



**Republic v Mutati (Criminal Case 10 of 2018)
[2023] KEHC 4149 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 10 OF 2018**

**RK LIMO, J
MAY 9, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS MUTATI ACCUSED

JUDGMENT

1. Francis Mutati Musyoka the accused is charged with the offence of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars as per the information filed are that, on 8th February 2017 at Katuni Village, Kitoo Sub-Location, Mutitu Sub-County within Kitui County, he murdered Daniel Mutinda Mukuni (the deceased herein).
3. The Accused person denied committing the offence and the prosecution has presented a total of eight witnesses to prove their case. The accused on his part gave sworn statement and called no witness. The Prosecution's Case against the accused is circumstantial and *inter alia* based on the fact that he was the last person seen with the deceased when he was alive.
4. Josphat Muthuvi Musili (PW1) stated that he was at his home on 7th February 2017 when the deceased (his nephew) and the accused came to his home. He stated that the deceased gave him twenty shillings and left shortly together with the accused. He stated that he learnt that his nephew has been murdered the following morning. He stated that he informed the police that the deceased had passed by his home the day before he was found dead and that he was in the company of the accused.
5. Joyce Kamene Muthui (PW2) informed the court that she was the wife of Josphat Musili (PW1). She stated that the deceased had passed by their home on the night of 8th February 2017 at 2.00 a.m. She stated that she heard noises outside her house and that she used a torch to check who the deceased was with and saw that it was the accused. That the two left together after the deceased gave 20 shillings to



PW1 and indicated that he would come to see him the following day. She also stated that the deceased was carrying a cell phone and a small radio. She told this court that, she learnt that the deceased had been murdered the following morning. She stated that she went to the scene of the murder which was close to her home and when she arrived she observed the body of the deceased which she stated had injuries on the head, adding that the deceased was also wearing the same clothes as he did when he visited her home.

6. Talib Kioko Jihad Mutonyi, (PW3) the assistant area Chief Mutitu Sub-Location stated that he received information about a murder in his area jurisdiction on 8th February 2017. That he went to the scene where he saw the deceased who was known to him. He observed that the deceased had sustained injuries to his head. He stated that he accompanied police to the home of the accused on 12th February, 2017 which was close to the scene where the body was found. He stated that on arrival, they retrieved a small axe which had blood stains, a rubber whip, a shirt and a pair of trousers which also had blood stains.

He identified a shirt and a pair of blood stained jeans in court adding that the police took possession of the items from the home of the accused.

7. Winfred Muema Mwaniki (PW4) the uncle to the deceased identified the body of the deceased to the pathologist at Kitui District Hospital for purposes of performance of a post mortem. He stated that he observed cut wounds on the body of the deceased.
8. Dr Muriithi Miano (PW5) from Kitui District Hospital testified on behalf of his colleague Dr Kiatu who performed and prepared a post mortem report in reference to the deceased. Before giving his testimony, the witness told the court that Dr. Kiatu has left the hospital to further his studies. The witness also stated that he had worked with the doctor for 6 years as such he was familiar with his handwriting. The doctor stated that upon examination of the body of the deceased, it was observed that the deceased had lacerations on his right ear, 4 lacerations on the front and back of the head, a fracture on the left jaw and loose teeth on the left side. Internally, the deceased sustained parietal depressed fracture and subdural hematoma which the witness clarified was internal bleeding in the head. The examiner's opinion was that the deceased died from severe head injury. The doctor's opinion is that the deceased suffered cuts the measuring 4x3 cm while the other cut was 2x2cm. He produced a post mortem report dated 28th February 2017 as P Exh. 4.
9. Mutinda Dennis "Baba" (PW6), testified that he used to stay with the accused who was a cousin to him in the same house and that on 8th February, 2017, the accused never spent the night with him. He added that on 9th February, 2017 he got information that the accused was being sought by the police.
10. Pius Mutuku (PW7) an M-pesa Operator based at Mutitu Town testified that his work entailed inter alia charging phones and radios. He testified that on 9th February, 2017, the accused person took a small radio red in colour for charging and left. He stated that as the radio was charging Joyce Kamene (PW2) went to his shop for shopping and as she was making her orders, she saw the red radio charging and claimed that the radio was hers. The witness stated that because he knew both the accused and Joyce well, he told Joyce to go to the Police Station which she did and that shortly thereafter, she went back with a Police Officer. He stated that he gave the radio to her because of the presence of a Police Officer.
11. Chief Inspector of Police Wilson Kaguru, (PW8) the Investigating officer, told the court that he was stationed at Mutito as the Station Commander at the material time. That he received information from PW3 of a dead body that had been discovered within Kitoo village. The officer stated that upon reaching the scene, he saw the body and observed that the victim had sustained stab wounds at the back of his head. He stated that he secured the scene and also drew a rough and fair sketch map of the same.



