



**Republic v Muli & another (Criminal Case 16 of 2017)
[2024] KEHC 13802 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 16 OF 2017
SN MUTUKU, J
SEPTEMBER 24, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BERNARD KINGOO MULI 1ST ACCUSED

MAGADALINE NDUNGE MUTISO 2ND ACCUSED

JUDGMENT

Background

1. Bernard King’oo Muli and Magadaline Ndunge Mutiso are man and wife. They are jointly facing murder charges, accused of killing Purity Mumbua Mwangangi, contrary to section 203 as read with section 204 of the penal Code. Details of the offence show that the act was committed on the night of 25th October 2017 at an unknown time and place within the Republic of Kenya.
2. Both were arraigned in court at the tail end of 2017. They pleaded not guilty. Their long journey in pursuit of justice began. Their case has passed through the hands of three judges in a hearing that has span over seven (7) years before it concluded on 8th July 2024 paving the way for this judgment.
3. The reasons for the delay are captured on record. They include transfer of judges having conduct of the matter, change in prosecution counsel handling the matter, and issues of legal representation. The hearing commenced on 26th October 2018 before Hon. Mr. Justice Nyakundi. He took evidence from two witnesses before he was transferred to another station. Hon. Mr. Justice Mwita took over the conduct of the case in March 2019. He took evidence of seven (7) witnesses in a period spanning from March 2019 to September 2021. I inherited the file in October 2021. I took evidence from eight (8) witnesses.



4. The accused persons had no objection to the case proceeding from where the former judge hearing the matter had reached.

Prosecution evidence

5. From the evidence on record, the deceased went shopping with her employer, Ann Wangui (PW1), on 25th October 2017 after which they parted ways. The deceased was expected to go back to work on 30th October 2017. She worked as a shop attendant and cashier at PW1's shop and butchery. She did not report on duty on 30th October as expected.
6. On the same date, 25th October 2017, Patrick Kyalo Muli (PW2) took the deceased home on his motorcycle registration number KMBG 508B. She alighted at Huduma Centre in Kajiado Town. PW2 took the deceased's shopping home and handed it to Jemimah Mutindi Mwangangi (PW9), sister to the deceased. Later the same day at 10.00am, according to the evidence of Pw9, the deceased went home, took a bath, prepared herself and left without telling her sister PW9 where she was going.
7. Evidence shows that, on the same day, the deceased called PW2 and asked him to lend her Kshs 20,000. PW2 did not have the money. The deceased instructed PW2 to go to her home and wait for instructions. PW2 did so. The deceased instructed her sister PW9 to give PW2 her ATM card and PIN to go to cooperative bank and withdraw Kshs 10,000 from deceased's account in two instalments of Kshs 10,000 and send the money (Kshs 20,000) to the deceased. PW2 did as instructed and sent the money to the deceased. PW2 learned later that the deceased was missing and that her body was later found.
8. The evidence of PW2 was confirmed by PW9 who testified that PW2 delivered the shopping of the deceased on 25th October 2017. That PW2 returned later in the evening and told her to give him the ATM and PIN of deceased to withdraw money and send to the deceased. She testified that PW2 went away and returned after 30 minutes and handed the ATM card back to her and two transaction receipts of Kshs 10,000 each.
9. The evidence that money was withdrawn from the account held by the deceased at the Cooperative Bank in Kajiado on 25th October 2017 in two instalments of Kshs 10,000 each through her ATM was confirmed by Francis Otieno (PW13), an employee of Cooperative Bank Kajiado. PW13 testified that these two transactions were the last transactions from the account held by the deceased.
10. On the same day, 25th October 2017, Rosemary Njura Njagi, (PW3) went to ask the 1st Accused to refund her Kshs 600 she had given to him for fare to bring a house girl for PW3 but he had not done so. While talking to the 1st Accused, the deceased came and started talking to the 1st Accused. PW3 learned later that the deceased had died and her body had been found.
11. Judith Mumo Mwangangi, (PW4), another sister of the deceased, talked to the deceased last on 24th October 2017. On 25th October 2017, she tried calling the deceased without success. She tried calling her again on 26th October 2017 without success. On 29th October 2017 she called PW9 who told her that the deceased had been away since 25th October 2017. After asking around and finding no information about their missing sister, they reported to the police that she was missing.
12. The deceased was not seen alive again. On 26th October 2017, two days after the deceased went missing, her body was found at B2 Yatta Ranching Cooperative Society Ltd in Lower Yatta Kitui. Kasusya Muange, (PW5), a resident of Kanyonyoo in Kitui County and an employee of the B2 Yatta Ranching Cooperative Society Ltd, was herding goats at the Farm when he stumbled upon the body of a female



