



**Republic v Matuku & another (Criminal Case 45 of 2015)
[2024] KEHC 8626 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 45 OF 2015**

**RK LIMO, J
JULY 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

GEOFFREY KITILI MATUKU 1ST ACCUSED

KYALO MATUKU 2ND ACCUSED

JUDGMENT

1. Kyalo Mutuki and Geoffrey Kitili Matuku, the 1st & 2nd accused respectively in this case are jointly charged with the offence of murder. The particulars as per the information presented are that on 28th May 2015, Kanziku Location in Ikutha Sub-county within Kitui County the two jointly with others not before court murdered Joyce Micky Mwendu.
2. The two accused person denied committing the offence. The prosecution has presented 8 witnesses to prove their case against both the accused persons and their case is based on circumstantial evidence. Below are the testimonies from the prosecution as well as the defence case.
3. Margaret Makau (PW1) the mother to the deceased testified that, she last spoke to her deceased daughter on 28th May 2015 (the material date) at around 6.00pm. She said that she was later, at around 11.00 pm on the same day received a call from Geoffrey Kitili Matuku (the 2nd accused herein) that her deceased daughter had been injured by thugs on the road and informed her that he was in Nairobi and therefore was unaware about the details.

She stated that, she headed to Mutomo using a motorcycle and later to Kanziku where he found Geoffrey's father who confirmed that Joyce (deceased) was dead. She stated that the family members then went to record statements.



She stated that later they took the body to Mutomo hospital mortuary. She also confirmed that her daughter (deceased) was married to Geoffrey (2nd accused) and that the two never lived harmoniously. She stated that 1st accused (brother to the 2nd accused) used to insult her deceased daughter who was a teacher by profession as well as a business woman.

She stated that her deceased daughter used to inform her that the 1st accused used to threaten her and that the 2nd accused had married another woman.

4. Peter Kilonzo Kinyamasio (PW2) told the court that he was a boda boda operator and that he had carried the 2nd accused on his bike on the material day at around 8.00pm to a place he referred to as Kanziku. He testified that the accused was in the company of another individual and upon reaching Kanziku near a river, the two alighted claiming that there was a possibility of the trio meeting the police officer who would demand money from them. He testified that the duo alighted and he left them there.
5. Stephen Mwoka Makau (PW3) informed the court that he worked at Standard 3 Uwezo Club and that the 2nd accused was present in the bar on the material day in the evening at around 5.00pm but he could not recall the time at which he left. He was however positive that he was not there when he went to check on him at around 7.00pm
6. Rose Kalekye Muasya (PW4) testified that she met the 2nd accused at the said bar on the material day at around 5.00pm. That he was in the company of three other people and that he had left when he later checked out on them at around 7.00pm the same evening.
7. 237512 PC Fredrick Omenya (PW5) testified that he was stationed at Kanziku AP Post at the material time. He stated that he was called to the place of work at around 9.00pm on the material day and upon arrival, he met three young men one of them called Rasta who made a report that the deceased that been involved in an accident. He stated that the three men travelled to make report using the deceased's motor cycle and after making the report, the police asked them to escort them to the scene. That upon arrival, he observed the body of the deceased lying on the road with several cut wounds. The witness also testified that he also saw the 1st accused, who is the brother to the 2nd accused standing about 5 meters away from the scene. He stated that they secured the scene and waited for police from Mutomo Police Station who latter arrived and took pictures of the scene and also transported the body of the deceased to the mortuary. The witness testified that the deceased had made several reports at the police station indicating that she was receiving threats from the 1st accused and his family.
8. Mindo Kilonzo (PW6) on his part testified, he was a businessman selling "Muguka & Miraa" at Ikutha and that on 28th May 2015, the 2nd accused went to his stall and bought "Miraa" and chewing gum (Big G). He stated that the same person went back to him latter with a lady and bought for her "Miraa" and cigarettes and left. He stated the 2nd accused also went back to him the 3rd time and asked for a boda boda and got one from Peter Kilonzo (PW2). He stated that he knew both the 2nd accused and his brother the 1st accused as they were from his location.
9. Dr Kennedy Munyoki (PW7) from Kitui Referral Hospital testified on behalf of Dr Mutuku who conducted a post mortem on the body of the deceased. The witness testified that Dr Mutuku had since passed on but having worked together for two years, he was well versed with the doctor's handwriting as well as her signature. The witness stated that as per Doctor's report the body of the deceased was well preserved at the time of the post mortem. On the external examination, the deceased had clotted blood on the veins and entire body, a 10 cm cut on the face extending from the bridge of the nose to the forehead. The deceased also had a 2 cm cut below the right sheen involving the right mandible, 4 cm long. The deceased also sustained a fracture dislocation of the left shoulder. Internally, the deceased sustained a fracture of the frontal bone (fragmented) with destruction of frontal sinus. Fracture of