- He produced the two as PExh. 6(a) and 6(b) respectively. He also produced another document which indicted measurements of the scene and the same was marked as PEXH 6 (c). The witness stated that the Director of Criminal Investigation Office and Officer Commanding Police Division who were also present took photographs of the scene.
12. He added that as he was in the process of drawing sketches of the scene, his colleague, Police Constable Kariuki received a call from Mutitu informing him that the suspect was last seen with the deceased at 2300 hours the previous day, had been spotted in Mutitu and that he was planning to board Matatu to Nairobi.
 13. He testified that Police Constable Kariuki took the police vehicle and rushed to Mutitu and came back to the scene with the suspect (the accused herein).
 14. He stated that, he tried to interrogate him but he denied having anything to do with the murder of the deceased. He added that they decided to visit his house which was around two hundred metres from where the body of the deceased was found.
 15. He testified that inside the house of the accused, they recovered a pair of jeans trousers which was blood stained. He tendered the pair of jeans as P. Ex 3.
 16. He stated that he was also able to recover a maroon shirt that was also blood stained and he produced the maroon shirt as P Ex 4.
 17. He testified that with the recovery of the blood stained clothes, he was able to connect the murder with the accused and escorted him to the Police Station before taking the body to Kitui County Hospital for preservation and autopsy.
 18. He testified that he investigated and recorded statements from witness. He stated that he went back to the house of the accused accompanied by Police Constable Michael Kariuki on 12.02.2017 and recovered a small axe which also had blood stains. He produced the axe which still had visible blood stains as P Ex 1.
 19. He further testified that from the statements recorded he came to learn that the accused had taken a small radio for charging at Mutitu. He stated that PC Kariuki went and recovered the radio and he tendered it as P Ex 5. He added that the father to the accused later went to the Police Station with a receipt showing that the radio was purchased in Nairobi but his efforts to trace the shop that the radio was bought was futile.
 20. He further testified that after recovering the exhibits from the house of the accused, he marked them and sent Police Constable Chumba to take them to Government Chemist for forensic analysis.
 21. He testified that the accused in his statement under inquiry had told him he slept home at the material time but upon investigation he learnt from Mutinda Dennis (PW6) that the accused never slept home that material night of 8th February, 2017.
 22. When put on his defence, the accused denied committing the offence. In a sworn statement of defence, he stated that he was working at a construction site at the material time that he went to work as usual on the material day and later went to have drinks at a local club. He stated that he was joined by his uncle Musyoki at the bar at around 8pm but he left for home to see his mother. That he met his mother who informed him that his father had been arrested due to a fight but also stated that he spent the night with his father Musyoka Nguli. It was also his testimony that he spent the night at his grandmother's home together with PW6. The accused then proceeded to state that was arrested the following morning on 9th February 2017 in town as he went to work. He stated that he met his father at the police station and



thought that he was arrested because of his parent's differences. He also stated that he was shown some clothes by the police and he identified his shorts. He also testified, the radio recovered by the police, belonged to him and explained that he had purchased it from a hawker at country bus and gotten a receipt for the same. He denied seeing the deceased on 8th February 2017 and stated that he had not seen him since his return to Mutito from Nairobi. The accused also testified the relationship between him and Josphat Muthuvi Musili (PW1) and Joyce Kamene Muthui (PW2) was not good as they had quarrelled over their chicken destroying his crops.

23. The accused submits that the prosecution failed to discharge the burden of proof. He faults the investigations carried out by the police stating that there was no explanation given as to why the police only recovered the alleged murder weapon, i.e. the sculptor axe from the accused house on the second raid four days after the murder. The accused also faults the manner in which the raids were conducted stating that the same were done without search warrants. The Accused further submits on the blood stained items recovered stating that the prosecution failed to ascertain through DNA testing who the blood belonged to. The accused also faults the investigations stating that that the police did not secure the house after 9th February 2017 before the alleged murder weapon was retrieved on 12th February 2017. Still on the murder weapon, the accused submits that medical evidence was to the effects that the deceased only sustained superficial cuts and not deep cuts.
24. On the evidence presented, the accused submits that the same was not credible. He submits that although Joyce Kamene Muthui (PW2) claimed to have heard the accused on the night of the murder, she did not explain how she was able to see him as she claimed that he visited her home at night at 11.00pm. He submits that there was no evidence that the alleged murder weapon and the blood stained clothes belonged to the accused, further, that there was also no evidence that the radio recovered by the police from Pius Mutuku (PW7's) shop belonged to the deceased. The accused relies on the Court of Appeal's decision in *Richard Munene versus Republic* [2018] eKLR on the maxim that substantial contradictions, discrepancies and inconsistencies should be resolved in favour of an accused person.
25. He contends that the Prosecution's Case has failed to establish the motive of the murder adding that without that ingredient the charge cannot stand. He submits that there is no evidence suggesting he had a grudge or personal vendetta against the deceased person.
26. The accused person as noted above is charged with the offence of murder Contrary to Section 203 of the *Penal Code* which provides as follows: -

