



**Republic v Mutuku & another (Criminal Case 11 of 2019)  
[2024] KEHC 9014 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL CASE 11 OF 2019  
GMA DULU, J  
JULY 10, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MWENDWA MUTUKU ..... 1<sup>ST</sup> ACCUSED**

**KIMAILI NGANO ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The two accused persons herein Mwendwa Mutuku and Kimaili Ngano stand charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence are that on the morning of 19<sup>th</sup> March 2019 at Mkengerenyi village in Mwatate within Taita Taveta County murdered Emmanuel Mwashimba Mwadime while robbing him of his motor cycle registration number KMDG 821H, a black bicycle and Kshs. 5,200/=.
3. They have denied the charge.
4. In proving their case, the prosecution called seven (7) witnesses. On their part, each of the accused persons tendered sworn defence testimony, and did not call any additional evidence.
5. It is important to put it on record here, that the two accused persons were initially charged with Erick Mutuku, who was acquitted by the court at case to answer stage, and thus was not put on his defence.
6. PW1 was Caronline Wakesho Mwashimba a daughter of the deceased who testified that on 9<sup>th</sup> October 2019 she visited her mother at Manoa, who told her that her father the deceased had come there to pick oxen for ploughing on 7<sup>th</sup> October but did not get the oxen and had gone back to the farm intending to come back to Manoa for the oxen on 11<sup>th</sup> October 2019.



7. However, by 14<sup>th</sup> October the mother informed her that the deceased had not come back, so after going to the market, she got transport to the farm where the father lived alone.
8. On arrival, she checked in the kitchen and found no signs of human activity, and when she went into the main farm house, she noticed that the motor cycle, bicycle, axe and hoe and machete were missing.
9. She then informed the mother and the nyumba kumi elder one Musyoka about the missing person. Next day, the family joined the search group and on advise from the nyumba kumi elder, they made a report to the police.
10. It was her evidence that the search continued, and that on 24<sup>th</sup> October 2019 the OCS Mwatate Police Station informed them that the body of her father had been found about 20 minutes walk from his house at the farm.
11. It was her further evidence that thereafter, post mortem examination was conducted on the deceased and a suspect who had been found with the motor cycle engine, and bicycle of the deceased arrested.
12. It was her evidence also that she knew all the three accused persons before as neighbours.
13. PW2 was Selina Mwashimba Emmanuel the wife of the deceased whose evidence was that she comes from Manga village and that her husband the deceased, lived at Mukerenyu farm.
14. That the deceased came to the village on 7<sup>th</sup> October 2019 to pick oxen for ploughing but did not get them and went back to the farm, with intention to come back later for the oxen.
15. On the following Saturday however, when she went to buy fertilizer, she saw her basket which was used by the deceased on the road and got shocked.
16. She then proceeded to the deceased's farm but did not find him and noted items such as the bicycle, axe, hoe, cooking pots, beans and maize missing.
17. It was her evidence that as she was there Wakesho PW1 arrived and informed her that she had also visited that house but had not seen the deceased.
18. Next day, the nyumba kumi elder advised them to make a report to the police, which they did and she also handed over the basket to the police.
19. It was her evidence that with the help of the police, the 1<sup>st</sup> accused person was arrested, and that she was also informed that the deceased had been found buried.
20. She knew all the 3 accused persons before as neighbours and denied having had a disagreement with the 2<sup>nd</sup> accused person.
21. PW3 was Mutuku Kiilu the step-father of 1<sup>st</sup> accused who stated that the deceased was a friend and that on the night of 19<sup>th</sup> March 2019 he heard dogs barking and on checking outside saw Kimaili (2<sup>nd</sup> accused) pushing a motor cycle towards his sons (1<sup>st</sup> accused) house.
22. It was his evidence that he got scared and armed himself with a stick, but shortly thereafter Kimaili left the motor bike at Musyoki Mutuku's house and left.
23. It was his evidence that about 3 minutes thereafter his son Mwendwa 3<sup>rd</sup> accused arrived and informed him not to worry as there was no problem.
24. It was his evidence also that next morning he reported the incident to the nyumba kumi Chairman. He noted that the motor cycle was covered with a sack.



