



REPUBLIC OF KENYA



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**Republic v Mwinzi & another (Criminal Case 19 of 2020)  
[2024] KEHC 10 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 10 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 19 OF 2020  
GMA DULU, J  
JANUARY 12, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GEOFFREY KIOKO MWINZI ..... 1<sup>ST</sup> ACCUSED**

**ERICKNESS MUGURE MASASE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The two accused persons herein stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence are that between 6<sup>th</sup> and 12<sup>th</sup> June 2020 at Ndwaani area, Nzau Sub County within Makueni County jointly murdered Silvester Mwinzi Mukuva.
2. They have each denied the charge, and in their effort to prove the charge the prosecution called eleven (11) witnesses.
3. PW1 was Eunice Nduku Mweni the wife of the deceased who testified that she was blind as at the date of the incident and that on 6<sup>th</sup> June 2020 her husband left home at 9:30a.m with a radio to go and charge it at his mother's Martha Ndanu residence, but never returned home.
4. It was her evidence that when she called him on phone, she could not reach him, and when she reported the disappearance to the Chief, he advised her to report to the Ndaui Police Post, and her sons Geoffrey and Richard Mbithi made the report to the police and were advised to continue looking for the missing man.
5. It was her further evidence that they looked for her husband from 6<sup>th</sup> to 11<sup>th</sup> June in vain. On 12<sup>th</sup> June 2020 at 7a.m, Titus Mwangangi phoned her son and together with Kioko they left, and after a short



- while many people gathered, and she was informed that her husband's phone had been found outside the home of Titus.
6. At 11a.m Kioko told her that the police had asked for a lamp and she gave the lamp. Later, she heard that Kioko and others had escorted the body of her husband to hospital. It was her evidence that she married her husband in 1998 and had five (5) children born in 1992, 1994 and 1996 before marriage, and 2000 and 2001 after marriage.
  7. She did not know what befell her husband, and did not know if her husband had a relationship with another woman though she heard that he had an earlier relationship with Mariam Kisilu in 2006.
  8. It was her evidence that she developed eye problems 3 years after birth to the last born. She also said that her husband did not take alcohol.
  9. In cross-examination, she maintained that her husband went missing on 6<sup>th</sup> June 2020. She confirmed that her first born child was Geoffrey Kioko (1<sup>st</sup> accused). She stated that she had not been informed that Kioko was involved in the killing. She also stated that 2<sup>nd</sup> accused Erickson Mugure worked for the mother of the deceased.
  10. PW2 Wavinya Mutiso Kitwili testified that on 7<sup>th</sup> June 2020 at 10a.m she was informed that a neighbour had gone missing, by the wife and they agreed to make a phone call to Richard Mbithi Geoffrey Kioko to report the incident to the Assistant Chief and the police.
  11. They then got engaged in searching for the missing man until 12<sup>th</sup> June at 7a.m when she was called by Titus Mwangangi who informed her that the mobile phone of the missing man had been seen and on seeing the phone told Purity his daughter-in-law to call Kioko and she came with him and confirmed that he knew the phone which he smelt and threw down. Kioko then phoned the Assistant Chief and the police. The witness said that the phone was found with his son Mutunga and was found near his house.
  12. She stated that she had given the phone to the missing person when he worked for him and described it as make ITEL – silver button, black front, and orange back. She identified the phone in court.
  13. It was her evidence that Kioko was a son of the missing person and that they looked for the missing person with Kioko up to 12<sup>th</sup> when the phone was found. According to her, when the police came and took the phone, Erick was trembling and the police thus took him.
  14. According to this witness, when the police interrogated Erick (2<sup>nd</sup> accused), he disclosed that the missing person was in the well, and shortly after the owner of the well phoned to say that the body was in the well. She identified Erick in the dock.
  15. In cross-examination, she stated that the phone was found outside the house of Mutunga in which the witnesses son Titus lived. She maintained that it was Titus who said the phone had been found. She stated that a girl called Ndanu was asked to remain at home.
  16. She also stated that Kioko was involved in the search, and that Erick appeared shaken and told the police that he would take them to where the body was and took them to the well of Kyallo Musembi. She said that initially her son Titus and Mwongeli were arrested as well as Kasoka and Mbote.
  17. PW3 was Julius Musyoki Maweu. He testified that on 8<sup>th</sup> June 2020 in the morning while digging at 7:30a.m he was phoned by Geoffrey Kioko who told him to go urgently.
  18. They then joined in the search for the missing person, and they searched on 8<sup>th</sup> June 2020, and the following days and on 12<sup>th</sup> June 2020 Geoffrey Kioko phoned and when he went to meet him he saw



