



**Republic v Muleme & another (Criminal Case 8 of 2017)
[2023] KEHC 22237 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 8 OF 2017
AC MRIMA, J
SEPTEMBER 19, 2023**

BETWEEN

REPUBLIC STATE

AND

MAXWEL BARASA MULEME 1ST ACCUSED

METRINE MUYOKA BARASA 2ND ACCUSED

JUDGMENT

Introduction

1. The accused herein, Maxwel Barasa Muleme and Metrine Muyoka Barasa, were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 7th May, 2017 at Chalicha village, Weonia Location in Kiminini Sub-County within Trans Nzoia County, the accused jointly murdered Metrin Nabwile Masinde (hereinafter referred to as ‘the deceased’).
2. When the accused were arraigned in court to answer to the charge, they pleaded not guilty to the offence. They were tried. The hearing of this case was conducted by three Judges. The first eight prosecution witnesses testified before Hon. Chemitei, J. The rest of the prosecution witnesses testified before Hon. Kimaru, J (as he then was). After the close of the prosecution’s case, this Court found that a prima facie case had been established against each of the accused to place them on their defenses.
3. The defence hearing was before yours truly. The first accused gave an unsworn testimony and the second witness opted to be silent. No witnesses were called.

The trial

4. The prosecution called eleven witnesses to establish that the accused jointly murdered the deceased. The prosecution’s case was that the first accused is the husband of both the deceased and the second



- accused. That, the deceased went to Church during the day on 7th May, 2017 and on return, she was never to be seen alive.
5. Frantic efforts to find her were initiated by the family. Those who took part included Judith Masinde (a sister to the deceased and who testified as PW1), Pius Barasa Masinde (a brother to the deceased and who testified as PW2), Leonard Juma Masinde (a brother to the deceased and who testified as PW3), Noel Barasa Wefwafwa (a son to the deceased and who testified as PW4), Centrine Mmoje Wangila (a sister-in-law to the deceased and who testified as PW5), David Kirui Maisi (a neighbour to the deceased and who testified as PW6) and Justus Sifuna Mute (the Chief, Weonia Location and who testified as PW9).
 6. It was PW4 who lived with the deceased in the same compound together with his other siblings. PW4 had his own house as well as the deceased. The houses were not far apart. On 7th May, 2017, PW4 returned home in the evening from playing football only to find his younger brother, George (not a witness), alone. Whereas the deceased's house was open, the deceased was not at home. George also did not know where the deceased, their mother, had gone to.
 7. PW4 looked for the deceased in the neighbourhood in vain. He only learnt that the deceased was seen returning home from Church at around 2pm. PW4 called the deceased's phone which was ringing, but went unanswered.
 8. At around 8pm, PW4 went to look for the deceased at the second accused's home where his father was that day. PW4 was met with hostility from the second accused and was chased away. PW4 then called and informed PW1 of the state of affairs at their home.
 9. PW1 also called the deceased's phone number, but it went unanswered. She went to the home of the deceased. She found PW4 alone at the home. PW1 entered the house of the deceased, her sister, and confirmed that the deceased was truly not inside. She went into the bedroom and found a purse. She recognized it as one belonging to the deceased. It had Kshs. 13,000/= which PW1 was aware the deceased had been given at the women Chama the previous day.
 10. PW1 became quite curious. She looked around the house. She found some footprints next to the window that was in the bedroom. Although it had rained, the footprints were quite clear.
 11. PW1 mobilized the neighbours and a search party began. They did not find anything in the toilet that had sunk. The deceased was not in the neighbourhood. They also visited the second accused's home where they were chased away by the second accused. A report of a missing person was, thereafter, made at Weonia Police Post.
 12. To her amazement, PW1 received two phone messages from the deceased's phone number which were threatening. The messages also indicated that the body of the deceased was in Nairobi. PW1 returned to the police the next day at 8am.
 13. The police and PW9 urged the villagers to continue with the search. According to PW2, he was really astonished by the first accused conduct over the matter. That, whereas the people were looking for the deceased who had disappeared, the first accused was not even disturbed at all and went on with his duties normally. In fact, according to PW2, the first accused went to his farm while the search was on. He did not take part in the matter or at all. To PW2, the accused know and had a hand in the death of the deceased.
 14. PW2 stated that when he was at the police station making the report, the police were also surprised that the first accused, who was the one who ought to have made the report, was not present. The police called him and he appeared.



