



**Republic v Meme (Criminal Case 15 of 2017) [2024] KEHC 7622 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7622 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 15 OF 2017  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER MUNG'ATHIA MEME ..... ACCUSED**

**RULING**

1. This is a decision of the court at the stage of case to answer pursuant to section 306 of the Criminal Procedure Code. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that he on 10<sup>th</sup> February 2017 at Akirang' Ondu location murdered Muthuri Mutia and upon plea of not guilty to the charge, the matter proceeded to trial with the prosecution calling 4 substantive witnesses to prove the charge.
2. The court has considered as required under section 306 of the Criminal Procedure Code whether there is the evidence that the accused persons or any of the accused persons committed the offence. At this stage, the court considers the prosecution evidence to establish whether a prima facie case exists, which as held in *Ramanlal T. Bhatt v. R* (1957) EA 332, 335 is "one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." Where the court finds that a prima facie case has been established as held in *Kibera Karimi v. R* (1979) KLR 36 (*Trevelyan & Todd JJ*), the court does not give the detailed its reasoning so as not to prejudice the fair trial of the case by giving the impression that the court has already made up its mind without hearing the defence. See also *Festo Wandera Mukando v. R* (1976 – 80) KLR 1626 and *Antony Njue Njeru v. R*, Nairobi C.A. Cr. Appeal No. 77 of 2006.
3. Where the court considers that there is not established a prima facie case, the accused is entitled to an acquittal, see *Murimi v. R* (1967) EA 542 and *Wachira v. R* (1975) EA 262, and the Court is required to give full reasons for the decision.



## **Ingredients of the offence of murder**

4. The ingredients of the offence of murder have been accepted as set out by Etyang, J. in *R. v. Nyambura & 4 Others* (2001) KLR 355, as follows:

“There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction, namely:

- a. The death of the deceased, and cause of death
- b. That the accused committed the unlawful act which cause the deceased’s death; and
- c. That the accused had malice aforethought.

The issue for determination in this case is whether these three ingredients of murder have been proved by the prosecution beyond reasonable doubt.”

5. Similarly in this case, the issue for determination at the stage of ruling on a case to answer is whether the prosecution has made a prima facie case for the offence of murder to warrant the accused being placed on his defence. If not, he is in terms of section 306 (1) of the Criminal Procedure Code, to be acquitted of the charge in a full judgment of the Court.

## **The Evidence**

6. The evidence adduced by the Prosecution before the court is set out in detail as follows.

7. PW1 Jakubu Kiunga testified that -

I know Karuti. Who is before the court. Benjamin also in court. They are now witnesses. I did not see any other person but I know except the accused (points) who is Mung’anthia. I know Mung’anthia as a villager for my whole life.

In February, 2017 in the village of Nguthokia, Mungathia threatened to kill any person who interfered with his work. He did not name the person who was threatening. On the following morning at about 8.00a.m. We heard that there was person who had been killed.

It was after about 2 months since we heard him say that he would kill someone. The person who was killed is a village mate called Muthuri. He was killed at a shamba belonging to a man called Ntuala which is near the boundary with the shamba. Paul Mungathia body was found at the boundary on the shamba of Ntuala.

The accused used to work at Paul Mung’anthia’s shamba to guard Miraa and take care of the shamba. The deceased Muthuri was mentally challenged. The accused worked at Paul Mung’anthia’s shamba as the only worker.

When the accused said he would kill any person who interfered with his working he meant any person who stole his miraa he would kill him.

He used to guard the Miraa with a knife a spear and bow and arrow. I went to the scene. I heard deceased’s sister screaming and I went to the scene. I saw Muthuri lying and I called him but he did not respond. I did not touch him. He was lying on his stomach facing the ground. He was dead but we did not see any place of injury.



On that morning I saw the accused. I did not speak with him they were with Muthuri's father. When asked by the people what had happened he only said he did not know.

We called the sub-area Manager and he came with police officers. On inspecting the body had a stab wound on the right rib and he had a burn works on the left arm since was hit with metal for marking cattle during branding.

The body was taken and Mung'anthia was arrested. When asked to produce the weapons used he called for the weapons and they were brought. It was a spear, arrows. I only saw a spear and a panga. He was taken by the police with the recovered weapons.

