joke. He stated that he arrived at the scene at the same time with the police.
24. PW6 Japhet Kyalo Mutua testified that he knew the accused Kyalo Musau whom he had employed in his farm as a worker in March, April and May 2020.
25. It was his evidence that on 14<sup>th</sup> May 2020 at 9a.m he received a phone call from a police officer that his farm worker had killed somebody. He then proceeded to the scene and found members of the public and the police and the person who had been killed with a burnt tyre around him outside his farm about 300metres away from his farm at a gate whose owner he had not known.
26. When he checked in his farm house, he found one tyre missing and formed the opinion that it was the one used in the burning of the deceased. He noted that his farm worker was absent, and his farm gate was open. He was there until 1p.m but his worker did not appear.
27. In cross-examination, he stated that he did not witness the incident and initially he did not believe the report. From his observations, it was his opinion that his worker Kyalo was at the farm that morning. He testified that Kyalo smoked cigarettes.
28. PW7 Caroline Ndeto, a sister of the deceased, stated in her evidence that on 14<sup>th</sup> May 2020 in the morning she received a phone call from a cousin Pius Muthoka asking her to meet him at Mulei market in Emali, and that when they met in presence of another cousin Makau, she was informed that Maula had died.
29. They then reported the matter to the police and proceeded to the scene where they found the body, near a gate with a burning tyre with the face facing downwards. The police then turned the body and took it to Makindu hospital mortuary.
30. It was her evidence that at 3p.m they were called on phone by the police and on arrival at the police station they saw two young men in custody, and one was Musau.
31. It was her evidence that on 18<sup>th</sup> May 2020 she attended the post mortem examination of the deceased at Makindu mortuary, where the doctor informed them that the deceased had a fracture of the skull, and had been killed before being burnt. It was her evidence that when she saw the accused person for the first time at the Emali Police Station, he said that he was responsible for the death of the deceased.
32. In cross-examination she insisted that the accused said that he killed the deceased. She also said it is not true that the deceased was stealing.
33. PW8 was Cpl. Peter Mutua the investigating officer whose evidence was that on 14<sup>th</sup> May 2020 at 10:30a.m he received a phone call from DCIO Emali Police Station CI Peter Atenga that there was a murder report from Mutua's area.
34. He then proceeded to the scene with other police officers. At the farm of John Mutua, they met many people at a gate. They found a body with a burning tyre around the waist, and the body was partly burnt.



35. It was his evidence that they put off the fire, and on enquiry they got information that on the previous day 13<sup>th</sup> May 2020 the deceased and Anton Makau Peter were given work to clean the compound of a farmer. Then on 14<sup>th</sup> May 2020 the deceased reported for the work and when he was entering the gate he was accosted by a neighbour, and attacked.
36. It was his information also that shortly thereafter, a neighbour Makau arrived and found that it was Daniel Kyalo Musau who had burnt the deceased. As they prepared to remove the body, they received information that Kyalo had been seen at Matiku market.
37. They then proceeded there and found that the accused person had already been arrested. On the way they received information that the accused person was not alone during the incident, but with Mwendwa Mumbua who had already been arrested at Kavitani market.
38. According to this witness, at the police station the accused person stated that he saw the deceased coming to the compound and since he had earlier been told that some people had stolen in the house where he lived, he thought that the deceased was a thief and attacked him by cutting him with a hoe at the back of the head.
39. He stated that he pulled the deceased from the main door of the home to the gate and again used a stone to hit the deceased on the head, and proceeded to the house took a tyre and put a fire to burn the deceased.
40. The accused then led the police to where the hoe was and it was taken possession of by the witness, who produced it in court as an exhibit. He also showed the stone which was recovered by the witness who produced it as an exhibit.
41. The witness also attended the post mortem examination of the deceased on 18<sup>th</sup> May 2020. Though he initially arrested two suspects, the second suspect was released and the accused person was charged in court.
42. According to this witness, a person called Anton Makau Peter said that he met the accused person at the scene, but he fled on a bicycle.
43. In cross-examination, he stated that the doctor initially said that the accused person had mental illness, but now he is mentally stable. He stated that no exhibit was taken to the Government Analyst. He agreed that there were marks indicating the dragging of the deceased, but he did not prepare a sketch of the same.
44. PW9 Dr. David Kasanga testified to a post mortem report on the deceased prepared and signed by Dr. Makali with whom he had worked, and who proceeded for further studies.
45. According to the report, the post mortem examination was done on 18<sup>th</sup> May 2020 at Makindu Sub County Hospital. The findings were that some body organs were charred by burning, there was a fracture on right side of the head, and cause of death was severe head injury due to blunt trauma. It was observed that the body was partly burnt. He produced the post mortem report as an exhibit.
46. In cross-examination, he stated that the report was not specific on the cause of death. That is the prosecution evidence.
47. When put on his defence the accused person tendered sworn defence testimony. He stated that he was Daniel Kyalo Musau and denied killing the deceased.