- adult. It was tied to a tree with a handbag strap. The body was dressed in blue trousers and a black top. PW5 called officers from KWS who went to the scene.
13. This evidence was confirmed by No. 4826 David Ngetich, (PW6), an officer with KWS attached to Kanyonyoo Ranch. He testified that he received the call from PW5 at 9.15am and in company of Juma Mwendwa, they proceeded to the scene. They found the body of a woman tied to a tree with a handbag's strap. At the scene was foil paper, salt, tissues, handbag and water bottles. The neck had shoe (boot) marks as if someone had stepped on it. The handbag was about 20 metres from the body. PW6 notified Kwa Vonza Police Station and the Officer in Charge of AP Camp Kanyonyoo.
 14. No. 67512 James Wahome, (PW7), an officer attached to Kwa Vonza Police Station confirmed receiving a call at noon on 26th October 2017 about a woman suspected to have committed suicide at B2 Yatta Ranching Cooperative Society Ltd. He entered the report on the Occurrence Book (OB) and proceeded to the scene in company of DCI Lower Yatta, and scenes of crime officers.
 15. At the scene they found the body tied at the neck near a tree branch on the ground with the hands about 15cm from the ground, an empty water bottle and a pen. The body had no visible injuries. There were shoe (boot) marks on the neck as if someone had stepped on the neck.
 16. The scene was processed on 26th October 2017 by No. 235229 IP Nicholas Mulei, (PW8) who took eight (8) photographs (Ex. 7(a)) showing general view of the body tied to a tree, close-up views of the body after it had been untied from the tree, general and close-up views of the handbag suspected to belong to the deceased, pen and empty water bottle. PW8 told the court that he did not see shoe (boot) marks on the neck of the deceased.
 17. The body was examined on 10th November 2017 by Dr. King'oo. The postmortem report was produced by No. 241325 IP Irunga Njagi (PW17) and marked Ex. 37. The cause of death was strangulation and collapse of right lung.
 18. Evidence shows that through investigations, the police, CPL Kiprotich Ng'eno (PW16) in company of PC Musa Oliecha (PW15) and other officers arrested the 1st Accused on 7th November 2017. The 1st Accused was traced through mobile number 0742XXXX registered in the name of the 2nd Accused. This number had communicated to Rosemary Njagi (PW3). She was traced by the police and she took them to the business premises of the 1st Accused. The 1st Accused took police to his home where police found the 2nd Accused and children. Police recovered black shoes (boots) from the home. After interrogating the 1st Accused, they returned to his home and recovered a handset which had no sim card.
 19. Through assistance of Safaricom Law Enforcement Liaison Officer CPL Jonathan Limo (PW11), police were able to trace the records of the subscribers of telephone numbers 0725XXXX registered in the name of the deceased, 0742XXXX registered in the name of the 2nd Accused person and number 0795XXXX registered in the name of Partick Kyalo Muli (PW2). These three telephone numbers are the ones that feature prominently in these proceedings.
 20. Police were able to trace the movement of the deceased and the accused persons using mobile data records. Evidence shows that on 25th October 2017, handsets paired with telephone numbers 0725XXXX and 0742XXXX registered in the name of the deceased and the 2nd Accused persons respectively, moved from Kitengela to past Thika to Matuu and Kang'onde area but in different times.