Muthuri the deceased was mentally challenged and he used to be taken care of at home sometimes he could run away from house when at home did not know. The mother of the deceased is also dead. Even the father of Muthuri is mentally challenged.

8. On Cross – examined by Mr. J. Mutuma he said-

I did not see the accused killing anyone. The body was recorded on Ntuala's shamba. (Witness is referred to statement there was no reference to the accused being asked to bring his weapons)

It is true that I did not record the fact of accused being asked to bring weapons. Accused and Muthuri are neighbours. Even on the following day accused was present. He did not run away. He was arrested on the same place.

(Statement that accused had threatened witness to kill him) the accused has said that I was one of those who were interfering with the Miraa. I did not report to the chief or area manager. I was advised by our parents not to quarrel with Mung'anthia.

Court: Are you related with accused?

Witness: I am an in law of the accused. My wife is a relative of the accused.

Mr. Masila in re – examination statement was written. I was not asked for information on weapons.

Court

Mr. Mutuma J: We pray for the statement of PW1 to be produced.

Court: The investigating officer shall produce statement of PW1 evidence.

9. PW2 Flora Kawira testified that –

I know the accused. He is a village mate at Nguthukire village.

On February, 2017 at about 9.00a.m. I was called by Murithi. He told me to go and see Muthuri was lying on the ground. Muthuri is my brother. I went to the scene. I went there and found Muthuri lying on ground in the shamba belonging to Ntuala. He was lying facing down to the ground. I tried to calling and there was no response. I started screaming. People came but I collapsed in shock because of what I had seen.

Later, when I came to, I saw many people wand when I was taken home I saw the men who came for blanket for Muthuri.

On 16<sup>th</sup> February, 2017 at a family meeting we agreed to pursue the matter and asked that any person who had information should be taken before Njuri-Nchke. Kalingi came and



told me that he saw petrol. He is Isaiah Kalunga. He said he saw Petero the accused pointing killing Muthuri. He said he saw Muthuri killing the deceased and when he saw he run away.

Kalunge was in the same village. When I was told that Isaiah killed my brother and asked Geoffrey Mukaria and told him to get the information from Isaiah. Geoffrey is a villager.

Geoffrey went and met Kalunga and when Geoffrey came later he told me it was true. Isaiah Kalenge and Geoffrey went to record statement.

Isiah Kalunge told us that he saw accused killing the deceased about 5 days after the incident. He told me that he was afraid of telling earlier. Accused used to work as a guard for Miraa at a school next to where Muthuri was found. Accused was guarding Miraa.

Deceased was healthy. He was however sickly and the stomach ailment and suffered frequently.

10. On Cross – examination she said-

Did deceased suffer mental illness?

Yes, he had a mental illness but he went to hospital and he was okay. At the time of the incident he was okay.

You fainted on seeing the body?

Yes, when I called him and he did not respond and I saw some blood and screamed.

I did not see the accused at the scene. When I got to the scene which was about 9.00a.m. In the morning the deceased was on Ntuala's land. The person was Isaiah. It was on 11<sup>th</sup> February, 2017. Isaiah came on 16<sup>th</sup> February, 2017. It was 5 days later. He said he saw Petero killing the deceased.

(Statement of Isaiah states it was at night 9.00p.m.) I went to the scene at 9.00a.m. When I was called. When Isaiah told me about what he had seen. We were with others but he did not tell mw while the others were here. When I screamed people came. Petero was not there. I did not see Petero when people came.

Did you see any weapons?

Petero was asked to bring out weapons after the body was taken. It was after the body was taken.

I did not see Petero. I was not there when body was taken. When I came in the morning Jacob may have been there. I saw people going with weapons.

Did you see him being forced to produce weapons?

I was not there but I could hear from my house where I was. Even my house to the shamba is a distance. When he was being asked to produce weapons. It was a distance of about 50-100 meters.

11. There was no Re – examination.

12. PW3 Dr. Nkonge Lina testified on behalf Dr. Beth on the deceased's Post mortem report of 21<sup>st</sup> February, 2017 as follows:

Deceased's body had no clothes. Age not indicated. 168 height.

Body had stayed the body had started decomposition.