the right mandible on two areas and missive sub-dural haematoma with destruction of brain matter. The cause of death was established to be severe head injury with haemorrhage secondary to deep cuts occasioning fracture of skull bones. The witness tendered a post mortem report dated 10/6/2015 as PEX 1.

10. David Uka (PW8) and the Investigating Officer in the case testified that he was an officer attached to DCI Mutomo performing investigations. He informed the court that he had taken over this matter from officer Henry Kithinji who had since retired from service. The officer informed the court that he studied the file after taking over the matter and this is what he gathered; that there were exhibits forwarded to the government chemist for analysis including a panga, a blue trouser and safari boots shoes. The witness testified on communication data obtained from Safaricom from three mobile phones which were;
 - i. White Samsung phone Imei No. 35317005011XXXX marked as PEX 2 (c) (belonged to the 2nd accused)
 - ii. Nokia phone Imei No. 35364906252xxxx marked as PEX 2 (b) (belonged to the 2nd accused)
 - iii. Black Samsung phone Imei No. 35879104216xxxx marked as PEX 2 (a) (belonged to the deceased)
11. The witness indicated that he received communication data in respect to the two phones belonging to the 2nd accused from Safaricom and Airtel service providers whose numbers were 071448xxxx and 078775xxxx for data in respect to 28th and 29th May 2015. That the report indicated that the 2nd accused left Kanziku in Ikutha early morning on 28th May 2015 for Kitui town and went back to Ikutha the same day and stayed at Mutomo township on 28th -29th May 2015. He testified that the 2nd accused's phone was switched off at 3.45pm on 28th May 2015 for a period of about 6 hours before it was switched on at 9.30pm the same day in Mutomo. The officer's testimony was that it was suspected that the offence took place at 7.30pm on 28th May 2015 within Ikutha. The witness testified that the 2nd accused informed the police that he had travelled to Kitui on 28th May 2015 and thereafter proceeded to Nairobi where he spent the night at Pipeline. That he travelled back to Ikutha the following morning upon learning that his wife had been murdered. The officer also testified that the 2nd accused had been at Standard 3 Uwezo Plus Bar on 28th May 2024 while in the company of another man where they ordered drinks and thereafter left on a motor bike.
12. The witness testified on the report received from the government chemist as follows; that blood stains found on the Panga (PEX 3) recovered from the 1st accused did not match the blood of the deceased. This finding was the same for blood stains found on a trouser (PEX 4) recovered from the 1st accused as well as blood stains found on safari boots recovered from the home of the 1st accused.
13. The witness stated that the forensic analysis conducted on the blood stained Panga (PEX3) recovered from home of 1st accused turned out negative when it was compared with blood sample from the deceased body. This also applied to a pair of jeans trouser from the home of 1st accused person and so to a pair of shoes.
14. The Investigating Officer further stated that there was another person who was suspected to be involved as was seen with the 2nd accused at Ikanga on the material day. He stated that the person was traced and found in Kitui GK Prison and that the person was positively picked by PW2 at an identification Parade conducted. He stated that the person was later released from prison and later got killed by members of an irate mob at Ikanga.



