



**Republic v Mubia (Criminal Case 69 of 2015)
[2023] KEHC 22487 (KLR) (22 September 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 69 OF 2015
PJO OTIENO, J
SEPTEMBER 22, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PHILIP MUBIA ACCUSED

JUDGMENT

1. The accused, Philip Mubia, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 7th October, 2015 at Kimang’eti Trading Centre in East Kabras location in Kakamega North Sub-County within Kakamega County, the accused person murdered ISAAH MATE IMBUSI. He pleaded not guilty to the charge and a trial ensued.
2. In order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from four witnesses.

The Evidence

3. PW1, Nancy Wanjala testified that she was a waiter/bar attendant and that on 7/10/2015 at about 9PM she was working at Abikole bar at Kimanget area in Malava Constituency, when the deceased, whom she knew as Isaiah, entered the bar running while being chased by the accused who had a hammer and another man called Moi who had a knife. The deceased kneeled down and pleaded with them telling them that he would give them what they wanted but they pulled him out of the bar after struggling for about 30 minutes. She then closed the door since there were no customers inside and looked through the window and saw the two men beat the deceased about 30 meters from the bar. She stated that she was able to witness the beating since there was a security light outside the bar. She tried to call the deceased’s friend by the name of Luvonga but she had no credit and she later sent him a please call me and when he called her back she narrated to him what had transpired. The friend was unable to trace



- the deceased and when they went to the scene of the beating the next day they found a lot of blood prompting them to record a statement with the police. She claimed that the accused was a frequent customer at the bar and that he would get violent when drunk.
4. On cross examination she stated that she recorded two statements; the first being when the deceased was beaten and the second was made two weeks later following the death of the deceased. She refuted the contents of her statement that she slept and did not know what was happening outside.
 5. PW2, Nathan Luvanga, a farmer, testified that the deceased was his brother and that on 8/10/2015 at 5AM he received a call from PW1 asking him if he had seen the deceased. He contacted the deceased's wife at about 8AM but her phone did not go through. He then called one Hassan Ngome who informed him that the deceased was lying beaten at Kimanget Primary School. He rushed to the scene where he found the deceased lying down with a swollen face and surrounded by his wife and other villagers. They placed him in a motorcycle since he could not walk and took him to Malava Hospital. After receiving information that he had been beaten in a bar, he headed to the bar where he found a lot of blood in the trenches outside the bar. In the bar, PW1 narrated to him how the deceased came into the bar running while being chased by the accused and one Philip the previous night and that they pulled him out and beat him with stones. A Sunguti Karanga who was there said that he saw the accused and one Boy argue with the deceased. The accused was then arrested at the stage while Boy has never been seen to date. He later visited the deceased who was admitted at Kakamega County Hospital and he told him that the accused had stabbed him and later stoned him because of his affair with the wife to Philip's uncle.
 6. On cross examination he stated that the deceased had told him that the accused and Boy had followed him to the bar.
 7. PW3, Sunguti Karanga Moses, a resident of Kimangeti village in Malava testified that on 7/10/2015 at about 9PM he was coming from work when he bumped on the deceased who told him that he was being followed by two young men. He left as the deceased walked towards the market being followed by the accused and Boy and he thought it was out of drunkenness. After walking for about 20 meters he heard shouts which he thought was from drunkards. The next morning as he was heading to work he heard villagers saying that a man had been beaten and when he called PW2 to inquire on who had been beaten he told him it was the deceased. He then informed him that the previous night he had met with the deceased, the accused and Boy and they were not in good talking terms.
 8. On cross examination he stated he did not see the people beating the deceased.
 9. PW4, No. 71254 CPL Joseph Ngaira of Makunga Police Base testified that he was previously stationed at Kabras Police Station and that on 8/10/2015 while on duty he received a report from PW2 that his brother, the deceased, was beaten by two people known to him that is the accused and Boy and that his brother had since been taken to Kakamega County Hospital. He accompanied him to Kimangeti where the deceased had been discovered in a trench and on the trench they found blood stains. He then interrogated PW1 who narrated to him the events of the night when the deceased was attacked. He later visited the deceased in hospital and noticed he had injuries in the ribs and was not talking. Come the 22nd day of October, 2015, the deceased was discharged from hospital and died at his home the same day. A post mortem was conducted and cause of his death was found to be injuries on his ribs.
 10. On cross examination he stated that the deceased was not talking and nobody was able to obtain a dying declaration from him.
 11. By consent of the parties the post mortem report was produced as PEXH 1, the treatment notes as PEXH 2 and X ray report receipt as PEXH 3. The production of the two exhibits marked the close of



the prosecution case and the court ruled that a prima facie case had been established against the accused person and he was thus placed on defence.

