



**Republic v Kiloko & another (Criminal Case 9 of 2015)
[2023] KEHC 1358 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 9 OF 2015
RK LIMO, J
FEBRUARY 13, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

TABITHA NDANU KILOKO 1ST ACCUSED

AMOS KINGOKU MUIA 2ND ACCUSED

JUDGMENT

1. Tabitha Ndanu Kiloko and Amos Kingoku Muia, the 1st and 2nd Accused are both charged with the offence of murder contrary to Section 203 of the Penal Code as read with Section 204 of the [Penal Code](#).
2. The particulars as per the information presented are that on the 16th January, 2015 at Nguuni Village, Nzamba Sub-Location in Ikutha District within Kitui County they murdered Francis Kiloko Masusu (the deceased herein).
3. Both the Accused persons deny the charge and the Prosecution has presented a total of seven witnesses. The prosecution's case in summary is that the 1st accused, who was the 2nd wife to the deceased and the 2nd accused who was a casual worker at the homestead murdered the deceased. The Prosecution's case was mainly circumstantial and the circumstances were that the 1st accused as the 2nd wife lived with the deceased and the 2nd Accused as a casual labourer in the homestead. The deceased reportedly went missing from home for some time and was presumed dead after parts of his body were recovered scattered in Nguuni Forest between 25th and 28th January, 2015. The Accused person on their part defended themselves urging this court to find that the deceased may have been killed and devoured by wild animals.
4. The following is the testimony of witnesses presented by the prosecution.



5. Mutinda Maundu (PW1) the Senior Chief Kaselu location told the court that he had summoned the deceased and the 1st accused to his office sometime in the year 2014 for purposes of settling a marital dispute between them. The witness stated that the deceased had made a report to his office indicating that he wanted to take the 1st accused back to her parent's home because she wanted to kill him. The witness stated that he interrogated the 1st accused who disclosed that the two were having a dispute because of her step son Pius as the deceased favoured him amongst his children. The witness however stated that the matter was discussed and resolved by elders and the couple reconciled. He thereafter stated that a report of the recovery of a body which matched that of the deceased was made to his office on 15th January 2015.
6. Justus Pius Kiloko (PW2) the son to the deceased told the court that his step mother, the 1st accused called him on 19th January 2015 and told him that the deceased had left home but he had not returned. He also stated that the 1st accused had sent the second accused who worked as their herdsman to go and look for the deceased at his mother's home. He stated that he reported his father missing at the chief's office on 20th January 2015 and on 26th January 2015, the 2nd accused went to their home and reported that he had seen some bones while he was herding. That a dog carrying what seemed to be human bones and had led the 2nd accused to the scene. That the 2nd accused took PW2 and his other brother (PW4) to where the bones were and he indicated that the 2nd accused had collected the bones and stored them in a sack. The witness stated that he reported the incident at Mutomo Police Station who came and collected the remains before taking them to Kitui mortuary.

The witness recalled that on 31st January, 2015, the Police accompanied by the accused home and that when they arrived at the homestead, the police asked people to move aside as the 1st accused, who was her step mother, led the police to where there was some ash and that the Police scoped the ash and recovered a club that was partly burnt. The witness identified the club in court and added that he also witnessed the 1st accused leading the police inside her house where a panga was recovered. He identified the panga in court adding that the panga was inside the house and that there was a mattress hanged on the fence which had blood stains on it. He identified the mattress in court. He further testified that they went up a hill which was about 370-375 metres away where he saw blood stains and human hair.