15. The body of the deceased was eventually found in an abandoned pit latrine in the morning of 8th May, 2017. The police were informed and, with the help of firefighters, the body was retrieved. According to PW2 the body had injuries on the neck and allover.
16. PW10 was No. 235227 CIP Peter Were from the Scenes of Crime Department of the DCI. He was called by CIP Yusuf Nzioka and, alongside other officers, proceeded to the scene. He documented the scene and took 18 photographs which he later processed and produced in evidence before Court.
17. The investigating officer was PW11 No. 1133818 PC Benard Musila, attached to the DCI Trans Nzoia West. He was among the officers who visited the scene on the 8th May, 2017. He interrogated people at the scene and carefully observed the area.
18. To PW11, the deceased was killed in her house and the body moved through the window and was taken past the land and dumped into an abandoned pit latrine.
19. PW11 also saw footprints from the house of the accused to the window of the house of the deceased. The footprints then moved from the house of the deceased to the pit latrine.
20. PW11 arrested the accused in connection with the murder. He organized for and a post mortem examination of the body of the deceased was conducted on 18th May, 2017 by PW8, Dr. Nancy Kegode at Kiminini Cottage Hospital mortuary.
21. PW8 found bruises on the face, neck, left knee and thigh. There was also a stab wound on the neck. Both lungs were hemorrhage and there was no blood in the heart. PW8 formed the opinion that the cause of death was severe hemorrhage secondary to stab wound on the neck due to severe assault. PW8 took samples for further analysis to ascertain any toxins in the blood.
22. PW11 then led the accused to hospital where PW7, a Psychological Assistant, mentally assessed them. He found the accused to be mentally fit to stand trial. That was on 24th May 2017.
23. On completion of the investigations, PW11 recommended that the accused be charged with the murder of the deceased. The accused were eventually arraigned before Court where they were accordingly charged.
24. According to PW11, he decided to charge the accused because of the footprints which he found in the course of the investigations. He, however, admitted that he did not know whose footprints they were and also agreed that many people had taken part in searching for the deceased and had moved within and outside the home of the deceased.
25. When the prosecution closed its case, the Court found that each of the accused had a case to answer. The first accused gave an unsworn testimony while the second accused remained silent.
26. The first accused stated that he had met the deceased on 7th May, 2017 in the morning as she went to Church. He was at the home of the second accused. He did not see the deceased again on that day.
27. On 8th May, 2017 the first accused went to his mother's farm where he oversaw cane cutting. While at work, PW4 went and informed him that the deceased had disappeared. He immediately reported the matter to Sikhendu Police Station where he met his in-laws. They later proceeded to the police headquarters in Kitale to have the deceased's phone number tracked.
28. The police found out that the phone had been put off around 11:30pm the previous night at around Kilimani Academy. As they were on their way back, one of the in-laws was called and told that the deceased had been found dumped in a pit latrine. He was shocked of the death. He noted that there was nothing to connect him with the death of the deceased.



29. The record, however, has it that whereas the first accused opted to give an unsworn testimony, he was nevertheless cross-examined. That was a misdirection and a lapse on both the Court and Counsel, which this Court highly regrets. In order to cure that anomaly, this Court will not consider the testimony rendered by the first accused during cross-examination.
30. As stated, the second accused remained silent.
31. After close of the defence cases, parties were directed to file and exchange written submissions. Both complied.
32. Learned Counsel for the accused, Mr. Nyamu, argued that the prosecution had failed to discharge its burden of proof to the required standard to establish that the accused murdered the deceased. Several decisions were referred to in disproving the circumstantial evidence on record. He urged this Court to acquit the accused.
33. The prosecution argued that the evidence on record was sufficient to connect the accused with the death of the deceased. Several decisions were also referred to.

Analysis

34. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
 - (a) the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
35. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased

36. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
37. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the lifeless body of the deceased. The body was later collected by the police, taken to the mortuary and an autopsy carried out. The body was later buried.
38. The second way in which the death of the deceased was proved was through the evidence of PW8 who produced a Post Mortem Report on the autopsy she had conducted on the body of the deceased. The Post Mortem Report was produced in evidence.
39. PW8 concluded that the deceased's cause of death was severe hemorrhage secondary to stab wound on the neck due to severe assault.
40. This Court, therefore, finds and hold that the death of the deceased and its cause were proved to the required standard.



Whether the accused committed the unlawful act which caused the death of the deceased:

41. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long dead in an abandoned pit latrine.
42. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -
 - (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
 - (ii) The circumstances should be of a definite tendency unerringly pointing towards 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.
43. The foregone principles were set out in the locus classicus case of *R v Kipkering arap Koske & Another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI v Republic* (2013) eKLR, *Musii Tulo v Republic* (2014) eKLR among many others.
44. The Court of Appeal in *Musii Tulo* (*supra*) in expounding the above principles expressed itself as follows:-
 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R* (1958) EA 715 citing with approval *Teper v. R* (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
45. Further, the Court of Appeal in *Sawe v Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

"... In order to justify, 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 on. 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 is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused....."
46. Returning to the case at hand, the totality of the prosecution's evidence pointed to the fact that the accused were not culpable for the death of the deceased.
47. According to PW11, the only evidence that connected the accused with the death of the deceased was that there were footprints which ran from the house of the accused, to the house of the deceased and then to the pit latrine where the body of the deceased was recovered.



48. PW11, however, admitted that he did not know whose footprints they were and also agreed that many people had taken part in searching for the deceased and had moved within and outside the home of the deceased and the accused.
49. From this Court's perspective, I think, it will require extremely advance investigations to connect an accused with some footsteps especially where no witness attest positively to seeing the accused walk around where the footprints were found and in circumstances where many people had the opportunity of walking around that area.
50. This Court is not, therefore, persuaded that the prevailing circumstances in this matter taken cumulatively 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.
51. This is a case where the accused were charged merely on suspicion. However, as was held by the Court of Appeal in *Sawe v Rep* [2003] KLR 364: -
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
52. In *Mary Wanjiku Gichira v Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -
- "... suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."
53. A similar view was expressed by the Tanzania Court of Appeal in *R v Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -
- Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.
54. Therefore, whereas there may be some suspicion that the accused may have been involved in the death of the deceased, that suspicion alone, however, strong cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.
55. The prosecution, therefore, failed to prove that any of the accused was responsible for the death of the deceased in any way whatsoever.

Disposition

56. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused are found not guilty of the murder of the deceased.
57. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the *Criminal Procedure Code*. They are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

