



**Republic v Ondiek & another (Criminal Case 16 of 2017)
[2024] KEHC 39 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 39 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 16 OF 2017
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALEX GORI ONDIEK 1ST ACCUSED

KENNEDY MWINZILA MULYUNGA 2ND ACCUSED

JUDGMENT

1. The two accused persons herein Alex Gori Ondiek and Kennedy Mwinzila Mulyunga stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which being that on the night of 12th and 13th April 2017 at Kanaani village in Kiboko area within Makindu Sub-County of Makueni County with others not before court murdered Titus Kyangaa Kiema.
2. They have denied the charge, and in support of their case, the prosecution called eleven (11) witnesses.
3. PW1 was James Mwitia the Chief of Kiboko area whose evidence was that on 13th April 2017 at 5:00a.m he received a phone call from Martha Murweu a village elder who informed him that some people had attacked a neighbour and a certain young man was injured.
4. He then informed the Kiboko Police through a Sergeant. They then proceeded from the police station to the scene where they saw the injured young man Kennedy Mwinzi who informed them that there was an attack at around 2:00a.m in which he was cut with a panga (machette) and his Kshs. 5,000/= taken away by the attacker whose identity he did not know.
5. It was his evidence that they noticed that the phone of the owner of the homestead Titus Kyamba was ringing, but no one was picking it. The house was locked with a padlock and thus Sgt. Ngoka asked



- for a chair and on climbing the chair and checking, he saw the hand of a person and on breaking the padlock and entering saw Titus lying on the floor in a pool of blood.
6. According to this witness, he saw Titus and noticed that he had injuries in the mouth and neck, and was lying in the kitchen with the phone on the table. He noted that the other rooms were broken into.
 7. They then took the injured boy to hospital where he was admitted while police took photos, and carried the body away. According to him the injured boy was 2nd accused.
 8. In cross-examination he confirmed that 2nd accused was injured. He stated that some stolen items were left outside the deceased's house. He also stated that 2nd accused informed them that some workers had been sacked same day and left. Though he mentioned presence of blood stains from the house of the 2nd accused to the deceased's house he confirmed that such information was not in his witness statement.
 9. PW2 was Rukia Nziku Mutune who operates a butchery. On a date she cannot remember at 8p.m. Wanza a bar waiter from Jamaica Bar ordered meat for a customer.
 10. She sent for employee Mogaga to attend to the customer, who came back and said that the old man stared at him in a vicious way and asked for a half of keg, which they did not have.
 11. It was her evidence that shortly thereafter, the man came and asked why his meat order was not responded to and when she told him that they did not have what he had asked for, he said they cut for him the upper limb. That was done and when the meat was prepared, the man said that he would eat at home.
 12. She never saw the old man thereafter, but at 10:00a.m heard that the old man had died.
 13. PW3 Fredrick Mutuku Musyoka testified that he was a boda boda (motorcycle) operator and that on 12th April 2017 at 9p.m, he was called by a customer Titus at Kiboko who told him to go and pick him up.
 14. He picked him at a bar at 10p.m and dropped him home, though at the home he did not see the two workers whom he knew before. He did not see anybody waiting for the customer at a home.
 15. PW5 was Philip Mbithi Kiema a brother of the deceased who lived at Mombasa. It was his evidence that on 13th April 2017 he was called on phone by the wife of the deceased, who stated that she had received a phone call to tell her to go to Makindu from Mombasa at once. She gave this witness a phone number and on ringing it came out that it was phone number of a neighbour teacher who informed him that Titus had been killed.
 16. The witness then left Mombasa with Celestine the wife of the deceased for Makindu where they arrived at 9p.m and found many people at home and the body already in the mortuary. He noted presence of blood stains and the house was in a mess. He was aware that his late brother had three (3) workers and learnt that one of those workers was in hospital. Next morning they went to the mortuary and noted that deceased had a cut on the forehead, back and the hand.
 17. It was his evidence that two people were arrested for the murder. He had not known 2nd accused person before, but noted that he had an injury on one of his hands. He also testified that the deceased was over 60 years of age, and the children were in America. In cross-examination, he stated he knew 1st accused, who was from Kisii.
 18. PW6 was Martha Wanzila Muthosi a farmer whose evidence was that on 13th April 2017 at 7a.m he was called by Mama Mueni who asked her to accompany her to Kamene's house. They proceeded there and found an injured workman lying down, and bleeding seriously.



