



**Republic v Ilai & another (Criminal Case 17 of 2018)
[2024] KEHC 12534 (KLR) (3 October 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 17 OF 2018
RK LIMO, J
OCTOBER 3, 2024**

BETWEEN

THE REPUBLIC PROSECUTOR

AND

STEPHEN NGONDE ILAI 1ST ACCUSED

KATIWA ILIA 2ND ACCUSED

JUDGMENT

1. Stephen Ngonde Ilai and Katiwa Ilai 1st and 2nd accused persons respectively are jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 29th April 2018 at Kanyonyo Location in lower Yatta within Kitui County they murdered Paul Syengo (hereinafter to be referred to as the deceased).
2. Both the accused persons denied committing the offence. The prosecution called a total of eight witnesses. The prosecution’s case is hinged on circumstantial evidence. Below is the evidence tendered at trial by both the prosecution and the defence.
3. Sylvester Kimanzi Wambua (PW1), a businessman from Kanyonyo location testified and recalled that on 29th April 2018 (material date) at around 7.30pm one Kyalo Wandai called him on his mobile phone and asked him to assist in carrying a patient from a place known as Yaana to Muthale Hospital. He stated that he operated a taxi Registration No. KBN 999X.
4. Upon arriving at a place he was directed to, PW1 stated that he found the 1st accused whom he knew as “Gande” and 2nd accused whom he referred to as Katiwa along the road with a patient being supported by Kyalo and the 2nd accused. He stated that he turned his Motor Vehicle round and the patient was placed on the car and he drove towards Muthale hospital but on the way he was told by the 1st accused that the person was dead they should instead head to a mortuary which he did. He stated upon reaching a mortuary at Syongila they found a mortuary attendant who received the body upon assurance by



- the 1st accused that he would get a letter from the area chief the following day. He stated that the 1st accused gave out his details and mobile number adding that he found it odd that the 1st accused gave out a number ending with 90 instead of 75 which he was familiar with. He stated that the 1st accused also identified himself as a brother to the deceased and gave out his name as “Mutie Syengo” when he knew him as Gande.
5. He further testified that they left the body at the mortuary and as they drove back home, they stopped along the way for a call of nature. He stated that as they relieved themselves he overheard both the accused persons discussing between themselves and agreeing that the clothes that the deceased had worn and which they had carried from the mortuary should be thrown away. He stated that he saw the 1st accused throwing the clothes away. He stated that when they reached their destination, he was paid Kshs. 7,000/= the agreed amount for transport.
 6. He added that the following day, the Area Chief called him to his office after learning that he was the one who had transported the deceased body to the morgue. He stated that he went to the Chief and told him everything that had transpired the previous night.
 7. Moniva Eunice Maluki (PW2) testified that she was a tailor and on 13th May 2018 the wife to the 1st accused took a torn shirt to her for stitching. She stated that she stitched and as she did so she noticed that it had a stain on the lower part. She stated that the wife of the 1st accused later went for it but she told her that the area Chief had collected it adding that she could not say no to the Area Chief.
 8. Patrick Kilimo Mwanzia (PW3), the mortuary attendant at Tribute Funeral Home testified that on the material date at around 9.15pm, some people took a body to the said morgue and when he inquired what had happened or caused the death of the deceased, he was told that it was an accident involving a boda boda. He stated that the person had died while being rushed to hospital in Kabati. He stated that he gave the 3 people who had taken the body a standard Form to fill which they did. He recalled that the 3 persons recorded as brothers to the deceased and that the deceased body was then received and preserved.
 9. The Morgue attendant further stated that the clothes the deceased wore had dust and the body had a visibly injury to the leg and chest. He stated that he accepted the explanation given and told the 3 people to get a doctor to conduct a post mortem to determine the cause of death.
 10. He further stated that on 2nd May 2018, the police from DCI Yatta went to the Morgue and took the body telling him that it was a case of murder.
 11. Abednego Mulati (PW4) the Sub-Chief Mwakini Sub-location testified that on 30th April 2018 around 3.00pm he received a call from a village elder named Wambua Mutisya. He stated that the caller informed him that a worker in the locality had been beaten badly and taken away using a Probox car and that the person was missing. He stated that the worker had been employed by the 1st accused person and that one Sylvester Kimanzi (PW1) is the person who had carried the injured worker. The Chief stated that he summoned the said Sylvester Kimanzi (PW1) who told him what had transpired.
 12. He stated he called the Deputy County Commissioner and called the OCS Kwavonza. He stated that then he got information that the worker (deceased) had been beaten by his employer (1st accused) and the worker later died and his body was carried by PW1 to a private Morgue at the request of the accused persons.
 13. Kyallo Ilai (PW5) a brother to both the accused persons testified and recalled that on the material date at around 9 pm he arrived home and slept. He stated that the following morning, her mother called



