



**Director of Public Prosecutions v M'muchui (Criminal Case
7 of 2018) [2024] KEHC 6265 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 7 OF 2018
TW CHERERE, J
MAY 23, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

JOSEPH THARAI M'MUCHUI ACCUSED

JUDGMENT

1. Joseph Tharai M'Muchui (Accused) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code in that he murdered one Philip Itharei Mugambi on 17th January, 2018 at Giakii Location in Imenti North Sub County within Meru County.
2. The 1st witness Stellah Karugu stated that he used to work with Accused and one Philip Itharei Mugambi (Itharei). On 17th January, 2018 at about 02,00 pm, she heard another of her co-workers, one Salome Kuri screaming. She rushed to the scene and found Itharei lying outside the kitchen bleeding from the mouth. She stated she saw a piece of wood where Accused was standing next to where Itharei was lying down. She confirmed she neither saw accused armed nor assaulting Itharei.
3. The 2nd witness Francis Kanyoki visited the scene long after Itharei died. He reported the matter to the police.
4. PC Charles Mwangi too visited the scene long after Itharei died. He removed the body to the mortuary and arrested Accused. He tendered an autopsy report PEXH. 1 filled by Dr. Muthuri which reveals that Itharei suffered skull fracture of temporal region and had died of severe head injury and intracerebral hematoma secondary to blunt trauma.
5. In his defence, Accused confirmed that Itharei was his workmate. He stated that Itharei returned home drunk and fell on firewood from which he injured his head.



Analysis and Determination

6. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence. Any doubt raised by an accused person is to be given to that accused.
7. I have considered the evidence on record and the issues for determination is whether the DPP has proved the three main ingredients of murder i.e the death, that Accused person/s committed the murder and that they were actuated by malice. (See Anthony Ndegwa Ngari v Republic [2014] eKLR and Republic vs Andrew Muecha Omwenga).

a.The Death of the Deceased

8. That Itharei died was confirmed by a postmortem form PEXH. 1 which reveals that he suffered skull fracture of temporal region and had died of severe head injury and intracerebral hematoma secondary to blunt trauma.

b.Proof that Accused Person committed the Unlawful Act which caused the Death of the Deceased

9. The onus to adduce evidence under Section 107 (1) of the Evidence Act to establish the guilt of the accused remains on the prosecution throughout the trial. The degree of proof is one that is beyond reasonable doubt within the scope of the principles in Woolmington v DPP (1935) AC 485 and as stated by Lord Denning J in Miller v Minister of Pensions (1947) 2 ALL ER 372

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability proof of beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as 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, then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

10. None of the prosecution witnesses stated that they saw Accused or anyone else kill Itharei. From the evidence by the prosecution witnesses, I gathered that Accused was suspected to have killed Itharei for the reason that they were workmates and he was found at his place of work next to where Itharei was lying dead.
11. Whereas there is strong suspicion against the Accused, the Court of Appeal in Erickson Chengoli Wanyonyi v Republic (2018) eKLR stated as follows concerning suspicion: -

“We find that there was no circumstantial evidence adduced against the appellant that could lead to the inescapable conclusion that he was guilty of the murder of the deceased. All there was, was suspicion, but a court of law cannot act on mere suspicion no matter how strong.
.....”

12. Accused explained that Itharei fell out of drunkenness and injured his head. There was no evidence that the injuries on Itharei's could not have been sustained by a fall.
13. From the foregoing, I find that the evidence on record is based on suspicion and falls short of prove beyond any reasonable doubt that Accused committed the unlawful act which caused the death of Itharei.



Malice Aforethought

14. The prosecution having failed to prove actus reus', it would be futile for this court to delve into the issue of malice aforethought.
15. From the foregoing analysis, I find that Accused Not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and hereby acquit him under Section 322 (1) of the Criminal Procedure Code.
16. Accused shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU 23rd DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For Accused - Mr. Maheli Advocate

For DPP - Ms. Rita Rotich (PC-1)

