



**Republic v Muricho (Criminal Case 17 of 2015)
[2024] KEHC 8915 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 17 OF 2015**

AC MRIMA, J

JULY 25, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

ZEBEDAYO MURICHO ACCUSED

JUDGMENT

Background:

1. Zebedayo Muricho, the accused herein, was charged with two counts of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the first count were that on the 8th day of May 2015 at Sango village within Trans-Nzoia county murdered Julius Malaba.
3. The particulars in respect of the second count were that on the 8th day of May 2015 at Sango village within Trans-Nzoia county murdered Miriam Machuma Simiyu.
4. The Accused was formally charged on 16th June 2015 before Hon. J.R. Karanja, J. He denied the charges and pleas of not guilty entered.
5. The case was thereafter set for hearing which lasted for a record of almost 9 years as the Accused had to severally undergo mental treatment and hospitalization in between.

The Prosecution's case:

6. Four witnesses testified in this case. The 1st, 2nd and 3rd witnesses testified before Hon. Chemitei, J. The 4th witness testified before Yours truly. The 2nd witness was also recalled for further examination.



7. Dr. Alex Barasa testified as PW1. He was a Medical Doctor then attached at Mt. Elgon Sub-County Hospital. Brenda Malaba Simiyu testified as PW2. She was a daughter to the two deceased in this matter.
8. It was PW2's evidence that she witnessed the accused use a hoe/jembe in cutting the deceased. She testified that the accused had a Bible and appeared normal. To her, the accused did not suffer from any mental challenges at the time he committed the offence. She identified the hoe/jembe which was used to kill the two deceased.
9. According to PW2, she saw the accused cut her father, Julius Malaba (hereinafter referred to as 'the first deceased') on the head. She also saw the accused cut her mother, Miriam Machuma Simiyu, (hereinafter referred to as 'the second deceased') in the abdomen. That was on 8th May, 2015.
10. PW2 also stated that the night before the accused hacked her parents to death, the accused had caused mayhem in the neighbourhood. He had pulled some iron sheets from the roof of a neighbour's house and also proceeded to another neighbour where he pulled a cross from a grave. The accused had also come to PW2's home that very night and the second deceased prayed him off. The accused left and returned later that night. The second deceased continued praying against him and he left again.
11. The accused did not return to the deceased's home that night. It was PW2's assessment that the accused appeared demon-possessed that night.
12. The accused returned to the deceased's home early the next morning. He met the second deceased who was milking as the first deceased had gone to collect fodder. It was in PW2's presence that the accused attacked the second deceased. PW2 screamed and the first deceased came running only to be also fatally attacked by the accused.
13. It was PW2's further testimony that the accused then cut a piece of the second deceased's private parts and began eating it. He then turned to PW2 and said that she should also be sacrificed. As the accused pursued PW2, she managed to escape.
14. PW2 later witnessed DCI officers collect the bodies of her parents and the jembe from the scene.
15. Amos Nyongesa Simiyu testified as PW3. It was his evidence that the deceased were his grandparents. He stated that on 7th May 2015 as he was sleeping, he heard noise from outside at around 9 p.m. He went out only to see the accused carrying a jembe and a cross. To him, the accused was demon-possessed.
16. PW3 testified that in the morning of the following day, he was called by PW2 to be told that the accused had killed the deceased, his grandparents. That PW3 rushed to the scene and found the accused praying inside a house after killing the deceased.
17. No. 79575 PC James N. Nthiahuri testified as PW4. He was attached at Kitale Police Station. He took over the matter from one Cpl. Katana who was the initial investigating officer.
18. It was his testimony that on 8th May 2015, Police officers from Kiminini Police Base under Kitale Police station received a report that the accused had murdered two persons, the deceased herein, at Sango B area within Kiminini Sub-County.
19. The officers proceeded to the scene and found the deceased lying lifeless and that the accused was being arrested by the members of public.
20. The police observed the bodies which had a litany of injuries. Upon documenting the scene, they collected the bodies and the accused.



21. The accused was taken to Kiminini Police station and the bodies taken to Kiminini Cottage Hospital for preservation. He stated that according to the statements in the police file, it was believed that the accused was possessed by demons the night before the incident.
22. PW4 produced the jembe as an exhibit.
23. On cross-examination, PW4 stated that he recorded a statement based on what he had done in the matter and from the witness accounts.
24. According to PW4, the accused was not in his right frame of mind. He stated that when he was assessed at Kapenguria District Hospital he was found not fit to plead but was later found to be of sound mind and fit to take plea, which he did on 15th May 2015.
25. He admitted that he was not aware of the subsequent Mental Assessment Report dated 22nd May 2015.
26. The foregoing evidence marked the close of the prosecution's case. The Court ruled that sufficient evidence had been adduced to establish a prima-facie case.
27. The accused was placed on his defence on both counts.

The Defence:

28. The accused testified on oath and called two witnesses. DW1 was Job Sabwani Thomas, a Psychiatrist Assistant based at the Kapenguria County Referral Hospital. DW2 was Dr. Odhiambo Edward, a Consultant Psychiatrist at the Kitale County Referral Hospital.
29. The accused stated that he was aware of the charges he faced. He further stated that when he was arrested, he was unable to take charge of himself since he had been mentally unwell for a while.
30. It was his evidence that he used to mysteriously lose consciousness and during such times he would do anything without his knowledge.
31. He averred that he recollected himself when he was in police cells and upon inquiring why he was inside there, he was told that he had killed two people. It was his case that he was so shocked because he remembered nothing.
32. He urged the Court to forgive him and that he be given a chance to seek further medical attention. He also stated that he had been on treatment since the unfortunate incident occurred in May 2015. He produced a Medical Report and treatment notes to that end.
33. On cross-examination, the accused stated that he had been previously treated and his family used to take him to Church.
34. DW2 testified that when the accused visited the facility on 15th May 2015, he was unable to follow serial observations, could not interpret proverbs, hallucinated, that his judgment was poor and the intellectual capability inappropriate.
35. It was his conclusion that the accused was of unsound mind and could not even plead before Court. He opined that the accused gets further mental assistance from a mental facility.
36. He produced the Mental Assessment Report dated 15th May 2015, which DW1 prepared, as an exhibit.
37. In his evidence, DW3 referred to the treatment notes dated 13th February 2020 authored by one Celestine Nyongesa, a Psychiatric Nurse in the Hospital.