25. It was his further evidence that later Kimaili (2<sup>nd</sup> accused) came back carrying a spanner, and machete, and commented that it was getting bad and picked the motor cycle and left with the 3<sup>rd</sup> accused.
26. Next day, he went to work with Musyoka and the police then arrived and asked if he knew of a dead person on the area, and on denial, the police informed him that they had already arrested some people.
27. In cross-examination, he agreed that he had a disagreement with 1<sup>st</sup> accused but insisted that they had settled the dispute. He stated that 3<sup>rd</sup> accused was a student and was thus victimised in being brought to court.
28. PW4 was Musyimi Muia a village elder at Mgololinyi village who knew all 3 accused persons as neighbours.
29. It was his evidence that on 20<sup>th</sup> October 2019 at 6:30a.m, Caroline Mwashimba (PW1) reported the disappearance of her father, and motor cycle and bicycle. When he talked to the wife (PW2) she said that she had seen him last on 7<sup>th</sup> October 2019, and he thus advised them to make a report to the police.
30. The witness then phoned the OCS Mwatate, the area Assistant Chief and Chief and, after one day, received information from Mutuku that Mwendwa had been spotted with a motor cycle with Kimaili at the house of Mutuku three (3) days earlier, thus Mwendwa was arrested by the police.
31. It was his evidence that on 24<sup>th</sup> October 2019, they were led to the place where Mwasimba was buried, and that on 28<sup>th</sup> October 2019 exhumation of the body was done.
32. In cross-examination, he stated that a panga was recovered from the 2<sup>nd</sup> accused's house, but he did not see it in court.
33. PW5 was Dr. Joyner Wali who testified on behalf of Dr. Katana who had left Moi Referral Hospital Voi. It was her evidence that post mortem examination on the deceased was conducted on 28<sup>th</sup> October 2019 on a decomposed body which had a penetrating wound on the scalp, blunt depression on the head, deep cut wound on the left side of the neck, and that the internal body was not opened. The cause of death was recorded as severe head injury secondary to assault with sharp and blunt object. The doctor produced the signed post mortem report in evidence as an exhibit.
34. PW6 was PC Allan Wanyama the investigating officer whose evidence was that on 24<sup>th</sup> October 2019 while at Mwatate Police Station he was assigned investigation duties herein and proceeded to a crime scene at Manoa together with the DCIO.
35. On arrival, the OCS pointed at a site where the body of Emmanuel was buried. That he arrested the 2<sup>nd</sup> accused and later obtained an exhumation order from court, and the body was then exhumed.
36. It was his evidence that he witnessed the post mortem examination on 28<sup>th</sup> October 2019, and that he took possession of a recovered bicycle, stick, machete, hoe.
37. According to this witness, the accused persons took them to the site where the body was dug out, and also to the site where a motor cycle was hidden in the same farm. Also, a bicycle was recovered from the house of the 2<sup>nd</sup> accused person where he also dug out a motor cycle engine, but the fuel tank was missing.
38. It was his evidence that he knew 1<sup>st</sup> and 2<sup>nd</sup> accused persons before. He produced the recovered items in court as exhibits together with a motor cycle log book.
39. In cross-examination, he stated that for the 3<sup>rd</sup> accused person he did not have good evidence to connect him to the incident.



40. PW7 was Cpl. Shem Asher a gazetted forensic human investigator, whose evidence was that on 25<sup>th</sup> October 2019, he documented the scene of crime herein, took several photographs of the scene, the body of the deceased as well as the items recovered. He processed and printed the photographs, and produced them in court as exhibits. That was the prosecution evidence.
41. At the close of the prosecution evidence, the 3<sup>rd</sup> accused person was found to have no case to answer and was accordingly acquitted.
42. When put on his defence, the 1<sup>st</sup> accused person Mwendwa Mutuku tendered long sworn defence testimony. He stated that he was a mason and timber dealer and that on 20<sup>th</sup> September 2019 he visited his brother Musyoka for birthday celebrations.
43. That on 24<sup>th</sup> October 2019 at 9:00a.m, while at the timber workshop police came, searched his house and took his bicycle frame which was outside the house. They also led him to a police vehicle where he met his step-father who was later released from custody.
44. It was his evidence that while in custody same days later, police took him to a sisal estate where they took photos of him and someone he did not know and later charged him with an offence he was not aware of.
45. He denied knowing or killing Emmanuel but stated that Caroline Wakesho (PW1) was his neighbour. He claimed that he had a standing dispute with his step father since 2014 after his mother died and said the case against him was a frame up. He was cross-examined at length.
46. On his part the 2<sup>nd</sup> accused Kimaili Ngano testified as DW2 also under oath. He stated that he was a motor cycle operator and knew the deceased as a customer. It was his defence that on the alleged date he did not see or meet the deceased. He stated that he was arrested on 24<sup>th</sup> October 2019 but denied committing the alleged offence. He was cross-examined at length.
47. After closure of the prosecution and defence evidence, the Director of Public Prosecutions and defence counsel Mr. Motuka and Mr. Mosioma filed written submissions, which I have perused and considered.
48. This is a murder case against both accused persons. The offence of murder is defined under Section 203 of the Penal Code. In short it is the killing of a human person with malice aforethought.
49. The burden was on the prosecution to prove all the elements of the offence against each of the two accused persons. This legal burden is codified under Section 107 and 108 of the Evidence Act (Cap.80). This being a criminal case, the standard of proof is beyond any reasonable doubt.
50. The major elements of the offence of murder are first the death of the deceased. Secondly, whether the death was unlawful. Thirdly, whether the accused or any of them caused the death. Fourthly, whether the death was caused with malice aforethought.
51. Did the deceased herein die? The evidence of PW1 Caroline Wakesho his daughter, and PW2 Selina Mwashimba his wife is clear that the deceased disappeared after 7<sup>th</sup> October 2019, and on checking on him at his farm where he lived alone, he could not be traced. Also missing were his motor cycle, bicycle and other farm items.
52. A report was then made to the nyumba kumi Chairman, and also to the police at Mwatate. A search was conducted for some days and on 24<sup>th</sup> October 2019 an exhumation order was obtained from court and a decomposing body was dug out which PW1 and PW2 identified as being that of the deceased.



