



**Director of Public Prosecutions v M’sobere (Criminal Case
E019 of 2022) [2024] KEHC 2862 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E019 OF 2022
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

MUNG’ATHIA SAMUEL M’SOBERE ACCUSED

JUDGMENT

1. Mung’athia Samuel M’Sobere (Accused) is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) in that on 12th March, 2022 at Kithare village, Muringene Location in Igembe Central Sub-County within Meru County murdered Julius Muriungi M’Limbere
2. The prosecution case as narrated by one Faridah Kendi, the daughter to Julius Muriungi M’Limbere (Muriungi) is that on the morning of 12th March, 2022, her grandmother, Maritha Ciobarita requested her to travel home because her father Muriuni was sick. She arrived home to find her father lying on the bed looking sickly and upon asking home what had happened informed him that he had been assaulted by their neighbour one Mung’athia at the home of one Kabuthia who she said informed her that her father was assaulted by Mung’athia.
3. Noticing that her father was unable to walk, she escorted him to Maua hospital where he was treated as an outpatient. His condition did not get better and some days thereafter, she escorted him to Meru Teaching & Referral Hospital where an X-ray revealed an injury to the head. He was subsequently admitted in the ICU and unfortunately died on 12th April, 2022.
4. On 23rd March, 2022, Patrick Mutembei, visited his father-in-law, Muriungi who was lying in bed, sick and he informed him that he had been assaulted by Mung’athia (Accused). He accompanied Faridah Kendi to take Muriungi to hospital where he was treated as an outpatient. On 09th April, 2022, he again accompanied Kendi to take Muriungi to hospital where he was diagnosed with an injury to the



head. In an attempt to try and save his life, Muriungi was transferred from Meru Teaching and Referral Hospital to Kenyatta National Hospital on 11th April, 2022 but unfortunately died the following day on 12th April, 2022.

5. Joel Karitha Karani went to the home of one Stanley on 21st March, 2022 where he found Mungathia (Accused) who informed him that Muriungi had injured him on the chest. That Muriungi who looked sickly was lying inside the house of Stanley and Stanley informed the witness that Muriungi had been assaulted by Mungathia(Accused) and Muriungi on the other hand told him that he was assaulted by Mungathia (Accused) after they quarreled over some 100/-. He stated that he escorted Muriungi to his home and later learnt that he had died.
6. Samuel Mithiini stated that on 21st March, 2022, he went to the home of one Stanley to drink changaa and there found Muriungi, Mungathia(Accused), Stanley and Stanley's wife. He said he saw Mungathia (Accused) attempt to snatch a 100/- note from Muriungi and when Muriungi refused, Mungathia (Accused) who was armed with a rungu hit Muriungi thrice on the stomach and twice on the head sending him sprawling to the ground. The witness stated that he escaped from the scene and later learnt that Muriungi had died.
7. An autopsy report dated 22nd April, 2022 by Dr. Kibet and Dr. Zuriel of Kenyatta National Hospital revealed that Muriungi suffered massive chronic subdural hematoma on right side with features of raised intracranial pressure and died of traumatic brain injury secondary to blunt trauma (assault).
8. After investigations, Mungathia (Accused) was subsequently arrested on 14th April, 2022 and charged.
9. In his sworn defence, Accused denied the offence and stated he was in Mararal between 21st and 24th March, 2022 doing his business of selling miraa. His witness Joseph Kanyaru stated Mungathia (Accused) arrived in Mararal on 22nd March, 2022 and remained there until 24th March, 2022.

Analysis and determination

10. Section 203 and 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
11. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the Muriungi, that Accused person caused the said death and that he was actuated by malice.

a. The death of the deceased

12. The postmortem form tendered in evidence PEXH. 1 reveals that that Muriungi suffered massive chronic subdural hematoma on right side with features of raised intracranial pressure and died of traumatic brain injury secondary to blunt trauma (assault).

b. Proof that accused person committed the unlawful act which caused the death of the deceased

13. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of the Constitution which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.