- him and told him that someone was sick and should go there. He stated that the 1st accused also called him but he told them to take the injured person to hospital.
14. Nguli Musee (PW6) testified that both the accused persons are his cousins and that he knew the deceased as a herder for Regina Ilai the mother of accused persons.
 15. He testified and recalled that on 28th April 2018 he went home a bit tipsy and slept. He stated that at midnight he was woken up by his wife and told that there was noise outside. He stated that he woke up and peeped through the window and saw someone crying for help. He stated that the deceased was holding on to his door asking for his help stating that his people from Mwingi were far and could not rescue him. He stated he saw the 1st accused with a walking stick and the 2nd accused with a piece of wood. He stated that he opened his door to let the deceased in but the accused persons pulled him away. He stated that there was moonlight and he also had solar light in his house and that when he told the accused persons to go back to their homes and leave deceased alone. The 1st accused warned him and told him to back off threatening him unless he went back to his house, he would 'see blood.' The witness stated he backed off and went back to his house and slept.
 16. He stated that the following morning, he found the ID Card of the deceased outside his door adding that he lived next to where deceased was employed. He stated that he sent his son to take the ID card to his aunt who was the employer of the deceased.
 17. He stated that he received information that the worker (deceased) had received serious injuries which necessitated him being taken to hospital for treatment. He stated that he later learnt that the worker had died.
 18. He added that the deceased ran to him for help and rescue since he was also a village elder (nyumba kumi). He clarified that when he was woken up he was sober and no longer drunk. He insisted he recognized the accused persons who were his cousins and that he had no grudge against them.
 19. Dr. Kennedy Munyoki (PW7), a doctor working at County Referral Hospital testified on behalf of Dr. Lilian Bosire who was away in Tanzania for further studies. Dr. Munyoki stated that having previously worked with Dr. Lilian Bosire for 5 years, he was familiar with her handwriting and signature.
 20. According to the doctor's report on post mortem of the deceased body had the following external injuries;
 - a. Laceration wound on the nose measuring 3 x 1cm
 - b. Abrasion on the left eye measuring 8.2cm
 - c. Abrasion on the left cheek measuring 4 x 1cm
 - d. Abrasion on the left leg measuring 5 x 1cm
 - e. Abrasion on the right leg measuring 3 x 2cm
 - f. Abrasion on the right thigh measuring 5 x 3cm
 - g. Abrasion on the posterior shoulder measuring 30 x 10cm
 - h. Defence injuries seen on the right wrist, left wrist and left forearm.
 21. The doctor's findings on the internal parts of body were;
 - i. Hematoma on midline from sternum to diaphragm.
 - ii. Hematoma on the right side below the ribs measuring 29 x 5cm.