48. He testified that on that day he herded cows and took them home in the evening, when he noticed the tyre he used for closing the door missing at 6:45p.m. He noticed that the tyre had been carried away on a motor bike, and he phoned his employer.
49. About 50 metres away, he saw smoke and noted that the tyre was alight, and that there was a human body in the tyre. He then stood there and a person asked him from behind what was happening, and then that person said the person burning was his cousin who had come to work there, and almost threw himself in the fire.
50. They discussed and decided to throw away the tyre, and agreed that the cousin of the deceased reports the incident to the police. He then went home, took tea, took a bicycle and proceeded to the farm about 4km away.
51. It was his further evidence that at 1p.m, he was arrested, handcuffed and taken to Emali Police Station and asked many questions. Then another suspect Mwendwa Mumbua who lived where deceased lived was brought and both were interrogated. The other person was later released and he was charged alone with murder. He reiterated his denial of the offence and was cross-examined at length.
52. The accused person herein stands charged with murder. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80), the prosecution has the burden to prove each of the allegations made against the accused person. This being a criminal case, the standard of proof is beyond any reasonable doubt.
53. Did the deceased die? The evidence of both the prosecution and the defence is that on that early morning the body of the deceased lay motionless and dead near a gate of adjacent farms. It was in a burning tyre. The post mortem report produced by PW9 was to the effect that he died of severe blunt head injury. I find that the prosecution proved beyond reasonable doubt that the deceased died.
54. Was the death unlawful? No lawful explanation has been given by prosecution witnesses for the death. The accused person says that there was theft or suspected theft in that place where he lived in a house. There is no evidence that the deceased stole or attempted to steal anything. There is no evidence that he was armed, or resisted any attempt to ask him to explain why he was there. I find that the death was unlawful.
55. Did the accused cause the death of the deceased? No one witnessed the killing. The prosecution maintains that the accused person killed the deceased by attacking him. The accused person stated that he proceeded to the gate only to find a dead man burning in a tyre. It is a case of circumstantial evidence as nobody witnessed the killing.
56. In my view, the evidence on record points irresistibly to the accused person as the killer of the deceased. He was the only person at that house, which he admits. All other people found him there alone, and he then left on a bicycle. He was the only person with a reason to assault or kill – that is the theft or suspected theft from the place where he lived. I find that the prosecution proved beyond reasonable doubt that the accused person killed the deceased.
57. Was the death caused with malice aforethought? In my view it was. I note that malice aforethought is defined under Section 206 of the *Penal Code* as an intention to cause death or do grievous bodily harm. Though the accused’s counsel suggested in cross-examination that the accused person was mentally unstable at the time of incident that was not pursued as a defence, and not all mental condition constitutes insanity, as clearly stated under Section 11 of the *Penal Code* (Cap.63).
58. With the serious injuries suffered by the deceased resulting in his death, I find that malice aforethought was proved beyond reasonable doubt.



59. In the end, I find that the prosecution proved beyond reasonable doubt all the elements of murder against the accused person. I accordingly convict him of the offence of murder as charged contrary to Section 203 as read with Section 204 of the *Penal Code*.

**DATED, SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JANUARY 2024 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Ms. Omolo for DPP

