



**Republic v Musyala (Criminal Case 21B of 2017)
[2024] KEHC 297 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 21B OF 2017
GMA DULU, J
JANUARY 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH MUSYOKA MUSYALA ACCUSED

JUDGMENT

1. The accused person herein Joseph Musyoka Musyala stands charged with murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars of the offence are that on the night of 21/22nd July 2017 at Kikumu bridge, Kyuu village, Mbanya Location in Mbooni District within Makueni County, murdered Michael Maitha Mutunga.
3. He has denied the charge, and in the effort to prove the charge, the prosecution called five (5) witnesses.
4. PW1 Julius Mbithi Mutune a waiter at Pirates Bar Kalawani testified that on 21st July 2017 at 8p.m he was on duty when Musyoka Musyala entered the bar with Michael Maitha, and he served the two with Dallas Spirit (2 bottles) and Senator K two cups, and that at 10p.m, the said two customers left after a happy period of drinks.
5. Next day however, at 11:00a.m police officers arrived at the bar and asked if he knew Musyoka and he said yes as he was a customer who was at the bar the previous day.
6. According to this witness the police then asked him to accompany them to the police station where he recorded a statement.
7. According to this witness also, Musyoka wore a black trouser and black coat and paid the bill. It was his evidence that he did not see Michael well to observe what he wore. It was his further evidence that



- he then learnt that Michael was no more. He stated that both Musyoka and Michael were his regular customers. He identified the accused in court as Musyoka.
8. In cross-examination, he stated that he did not know the person who killed Michael, and maintained that Musyoka and Michael, who were related as cousins drank in the club happily that day.
 9. PW2 Dr. Kariuki Mbithi testified to a post mortem report prepared by Dr. Timothy Munga who had gone for further studies at Eldoret.
 10. It was his evidence that post mortem examination was conducted on the deceased on 27th July 2017 and the external injuries seen were abrasions on face, cut wound on right thigh, and cut through femoral muscles. The cause of death was massive haemorrhage by penetrating injury. He produced the signed post mortem report as an exhibit.
 11. In cross-examination he stated that some specimen items were removed from the body such as finger/ toe nails for further examination, but that he had not been shown those specimens. He stated that he had not seen the clothes that were said to be soaked in blood. He also confirmed that the type of weapon causing the injuries was not indicated in the post mortem report, but maintained that it could either be a machette or knife, a sharp object.
 12. PW3 Ruth Wangare a Government Analyst stated in evidence that on 31st July 2017 at the Government Chemist Department Nairobi, she received exhibits and an exhibit memo from PC Fred Ambara for CID Mbooni which were marked 'A' a blood sample in a container from Mutunga (deceased), 'B' a pair of black jeans in a khaki envelope from Michael Mutunga (deceased), 'C' nails sample in a plastic bottle from Michael Mutunga (deceased), 'D' black pair of jeans trouser in khaki envelope from Joseph Musyoka Musyala (accused), 'E' grey/white stripped coat of Joseph Musyoka Musyala (accused) 'F' blood sample in a container from Joseph Musyoka Musyala.
 13. She conducted DNA tests and the results were:-Pair of jeans trouser 'B' stained with blood of human origin.Pair of jeans 'D' stained with blood of human origin.DNA profiles from 'B' pair of jeans, and pair of trousers item 'D' generated DNA profile that matched blood sample 'A' of Michael Mutunga the deceased.
 14. The witness produced the report which she had prepared and signed as an exhibit, as well as the exhibit memo form.
 15. In cross-examination, the witness stated that she personally did the DNA testing and prepared and signed the report. She also stated that the exhibits appeared to have been properly preserved on receipt at the Government Chemist.
 16. PW4 PC John Odhiambo testified that in 2017 he was stationed at Mbooni Police Station and at 9a.m on 22nd July 2017 a report was made by the incharge of Kalawani AP Camp Snr. Sergeant Charles Mwanzia that a male person had been found lying helpless with visible injuries 10metres near Kikumu bridge.
 17. This witness then ordered an ambulance to ferry the man identified as Michael Mutunga to Mbooni West Sub County Hospital, where he was pronounced dead on arrival. It was his evidence that he saw the body and observed the physical injuries.
 18. It was also his evidence that at 9:40a.m himself, CI Robert Samoei, PC Ambasa and PC Godwin Githutho (driver) proceeded to the scene where they saw spilled blood, blood stained trouser, ring shaped metallic wire, and white cap, which they took possession of, they gathered intelligence