- iii. Hematoma on left muscle below the ribs measuring 9 x 6cm.
 - iv. Fracture of the right rib ulterior (i.e front side).
 - v. Fracture of the 6th & 7th left rib on the frontal side.
 - vi. Bleeding between the skull and the brain measuring 10 x 5cm
 - vii. Hematoma on the area around the nose 23 x 20 cm.
 - viii. Contusion of internal artery (i.e veins on the neck – the right side).
 - ix. Hematoma on the back of the head to the right shoulder measuring 30 x 20cm.
22. The doctor in conclusion opined that the cause of death of the deceased was fracture of thorax and contusion of the neck vessel due to blunt force trauma. He tendered the postmortem report as PEX 2.
 23. PC Luke Kimutai (PW 8), a police officer based at DCI lower Yatta testified that he took over the investigation file from Sgt Fredrick Mutua who had since retired from service. He testified that he was handed the investigation file plus a shirt which was an exhibit in the case. He stated that the shirt was removed from a tailor known as Eunice Monica Maluki (PW 2) who had been given the shirt for stitching. The officer stated that the shirt was torn and was suspected that it was torn during the murder incident. He tendered the shirt as PEX 1 and though the shirt visibly appeared blood stained, he conceded that the same had not been taken for forensic analysis. He however, insisted that the shirt was recovered from the 1st accused.
 24. When placed on their defence the accused persons denied committing the offence. Stephen Ngonde Ilai (DW 1) testified that the deceased was employed as a casual worker (shamba boy) by his mother. He stated that when he returned home on 29th April 2018, the deceased was not at home and that as he was going to a shopping Centre, he found the deceased on the road injured. He stated that he called his mum and brothers to inform them about the situation. He stated that his brother Katiwa (2nd accused) went to the scene and they took the deceased to hospital.
 25. He stated that they just decided to take the deceased to hospital for medical attention and that when they arrived at a hospital he did not reveal, they found it close and decided to go to Katutu. He stated that they were referred to Kitui General Hospital because of the condition of the deceased. He stated that the deceased died on the way to Kitui Hospital and they decided to take the body to Syongila Funeral Mortuary.
 26. He stated that the following day they went to the Area Chief to report and later to Kyusani Police Station where they recorded statements. He claimed that upon writing his statement he was arrested and later charged for murder.
 27. On cross-examination by the State Counsel, the 1st accused denied giving the morgue attendant a wrong mobile number but when pressed he stated that he gave the attendant his other number which had since been blocked. He also denied throwing away the clothes worn by the deceased during the incident.
 28. Katiwa Ilai (DW 2) also gave a sworn defence denying the offence. He stated that he slept at his home on the night between 28th & 29th April 2018 and did not go anywhere.
 29. He stated that he only learnt of the death of the deceased from the 1st accused after 3 days. According to the 2nd accused, the 1st accused reported to him that he had differed with the deceased and that after the aftermath (he did not explain) the 1st accused reportedly told him that he had taken the deceased to



hospital for treatment. He faulted the 1st accused and his brother for lying and insisted that he was not involved in the beating or taking the deceased to hospital. He also denied being called by the 1st accused on phone on the material date. He stated that he lived far from where the deceased worked.