people showing each other footprints, and Erick was asked to identify the owners of the footprints since he denied that the footprints belonged to him.

19. It was his evidence that the phone belonged to his uncle (the deceased), and in the process of inquiries one of the boys alleged that the hands of Erick had foul odour. The police then came and held Erick.
20. As they were at that place, the police were phoned by a person who informed them that a body had been found in the water of his well, and they proceeded there and retrieved the body and took it to his mortuary.
21. According to him, the well was 20ft deep and he did not know the person who dumped the body in the well.
22. In cross-examination, he said that he was not involved in the search of the deceased, but he was only called on 12<sup>th</sup> and that is when he got involved. He reiterated that he did not know the person who dumped the deceased in the well.
23. PW4 was Titus Mwangangi Mutiso, a mason from Ndauni whose evidence was that on 11<sup>th</sup> June 2020 at 6p.m, Erickson 2<sup>nd</sup> accused informed him that he wanted to give him a job (the witness appeared nervous). However Erickson did not explain the nature of the job, and he refused to go for the job.
24. According to this witness, at 9p.m, as he returned home from the market he met three people Erickson, Kioko and Mwinzi, together with Anthony and Kingola at the gate of Kioko carrying a body in a sack.
25. They then asked for a torch from this witness and he flashed his torch and saw the sack in which there was a person. He was convinced it was a person because the father of Kioko had gone missing. It was also his evidence that Erickson told him that it was the body of a person, but did not disclose whose body it was.
26. It was his further evidence that he gave his torch to Anthony and that Erick and Kioko carried the body to a place he did not know down to the river, and for him, he proceeded home.
27. On 12<sup>th</sup> June 2020, he went to the latrine in the morning and saw a mobile phone on the ground which had no cover. He then went and called his brother's wife 'Mama Nancy', and his mother Wavinya Mutiso, and Kioko Mwinzi and people gathered around.
28. The police were then called and the police came because the phone had been identified by Kioko as belonging to his father Mwinzi. After arrival of the police Kyalo Mwinzi phoned the police post to say that he had found a body of a person in his well.
29. This witness stated that he was initially arrested with others. It was his evidence that he went to the well of Kyalo and saw the naked body which was not in a sack, but did not identify the body.
30. He was arrested and taken to Ndauni Police Post, then to Emali Police Station with Anthony, Kioko and Erickson. It was his evidence that after investigations Anthony and Kilonzo were released.
31. He reiterated that on 11<sup>th</sup> June 2020 at 9p.m he met Erickson and others in the light of his torch carrying something with blood stains, and that they talked to him. He stated that he knew Kioko and Anthony well as they schooled together with him, and that Erickson he knew as a neighbour for one year who was employed at the homestead of Kioko. He stated that he had no grudge with any of them.
32. In cross-examination, he maintained that he saw Anthony, Kioko and Erickson at 9p.m in the torch light. He stated that the next day he saw the mobile phone. He maintained that he saw the face of the deceased, but did not identify the person.