19. They tied the injured hand with a piece of cloth. They then proceeded to the house of the deceased and on approaching she called the phone number of the deceased and the phone rang but was not picked. Then the second accused gained senses and said it was the TV of the deceased which was ringing and not the phone.
20. According to this witness, when she asked the 2nd accused where the boss (deceased) was he said that he had not come. The witness then called a neighbour Mukami who informed the Chief about the incident.
21. The Chief then arrived with police officers, and when the phone of the deceased was called it again rang, and the 2nd accused was then asked for a key and gave out the store keys and they opened to get access to the main house.
22. A policeman then climbed on the table and chairs and on peeping inside the main house saw blood stains and suggested that the house be broken, which was done and on entering found the deceased body lying on the veranda near the kitchen with a cut injury in the hand, face, back and head.
23. According to this witness, the 2nd accused person said that the robbers had taken the deceased's phone line, as they could not get the deceased's wife phone number. They thus took the 2nd accused person to hospital. According to this witness, the deceased lived with three workers who included 2nd accused and Alex a mkisii. However, only the 2nd accused was present at the homestead that morning.
24. In cross-examination, he stated that deceased was killed during a robbery, and that they found the 2nd accused already injured and they took him to hospital at 8:00a.m. He stated also that he took the mobile phone of the 2nd accused. He stated that the 2nd accused stated that the robbers took blood in a bottle and sprinkled the same.
25. PW6 was Josephine Musili Kitili who testified in evidence that on 13th April 2017 at 7:00a.m he phoned the deceased, as he was going to work at the deceased's place. The line did not go though and he then called the Zain line which went through but there was no response.
26. He was later called by his son who told him that there was an attack at the deceased's home and a worker had been taken to hospital. They then headed to home and on arrival, learnt of his death, and he saw the body with injuries.
27. It was his evidence that though the wife of the deceased called him from Mombasa, he was not able to talk to her. It was his evidence that he worked for the deceased with two (2) others and one of them Alex who had been sacked and then reinstated. It was his evidence that the deceased had told him on phone to go for work.
28. PW7 was Margaret Wahu Maina a Government Analyst from Nairobi whose evidence was that they received through exhibit memo items from PC Jacob Sukanda from DCI Makindu and he conducted DNA tests as requested.
29. The findings were that scrappings A, B, C and D were blood of human origin. But E slightly stained with human blood. DNA scrapping A matched DNA profile of blood TKK (deceased). DNA scrapping C, D and E matched blood from KMM (accused 2) Kennedy Mwinzila Mulyungi. The brown belt was slightly blood stained on inner side. He produced the signed report, and exhibit memo as exhibit.
30. PW8 number 69366 Sgt. Ronald Ngola whose evidence was that on 13th April 2017 he received a phone call from the Chief James Kioko informing him of a robbery at Kanini village.