Body

Blood on the face and the chain, blood on the chest, there was an injury on the front chest 4\*8cm and depth directly stabbing.



Internal

There was blood on the left chest area, no injuries on the head, stomach, and spinal cord.

Cause of death

Severe bleeding as result of stabbing on the chest. Post mortem was filed and stamped on 21<sup>st</sup> February, 2017 at Meru Level 5. I have the post mortem

Court: MFI postmortem

13. On Cross – examination by Mr. Mutuma, the witness said-

The postmortem shows the person who identified the body are Geoffrey Mukaria and Patrick Karothe.

Mild decomposition on the body, skin had started peeling off. the body was preserved, but the post mortem was done about 10 days later. Samples of the accused?

There was no samples taken.

14. There was no Re – examination.

15. PW4 PC Peter Mburu of Kangeta Police Station testified on behalf of his colleague-investigating officer who was transferred to Athi River. On objection by Counsel for the accused, the Prosecution called PW 5 Sammy Kamathi Abio, of Mungero Police Station Athi River, Initially attached at Kangeta Police Station in 2017 who testified as follows:

“I am the Investigating Officer in this case.

On 11/2/2017 at 11:39 am. I was at Kangeta Police Station. The deceased brother in law Geoffrey Mukaria bought a report that he had seen the deceased body in the farm of James Karungi. He said he had got the information from the one Evans Mwirigi who was herding the family cattle. He had told her sister Flora Kawira and a neighbor Kathuni that he had discovered the body of the deceased I the shamba.

When the two went to see the body, they screamed in shock and other people came to witness what was happening.

After exercising the right, we asked for Maua police vehicle No. GKA 971G Landcruiser and we went to Ngathuku village.

When we arrived at the scene we found the body. One could not see the footprints properly as they had been rubbed off by the cattle. I took a rough sketch. The body was facing downwards with its oozing from the mouth. When we turned her over, we saw that he had been stabbed on the chest and was bloody at the place of stabbing.

With the assistance of my colleagues and members of the public we took the body took it to Meru Level 5 Hospital. On return to Kangeta Police Station, we found the accused had been brought in by members of the public with a metal spear. We took him to Maua Police Station cells.

On 13/2/2017, the accused told me during his statement that on 10/2/2017 at 12:00 noon he was taking his miraa. At 10:00pm in the night. He had gone to check on the shamba where he worked as guard. The shamba belonging Petro Munga’thia, He then went to sleep. In the following morning while coming from home, he had found a crowd of people assembled at the shamba of James Kaunyangi. When he went to see what was happening he found that it



was the body of deceased Daniel Muthuri Mwathia. He then went to mourn with the family of the deceased.

On 14/2/2017, Paul Kalunge made a statement that 2 weeks before the death of the deceased, the accused had told him that he would kill somebody. Paul Kalunge said he had told the accused that he could kill him. Another witness Bernard Thurairia recorded a statement that while taking tea at a Joshua's hotel, the accused had told him that he would kill somebody.

Isiah Kalunge had gone to look for miraa to eat at the shamba of James Kalunge and had seen the accused holding the deceased from the back and pulling him and when he tried to pull off, the accused pulled back and stabbed him on the chest.

The deceased had fallen down. Isiah Kalunge had asked the accused why we had stabbed the deceased but the accused did not respond. When the accused went away, Isiah Kalunge went to see how the deceased had fallen and he was kicking his last as he died. Isiah Kalunge went away without telling anyone, when the members of the public threatened to take the matter to Njuri Ncheke, Isiah Kalunge went quietly to the deceased's sister Kawira and told that he had witnessed Petro Mungathia killing the accused.

Flora Kawira told Geoffrey Mukaria to find out from Isiah Kalunge whether it was true. On asking Isiah Kalunge, Kalunge told Geoffrey that it was true that he had witnessed.

Geoffrey Mukaria asked Isiah Kalunge to help by writing a statement.

On 22/2/2017, Isiah Kalunge recorded his statement that he had witnessed the accused killing the deceased.

I was the first person to get to the scene. I took a rough sketch. It had been disturbed. There was a house nearby. It was about 500 metres away.

The house was occupied but it was the kind used by nomadic people.

The deceased had clothes. We saw the injury when we tried to remove the clothes to see where the injury was.