- Though the body was decomposed and no details of how the body was identified with any special marks was given, this evidence was not contested.
53. Post mortem examination was then done and PW5 Dr. Joyner Wali testified to this. The cause of death was severe head injury secondary to assault with sharp, as well as blunt object.
  54. I find that the prosecution proved beyond any reasonable doubt that the deceased died.
  55. Was the death unlawful? No reason has been given for the vicious injuries found on the deceased and the somewhat secret burial of the dead body. This was obviously an unlawful act. I find that the prosecution proved beyond any reasonable doubt that the death was unlawful.
  56. Did the two accused person or any of them cause the death of the deceased? The prosecution says that both of the accused persons caused the death. Each of the two accused persons however denied the allegation.
  57. This is a case of circumstantial evidence, as nobody saw any of the accused persons killing or assaulting the deceased. The legal requirement is that to sustain a conviction, the evidence in such a case should point irresistibly to the guilt of the accused person and there should be no room for any other reasonable hypothesis than his guilt. Mere suspicion is not enough to sustain a conviction – see *Sawe v Republic* [2003] eKLR.
  58. Having considered the totality of the evidence on record, I am of the view that the prosecution did not prove beyond reasonable doubt that any of the two accused person caused the death of the deceased herein.
  59. The first reason is that none of the items which were said to have been recovered from the accused persons, including alleged weapons – such as machettes, were taken for any tests to establish traces of blood stains, DNA comparison, or fingerprints. In addition, the items in my view were not positively identified as belonging to anybody, thus the nexus between the items and the deceased or any of the accused persons is very unclear. Thus they cannot be said to have been connected with the killing of the deceased.
  60. The second and more important reason, is the date or dates of the death of the deceased. On this, the first information of charge dated 7<sup>th</sup> November 2019 signed by Grace Mukangu as Prosecuting Counsel has 19<sup>th</sup> March 2019 as the date of the offence. The second information signed by the same Prosecuting Counsel on 10<sup>th</sup> February 2020 also has the same 19<sup>th</sup> March 2019 as the date of the offence.
  61. In the opening address of the case on 10<sup>th</sup> February 2021 however, the same Prosecuting Counsel Ms. Mukangu stated that the death was 7<sup>th</sup> October 2019.
  62. I also note that in his final submissions, Mr. Sirima the Prosecuting Counsel referred to 19<sup>th</sup> March 2019 as the date of offence, while in all other evidence on record except that of Mutuku Kiilu father of 1<sup>st</sup> accused, the incident is said to have occurred in October 2019, not March 2019.
  63. In those circumstances, it is not clear which date or month the prosecution wanted to prove as the date of death of the deceased. That confusion in the prosecution position done, meant that they did not prove that the accused persons or any of them caused the death of the deceased as alleged, due to the uncertainty of the date of incident or offence.
  64. It is also apparent in my view that the prosecution brought the charge based on the incident described in evidence by PW3 Mutuku Kiilu, which was for 19<sup>th</sup> March 2019, and which is totally different from the disappearance of the deceased after 7<sup>th</sup> October 2019 described by PW1 and PW2 relating to the death of the relative the deceased herein. The benefit of that confusion has to be given to the accused



persons, and I hereby do so, as the prosecution failed to connect the two accused persons with the death of the relative of PW1 and PW2 who disappeared in October 2019.

65. I thus find that the prosecution did not prove beyond any reasonable doubt that any of the two accused persons caused the death of the deceased person.
66. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the Penal Code. With the evidence of the vicious attack with blunt and sharp object on record from the post-mortem doctor, it is obvious that death or grievous bodily harm was intended. I find that the prosecution proved beyond any reasonable doubt that the death of the deceased herein was caused with malice aforethought.
67. To conclude, having found that the prosecution did not prove that any of the two accused persons caused the death of the deceased, I have the duty to acquit them.
68. Consequently and for the above reasons, I find both accused persons not guilty of murder, and acquit each of them of the offence charged herein accordingly.

**DATED, SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2024 IN OPEN COURT AT VOL.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Sirima for State

Mr. Motuka for 1st accused

Mr. Mosioma for 2nd accused

Both accused