31. They proceeded to the scene the home of Titus Kiema and found Kennedy Mwanzili at the homestead who informed them that he had been attacked at 2a.m at night, his left hand cut and was robbed Kshs. 5,000/= . He said that the attackers arrived on a motor cycle and he did not recognize them.
32. It was his evidence that the owner had been brought home at 2:00a.m but did not know where he was. Because he was in pain and bleeding the Chief decided to take him to Makindu Hospital.
33. On going round the home, the windows were intact and door was locked. He asked for a chair and stood on it and on peeping through a small opening on top of the door shutter, he saw blood and asked for a metal bar and broke the padlock entered the house and saw Titus lying in the kitchen in a pool of blood with cuts in the head, cheeks, and right arm.
34. He then called the OCS IP Bill Kipruto and OCPD Harriet Wanyama and DCIO Jimmy Kimaru. According to him the house was a big house.
35. He identified the 2nd accused in court, and in cross-examination confirmed that the 2nd accused was in pain when he talked to him, and alleged that he had been attacked.
36. PW9 was Dr. David Kasanga of Makindu Sub County Hospital who testified in respect of a post mortem report filled by Dr. Makali. It was his testimony that the post mortem report was on the body of Titus Kyanga Kiema done at Makindu Sub County Hospital on 14th April 2017.
37. The major findings were several deep cut wounds on the head frontal and posterior area and left (temporal) side, and another cut extending to the jaw bone. He also testified to deep cut on right shoulder and fracture of radius, and cerebral bleeding. It was his evidence that the cuts were probably caused by a machete. He produced the report as exhibit.
38. In cross-examination, he stated that the attack was by substantial force. He stated that two fractures were compound in nature.
39. PW10 was Sgt. Samuel Mbatia a forensic investigator, also appointed by the Attorney General in 2003 as a Scenes of Crime Officer. He testified that on 13th April 2017 at 11a.m he went to Kanani village in Kiboko area where he met DCIO Mr. Kimani the investigating officer.
40. He saw the body of the deceased Kiema lying near the kitchen door, which door was visibly broken to gain entry. The investigating officer told him to take photographs and he took a photograph which he processed, made a certificate and produced both the photographs and the certificate as exhibits.
41. In cross-examination he stated that he took the photographs for processing in 2021, and that they were processed from a computer disk. He stated that he was transferred after taking the photographs. He confirmed that there were blood stains also in the workers house.
42. PW11 was SP Jimmy Harold Kimaru formerly of CID Makindu, and the investigating officer of the case. It was his evidence that in the morning of 13th April 2017 he was informed of a murder at Kanani area of Kiboko. He then gathered officers Kiplagat, Okoth and Suyanya and they proceeded to the scene at a farm where they found two permanent houses - one a main house, and the other a worker's house.
43. He gathered that the owner Titus was a businessman and owned a bar in Changamwe, Mombasa, as well as a school at Mombasa and teacher training school at Makindu. He gathered that Tuts (the deceased) lived in Mombasa but visited his farm at Kiboko from time to time, and had workers Alex Gori, Joseph Mukeu, who had not been arrested to date.
44. On arrival, he met Sgt. Donald Ngoka in charge Kiboko Police Base, and the 2nd accused Kennedy was also present, and had visible injury on left hand and they rushed him to hospital.