33. PW5 Veronica Ndanu Mwinzi testified in court that she was a daughter of Sylvester Mwinzi Makuu and on 6<sup>th</sup> June 2020 he left home in the morning and proceeded to her grandmother to charge a radio battery, but did not come back. That at 1p.m they called him on phone but the line was on answering machine. They called him because her aunts Wausi, Mumbua and Isina wanted to see him.
34. Next day on 7<sup>th</sup> June 2020 her brother Geoffrey Kioko Mwinzi and a neighbour Richard Mutiso reported to Ndaui Police Post and were given an OB number and advised to continue the search.
35. It was her further evidence that on 12<sup>th</sup> June 2020 the body of her father was found in Kyalo Musembi's well, and they heard that her late father's mobile phone was found at the home of Mutiso Mwangangi where Titus Mwangangi lived. It was her evidence that Titus phoned his sister-in-law Purity and it was Purity who informed Geoffrey Kioko about the phone, but that Kioko having been told at 7a.m took up to 11a.m to arrive.
36. It was her further evidence that at 8a.m they received information that the body was found in a well. It was her evidence that the home of Kyalo Musembi where the body was found was about 500metres from the home of the deceased.
37. The witness identified the orange phone as belonging to her father, and confirmed that Geoffrey Mwinzi (one of the accused persons) was her brother. She stated that Erickson (2<sup>nd</sup> accused) worked for her grand mother. She heard that Erickson had stained finger nails on the day the phone was found.
38. In cross-examination, she confirmed that Miriam Kisilu a neighbour was a lover of his father, but stated that she knew of no friction.
39. PW6 was Purity Loko Kimunde whose evidence, was that he was a close neighbour of the deceased and that on 7<sup>th</sup> June 2020 at 8a.m she went for prayers at his home and his wife Eunice asked if she had seen her husband, because he had not come back home after going to charge his phone battery at his mother's house.
40. After prayers, she went to the farm to harvest beans and at 5p.m she met her husband who informed her that Eunice had phoned her and on arrival at Eunice home they met Eunice, Ndanu and Kioko (Geoffrey) who is 1<sup>st</sup> accused.
41. It was her evidence that a report on the disappearance of the deceased was made to the police post, and that on 12<sup>th</sup> while at the farm with her husband Titus Mwangangi a brother in law said that he wanted to show them something.
42. They followed Titus and he showed them a mobile phone outside his house under a tree, and she identified the mobile phone in court.
43. When they informed Phyllis Mutiso who had given the deceased a phone, she said it appeared not to be the phone. When they showed Titus the phone he said it belonged to Sylvester his father. People then gathered and the police were called on phone.
44. It was her evidence that there were foot prints towards the pit latrine, and towards the road, and that the footprints appeared to lead to where Erick lived.
45. It was her further evidence that shortly thereafter Richard Kyalo Musembi phoned to say that a dead body was found in his well and the police called additional officers and on proceeding to the well saw the body of Sylvester naked and floating in the well.
46. The police from Emali then removed the body and arrested Erick and Geoffrey. It was her evidence that she had not heard of any disagreement between Erick and Sylvester.