7. John Kitavi Nzuki (PW3) testified that on 25th January, 2015 at around 8:00am he got a call from one Kiloki (PW2) who reported to him that they had seen some body parts suspected to belong to a human being. The witness, who stated that he was the Area Assistant Chief, stated that the 1st accused had on 19th January, 2015 called him informing him that the deceased had left him and had not returned and that she had informed him that she had notified the Administration Police(AP's).
8. The Assistant Chief further testified that he decided to visit the home to find out and that upon arrival he found people who led him to a nearby thicket where body parts had been collected and put in a sack. The Assistant Chief stated that he saw a sack and noticed that tree branches around the scene had been cut and had blood stains. He testified that he talked with the family and shortly, the Police from Mutomo Police Station arrived at the scene and collected the sack containing the body remains.
9. He further testified that on 27th January, 2015, Justus Pius Kiloko (PW2) called him and informed him that more body parts had been discovered lying in the bush and that a report had been sent to the Police. He testified that the Police went and collected the body parts discovered.
10. He recalled that previously prior to the incident, the deceased had reported to the Area Chief complaining that he felt insecure due to family wrangles. He stated that the 1st accused complained that the 1st wife was favoured and was loved more. He stated that though the matter was resolved, the deceased kept saying he was not comfortable living with the 1st accused.



11. Musyoka Kiloko (PW4) and a son to the deceased on his part testified that he was away in Mombasa where he works for gain during the material time. He stated that, on 19th January, 2015, he got a call from his step brother Kiloko (PW2) that his father (deceased) was missing. He testified that a week later he got another call from his stepbrother this time informing him that parts of the body of their later father had been found. He stated that he travelled home from Mombasa and on reaching home, he found parts of the body recovered and kept at a store 70 Metres away from their main house. He further testified that he saw his mother (the 1st accused) lead the police inside the house and that a mattress and a club was recovered and taken by the Police. He testified that he saw some stains on the mattress but could not tell if it was blood or urine.
12. Robert Kusinga Kisilu(PW5), the Area Chief, Mutomo Location, testified and recalled that he was called on 29th January, 2015 by Director of Criminal Investigations Office- Mutomo and on reaching at his office, he found the 1st accused (Tabitha Ndanu) and her two children whom he says he was seeing for the first time and was introduced to them by the Director of Criminal Investigations Officer.
13. The Chief testified that, the Director of Criminal Investigations Officer requested him to do translation as he took a statement from the first accused in the presence of her 2 children. The Chief added that the statement turned out to be a confession because the 1st accused informed the Director of Criminal Investigations that she murdered her husband the deceased herein, with the help of Amos Kingoku (the 2nd Accused) and that after committing the act, they took the body to the bush and cut it into several parts or pieces and placed the parts in various parts in the bush. The Area Chief stated that they were five in the room when the confession was made adding that the 1st Accused children were present they were Justus Pius Kiloko, Eunice Mungwee and a young man married to Eunice and that the confession was obtained voluntary/freely with no force or intimidation. He testified that he saw the 1st accused sign the Confessionary Statement before he also signed it as a witness. He clarified that he is the one who translated the confession to English because the 1st accused is illiterate.
14. Dr Murithi Miano (PW6) from Kitui County Hospital testified on behalf of his colleague Dr. Cosmas Mutisya who he stated was away for further studies. The witness produced a post mortem report marked as Pexh 5 and dated 5th February 2015. The witness stated that body parts/ bones were presented to the pathologist for analysis. He stated that the parts included the pelvis femur, parts of the lower abdomen, parietal piece of the skull bone and complete ribs, 13 vertebrae, one vine and 2 pieces of radius. The witness stated that the internal organs were missing as well as the spinal code. He indicated that some pieces of muscle were taken for analysis for purposes of identifying the body.
15. Wycliff Oguk (PW7) the Investigation Officer in the matter testified that on 25th January, 2015 he got a report from the Assistant Chief Nzamba Sub-Location informing him that some body parts of a human being had been seen in a forest in the area. He added that there was a report made on 17th January, 2015, booked of a missing person made by the 1st accused through the Assistant Chief.
16. He testified that, on receiving the report of a discovery of body parts, he proceeded to the scene with other Police Officers adding that, the place was roughly 90Km away from Mutomo Town. He stated that he was led to the home of the deceased by the Assistant Chief and on reaching there, he found relatives of the deceased and saw body parts kept in a sack at the homestead. He added that they found the pelvic area of the body and the skull. He testified that, a son to the deceased was categorical that the body parts belonged to his father. He testified that he began investigation to find out the circumstances under which the deceased went missing and interrogated the 2nd wife of the deceased (the 1st accused). He stated that the 1st accused informed them at the scene that the deceased had gone to the market on 15th January, 2015 and never returned. He stated that he interrogated the herdsman (the 2nd accused) who gave the same narrative. He testified that they took the body parts to Kitui Hospital mortuary. He