12. The Defence gave evidence of one witness, being the accused, Philip Mubia. In his unsworn testimony denied killing the deceased and stated that on 8/7/2015 he was arrested by Administration Police Officers who took him to Kimangeti police station and informed him that he had killed the deceased. He claimed not to know Jonathan Boy and tacitly denied knowledge of a woman that PW2 claimed he was quarrelling over. At that juncture, the defence closed its case with the parties being directed to file their respective submissions.

Submissions by The Prosecution

13. It is the submission by the prosecution that they have proved the offence of murder against the accused in that the death of the deceased was proven by the post mortem report. On whether the death of the deceased was occasioned by an unlawful act they submit that it was the opinion of Dr. Dixon Mchana in the post mortem report that the deceased's cause of death was assault which is an unlawful act. On whether the accused person was properly identified as the person who injured the deceased leading to his death, it is argued that the accused was identified by PW1 who saw him and Moi beat up the deceased and the accused was a person known to her. It is further argued that even PW2 saw the accused and Moi following the deceased the night he was attacked. On the last element of malice aforethought, the prosecution argues that the injuries the deceased suffered include multiple injuries on the forehead, stitched cut wounds and multiple fractures and that the intention of the attackers was to cause grievous harm to the deceased and that inferred malice on the actions of the deceased.
14. On the issue that the accused suffered a miscarriage of justice because the trial was conducted using duplicate files, they contend that this court allowed the parties to proceed on a duplicate file and further submit that the loss of an original police file does not lead to an acquittal and place reliance on the case of *Justus Cheruiyot Chumba v Republic (2016) eKLR* where the court of appeal held as follows: -

“On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared.”

Accused Person's Submissions

15. The accused, in his submissions, faults the evidence of the prosecution by arguing that; the evidence of PW1 is unreliable since she did not identify the perpetrators, that PW2 did not see the persons who attacked the deceased, the knife and stones used to attack the deceased were never produced as evidence, the original police file was not produced despite the court ordering for the same thus leading to a mistrial and, lastly that, it was the statement of PC Murgor that PW2 stated that the deceased was attacked by people known to him namely Anambia Mufua and Boy Jonathan and yet these two individuals have not been charged.

Issues for Determination

16. The offence of murder is defined in section 203 of the penal Code as follows;

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”
17. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond reasonable doubt.



18. That said, the issues that arise, after full appraisal of the evidence on record, for determination by this court are as follows; -
- a. Whether the failure by the prosecution to avail the original police file occasioned a mistrial requiring the acquittal of the accused?
 - b. Whether Isaiah Mate Imbusi is dead and if the death was out of unlawful acts or omission of the accused?
 - c. Whether the accused was actuated with malice afore thought in causing the death of the deceased?

Whether the failure by the prosecution to avail the original police file occasioned a mistrial requiring the acquittal of the accused

19. Black's Law Dictionary (9th Edition) defines a mistrial as follows;

“a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.”

20. The rights of an accused person are enshrined under article 50(3) of *the Constitution* and they include the right to be availed, in advance, with the evidence the prosecution intends to rely on and the right to challenge such evidence.
21. This is a case in which the prosecution lost the original police file and proceeded to rely in a duplicate police file which move the accused contends resulted in a mistrial.
22. I am aware that it is the duty of this court to ensure that the constitutional rights of an accused person are protected and upheld. It is equally the duty of this court to ensure that justice is dispensed thus requiring a balance of the rights and interests of both an accused person and the complainant. This was the position of the court of appeal in Criminal Appeal No. 187 of 2002 Francis Ndungu Wanjau vs Republic where it was observed: -

“Faced with that kind of situation this Court remarked as follows in the case of John Karanja Wainaina vs. Republic, Criminal Appeal No. 61 of 1993 (unreported): -

“In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Is the appellant responsible? Should he benefit from his own mischief and illegality if he is? In the final analysis, the paramount consideration must be whether the order proposed to be made in the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant has lost the benefit of the presumption of innocence given to him by section 72 (2) (a) of *the Constitution*, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.”(emphasis mine)



23. I have perused the proceedings in this file and I have noted that on 23/7/2018, Justice J. Njagi having conduct of the case at the time issued the following orders;

“The police file is said to have gotten lost. Defence to cross examine using documents in the duplicate police file.”

24. The accused person has not demonstrated how the use of the duplicate file prejudiced his case and if at all the contents of the duplicate file were in genuine or doctored to warrant his acquittal. It is therefore the court’s finding that the loss of the original police file necessitating the use of the duplicate police file did not occasion any prejudice the accused person to warrant a declaration of a mistrial. Looking at the cross examination delivered, the court finds that the rights of the accused under article 50(2)c of [the constitution](#) were duly facilitated and not violated at all.

Whether Isaiah Mate Imbusi is deceased?