- information that the white cap belonged to the accused person who wore same the previous day, and that he was spotted at the scene that morning, and appeared worried and then disappeared.
19. They then traced the accused person with assistance of relatives and before they arrived at his house, they spotted him and when he saw the police vehicle, he started running away, and a chase ensued and they arrested him.
 20. At time of arrest, he wore a coat which they suspected had blood stains. They then proceeded to his home and conducted a search and recovered a black pair of trousers which he was said to have worn the previous day, with blood stains.
 21. They then retained the black trouser, cap, wire and coat as exhibits. He identified the trouser of the deceased, the trouser of the accused, the wire, and cap. He also identified the arrested person in court.
 22. In cross-examination, he stated that he participated in the arrest of the accused but was not the investigating officer. He stated that the scene was not photographed. He could not confirm if there was a fight though the site showed signs of a struggle. He stated that there was also inner wear and liquor bottles at the scene which they collected. He stated that he did not recover any weapon.
 23. PW5 PC Fred Ambasa the investigating officer testified that on 22nd July 2017 while on duty at Mbooni West Police Station, Sgt. Charles Mwanza in charge of Kikumu AP Camp informed him that a man had been found with bruises lying in a pool of blood near Kikumu bridge, and had organized for transport from Tawa Sub County Hospital to rush the victim to Mbooni Sub County Hospital where he succumbed to the injuries on arrival.
 24. The witness then proceeded to the scene with PC John Odhiambo, then to the hospital and saw the deceased with deep cuts on right thigh, both knees and naked. They then proceeded to the scene where they found inner wear believed to belong to the deceased, blood stained trousers, broken liquor bottles, and an unbroken liquor bottle, and a metallic ring shaped wire, and a pool of blood and visible signs of struggle. They also saw a white cap believed to belong to the accused person, which accused wore previous day.
 25. It was his evidence that he was left at the scene to guard it while colleagues traced the accused person who was arrested and a black pair of trouser and white grey coat recovered from him. It was his evidence that the accused person was arrested, and post mortem examination on the deceased body was done.
 26. Meanwhile, he prepared an exhibit memo form and took blood samples and other items recovered to the Government Chemist for DNA profiling and comparison. It was also his evidence that he took the accused person for mental assessment and charged him in court.
 27. He also confirmed in court that he took possession of all the items recovered from the scene and from the accused person and produced them in court as exhibits. It was his further evidence that the Government Analyst report confirmed that there were blood stains matching the DNA of the blood of the deceased, and that the accused person did not have an explanation for that.
 28. He stated that he was not aware of the reason for the killing, but that the evidence was that the accused and the deceased were drinking in a bar where the deceased worked, the previous night. He identified the accused person in court.
 29. In cross-examination, he stated that his initial witness statement was lost and he had to record a fresh statement. He stated that Purity Mwangeli who did not testify said that the accused and the deceased were at the Pirates Club Bar the previous night. He stated that he did not record a statement from the accused, but that CI Robert Kiptoo recorded the statement. That was the prosecution evidence.