15. When placed on their defence, both the accused persons chose to give sworn evidence and denied committing the offence.
16. Kyalo Mutuku (DW1) testified that the deceased was his sister in law. He stated that the two operated their businesses close to one another and on the material day, the 1st accused closed his business at 6pm and left for his home in the company of his wife leaving the deceased in her shop. He proceeded that he received a call later that night at 9.00pm from his grandfather who informed him that the deceased had been involved in an accident at Kamwanda. He testified that he went to the scene where he found the deceased lying down next to her motorcycle. He testified that he asked one Nzuki to go and call the police who arrived at the scene and confirmed that the deceased was dead. He stated that he went to call his relatives and returned to the scene where he found police from Mutomo had arrived. He stated that the body was taken to the mortuary. That the police went to his home the following day and searched his house and that he later went and recorded a statement but was taken into custody. On cross examination, the 1st accused denied being intoxicated on the material day. He also denied threatening the deceased or conspiring with his brother, the 2nd accused to cause the death of the deceased.
17. Geoffery Kitilu Mutuku (DW2) gave a sworn testimony. He testified that he operated a business with the deceased and that the two were married for 11 years. He testified that he was escorted by his wife to the bus stop on the material day as he headed to Kitui to fetch supplies for their shop. That he returned to Ikutha the same day and at around 11.30pm when he was informed by his watchman that his wife had been involved in an accident. He stated that he proceeded to the scene found no one. He stated that he went home where he met his relatives including the 1st accused who informed him that his wife was dead. He testified that he called his mother in law (PW1) and informed her of the same. That the following morning, police from Mutomo arrived at his home and asked him to go and record a statement at Kanziku Police Post. He stated he went there but were referred to Mutomo Police station where he was taken into custody together with his brother, the 1st accused. He denied having issues with the deceased and maintained that the deceased died from injuries sustained from an accident. He stated that that a boda boda person told him that he witnessed the accident.
18. In cross examination, he denied telling the police that he had travelled to Nairobi at the material time and maintained that he did not travel to Nairobi to buy supplies. He also denied being at Standard 3 Uwezo Bar on the material day. He also refuted claims by PW2 that he had carried him on his motorcycle on the material day and maintained that he did not threaten the deceased.
19. The accused persons in their written submissions done through learned counsel Mr. A.M Kitonzi, contended that circumstances surrounding the death of the deceased were disquieting and most foul.
20. They submit that the prosecution's case against them was based on mere suspicion which they claim were never proved and have pointed out that the alleged threats were never established because no evidence was tabled during trial. They submit, the element of mens rea is lacking in the absence of the same, the case against them cannot stand.
21. On testimony evidence tendered by prosecution witnesses, counsel submits that for one PW2 contradicted himself when he stated that he carried the 2nd accused together with another person from Ikutha to Kanziku on the material time. That PW2 stated that the three left Ikutha at 8.00pm while at the end of this testimony indicated that the alighted at 7.00pm. That in the end, the 2nd accused denied riding on PW2's motor cycle. That the 2nd accused also refuted claims by PW3 and PW4 of his attendance at Standard 3 Uwezo Bar. Counsel basically raises the defence of an alibi on behalf of DW1 stating that he only arrived at the scene at midnight on the material day when everyone had dispersed.



With regards to DW1, counsel submits that he was the one who reported the incident to the police and not the one who committed the murder.

22. This court has laid out the prosecution's case as well as the defence and final submissions made on their behalf by their counsel.
23. As observed above the accused persons are facing murder and for a charge of murder as provided under Section 203 of the [Penal Code](#) to be sustained, the following ingredients must be established and proved beyond reasonable doubt. They are:
 - a. Death of the deceased and its cause.
 - b. That the accused committed the unlawful act which caused the death of the deceased (*actus reus*).
 - c. That the action causing death was activated or motivated by motive aforethought (*mens rea*).

(a) The death of the deceased & its cause

24. The death of the deceased is not disputed. The body of the deceased was discovered on 28th May 2015 lying on road. Dr P.N Mutuku (deceased) conducted a post mortem on the body of the deceased on 10th June 2015 and Dr Kennedy Munyoki PW7 who had worked with the late doctor and was conversant with his handwriting and signature produced the post mortem report dated 10th June 2015 as PEXH 1.
25. PW5 No. 237512, PC Fredrick Omenya, testified that he proceeded to the scene of the crime on 28th May 2015 after a report was made at Kanziku Police Post and found the body of the deceased lying beside the road in a pool of blood. He testified that police from Mutomo Police Station took the body to the mortuary. Family members (the father and uncle) of the deceased were present to witness the post-mortem examination. The cause of death as per PEXH 1 was due to severe head injury with haemorrhage secondary fracture of skull bones. The prosecution therefore proved the death of the deceased and the cause of the death beyond reasonable doubt.