25. There is no contention that Isaiah Mate Imbusi is deceased and his death is confirmed by the autopsy report dated 23/10/2015 prepared by Dr. Akhenya in which he captures that the deceased died on 22/10/2015 at 2PM. That report was produced by consent of both counsel and its contents are thus not subject to any contentions.

Whether the death was occasioned to by unlawful acts or omission of the accused?

26. The right to life is protected and guaranteed under Article 26 of [the Constitution](#) of Kenya, 2010, may only be deprived intentionally in circumstances authorised by [the constitution](#) or a written law hence by any action that take the life of another is unlawful, unless demonstrated to be done pursuant to due process.

27. The autopsy report demonstrates that the deceased died due to multiple rib fractures secondary to blunt trauma which injuries were demonstrated by the evidence on record to have been inflicted by the accused. The question that then arises is whether the commission by the accused by way of assault upon the deceased were justifiable as lawful.

28. Pw1 witnessed the deceased being assaulted by the accused who was in the company of another and in recounting the events of that night, she stated that the two were armed with a hammer and knife and that she was able see them well with the aid of security lights while about 30 meters from the bar. She testified that she informed PW2 about the incident and the next day PW2 indeed found the deceased lying on the ground injured and when they visited the scene later with PW4 they found blood on the trenches outside the bar as well as stones. PW3 in his testimony equally stated that the on the night the deceased was beaten, he had seen the deceased with the accused and another man by the name of Boy and they appeared not to be in good terms.

29. To further identify the deceased’s assailant, PW2 testified that he visited the deceased in hospital and he disclosed that he had been attacked by the accused and one Boyi on the allegations that he had an affair with the wife to the accused’s uncle. That piece of evidence was fronted by the prosecution as amounting to a dying declaration.

30. Section 33(a) of the [Evidence Act](#), Cap 80, Laws of Kenya, stipulates what constitutes a dying declaration to be any ‘statements written or oral of admissible facts made by a person who is dead... to be admissible in evidence if proved to have been made ‘by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who



made them was or was not, at the time when they were made, under expectation of death and whatever may be the nature of the proceedings in which the cause of her death comes into question’.

31. When to rely on dying declarations was settled by the Court in *Dzomo Chai vs Republic Mombasa HC Criminal Appeal No. 256 of 2006* where the court held as follows: -

“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the *Evidence Act*. Although the court can in law solely rely on such evidence, there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”.

32. While PW4 in his testimony stated that the deceased did not identify the persons that assaulted him as he was unable to talk, he visited the deceased in hospital the next day after the assault, that was during the first week of admission when the deceased never spoke. However, PW2 spoke to deceased during the second week when he was able to communicate. It is thus the holding of the court that what was said to PW2 by the deceased suffices as a dying declaration and is thus admissible in evidence.
33. The court thus finds that the evidence of the prosecution witnesses was coherent and believable as to the identity of the persons who fatally injured the deceased to be the accused before the court and another who according to PW4 has disappeared without a trace.
34. That evidence remained wholly uncontroverted by the unsworn evidence offered by the defence. The evidence by the defence other than being with little weight, having been unsworn, was equally of little credibility in so far as he opted not to give evidence as to remove from the scene where the prosecution’s case had placed him.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

35. What constitutes malice aforethought is well set out in section 206 of the Penal Code to be; 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 with the accompanying knowledge that the act or omission leading to death would 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 caused or not, or by a wish that it may not be caused.
36. In the context of this matter, to establish whether or not the killing of the deceased was premeditated by the accused, the court must evaluate all the events leading up to the death and how the it took place.
37. It was the testimony of PW1 that the accused and another chased the deceased to the bar and that the deceased pleaded for mercy but the plea fell onto deaf ears when the two pulled the deceased outside the bar armed with a hammer and a knife and continually beat the deceased. A look at the treatment notes from the Kakamega County General Hospital shows that the deceased suffered multiple injuries on the head, chest, abdomen and the pelvic area injuries so severe that they required the deceased to be admitted in hospital for two weeks.
38. The severity and extent of the injuries together with the sensitivities of the parts of the body aimed at are good indicators of the intentions of the assailant and a yard stick whether he appreciated the possible outcome of his conduct. That the accused in the company of another attacked the deceased in the head, chest, abdomen and pelvic area and inflicting the very grievous injuries disclosed in the autopsy report, point to the fact that the assailant’s sole intention and goal was to kill or grievously



harm the deceased. That finding establishes that the accused and his accomplice were accentuated by malice aforethought.

39. In the end, it is established by the totality of the evidence that all the ingredients of murder were sufficiently proved and the court therefore concludes and finds that the accused person guilty for the offence of murder as charged and convicts him accordingly.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF SEPTEMBER 2023.

PATRICK J. O. OTIENO

JUDGE