The accused was brought in by members of the public. I never went to house of the accused.

Why did Kalunge not report to the police?

He was fearing for his life that he could be killed by the accused. I recorded my statement fearing.

I never got to know where the accused had been arrested.

When the accused was recording his statement said that if he had not been taken to Police Station he would be killed and buried.

I see the metal spear I wish to produce the spear as an exhibit.

Court:

PEX No. 2 spear metallic.

Isiah Kalunge said the accused had the spear together with a knife. The knife was not recovered.



The relationship between accused and deceased were neighbours. Isaiah Kalunge stated that he had witnesses the killing and asked hi why he was doing it.

16. On Cross Examination by Mr. J. Mutuma the witness said-

[It is put to the witness that only 2 witness testified as Jacob and Flora].

There was no Isaiah Kalunge?

He should have testified before the court. I was never told that Isaiah Kalunge had not testified. I am not to blame for failure to produce Isiah.

It is only Isaiah who told me he had witnesses the killing. The witnesses who have testified did not witness that.

The spear was brought in by the members of the public when they brought in the suspect. I do not visit the accused's house I did not follow to find where the spear was recovered. I do not know where the spear came from.

Geffrey had been told by Flora that Isiah had said he witnessed the kill. Geoffrey had asked Isiah to recovered a statement. Geoffrey then asked Isiah to recover a statement. Geoffrey Mukaria only filled the report. He did not record any statement. I did not recovered any statement. I did not record the statement for Geoffrey Mukaria. The parcel of land where the body was discovered belonged to James Kalunge. I did not record the statement of James Kalunge. The shamba did not belong to the accused. Accused was guard of miraa at Paul Mungathia.

I did not record a statement for Paul Mungathia.

[The parcels of land are for apart in James Kalunge and Paul Mungathia ]

I did not visit the shamba. I do not know the distance.

The accused said that he guarded the shamba then went to sleep. I did not follow to see whether he was at the scene.

I have the spear and statement of Isaiah to show that it was accused who killed the deceased. There is no electricity in the area. I do not know whether there was moonlight.

Isaiah Kalunge was not produce as witnesses. I was let down.

17. There was no Re-examination by Counsel for the Prosecution, Mr. Magoma, not having any further witnesses closed the prosecution's case.

18. Counsel then made respective submissions on the matter as follows, and ruling was reserved.

"Mr. Mutuma

I pray to submit - We urge the court to find the prosecution has not established a case.

The only two Civilian witness PW1 and PW2 admitted on cross examination that they never witnesses anything pertaining to murder and they could not place accused on the same.

Only two exhibits, a post mortem and spear which was brought in by members of public who we have not been told who they were. The Investigating Officer testimony on one Isaiah who has been brought before the court to testify. In the absence of any eye witness, with the evidence of the witnesses who testified and to hearsay. We urge the court to find that no evidence regarding a prima facie case has been placed before the court.



The mistake of the Investigating Officer which he has clearly admitted should not be rounded on the accused.

Mr. Magoma

We submit we have established a prima facie case.

Deceased was killed he was stabbed. The failure to call eye –witness notwithstanding, the circumstantial evidence is stronger than the eye witness. The accused should be put on the defence. We have established the case by the 5 witnesses produced.

Mr. Mutuma in reply

Circumstantial evidence is only available if then the evidence was not available to the prosecution. The prosecution did not produce any witness of eye-witness.

The Investigating Officer did not visit the scene of crime to consider the distance between the shamba where body was found and where accused was guarding miraa.

The prosecution had the testimony of witness who was an eye witness but they did not call them.”

## **Determination**

### **Death of the deceased**

19. Death and cause thereof were established. PW3 was the doctor who testified on behalf of the examining doctor who certified the cause of death of the subject of the murder charge as severe bleeding as a result of stabbing on the chest.