45. According to this witness Kennedy said that he had been attacked at night around 2a.m when he went out for a short call. The witness also stated that his employer had come home the previous night, and that he was the last person to see him. It was his evidence that Kennedy said that Titus was brought by a motor bike (boda boda) at 10p.m the previous night and that he gave him the keys to the house and went to sleep.
46. He also gathered from Kennedy that Titus met the three employees on 12th during the day and in discussions, Titus was not happy with Alex and Joseph and he paid them, and sacked them, and left him alone in employment.
47. This witness also got information from Sgt. Ngoka that Kennedy had told him he did not know where the employer was, and then the Sergeant rang the deceased's phone and when it rang, he peeped into the house and saw the deceased lying down. He then broke the rear door entered the house and saw the deceased lying in a pool of blood.
48. This witness, noted that all the doors were broken and the bedroom was ransacked, especially documents as he saw many documents. He noted the injuries on the deceased, photos were taken and he drew a sketch plan, which he produced as an exhibit.
49. Blood samples, and items were taken to the Government Analyst for DNA testing and comparison. They thus treated Kennedy (2nd accused) as a suspect because the report on blood from the Government Analyst showed stains of the deceased's blood on Kennedy's belt, though he said he did not enter the deceased's house. Kennedy also initially said that Kshs. 5,000/= was taken from him but later asked the investigating officer to pick for him his 5,000/-. He also took Kennedy to be a suspect because when he asked him if the two sacked employees were the attackers, he looked aside and did not say anything, showing he was hiding something. According to him the other two sacked workers switched off their phones, though they later traced one of them – Nyachori.
50. He produced Kennedy's belt as exhibit, phone data report, and Alex mothers Motale phone as exhibits. The witness was cross-examined at length. That was the prosecution evidence.
51. When put on their defences, each of the two accused persons tendered sworn defence and did not call any additional witnesses.
52. DW1 was 1st accused Alex Gori Ondieki who testified on oath and stated that he presently worked in a hotel, and did not kill Titus. He stated that Titus the deceased was his employer until 12th April 2017 at 7a.m when the deceased Titus visited the place of work without notice. He talked to the three workers Alex, Kennedy and Joseph and suspended him and his co-worker Joseph from duty at around 11a.m.
53. He then arranged his things and went to his girlfriend at Emali as he did not have fare. At 10p.m he left bus to Kisii where he arrived on the morning and was there for a month.
54. He then proceeded to a cousin in Mombasa. In the meantime, his phone had a problem and was off most of the time, but he phoned his cousin who informed him that he has found a job for him and sent him fare and on arrival at Jomvu in Mombasa he took him to a job where he was paid on daily basis.
55. When he put his phone on, he saw a missed call from a person he did not know. That person called again and asked where he was and next day, he went and arrested him, and later he was told that he had killed his employer whom up to then he did not know that he had died.
56. On the day of arrest they took him to his house and searched, then locked him up at Changamwe Police Station and at 5a.m took him to Makindu Police Station. At 2p.m DCIO Kimaru informed him that he had killed his employer which he denied he reiterated that he left his employer alive.



57. In cross-examination, he confirmed that on 12th April 2017 the deceased arrived about 6a.m without prior notice. He insisted that he left the place of work at 1p.m not 5p.m. he stated that he left with Joseph but that they parted ways shortly after. He said that though his phone number was 072-857525 – at the time of arrest, he was not using this number as he had bought another phone number.
58. The second accused Kennedy Mwinzila Mulyunga testified as DW2. It was his sworn testimony that before arrest he worked as a farmer. He agreed that the deceased was his employer but denied that he killed him on the night of 12th/13th April 2017.
59. According to him, on 12th April in the morning, they went to the farm with Alex and Joseph and weeded vegetables. At around 11a.m the employer Titus arrived from Mombasa without notice. The employer was not happy with the work done and after talking to all the workers, the employer sacked Alex and Joseph and refused to pay them for work done to that date.
60. The deceased then left in public bus to Makindu, and the two sacked employees said they were waiting for the employer to come and pay them. According to him around 7p.m Alex and Joseph left, and between 10p.m and 2a.m the deceased was brought by a motor cycle rider. He knocked at his door and the gave him his key and he left to his house.
61. He also testified that shortly after deceased left for his house, he went to the latrine outside the house and saw people emerge, one tall and the other short, and ordered him to give them the money for selling vegetables Kshs. 5,000/= . They then proceeded to the house and took the money forcefully, cut his hands and left him out at the veranda. After a while he fainted from the excess bleeding.
62. In the morning he found that his clothes had been removed and a neighbour came and phoned the Chief. According to him, when the Chief and the police came to the homestead, they phoned the deceased and the phone rang but there was no response; then they peeped through a window and saw the deceased lying there.
63. They then broke the door and entered, and then took him to Makindu Hospital where the deceased’s wife and children visited him. He was asked about the whereabouts of Alex and Joseph and he said that he did not know. It was his evidence that on leaving hospital DCIO Kimaru recorded a statement from him. In July he was told that Alex had been arrested, and when he said that he did not have useful evidence, he was charged with Alex.
64. In cross-examination, he stated that he was employed by Titus in December 2016, then left and was thereafter re-employed. He insisted that the attackers demanded Kshs. 5,000/= . He maintained that he did not identify the faces of the attackers and also that Titus came back home between 10.m and 2a.m and that he gave him the key. He stated that he only realized in the morning that Titus had also been attacked.
65. This is a case of murder brought against the two accused persons. In accordance with Section 107 of the *Evidence Act* (Cap.80), the burden is on the prosecution to prove every element of the offence against each of the two accused persons.
66. This being a criminal case, the prosecution is bound to prove their allegations against each of the accused persons beyond any reasonable doubt – see *Sawe v Republic* (2003) eKLR.
67. Did the prosecution prove beyond reasonable doubt that the deceased Titus died? The evidence of the prosecution witnesses was that his body was found in his house on the morning of 13th April 2017. The evidence of 2nd accused is that he was attacked at the house of Titus but did not know that Titus was