Defence evidence

21. I need to state that the 1st Accused was represented by Mr. Waiganjo, learned counsel, while the 2nd Accused was represented by Mr. Ochieng, learned counsel. The 1st Accused objected to Mr. Waiganjo representing him. He told the court that he did not have faith in counsel. He had no problem with Mr. Ochieng representing him. This court tried to reason with him on the matter without success. Mr. Ochieng agreed to take up the brief and represent both accused persons.
22. The 1st Accused testified under oath. He told the court that the deceased was his customer and that he was making seats for her; that on 25th October 2017, the deceased went to his workshop to pick her seats around 11.00am; that the deceased met PW3 at his workshop and they greeted each other before PW3 leaving. That the deceased went to get a handcart to carry the seats with a promise to send money to him later.
23. He testified that his wife the 2nd Accused was admitted to hospital on 24th October 2017 to deliver and was in hospital on 25th October 2017; that around noon on he prepared to leave Kajiado to travel to Kithyoko where he operated another workshop to pick some tools. That he left Kajiado through Nairobi where he boarded a bus to Garissa and alighted at Kithyoko where he arrived at 7.00pm. That, he picked the tools and boarded a motor vehicle to travel to Matuu where he arrived at 8.00pm. That, he boarded another motor vehicle to go to Ekalakala in Masinga his rural home. He testified that he spent the night of 25th/26th October 2017 in Ekalakala and left to Kajiado on 26th October 2017.
24. He narrated how he was arrested and his business and home searched. He denied killing the deceased stating that she was his customer and that he did not have any other relationship with her. He admitted receiving Kshs 3,350 and Kshs 19,600 from the deceased through mpesa. He testified that he used telephone number 0742XXXX registered in the name of 2nd Accused. He stated that they used this number for business purposes and that he could not own a phone because he was not able to register a sim card due to lack of new generation national identity card.
25. The 2nd Accused also testified under oath. She told the court that she was admitted in hospital to deliver on 24th October 2017 and delivered on 25th October 2017 and that she was discharged to go home on 26th October 2017. She admitted registering number 0742XXXX in her name for use in the business. She denied knowing the deceased and that she did not kill her.

Submissions

26. The accused persons filed submissions on 8th July 2024. They have submitted whether the offence of murder has been proved to the required standard. Counsel for the accused appreciated that the prosecution is relying on circumstantial evidence. Counsel relied on *Judith Achieng' Ochieng v Republic* [2009] eKLR where the Court considered the applicable principles in a case based on circumstantial evidence 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 the inference of guilty 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 accused,



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.”

27. They submitted that the Safaricom data shows that the 1st Accused, using telephone number 0742XXXX was in Matuu on 25th October 2017 within Safaricom Booster No. 12642 and that the deceased was at Kangonde using her line 0725XXXX within Safaricom Booster No. 13343. It was submitted that the two were not together as they did not share the same booster. It was submitted that the police did not investigate all the telephone numbers the deceased communicated with on 25th October 2017.
28. It was submitted that the police did a poor job of investigating this case because they did not sample the items recovered from the scene for DNA and that the prosecution has not discharged the burden of proving this case beyond reasonable doubt. They urged that the accused persons be acquitted for reasons that the prosecution has failed to prove this case against them beyond reasonable doubt.

Analysis and Determination

29. The offence of murder is created under section 203 of the Penal Code. It provides that:
- Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
30. The elements of murder can be identified from the above section as follows:
- a. The perpetrator (any person).
 - b. Unlawful act or omission causing the death.
 - c. Victim of that death
 - d. Intention to cause the death (malice aforethought).
31. The burden of proof lies with the prosecution. Section 107 of the [Evidence Act](#) provides that:
107. Burden of proof.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
32. The standard of proof is proof beyond reasonable doubt. The prosecution has the heavy duty of proving the four main elements of murder beyond reasonable doubt. The onus of proof does not shift to the accused person to prove his/her innocence. It always remains with the prosecution.
33. I have taken time to keenly read all the evidence by the prosecution and the defence adduced in this matter. I have analyzed all the evidence. I am aware that I did not hear all the witnesses. The evidence received by Nyakundi and Mwita, JJ, is clear and easily understood. It is clear to me that there is no direct evidence against the accused persons. This is a case revolving around circumstantial evidence.



