



**Republic v Mutethia (Criminal Case 3 of 2018)
[2023] KEHC 519 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 3 OF 2018
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ANTONY MUTETHIA ACCUSED

JUDGMENT

1. Antony Mutethia (Accused) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).

The particulars of the charge are that on the night of 28th and July 29, 2017 at Njoka village, Mulathankari Location in Imenti North sub-location within Meru county murdered Joseph Muthiora

Prosecution Case

2. The prosecution case as told by Julius Kathurima Silas and M'Ituikwa Mbweria were that on July 28, 2017, Accused who was drunk passed by their home at about 07.00 pm and walked towards Muthiora's house about 30 metres away and from a distance, they heard singing from Muthiora's house. That the following day, Muthiora was found lying dead in his house. Joseph Karumba M'Rimberia stated he met Accused at Muthiora's gate on the material night and both of them went separate ways.
3. PC Francis Ekitoyo upon receiving the murder report visited the scene and found Muthiora's house locked from inside. Upon gaining entry, he discovered a dead body with serious injuries to the head and hands and removed it to the mortuary. Accused was subsequently arrested and charged.

Defence Case

4. In his sworn statement, Accused denied going to deceased's house or killing him.



Analysis and determination

5. Section 203 and 204 of the [Penal Code](#) under which accused is charged provide for the offence of murder and the punishment for it respectively. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
6. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the Muthiorai; that Accused caused the death and that he was actuated by malice.

a) Death

7. The postmortem form PEXH. 3 reveals that Muthiora suffered multiple cuts on both hands, his head and face were disfigured and skull and facial bones had multiple fractures exposing the brain. The doctor formed an opinion that he died of severe hemorrhage with hyperemic shock and severe head injuries and multiple deep cuts due to assault.

b) Whether Accused committed the unlawful act which caused the death of Mutugi

8. The offence was allegedly committed at night. The first two witnesses stated they saw Accused walk towards Muthiora's house whereas the 3rd stated he saw him near Muthiora's gate. None of the witnesses stated that they saw Accused enter or leave Muthiora's house. There is therefore no doubt that Accused was charged on the basis of suspicion.
9. In *Sawe vs Rep* [2003] KLR 364 the Court of Appeal held:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”
10. In *R. vs Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa had this to say:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”
11. Accused denied killing Muthiora. There being no direct evidence to link him to the murder, I find that the evidence by the Prosecution is in the circumstances of this case insufficient to sustain a conviction.

c) Malice aforethought

12. The prosecution having failed to prove actus reus', it would be futile for this court to delve into the issue of malice aforethought.



Disposition

13. In the end, I have come to the conclusion Accused is not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) and are hereby acquitted. He shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU 02ND DAY OF FEBRUARY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For the Accused - Ms. Athieno Advocate

For the State - Ms. Mwaniki