47. In cross-examination, she said that they did not recover the shoes and that Erick worked for the mother of Sylvester.
48. PW7 was Richard Kyalo Musembi, a fruit and vegetables farmer whose evidence was that on 11<sup>th</sup> June 2020 he worked at his farm until 6:30p.m and went home. On 12<sup>th</sup> June 2020 at 8:15a.m he went to the farm to water his plants and was surprised to see a human body floating in the well.
49. He then immediately phoned Ndaui Police Station and the police came in motor vehicles, and removed the body and the Assistant Chief said it was the body of Sylvester.
50. It was his evidence that he allowed the public to use his well, and that there was nothing unusual the previous day when he left the farm in the evening.
51. PW8 Geoffrey Ndolo Mwangangi testified that he was a taxi drier and that on 8<sup>th</sup> June 2020 while at the farm a woman asked him if he knew Mwinzi who had disappeared. Later, as he planned to go to the home to verify, he saw people running downhill who informed him that a body had been dumped in a well.
52. When he saw the body, he identified it as that of Mwinzi. On 15<sup>th</sup> June 2020 at Kilome Hospital, he identified the body to the post mortem doctor. He noted injuries on the neck and eyes.
53. PW9 Dr. Pauline Kingoo testified to a post mortem examination report filled by Dr. Martin Owino with whom she had worked at Kilome.
54. It was her evidence that the form was filled and signed on 15<sup>th</sup> June 2020 and the body was of Sylvester Mwinzi Mukuva.
55. From the report, the neck was unstable, body had cut on right temporal area, and tongue protruded. The spinal cord was dislocated twice. Cause of death was cardio pulmonary arrest due to suffocation and spinal cord dislocation. She produced the signed report as an exhibit.
56. PW10 was Kipngetch Bernard a Government Analyst, whose evidence was that on 19<sup>th</sup> June 2020 he received exhibit items from Sgt. Richard Kimeu of Emali Police Station, which were:-Fingernails in a khaki envelope 'A' of Sylvester Mukuva Mwinzi – deceasedBlade part in khaki envelope 'B' of Erickson MurageNavy blue blouse in khaki envelope 'C'20 litre yellow jerrican 'D'Pant clothing in khaki envelope 'E' of Titus MwangangiPant clothes in khaki envelope – 'F' Miriam MbulaRed short with long sleeves in khaki envelope – 'H' from Erickson MurageGrey shirt in khaki envelope 'G' – Miriam Kisilu.
57. They on 23<sup>rd</sup> June 2020 received additional items form PC Jacob Suyanga:-Soil debris in khaki envelope 'Y from scene of crime.Blood sample 'Q' Erickson MurageBlood sample 'R' from Titus MwangangiBlood sample 'S' from Geoffrey Kioko Mwinzi.Blood sample 'T' – Anthony Kingola Mwangeli together with exhibit memos.
58. The findings of the tests were – items B' pant, 'D' 20 litre jerrican, 'E' pant clothing, 'F' pant clothing, 'G' clothing Miriam, 'H' from Erickson found to have no traces of blood stains. The witness stated orally that items 'C' was found with blood stains of human origin, but which did not generate DNA profile. Item 'A' finger nails did not generate DNA profile.
59. It was his evidence that he prepared and signed the report, and produced same as an exhibit, together with the two exhibit memos.



60. PW11 was Cpl. Peter Mutua the investigating officer who received instructions from Sgt. Kimeu now retired. He proceeded to Ndaui Police Post with Cpl. Monica and proceeded to the home of deceased Sylvester Mwinzi Mukuwa.
61. He met PC Swalehe who led them to the home of Titus Mwangangi and were shown a place where the mobile phone was picked, and he took possession of the phone PC Swalehe then led them to the farm of Kyalo Musembi where they saw body floating in a well.
62. They did enquiries and were informed that the body was of Sylvester Mukuwa who had been reported missing, a report made by Geoffrey Kioko his son and now 1<sup>st</sup> accused on 7<sup>th</sup> June 2020.
63. They retrieved the body with help from the public and noted that 2<sup>nd</sup> accused had already been arrested by the public. According to this witness, the 2<sup>nd</sup> accused volunteered information that 1<sup>st</sup> accused was involved and they thus arrested 1<sup>st</sup> accused.
64. They also arrested Anthony Kingolo, and two others Titus Mwangangi and Gabriel Mutinda Musau. They took the body to Kilome Nursing Home.
65. It was his further evidence that he visited the scenes severally and recovered a number of items, which were taken to the Government Analyst for DNA tests and comparison. He also attended the post mortem examination of the deceased on 15<sup>th</sup> June 2020.
66. It was his further evidence that three (3) of the suspects were later released, leaving the two accused persons herein. He produced the mobile phone, and clothing other items in court as exhibits. He identified the two accused persons in court. That was the prosecution evidence.
67. When put on their defences, each of the two accused persons tendered sworn defence testimony.
68. DW1 was the 1<sup>st</sup> accused person Geoffrey Kioko Mwinzi. He testified on oath in his defence that he did not kill the deceased and that on 6<sup>th</sup> June 2020 after lunch at 1p.m his mother told him that his father Sylvester had left in the morning to go to his grandmother with his radio. He then proceeded to teach a pupil called Muthee until 4p.m, ate supper and later with his mother started wondering where the father was as his phone would not go through.
69. Next day he asked neighbours if they had seen his father and he was advised to make a report to the police which he did, and an OB entry was made and the police advised him to mobilise the public to look for his father.
70. They looked for his father with people like PW2 and PW3 until 12<sup>th</sup> when PW6 called him to the house of PW4 where he was shown a mobile phone which he identified as belonging to his father. It was on the same morning that they received a phone call that a body had been seen in a well and when the police came they called and handcuffed him and assaulted him for 2 weeks.
71. It was his defence that those who tried to implicate him in the crime were lying. He was cross-examined at length.
72. The 2<sup>nd</sup> accused Erickson Mugure Masasi also tendered his defence statement on oath and stated that he came from Nairobi on 29<sup>th</sup> May 2020 sent by Kioko to work for Maingi Mukuna who lived in the USA.
73. He reported and worked for the mother of his employer Martha Makuva. His job was cooking and cleaning in the home and in the evening to operate a barber shop. He worked until 12<sup>th</sup> June 2020 when he was arrested and was not told the reason for arrest.