38. He stated that upon examining the accused, the Nurse found out that the accused was suffering from a serious mental ailment known as Schizophrenia disease. That, on being consistent with treatment, the accused had shown marked improvement and was mentally stable. It was her assessment that the accused was fit to continue with the case.
39. DW2 produced the treatment notes as an exhibit.
40. DW2 further stated that the Schizophrenia disease caused hallucinations. In such a state of mind, one can attack anyone without provocation. He informed that the disease was mainly genetically acquired, but could also be acquired in life through other ways.
41. He also stated that by 13th February 2020, the condition of the accused had improved.
42. The defence then closed its case.
43. Both the accused and the State opted not to file any written submissions and left the matter to the Court for a determination.

Analysis:

44. For the offence of murder to be established, the prosecution has to prove three ingredients against an accused. The said ingredients were discussed by the Court of Appeal in Criminal Appeal No. 352 of 2012, *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR as follows: -
 - a. That the death of the deceased occurred;
 - b. That the accused committed the unlawful act which caused the death of the deceased; and
 - c. That the accused had malice aforethought.
45. Going forward, this Court will in turn interrogate the foregoing ingredients.

The death of the deceased:

46. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
47. In this case, there are two deceased persons. It is on record that on 2nd March 2020, PW1 took to the stand in Court, but was stood down as he had Post Mortem Reports for other deceased persons and not the ones in this case. However, PW1 was never recalled, but surprisingly there is a Post Mortem Report for one Julius Simiyu Masibo [not any of the deceased] which was marked as an Exhibit and is on record.
48. This Court has tried to come to terms on how the Post Mortem Report for a subject not a party in the case found its way into the record, in vain. As it is, the report does not relate to any of the deceased and it does not aid the prosecution in any way whatsoever.
49. The prevailing position, therefore, is that no Post Mortem Reports were produced for the deceased despite the bodies having been collected by the police and autopsies undertaken.
50. This Court is alive to the general practice adopted by trial Courts when ascertaining the death of a deceased. Unless in very exceptional instances where a Court may apply the principle that in some cases the cause of death can be established without medical evidence, medical evidence mostly through a Post Mortem Form, must be availed.



51. The Court of Appeal in *Ndungu vs. Republic* (1985) eKLR succinctly pronounced itself on the issue as under: -

.....where a body is available and the body has been examined, a post mortem must be produced, the trial Court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstance inexplicable and was unhelpful to the prosecution and to the Judge.

52. The Court of Appeal in *Ndungu vs. Republic case (supra)* in disagreeing with the Tanzanian decision in *Republic vs. Cheya & Another* [1973] E.A. 500 which held that the absence of medical evidence as to the death of the deceased in that instant case was not fatal as the prosecution could rely on other factors in evidence, rendered itself as follows: -

..... The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.....

53. Later, in 2015 the same Court re-affirmed the above in *Chengo Nickson Kalama vs. Republic* [2015] eKLR where it held: -

.... The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt.



54. Turning to the matter at hand, in the absence of any medical evidence on the causes of death, the only other evidence on the manner in which the deceased died is that of PW2.
55. PW2's evidence should then be weighed to ascertain whether it reveals very exceptional instances for this Court to apply the principle that the causes of death of the deceased can be established without medical evidence.
56. Turning to the matter at hand, since autopsies were conducted on the bodies of the deceased, it can be reasonably presumed that the causes of death were medically ascertained.
57. Whereas the temptation to find that the deceased died out of the alleged attack attested to by PW2, if that was true, is high on one hand, on the other hand, there lingers serious doubts as to why the Post Mortem Reports were not produced and whether it was truly that the alleged attack caused the deaths.
58. The State did not give any reasons as to why the Reports were not produced. In such circumstances, the presumption that had the witnesses produced the reports, their testimonies may have been adverse to the prosecution, therefore, arises. (See *Bukenya & Others versus Uganda* (1972) E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku versus Republic* (1985) KLR 412).
59. The Court of Appeal in *Ndungu vs. Republic case* (*supra*) emphasized that even though there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal, even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution.
60. As matters stand, this Court is unaware of the nature of injuries sustained by the deceased. That lacuna was not explained at all by the State. Therefore, on a careful assessment of the evidence herein, this Court finds and hold that this case is not among those which the principle that in some cases, the cause of death can be established without medical evidence can apply.
61. This Court now finds and hold that the causes of death of the deceased in this case were not established.
62. Having found as such, this Court returns the verdict that since it is not known how the deceased met their deaths, dealing with the rest of the issues will not add any value. Therefore, it can only be prudent that the matter ends here.

Disposition:

63. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have still been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
64. The accused is, therefore, found not guilty of the murder of any of the deceased.
65. Consequently, the accused herein, Zebedayo Muricho, is hereby acquitted in both counts of murder pursuant to Section 322(1) of the *Criminal Procedure Code*.
66. He is set at liberty unless otherwise lawfully held.
Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Miss Imainata holding brief for Mr. Nyamu, Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