30. When put on his defence, the accused tendered a long defence statement. He denied committing the offence. He agreed that they were together with the deceased the previous night after coming from work and went for a drink.
31. It was his evidence that they went to Pirates Club, but were called through a message by Purity who operated another Club and was a girlfriend of the deceased, as they lived together with Purity as man and wife.
32. On arrival, Purity asked the deceased where he was and who had bought him a drink. He stated that he left the deceased with Purity but because he did not find another open club, went again to Purity's club and though he found it open, he thought they were sleeping in the lodging and proceeded on a footpath, and heard someone make noise near a culvert, and called 'brother, brother' then on going down the slope found his cousin who appeared drunk. He sat him up and he noted that he had been injured, but physically fine, but not talking.
33. According to him, this was about 1a.m and he went and informed the parents about the incident, but they told him to leave him alone as this was not the first time to sleep outside, and he went home and slept.
34. In the morning, he woke up at 5:30a.m and proceeded for duty and passed by deceased's home to find if he had arrived home and found that he had not arrived. Then when he went to the tarmac road, he saw more than 100 people gathered near the bridge. When he ran there and asked, he was informed that Michael had been taken from there, and that he (the accused) was the last person to have been seen with him, and he did not ask them if Michael was alive or dead.
35. It was his defence that he explained to the people that he was with Michael the previous day and left him with Purity. On going to work, his employer gave him 500/= and told him to go home as he was a suspect.
36. When he went to buy bread police arrested him and took him to his house, and the house of Matumbe who had served them at the club. Matumbe was arrested with him but later released.
37. He stated that if police said that his pair of trousers had blood stains, then it is possible because he tried to assist his cousin (the deceased). If the long sleeved T-shirt had blood stains also, it was because he tried to assist his cousin.
38. It was his evidence that they lived peacefully with his cousin (the deceased), but the mother who had migrated to Machakos was not happy. He stated that he did not struggle with or stab his cousin. He did not know what befell him. He was cross-examined at length.
39. This is a murder case. In accordance with the provisions of Section 107 of the [Evidence Act](#) (Cap.80), the burden is on the prosecution to prove their allegations against the accused person.
40. This being a criminal case also, the standard of proof is beyond any reasonable doubt – see [Sawe v Republic](#) (2003) eKLR.
41. Did the deceased die? The evidence on record both for the prosecution and defence was that he was found motionless and speechless in the morning at daybreak near a bridge at Kikumu. He was rushed to Mbooni Sub County Hospital. He was pronounced dead on arrival in hospital. He had severe external injuries and had bled profusely. A post mortem examination was performed and report produced as an exhibit in court. I find that the prosecution proved beyond reasonable doubt that the deceased died of extensive haemorrhage due to injuries suffered.



42. Was the death unlawful? No reason or justification has been given for the cause of death. The injuries were vicious. He was even naked. I find that the death was unlawful.
43. Did the accused cause the death of the deceased? Nobody saw the incident resulting in the death of the deceased. It was a case of circumstantial evidence. As was stated in the case of *Sawe v Republic* (2003) eKLR (*supra*), mere suspicious however strong is not adequate to prove a criminal act.
44. In our present case, the accused person was a relative of the deceased, a cousin. The accused also says so. They were together taking alcohol the previous night. The accused admits so in his defence. It is alleged that after several drinks, they walked out of the club together. The accused person says he left the deceased with Purity, but adds that later he met the deceased at the place where he was found seriously injured.
45. The accused denied assaulting or fighting the deceased but says that he merely tried to assist him physically, reported the incident to the parents who brushed the matter aside, and went home and slept. He denied that his clothes had blood stains, but again said that if blood stains of the deceased were found on his trousers, then it was because he tried to help his cousin the deceased. I observe that no weapon was recovered.
46. In my view, with all the circumstantial evidence on record, the only conclusion that can be drawn is that the accused person was either the killer of the deceased or was one of the persons involved in doing so. He was the last person to be seen with the deceased, his pair of trouser was found with blood stains of the deceased, and his conduct after knowing that his cousin the deceased was seriously injured, paints him as a culprit or the culprit. I find that the prosecution proved beyond reasonable doubt that the accused person caused the death of the deceased.
47. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the *Penal Code*. It is an intention to cause death or do grievous bodily harm. With the vicious injuries suffered by the deceased, and the detailed circumstances of this death, it cannot be said that the death was an accident or without malice aforethought. I thus find that the death herein was caused with malice aforethought.
48. Consequently, I find that the prosecution proved beyond any reasonable doubt the charge of murder herein against the accused person. I thus convict him for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of-

Ms. Nusura – Court Assistant

Accused

Ms. Omolo for DPP

Mr. Muthiani for