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”
27. The above section shows that in a charge of murder the following elements/ingredients must be established and proved beyond doubt by the prosecution to secure a conviction or for the charge to be sustained;
 - i. The fact of death and the cause of that death.
 - ii. That the accused committed the unlawful act which caused the death of the deceased and
 - iii. That that unlawful act was activated by malice or ill motivated.

I will examine each element on the basis of the evidence tendered.



(i) The fact of death and the cause

28. The body of the deceased was discovered on 9th February 2017. Winfred Muema Mwaniki who was related to the deceased identified his body to a pathologist on 28th February 2017 before the pathologist performed a post-mortem on the body and established that the deceased succumbed to severe head injuries. The same was indicated in the post mortem report dated 28th February 2017 and produced in court as PEx.4.

This court finds that based on the above evidence the fact of death and its cause was proved beyond doubt. The deceased death was caused by someone who inflicted the serious and fatal injuries duly noted by the doctor who performed the post mortem examination.

(ii) Whether the accused committed the unlawful act that caused the death of the deceased

29. The Prosecution's Case on this element is based on circumstantial evidence because the murder incident occurred at night and no one saw the person who inflicted the fatal injuries on the deceased.

30. Evidence from Josphat Muthuvi Musili (PW1) and Joyce Kamene Muthui (PW2) was that the deceased went to their home on the night of 8th February 2017 and he was in the company on the accused. The accused was a neighbor to the two and although Josphat Muthuvi Musili (PW1's) evidence was that he is a person living with a visual disability in that he cannot see, he stated that he heard someone else laughing as he spoke to the deceased through the window and that his wife, Joyce Kamene Muthui (PW2) went outside and saw that the person was the accused. Joyce Kamene Muthui (PW 2) in her own testimony stated that she heard noises outside her house on the material night. She went out to investigate after the deceased called out for Josphat Muthuvi Musili (PW1) and using a torch, she saw the accused who was seated outside. That the two men left shortly after the deceased gave the Josphat Muthuvi Musili (PW1) some twenty shilling with the promise that he would visit him the following day. That the body of the deceased was then discovered a few meters from Josphat Muthuvi Musili and Joyce Kamene Muthui (PW1& PW2's) home the following day. This was also close to the home of the accused.

31. The accused discredited evidence from Josphat Musili (PW1) and Joyce Kamene Muthui (PW2) stating that first, PW1 was said to have been blind and that he relied on what his wife told him that it was the accused who was with the deceased. In regard to Joyce Kamene Muthui (PW2), the accused submits that the witness did not explain how she was able to see him as it was dark. He also faults the police for failing to conduct an Identification Parade for his identification.

32. This Court has considered the contentions by the accused regarding the evidence of Josphat Musili (PW1) and the fact that he was blind and could not have recognized him or the deceased. While this was possible, it is not always correct to assume that blind people cannot recognize a person particularly the people they are familiar with. They do recognize by means of voice and even touch. PW1 stated that the deceased who was his nephew gave him 20 shillings and talked to him through the window.

33. Furthermore, the wife of Josphat Musili (PW1) who testified as PW2 was present and says she recognized the deceased and the accused when they went to their home at about 2am she says she had a torch and saw the two who were their neighbours.

34. Recognition of the accused person in my view of the above evidence was positive and free from error because PW2 was firm in her evidence during cross examination by defence counsel that he saw the deceased and the accused that night. The same is corroborated by the evidence of Josphat Musili (PW1) that the deceased handed him Kshs. 20 and promised that he would come the following day.