(b) Actus Reus

26. The prosecution's case on this element solely rested on circumstantial evidence. Circumstantial evidence like direct evidence can found a conviction so long there is direct evidence linking the offender with the offence. In [Abamad Abolfathi Mobammed & another v Republic](#) [2018] eKLR The act held as follows:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.”

27. Before I delve into the threshold required for a conviction based on circumstantial evidence, I will first consider the circumstances that made the prosecution draw conclusions that the 2 accused persons here had a hand in the death of the deceased.
28. The prosecution through PW1, PW5 and the Investigating Officer (PW8) alleged that the deceased prior to the murder incident had received threats from accused one and the members of his family. The mother of the deceased (PW1) stated that her late daughter's marriage with the 2nd accused was strained and that she was informed that the 1st accused used to insult her.



PW5 and Investigating Officer (PW8) also stated that the deceased had made several reports of threats at the police station. However, none of the 2 officers either gave details of when the reports were made by way of OB numbers or whether any action was taken to address those threats.

29. The attempt by the prosecution to link the accused persons to the death of the deceased based on the said threats or strained marital relationship between the 2nd accused and the deceased was not supported or corroborated by tangible evidence. The evidence by PW3 & PW4 who both worked at “Standard Uwezo Club” that the 2nd accused was at the bar between 5.00pm & 6.00pm was a bit remote to connect him with the murder incident at about 7.00pm.
30. The evidence by PW2 that he carried the 2nd accused in his motorcycle and left his on a road near a river at Kanziku is also remote because the prosecution did not link the scene where the deceased was found to that river or the vicinity. The prosecution could have done better by linking the call signal or data of both the deceased mobile and that of any of the accused to the same vicinity (scene of crime) at around 7.00pm on the material day. The communication data from 2nd accused’s phone tendered by the Investigating Officer was not helpful to the prosecution’s case. This is because the prosecution made no efforts to call any of the service providers to provide the requisite link to make the evidence useful in this case.
31. This court has considered the defence put forward by both the accused persons and find there are discrepancies. For one, the 1st accused testified that he was called and told by Nzuki that the deceased had been involved in an accident along the road and that he rushed to the scene to find the deceased lying down with her motorbike next to where she lay. He stated that he sent his grandfather (Nzuki) to report at the police station but did not explain why he decided to send his grandfather instead of going there himself. He also stated that he later sent one Syengo to report as well but according to PW5 (Cpl F. Omenya) three young men using one motorbike reported the incident at Kaniku AP Post. The 1st accused also did not avail either Syengo or Nzuki to testify to corroborate his narrative or testimony. The 1st accused going by the evidence tabled was the first person to arrive at the scene. He was the one instrumental in making others know that the deceased was dead. It is apparent from his evidence that there is little he did to establish what had transpired at the scene and whether it was an accident or not. He did not say anything on the condition of the motorcycle used by the deceased. If he thought it was an accident as was reportedly told, the obvious thing he should have tried to check was the condition of the motorcycle or the nature of injuries the deceased has sustained. In his evidence he completely steered clear of the details raising suspicions about his involvement in the murder.
32. However, suspicion alone cannot sustain a conviction as was held in *Sawe v Republic* [2003] KLR where the Court of Appeal held *inter alia* held as follows;

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”
33. This court finds that the other evidence which could have aided the prosecution’s case to link the accused persons with the murder turned out to be negative and negated any link. This is the forensic evidence conducted on the blood stains found on the machete, jeans trousers and shoes recovered at the house of 1st accused turned out negative. The prosecution or the Investigating Officer was unable to tell whose blood stains were on the said items but it was certain that the blood stains never matched those of the deceased. An expert in that field of science was not availed to this court to explain or offer an explanation on why all the results turned out negative. The lack of the forensic evidence linking any of the accused to the crime or scene of crime was fatal to the prosecution’s case. A case resting on circumstantial evidence must be cogent and reliable.



34. In the same case *Abamad Abolfathi Mobammed and another v Republic* (*supra*), the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

35. From the foregoing applying the above test to the evidence tendered before this court, shows that the prosecution’s case has failed the threshold and with that the element of actus reus is not established.

(c) Mens rea

36. In the absence of “actus reus” the element of “mens rea” (though also lacking here) alone cannot stand or sustain a conviction.

In the end, this Court finds that the prosecution’s case against the accused persons is simply too weak to sustain a convict. The accused are not found guilty and are hereby acquitted of the charge.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF JULY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

