



**Director of Public Prosecutions v Kalung'e (Criminal Case
29 of 2017) [2024] KEHC 7156 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 29 OF 2017
TW CHERERE, J
JUNE 12, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

TONNY MANYARA KALUNG'E ACCUSED

JUDGMENT

1. Tonny Manyara Kalung'e (Accused) is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*.
The particulars of the charge are that on March 27, 2017 at about 13.30 hrs at Kathelwa sublocation within Igembe Central sub-county within Meru County jointly with others not before the court murdered Philip Mutuku Mathias
2. Accused person denied committing the offence and the prosecution called a total of two (2) witnesses in support of their case.
3. Japhet Alphan Mugambi stated that on the material date, he left church with his pastor Philip Mutuku Mathias (Mutuku) and drove to a shopping Centre where they met Accused who was unknown to him but who appeared familiar to Mutuku.
4. That the three of them left the shopping centre and walked to Accused's home and after sometime left Accused and Mutuku chatting as they sat outside the house. That an hour later, he received information that Mutuku had been murdered. He returned to Accused's home and found Mutuku's body on the same spot he left him chatting with Accused.
5. PC Antony Karua visited the scene where Mutuku died and found his body which had 4 bullet wounds and caused it to be removed to the mortuary. Five spent cartilages were recovered at the scene of the murder. Accused was later the same day arrested at a private hospital tand was subsequently charged.



6. With the consent of the defence, PC Antony Karua tendered the postmortem Pexh. 2 filled by Dr. Karani on April 4, 2017 which reveals that Mutuku died of cardiopulmonary arrested due to multiple bullet injuries causing severe head, chest and cardiac injuries and shattering of brain, lungs and heart.
7. In his defence, Accused denied the offence. He however conceded that he had met Mutuku who had been sent by Mrs. Kaithai who used to sell motor cycles so that he could introduce him to a man that was interested in buying a motor cycle. He stated that they went to his home and he had gone inside the house when he heard screams. He went out to find three men who had subdued Mutuku and he was instructed to lie down next to Mutuku. That Mutuku was shot dead. Accused said he managed to escape and injured his hand. He was later arrested at a private hospital where he had gone to seek treatment for the injured hand and charged.
8. Henry Kobia who is a neighbor of Accused's parents said he heard gunshots and saw Accused running through his farm. He later went to the home of Accused's parents of Accused's parents and found a man lying dead.

Analysis and Determination

9. 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.
10. I have considered the evidence on record and submissions filed on behalf of Accused and the issue 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).

a. The Death of the Deceased

11. That Mutuku died was confirmed by a postmortem form filled by Dr. Karani on April 4, 2017 in which he found that Mutuku died of cardiopulmonary arrested due to multiple bullet injuries causing severe head, chest and cardiac injuries and shattering of brain, lungs and heart.

b. Proof that Accused Person Committed the Unlawful Act which Caused the Death of Mutuku

12. Witnesses who testified for the prosecution did not witness the commission of the offence. From the evidence on record, Accused was charged on the basis that he was the last person that was seen with Mutuku alive.
13. In the case of [Stephen Haruna v The Attorney General of the Federation](#) {2012} LPELP 782 the Court had stated thus:

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.”
14. Accused explained that Mutuku was shot by unknown gunmen who escaped after the shooting which evidence was not controverted.



15. In *Elizabeth Waitibiegeni Gatimu vs. Republic* [2015] eKLR, Mativo, J (as he then was) stated that:

“To my mind, the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

16. I have weighed the defence by Accused person vi a vis the prosecution case and I find that Accused has offered an explanation of what he knows about the death of Mutuku which explanation is in my considered view probable and creates a reasonable doubt concerning his guilt.

17. Under the provisions of Section 322 (1) of the *Criminal Procedure Code*, Accused is found not guilty. He shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU 13TH DAY OF JUNE 2024.

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For Accused persons - Ms. Asuma Advocate

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