testified that on 28th January, 2015, the Area Assistant Chief called him and informed him that more body parts had been found in the forest and that he proceeded to the Area and recovered 16 parts of human ribs, a piece of bone (part of the lower leg) and 2 pieces of spinal cord bones. He added that he collected the bones and took them to Kitui Hospital Mortuary. He further testified that the home of the deceased was next to the forest and that the next home was about 7Km away. He testified that the body parts were scattered in various part of the forest. He added that on 29th January, 2015 they went back to the scene and picked the 1st and 2nd Accused for more interrogation in a conducive environment adding that he had doubted the narrative the two had given regarding the disappearance of the deceased.

17. He testified that later at the station Director of Criminal Investigation Officer, Lawrence Wahome recorded the statements from both the accused persons and that after recording the statements, the 1st Accused volunteered to lead them back to the homestead of the deceased where she showed them a hidden weapon she confessed to having been used to beat the deceased. The Investigation Officer stated that he recovered a club (rungu) under some ash outside the house, adding that the club was hidden under the ash. He tendered the club as P Ex 1. He added that the 1st Accused also removed a panga from her house. He recalled that the club appeared to have been covered by ash gotten from the kitchen because there was no sign of burning at the place they retrieved the “rungu”.

He testified that he forwarded the club to the Government Chemist for forensic analysis. He tendered the panga recovered as P Ex 2. He testified that he did a sketch of the house which was a one roomed house. He tendered the sketch as P Ex 6 He also stated that he recovered a blanket from the bed inside the house that appeared to have blood stains. He tendered the blanket as P Ex 4, adding that the parts of the blankets that had blood spots were cut and forwarded to Government Chemist for analysis.

18. He further testified that, he recovered a mattress with a worn out cover and tendered it as P Ex 3. He testified that he collected blood samples from accused persons and two sons of the deceased and took some specimens from body parts recovered and forwarded the samples to Government Chemist for forensic analysis. He added that in the compound of the deceased stood three houses, one main house with one bedroom, a store that was also used by the 2nd accused as a dwelling place, and a kitchen that extended to house a chicken coop.
19. When placed on their defence, the accused both persons denied committing the offence.
20. Tabitha Ndanu Kioko (DW1) on her part denied committing the offence and denied writing a Confessionary Statement. She told this court that the deceased was her husband and that she was the 2nd wife adding that, the deceased used to spend time with her as well as spending some time with the 1st wife. She testified that the deceased used to operate a Posho Mill and a shop which were located a bit far from their home adding that, the deceased also had 3 motor bikes two of which were used for boda boda business while the other one was used by him to run his errands. She further stated that, the 2nd accused, Amos Kingoku Muia was their herdsman.
21. She stated that on 16th January, 2015, the deceased left home for his shop and Posho Mill using a bicycle and never came back. She stated that she became anxious and decided to send the 2nd accused to the home of the 1st wife to inquire if he had gone there but the 2nd accused went back and reported to her that the deceased did not go to the home of the 1st wife.

She testified that she went to the Posho Mill and found a worker who also told her that she had not seen the deceased.