14. Lord Denning in the case of *Miller vs. Minister of Pensions* (1942) A.C. stated as follows: -
- “It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”
15. The degree of proof in criminal cases was properly established in the classic English case of *Woolmington vs. DPP* 1935 A C 462. Similarly, in *Bakare vs. State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
16. Accused raised the defence of alibi and shifted the burden to the prosecution to displace the defence of alibi. The Court of Appeal in the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR stated that:
- “It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution”.
17. The incident in which Muriungi was assaulted is said to have occurred at the home of one Stanley. Samuel Mithiini stated he was at the said home on the material date and saw Mungathia(Accused) attack Muriungi with a rungu after his attempt to snatch from him a 100/- note failed.
18. Joel Karitha Karani arrived at the scene immediately thereafter to find Stanley, his wife, Mungathia (Accused) there with Stanley informing him that Muriungi who looked sickly and was lying inside the house of Stanley had been assaulted by Mungathia(Accused).
19. From the evidence by the two witness, Accused was not only placed at the scene of crime but was identified as the person that assaulted Muriungi inflicting the fatal injuries.
20. Accused’s defence of alibi was not corroborated his witness having said that he saw Accused in Mararal not on 21st March, 2022 when the offence was committed but a day later.
21. From the foregoing, I find that the prosecution has discharged the burden of proving the falsity of Accused’s defence of alibi.
22. Other than the evidence of the eye witness Samuel Mithiini, there is evidence that before he died, Muriungi informed his children Faridah Kendi and Patrick Mutembei that he had been assaulted by Mungathia (Accused). Muriungi’s dying declaration that he was assaulted by Mungathia (Accused) was well corroborated by the evidence of Samuel Mithiini.
23. From the foregoing, I am satisfied that Mungathia (Accused) has been identified as the perpetrator of the unlawful act that culminated in the death of the Muriungi.



Malice aforethought

24. In *Morris Aluoch v Republic* Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of *Rex vs Tubere S/o Ochen* (1945) 12 EACA 63 with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed.....”.

25. In this case, there is evidence that Mungathia (Accused) inflicted two blows on Muriungi’s head. The repeated blows on Muriungi’s head caused him to suffer massive chronic subdural hematoma on right side with features of raised intracranial pressure and he subsequently died of traumatic brain injury secondary to blunt trauma (assault) after going through more than one month of suffering which caused him to be transferred from Meru to Kenyatta National Hospital’s intensive care unit (ICU).

26. The injuries inflicted on Muriungi were aimed at the most delicate parts of the body i.e the head and Accused ought to have known that such grave injuries could possibly cause grievous harm or the death of Muriungi.

27. Right to life is protected by Article 26 of the *Constitution* and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law.

28. The case of *Republic v Boniface Isawa Makioid* [2016] eKLR cited with approval the holding in *Gusambizi Wesonga –vs- Republic* [1948] 15 EACA 65 that: -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”

29. In this case, it been demonstrated that Accused assaulted Muriungi when his attempt to snatch a 100/- note from Muriungi failed. If It is sad that life can be plucked off a man over a 100/- note.

30. In conclusion, I notice that the charge sheet refers to 12th March, 2022 as the date the offence was committed yet all the witnesses except PW1 testified concerning 21st March, 2022.

31. I have considered whether the aforementioned contradiction is so material as to affect the trial. As was held by Ugandan Court of Appeal in *Twehangane Alfred v Uganda* (Criminal Appeal No. 139 of 2001) [2003] UGCA 6 (17 February 2003):

“.....With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

32. In this case, the defence by Mungathia (Accused) and his witness demonstrate that they were aware that the accurate date that the offence was 21st March, 2022 and not 12th March, 2022 as stated in the charge sheet. The contradiction noted is minor and did not prejudice Mungathia (Accused) in any way.

33. Having considered all the evidence in this case, I reject the defence and find that the prosecution has proved the charge of murder against Accused. Accused is thus found guilty and is convicted accordingly.



DATED THIS 14TH DAY OF MARCH 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused 1 - Present

For Accused - Ms. Musyimi Advocate

For DPP - Ms. Rotich (PC -1)