34. The last people to see deceased alive on 25th October 2017, as shown in evidence, are her employer Anne Wangui, PW1, who went shopping with her and parted ways, Patrick Kyalo, PW2, who carried the deceased home and later withdrew money from her Cooperative Bank and sent to her through mpesa, her sister Jemimah Mutindi, PW9, the 1st Accused and Rosemary Njagi, PW3. None of these witnesses said anything about the deceased looking or behaving in an agitated or stressed manner.
35. The deceased did not disclose to her sister PW9 where she was going. Given the manner in which she was borrowing money from PW2, she was in distressful need for money. She took risks by having her ATM card and PIN given to PW2 to withdraw money from her bank account. Why did she need money so urgently that she could not wait to get her ATM card and withdraw that money herself? I do not have an answer to this question.
36. That day, 25th October 2017, the deceased sent money to the 1st Accused in two instalments as shown in evidence. This was confirmed by the 1st Accused. He explained that it was in payment for the seats the deceased had picked. There is no evidence concerning where the deceased took those seats after picking them, if the evidence of 1st Accused is to be believed.
37. There is evidence that the 1st Accused complained to Rosemary that the deceased owed him money and that he had lost that money because the deceased had died. Would the 1st Accused have killed the deceased because she owed him money? If the 1st Accused committed this offence, what was the motive?
38. I am alive that motive is not an element of murder, but at least where it exists, it offers the reason behind the unlawful act or omission of an accused in committing murder. Motive, where it exists, couple with other cogent evidence, can be useful in aiding the court in determining the offence of murder was committed by the perpetrator.
39. I reiterate that there is no direct evidence implicating either the 1st or the 2nd accused persons. The prosecution is relying on evidence of the Safaricom data that shows that the deceased was in communication with certain persons including 1st Accused and Patrick Kyalo. Data also shows that the deceased and 1st Accused travelled in the same direction on the same date. Their respective telephone numbers were captured in different Safaricom Boosters from Kajiado, Thika, Matuu, Kang'onde, and Ekalakala for the 1st Accused. There is also evidence that the deceased sent money through mpesa to the 1st Accused. Although the time the deceased and the 1st Accused travelled on Garissa Road to Matuu and beyond was almost the same save for differences in minutes, there is no evidence placing them at the same location and time.
40. In *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal referred to the case of *Kipkering arap Koske & Another* 16 EACA 135 where it held, inter alia, that:
- “In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.
41. Are the inculpatory facts in this case incompatible with the innocence of the accused persons? Firstly, there is no evidence whatsoever implicating the 2nd Accused with this offence. Although evidence shows that a telephone number used by the 1st accused was registered in her name and that she was mentioned in connection with another handset, there is no evidence connecting her with the deceased or her death. She was in hospital delivering her baby on 25th October 2017 and the police did not controvert that evidence or tender any evidence linking her to the death of the deceased.



42. In respect of the 1st Accused, there is connection with him and the deceased. He said that the deceased was her customer and that she collected her seats without paying but later sent him money although not all of it. To my mind, the 1st Accused has explained his connection with the deceased and his travelling to Kithyoko and the reason for that travel. He has no duty to prove his innocence. The duty remains with the prosecution to place the 1st Accused at the scene of the murder or having anything about the deceased travelling to Matuu and Kang'onde. The prosecution has a duty to place the deceased and the 1st Accused together on that day. I have not found any evidence that the two met outside Kajiado on 25th October 2017.
43. There is evidence that they both travelled along Garissa Road to Matuu area and Kang'onde but evidence, either through Safaricom Booster or any other data, does not place them at the same location that evening. What this court is left with is suspicion that the 1st Accused may be connected with the death of the deceased. Is suspicion alone sufficient to prove a murder case beyond reasonable doubt?
44. In the Joan Chebichii Sawe case cited above, the Court of Appeal had this to say on suspicion:
- “In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998)* (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt” (emphasis added).
45. I have given this matter due consideration and analyzed all the evidence tendered. It is my considered view that the police failed in their investigation duties. The police left crucial areas uninvestigated. They concentrated on the 1st Accused and ignored other persons who may have communicated with the deceased. They failed to take samples of the items found at the scene for DNA testing.
46. I find that the evidence falls short of proving the offence of murder against the 1st Accused person beyond reasonable doubt. I admit the movements of the 1st Accused on 25th October 2017, especially the traveling to Matuu, Kang'onde, Ngungi, almost the same time with the deceased creates suspicion although they were never placed at the same location at the same time. However, suspicion alone, as stated above, is not sufficient to prove murder beyond reasonable doubt.
47. The family of the deceased will never know who killed their kin. The investigations conducted by the police in this matter did not obtain sufficient evidence for this court to rely on to convict any of the two accused persons before it.
48. In conclusion, it is my finding, and I so hold, that the prosecution has not discharged the burden of proving any of the accused persons guilty of the offence of murder. They have waited for justice since 2017. Their journey has come to an end. I hereby acquit Bernard King'oo Muli and Magdaline Ndunge Mutiso of the offence of murder forthwith. They are free to go home unless, for any other lawful cause, they are held in custody.
49. Orders shall issue accordingly.



Dated, signed and delivered this 24th September 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Akunja for the Prosecution

Ms Wasilwa holding brief for Mr. Ochieng for both accused

Mr. Bernard King'oo Muli – 1st Accused

Ms Magdaline Ndunge Mutiso – 2nd Accused