22. She testified that she decided to go to the home of the 1st wife to inquire but to no avail. She testified that her deceased husband was not a drunkard adding that, her home was next to a game park with wild animals. According to her, several relatives visited her home wondering where the deceased was.
23. She testified that after 7 days the 2nd accused saw a dog carrying a human skull which still had hair. She testified that the skull looked like it was for a human being. She stated that the children from the first house followed the dog and that the dog led them to a valley in Nguni Forest where body parts were found and put in a sack.
24. The 1st Accused testified that the deceased may have been killed and eaten by the wild animals. She further stated that later, the Area Chief came accompanied by some people and inquired from her where the deceased was and she told them that she had even sent the 2nd accused to the 1st wife to find out as she was unaware of his whereabouts. She testified that he was later arrested together with the 2nd accused and that she was not aware of the forensic results of the items taken for forensic analysis. She testified that her deceased husband may have been killed by wild animals and when pressed to state if anyone had ever been killed by wild animals, she replied that there was an epileptic person who was mauled by hyenas. She denied having any differences with her deceased husband.
25. Amos Kingoku Muia (DW2), the 2nd Accused herein, testified that he was a casual worker working for the deceased as a herder.
26. He testified that the deceased left home on 16th January, 2015 but he had left him at home when he left to herd the animals, adding that, he used to leave at around 8:30am and would come back at around 6 PM.
27. He testified that, when he got home on 15th January, 2015 he did not see him. He testified that after around seven days, he saw a dog carrying a part of a human skull and called some people to come and have a look at it. He said people came and stated that it was a human skull adding that he had no knowledge of the whereabouts of the deceased, adding that no one had come to inquire about him except one friend who came.
28. He further recalled a time the 1st accused sent him to the 1st wife to inquire if the deceased had been seen.
29. He defended himself saying he had no idea how the deceased died adding that when they followed the dog that brought part of the skull home, they found more body remains in the bush, adding that though they lived near a game reserve, it was rare to hear someone being killed by wild animals. He could only recall one incident where a wild animal attacked a person who person who survived the attack.
30. He further added under cross-examination by State that he was the only adult with the 1st accused who stayed with the deceased at the time, adding that there were also small grandchildren aged between 4 and 6 years who stayed at the homestead.
31. The defence did not put in final submissions and the State through the Office of the Director of Public Prosecution asked this court to determine this case on the evidence tendered.
32. The accused persons are charged with the offence of murder which is defined under Section 203 of the Penal Code as;

“When any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”



33. The above provisions show that for a charge of murder to be sustained, the following elements must be established and proved beyond doubt. The elements are;
- a. The death of the deceased and the cause of that death;
 - b. That the accused committed the unlawful act which caused the death of the deceased and
 - c. The Accused had the malice aforethought this constitutes ‘mens rea’ of the offence.
34. The Prosecution’s Case against the accused persons is solely based on circumstantial evidence. The circumstances as presented by the Prosecution were as follows: -
- i. That the two Accused Persons were the only adult persons that were staying with the deceased at the time.
 - ii. That the 1st accused and the deceased had domestic problems that one time were escalated to the Area Chief to have them resolved.
35. It is now well settled that circumstantial evidence can be as good and reliable as direct evidence depending on some given circumstances particularly where the facts presented leads one to make an inescapable and reasonable inference of some fact pointing to the guilt of an accused person.
36. Courts of law have developed clear parameters that must be met by the Prosecution’s Case before a conviction can be based on circumstantial evidence.
- In the case of *Republic versus Kepkering Arap Koske & Ano.* (16EACA) the court held as follows: -
- “In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation hypothesis other than that of his guilt.”
37. In the case of *Judith Achieng Ochieng versus Republic* [2009] eKLR the Court of Appeal sitting in Kisumu made the following observation regarding reliance on circumstantial evidence;
- “It is settled Law that when a case rests entirely upon circumstantial evidence such evidence must satisfy three tests: -
- i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.
 - ii. Those circumstances should be of a tendency unerringly pointing towards the guilt of the accused.
 - iii. Circumstances when 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.....”
38. In *Joan Jebichy Sawe versus Republic* [2003] eKLR the Court of Appeal also weighed on the subject by holding as follows;
- “On circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from



the facts to the exclusion of any other reasonable hypothesis of innocence raim with the prosecution. It is a burden which never shift to the party accused.....”