35. The testimonies of the Assistant Chief Mutitu Sub-Location Talib Kioko Jihad Mutonyi (PW3) and the Investigating Officer (PW8) reveals that they visited the house of the accused on two occasions. The first visit was on 9th February, 2017 when the body of the deceased was found and a search conducted by the Investigating Officer and he saw a blood stained pair of jeans and a maroon shirt. The same were recovered from the house of the accused. The accused person did not offer any explanation to explain the presence of blood stained clothes in his house and though the prosecution failed to adduce evidence from a Government Chemists experts to shed light on the forensic analysis and results obtained, the accused conceded that the clothes belonged to him.
36. In their second visit on 12th February, 2017, the Investigating Officer recovered a blood stained axe which was tendered as P Ex 1. The axe still contained visible blood stains and though there was no forensic evidence regarding DNA analysis of the blood stains, this connection between that axe and the medical findings on the Post Mortem Report (P Ex 4) because the cuts noted on the head of the deceased were small (4x3cm and 2x2 cm), shows that something similar to P Ex 1 was used to inflict the injuries. The accused again in his statement of defence did not deny that axe was his or explain why an axe found in his house had blood stains.
37. According to the evidence of Josphat Musili (PW1) and Joyce Kamene Muthui (PW2), the accused was the last person seen with the deceased and even though the prosecution had a duty to prove their case beyond reasonable doubt, the accused in this case was required to give an explanation of his whereabouts on the night the deceased was murdered in view of evidence of PW1 & PW2. The accused stated that Joyce Kamene Muthui (PW2) could not have seen him as it was dark which is not correct as she stated that she used a torch and saw the accused who was seated outside the house as the deceased spoke to PW1.
38. This court finds that going by the evidence of Mutinda Dennis who was staying with the accused in one house it is quite evident that the accused never slept home at the material time. He tendered no evidence showing where he spent the material night. He was the last person seen with the deceased in the wee hours of the night and the following day, the deceased body was discovered about 200 metres from where the accused lived. In fact, the Area Chief (PW3) stated in his evidence that the body of the deceased seemed to have been dragged to a bushy area perhaps to conceal the crime. The circumstantial facts presented in my view strongly links the accused with the murder.
39. In the case of *Abmed Abolfathi Mobammed & Another versus Republic* [2018] eKLR the Court of Appeal made the following observations which I find relevant to the facts obtaining in this case;

“..... It is 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 circumstance or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person.....”

The Court went on and observed that circumstantial evidence was capable of proving a proposition with an accuracy of mathematics and stated that before circumstantial evidence is relied, the evidence must satisfy the following criteria.

- 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 pointing towards the guilt of the accused person.



- iii. The circumstances when taken cumulatively should form a complete chain that there is no escaping the conclusion that the crime was committed by the accused and no one else.
40. The accused in this matter was last seen with the deceased in the wee hours of the night and the next morning, the deceased body was discovered not very far from his home. The doctrine of last seen also applies in this case.
41. In *Republic Versus EKK* [2018] eKLR Lesiit J (as she then was) had this to say regarding the doctrine of last seen;
- “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”
42. In the case of *Stephen Haruna V. The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 opined thus:
- “The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”
43. In his defense, the accused denied being in the company of the deceased that night or even seeing him at all. He claimed that he went to work on the material day and later on went to a bar where his uncle joined him before the accused left for home. The accused did not call any witness to verify this information and his testimony of what transpired when he reached home was also contradictory. He stated that upon reaching home, he met his mother who told him that his father had been arrested following a fight with her. He then stated that he left his mother’s home and went to spend the night with his father Musyoka Nguli. In another instance, he stated that he spent the night at his grandmother’s place. On cross examination, he stated that he spent the night with Mutinda Dennis (PW6) who told the court categorically that the accused did not spend that night at his usual place.
44. Under Section 119 of the *Evidence Act*, the court is entitled to presume certain facts where a reasonable explanation is not given. The Section provides as follows;
- “The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
45. This Court finds that the evidence presented by the Prosecution is sufficient enough to draw an inference that the accused was responsible for the acts that caused the death of the deceased in this case. The circumstantial evidence has proved that fact beyond reasonable doubt.



Whether the act of causing death was done with malice aforethought.

46. The accused in his defence states that he had good relationship with the deceased and that no evidence was tendered showing he harbored ill motive which is true but going by the post mortem report, the deceased suffered serious and fatal injuries which could only have been inflicted by a person with ill motives. In such instances, the element of malice aforethought can be inferred under Section 206 of the Penal Code as aptly stated in the case of John Mutuma Gatobu versus Republic [2015] eKLR. Section 206 of the Penal Code states;

“That leaves the question of malice aforethought. With respect to the appellant’s learned counsel, malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code thus;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited.”

In the light of the above decision, I am satisfied that the Prosecution has proved the element of Mens rea beyond doubt. In short, this Court is satisfied that the Prosecution has proved its case against the accused to the required standard in law. He is hereby found guilty as charged and is convicted accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