74. He denied killing the deceased, and stated in his long defence testimony that the prosecution witnesses who implicated him were liars. He was cross-examined at length.
75. This is a murder case in which the two accused persons stand charged. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80), the burden is on the prosecution to prove their allegations. This being a criminal case also, the standard of proof is beyond any reasonable doubt – see *Sawe =Versus= Republic* (2003) eKLR.
76. Did the deceased die? With the evidence of the prosecution and the defence on record, in my view the deceased died. He disappeared from home on 6<sup>th</sup> June 2020, and his body found floating in a well on 12<sup>th</sup> June 2020. Post mortem examination was conducted and he was found to have died after his spinal cord was forcefully broken. I so hold and find that the prosecution proved beyond reasonable doubt that the deceased died.
77. Was the death unlawful? No justification for the death or the manner of the death herein was given. Death by breaking the spinal cord cannot be lawful. I find that the prosecution proved beyond reasonable doubt that the death was unlawful.
78. Did the two accused or any of them cause the death? The evidence is circumstantial. For such evidence to prove a criminal action it must point to the guilt of the accused person and there should be no other reasonable hypothesis. Mere suspicion however strong cannot be a basis for sustaining a conviction in a criminal case – see *Sawe =Versus= Republic* (Supra).
79. In my view, the evidence herein against the accused persons is mere suspicion. This is because there is no indication in the exhibits which were taken to the Government Analyst that the DNA tests connects any of them to the death. Secondly, the witness who purported to see them at night carrying a sack containing a human body, was visibly shaking in court, and was initially also a suspect.
80. In addition, the so called shoe marks on the ground where the phone of the deceased was found, were not photographed, and the evidence does not prove that the shoes or shoe marks leading to the phone were from any of the accused persons. In my view, it is quite possible that a third party put those shoe marks there to implicate an innocent person, as there is no evidence that that place was only accessible to one particular person alone.
81. In my view therefore, the prosecution did not prove beyond reasonable doubt that the accused or any of them killed the deceased. On that account they will all be acquitted.
82. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the Penal Code. In my view the viciousness of breaking the spinal code of the deceased twice, proved malice aforethought, which was an intention to kill or cause grievous harm. I thus find that the prosecution proved beyond reasonable doubt the death of the deceased was caused with malice aforethought.
83. For the reason that I have found that the prosecution did not prove that any of the two accused persons killed the deceased, I find that the prosecution did not prove the charge of murder against any of the two accused persons. I thus find each not guilty of murder and acquit both the accused persons accordingly.

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

**GEORGE DULU**

**JUDGE**