39. In this matter, to begin with the 1st ingredient of proof of death the prosecution’s case from the evidence of PW1, PW2 and PW3 shows that some bones believed to belong to a human being were discovered days after the deceased was reported missing. The evidence tendered by the Doctor (PW6) and the Investigation Officer (PW7) in my view were inconclusive in so far as the identity of the person whose remains were found is concerned. Dr. Miano (PW6) stated clearly that forensic analysis (DNA) would have been ideal for purposes of identification of the body.
40. The Investigation Officer (PW7) on his part stated that he forwarded the samples collected from the body parts recovered, plus blood samples found on the club (Rungu-P Ex 1) believed to be the murder weapon, the panga and blood samples from the accused persons and deceased’s children but strangely, the Police and the Prosecution made no attempts to procure those results and tender them in evidence leaving the question of identity of the deceased unanswered.
41. The Investigations Officer stated in his evidence that, when he visited the scene, after receiving news that body parts had been found scattered in the forest near the homestead of the deceased, he interrogated family members and that one of the sons of the deceased was “categorical that the recovered body remains belonged to his father.” However, the name of the son referred to by the Investigation Officer was not indicated and furthermore, the only son called Pius Kiloko (PW2) never mentioned anything in his evidence to indicate that he identified the body parts to belong to his father.
42. Evidence from PW5 was that the parts were presented to a pathologist Dr. Cosmas Mulisya who prepared a post mortem report. The witness stated that there were skeletal bones available for post mortem. The said witness however did not tell the court how the examining doctor was able to identify the skeletal bones and connect them to the deceased. He stated that some pieces of muscle were taken for analysis for purposes of identifying the body but there was no evidence presented in court on the outcome of the DNA analysis. Given the state of the remains and without DNA analysis, it was difficult to establish with certainty that the remains belonged to the deceased.
43. On the proof of the cause of death, though PW6 presented a post mortem which recorded the same as being murder with mutilation of the body, he proceeded to state as follows;
“...The opinion of the doctor in respect to cause of death should not have added that it was a murder. He should have just indicated his opinion. The body was mutilated. The skeleton was not complete...”
44. The Doctor who authored the post mortem report concluded that the cause of death was murder because of the mutilation by the doctor (PW5) who tendered the report doubted the basis for the conclusion made that it was a case of murder given the circumstances.
45. There are situations however, where a cause of death or the fact of death can be inferred from the circumstances. In *Ndungu v Republic* [1985] eKLR487 the Court of Appeal made the following observations: -
“Though there are cases in which death can be established without medical evidence relating to its cause where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death as alleged by the prosecution.”
46. In the absence of any direct evidence linking the accused persons with the cause of death and in the absence of forensic (DNA) results linking the body parts discovered and the deceased, the Prosecution’s



Case in respect to the element of fact of death and its cause, is shaky and has left doubts in the mind of this court.

47. (ii) Actus Reus (Proof that the accused committed the unlawful act that cause death of the deceased).

The Prosecution Case on this element, is also circumstantial and rested on the evidence of PW1, and PW3 in respect to the past domestic issues between the 1st accused and the deceased.

The evidence of PW1 somewhat appears to deflate the ingredient of malice because he stated that the domestic issues was resolved by the elders. It is of course evident from the evidence of PW1 (the Area Chief) that the deceased had expressed fears about his life to him and according to the said Chief, the deceased at one tme, wanted to send the 1st accused to her parents' home because he felt that she wanted to kill him. The Chief as I have said stated that he called some elders and resolved the dispute. On 9th September, 2014. There was no evidence tendered to show that the quarrel between the deceased and 1st accused ever recurred.

48. The evidence that perhaps could have changed the dynamics in this case was the alleged confession made by the 1st Accused but for strange or unknown reasons, the Prosecution inexplicably left out the evidence and made no efforts to tender it notwithstanding that it formed a crucial part of their case against the accused herein.