- dead until he was so informed. The medical evidence is that Titus died and a post mortem examination was conducted which showed that he died of severe cut injuries caused by a weapon like a machette.
68. In my view, the prosecution proved beyond reasonable doubt that Titus died.
 69. Was the death unlawful? No lawful reason or circumstance has been given to justify the death. There was no doubt that he was attacked in his own house at night and brutally cut as a result of which he died. I find that the prosecution proved beyond any reasonable doubt that the death of Titus was unlawful.
 70. Was the death caused by both accused persons or any of them? There was no doubt that both accused persons were employees of the deceased. The deceased is said to have sacked the 1st accused and another worker in the morning of 12th April 2017 without paying them. The deceased died the same night from cut wounds. The murder weapon was not recovered.
 71. Nobody witnessed the incident. The evidence on record is that only the 2nd accused was at work on that night. He had a serious cut wound on the hand and was rushed to hospital. He is said to have had a belt which had some blood stains matching the DNA of the deceased.
 72. The evidence of the prosecution on who killed the deceased is circumstantial in nature. To sustain a conviction the inculpatory facts have to be consistent with only the guilty of an accused person and be incapable of any other hypothesis than guilt.
 73. With regard to 1st accused the allegation is that he was sacked on 12th April without pay and he was annoyed. He could also not be traced on phone for some days or more than a month. In my view, the evidence on record is not sufficient to connect him to the death of the deceased.
 74. With regard to 2nd accused, he was at the homestead that night. The investigating officer said that when he asked him about whether the two sacked employees killed the deceased he looked aside and did not answer. His belt was also said to have blood stains matching the DNA of the deceased.
 75. In my view, the evidence on record creates strong suspicion against the 2nd accused, but not sufficient to connect him to the death of the deceased. Firstly, the accused person was viciously attacked and lost consciousness, so his memory might not be particularly good. Secondly, with the attackers of the deceased attacking him it cannot be ruled that traces of blood stains of the deceased would be noted with him. We have not been given the quantity of blood that was found on his belt, and we have not been told that he was found in the morning. In my view, if he was involved in the killing substantial amounts of blood stains would be found on him.
 76. With regard to him turning away when asked about the involvement of the two sacked workers, that is not evidence that would connect him to the killing as he said specifically that he was not able to recognize the two attackers. I thus find that the prosecution did not prove beyond any reasonable doubt that the 2nd accused killed the deceased.
 77. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the [Penal Code](#) – as an intention to cause death or do grievous bodily harm. With the vicious injuries suffered by the deceased, I find that the death was caused with malice aforethought.
 78. For the reason that I find that the accused persons did not cause the death of the deceased, I will have to acquit them.
 79. For the above reasons, I find that the accused persons are not guilty. I thus acquit each of the two accused persons of the offence of murder. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.



GEORGE DULU

JUDGE

In the presence of:-

Ms. Nusura – Court Assistant

Ms. Omolo for State

Both accused