### **Accused’s involvement**

20. PW4 sought to testify on behalf of the investigation officer who investigated the case and to produce the statement of the former I.O. under section 33 and 77 of the *Evidence Act*. On objection by the defence that the I.O. who was available and could be called to present his own statement, the Court adjourned to afford the prosecution to call the investigating officer as PW5. The I.O. said that the deceased’s brother in law Geoffrey Mukaria had made a report on the discovery of the deceased’s body in James Kalunge’s farm, saying that he had obtained the information from one Evans Mwirigi who had told his (Mukaria’s) sister Flora Kawira (PW2) and a neighbour Kathiomi that he had discovered the body in the shamba and that one Isaiah Kalunge had gone to look for miraa to eat from the shamba belonging to James Kalunge and had seen the accused holding the deceased from the back and pulling him, and when the deceased tried to pull off, the accused pulled back and stabbed him on the chest.

### **Hearsay**

21. There were only two civilian witnesses who testified, PW1 and PW2. The only evidence adduced by the prosecution tending to establish the guilt of the accused is hearsay, as the alleged eye-witness was never called as a witness and only accounts of his statements was given by PW1, PW2 and PW5, the Investigating Officer. The Investigating Officer had asked the accused why he had stabbed the deceased but the accused did not respond. Under the threat and pain of Meru customary practice of proceedings before traditional mechanism of Njuri Ncheke, Isaiah Kalunge is said to have informed the deceased’s sister Flora Kawira (PW2) that he had witnessed Petro Mungáthia (accused) killing the deceased.
22. The alleged eye-witness was never produced as a witness and the I. O. ‘s evidence is merely hearsay, which the court cannot take as the truth of what happened to the deceased. In addition, the provision



of section 33 of the *Evidence Act* do not apply with respect to evidence of the eye-witness to killing to exempt it from the requirement of section 63(1) of the Act that provides that oral evidence must in all cases be direct evidence.

23. Despite section 143 of the *Evidence Act* that no number of witnesses are required to prove a fact, and consequently, a fact may be proved by the evidence of one witness, In this case the eye-witness who could perhaps suffice as a single witness in terms of section 143 of the Act was not called in evidence.

### **Circumstantial evidence**

24. The Court is guided by the principle for the establishment of circumstantial evidential to justify a conviction as reiterated in *Kariuki Karanja v. R* (1986) KLR 190 citing *Rex v. Kipkering Arap Koske* (1949) 16 EACA 135 that:

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the enculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the Prosecution.”

25. There is nothing in the evidence of PW1 who merely reported how he was aware that the accused had about 2 months before the killing of the deceased threatened to kill anyone “who interfered with his work” and the fact that the deceased’s body was found “at the boundary of the Shamba of Ntuala” which is near the boundary Paul Mungathia’s Shamba “where the accused worked as guard for miraa and caretaker.” The period of two months is not sufficiently proximate in time as to rule out any other intervening incident. It was not shown that the deceased had interfered with the accused’s work at his place of deployment as miraa guard. The hearsay evidence does not suffice as corroboration of the alleged identification evidence of Isaiah Kalunge who was in any event not called as a witness.
26. The proximity of the body to the Accused’s place of work is not inculpatory and not capable of explanation by any other reasonable hypothesis than that of guilt, as required of circumstantial evidence. The deceased, for instance may have been killed by others elsewhere and deposited at the Shamba close to where the accused worked. It also did not exempt killing of the deceased at the site by any other person including the persons who occupied or guarded the shamba adjacent to where the accused worked. And the pledge or threat to kill any person who interfered with his work, even when presumed to be the work of miraa guard at Paul Mungathia’s farm, is not conclusive as the evidence that the deceased had gone to the shamba was not established other than in the alleged eye-witness’ account.
27. It would be wholly unsafe to convict on the evidence presented by the Prosecution in this case, which the court finds does not approximate the threshold of prima facie case in terms of section 306 of the Criminal Procedure Code, as defined in *Bhatt v. R*, supra. The court finds that the accused’s involvement in the death of the deceased was not proved beyond reasonable doubt.

### **ORDERS**

28. Accordingly, for the reasons set out above, and in terms of section 306(1) of the Criminal Procedure Code, the court at this stage of case to answer considers that there is no evidence that the accused committed the offence of murder contrary to section 203 as read with 204 of the Penal Code herein charged.
29. The Court shall, consequently, record a finding of not guilty and direct that the accused be released from custody forthwith unless he is otherwise lawfully held.



Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Mr. Masila and Magoma, Prosecution Counsel for the DPP.

Mr. J. Mutuma Advocate for Accused.