49. The prosecution also relied on witness testimony of PW5, a chief from Mutomo Location who stated that he was summoned by the Director of Criminal Investigation Office Mutomo for purposes of translating a confession by the 1st accused. The witness stated that PW2 was in the room together with some police officers when the confession was being made and allegedly the same was recorded by the Director of Criminal Investigation Officer. PW2 did not mention any confession in his testimony, the Director of Criminal Investigation Officer who recorded the confession was not called to testify and the prosecution did not provide the alleged confessionary statement even after a court directive on 18th January 2021 for the same to be presented in court. Additionally, the 1st accused denied making any confession in her testimony in court.

50. The Law is clear on how a confession should be handled and presented in evidence.

Section 25 of the *Evidence Act* defines confession;

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

51. Section 25A (1) of the *Evidence Act* then proceeds as follows;

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.”

52. The Officer who recorded the confession was not called to tell the court if he is a Senior Police Officer competent to record a confession as provided under Section 25A of the *Evidence Act*. The Area Chief (PW5) gave critical and useful information on how he translated the confession from Kamba to English because the 1st accused is said to be illiterate but in the absence of the evidence of Police Officer who recorded and signed the confession the evidence by PW5 were of no probative value to the Prosecution's Case. A keen and diligent prosecutor should have noted that the gap and move with speed to avail the Director of Criminal Investigations Officer who recorded, given that the



Prosecution's case appears to have majorly hinged on that confession because it was as a result of that the club (rungu) (P Ex 1) and the panga were recovered among other items.

53. In the end this court finds that the element of actus reus has not been established or linked with the accused persons. This court finds that the Police should have done better in ensuring that the crucial evidence like the DNA analysis report was availed and besides that, more information regarding the culpability of the accused persons if at all should have been obtained from close relatives and neighbours. The son for example who recognized the body parts should have been called to assist the court by giving information on how he was able to recognize the body parts to be those of his deceased father. That way at least this court could be better placed to determine or infer that the body parts belonged to none else but the deceased in this case.

54. *Republic v Michael Mucheru Gatui* [2002] eKLR, the court dealt with a similar situation where five deceased persons were burnt beyond recognition. There was an argument that the prosecution was only able to establish the cause of death of only one victim. The cause of death for the others could not be unascertained. The court had this to say;

“Even in more difficult cases where the body of a deceased person may not have been recovered, proof of death can be established through circumstantial evidence. It all depends on the quality and extent of that evidence. Where, for instance, a deceased person was kidnapped and taken to a forest where he was said to have been shot dead but the evidence of that eye witness was found to be contradictory and false and the deceased's body was never recovered, that circumstantial evidence was found to be unsatisfactory, for the deceased may have escaped from his abductors.”

55. Similarly, in the case of *Kimweri v Republic*(1968) EA 452 the Court held that, although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death.

Sir Charles Newbold, then President of the Court of Appeal, had this to say on Page 453.

“While death may be proved by circumstantial evidence, without evidence as to the production of the body of the allegedly dead person, and without any evidence of a person who saw the body of dead person, and without a confession by a person accused that he caused the death, yet where a court is asked to find in a murder charge that a person is dead in the circumstances which we have stated, the evidence on which the court is asked to infer the death must be such as to compel the inference of death, and must be such as to be inconsistent with any reasonable theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead.”

56. In this instance, the identity of the person(s) whose remains were discovered and samples taken for DNA analysis remains a mystery. The reasons why the state failed to adduce the DNA results is also a mystery. In such circumstances this court certainly cannot be called to render a conviction despite the strong suspicions expressed by the witness (PW1, PW2 & PW3 & PW 7) that the Accused persons were responsible. The element of mens rea (motive) was not brought out clearly. The Prosecution's Case in respect to that element rests on the evidence of a single witness (PW1) which as I found out above, is insufficient because the same witness stated that he had resolved the domestic issues between the deceased and the 1st accused a year before the incident herein.

In the end, I found that the Prosecution's Case against both the accused persons is simply too weak to sustain a conviction. The accused for the foretasted reasons are not found guilty and shall be acquitted accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO



KITUI HIGH COURT