30. Kalem Katiwa (DW3) testified that on 29th April 2018 she was home with her husband the 2nd accused the whole day. She also stated that her mother in law, the mother to the 2nd accused lives about 2km away from where she lives with her husband. She stated under cross-examination that 29th April 2018 was a Sunday and that she went to church but later retracted and said she never went to church that day.
31. In his written submissions through counsel, the 2nd accused distanced himself away from the crime of murder. He submitted that he never knew the deceased and had no malice against him.
32. He contends that the circumstantial evidence tendered has not positively linked him with the offence of murder and that he had nothing to do with the murder of the deceased.
33. This court has highlighted both the prosecution's case and the defence case. The accused persons are both charged with the murder of the deceased in this case. For a charge of murder to be sustained, the following elements must be established proved by the prosecution beyond any reasonable doubt;
 - i. Fact of death and the cause
 - ii. Actus reus the proof that the accused person by unlawful act of commission or omission caused the death.
 - iii. Means rea or malice aforethought. Proof that the unlawful act was activated or motivated by malice.
34. Fact of death and its cause
This element is less contested in this case. The evidence of Silvestre Kimanzi Wambua (PW 1) that he carried the body of deceased was corroborated by the evidence of Patrick Kilimo Mwanzia (PW3) the Morgue attendant who stated that he received a body from accused persons and PW1. The same is further corroborated by the medical evidence of Dr. Kennedy Munyoki (PW7) who tendered postmortem report (PEX 2) which indicated that the cause of death was fracture of the Thorax/ contusion of neck vessels due to blunt force trauma. A Death Certificate Serial Number 0751867 was issued by the doctor to certify the death of the deceased. The element of death and its cause was therefore well established and proved beyond any reasonable doubt. The big question is who caused it?
35. Actus reus
The prosecution's case in respect of this element is largely based on circumstantial evidence. Circumstantial evidence is indirect evidence that give rise to a logical inference that a fact exists. The existence of that fact is not drawn from direct evidence of a fact in issue but rather when considered with other material fact leads to positive or reasonable conclusion of fact based on inference or assumptions.
36. Section 119 of [Evidence Act](#) 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.”



37. There are clear parameters that the prosecution’s case should meet when relying on circumstantial evidence. Those parameters were spelt out in the case of R –vs- Kipkering Arap Koske & Another 16 EACA 135 where the court held as follows;

“In order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

38. In the case of Joan Chebichiy Save –vs- R [2003] eKLR the Court of Appeal held that for the prosecution to successfully rely on circumstantial evidence, there must be a direct link or positive link of the cause of death of the deceased and the accused person, circumstantial evidence can be as good as direct evidence.

39. In the case of Chiragu & Another –vs- R [2021] eKLR the court of Appeal reaffirmed the decision in Ahamed Abofathi Mohammed & Another –vs- R. [2018] eKLR where the court held;

“...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 circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. The court then went on to state that when a case rests entirely on circumstantial evidence, such evidence must satisfy the following three tests:

- a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- b. Those circumstance should be of a definite tenderly unerringly pointing towards guilt of the accused.
- c. The 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.”

40. It has been also reiterated in addition to the above tests, the prosecution must establish that there are no other co-existing circumstance which would weaken or destroy the inference of guilt and where such circumstances are established by the defence then the case has not been proved beyond reasonable doubt (see Musoke –vs- R [1958] EA 715).

41. In this case the prosecution’s rests on the circumstantial evidence of PW1, PW2, PW3 & DW6. PW1 stated that he called on the material date at around 7.30pm by one Kyalo Wandai and asked to go and take someone to hospital for treatment. He went and found both the accused persons holding the deceased and took him to Muthale hospital but on the way he was told to change course and head to mortuary.

42. At the Morgue, PW1 was surprised when the 1st accused gave out wrong number regarding his mobile number. He was certain that his mobile number ended with number 12 but saw him indicate a strange number ending at No. 90. On the way home he also noted a strange conduct from the 1st accused. He saw him throwing away clothes that had been worn by the deceased.

43. The other incriminating evidence was tendered by Monica Eunice Muluki (PW2). She stated that the wife of 1st accused took a torn shirt for stitching. As she stitched the shirt, the tailor (PW2) noticed a stain on the lower part of the shirt. The shirt was torn that probably was a sign of struggle between



the 1st accused and the deceased during the incident. That shirt was tendered as PEX1 by PW8 (PC Luke Kimutai).

44. It is also important to note that all witnesses who knew the 1st accused knew him by the name “Ngande” and not Ngonde as reflected in the charge. That however, is insignificant issue because all the witnesses were positive that they knew the 1st accused well.
45. The mortuary attendant testified and identified both the accused persons as the people who took the body of the deceased to the mortuary in company of PW1. He stated that the 2 accused persons identified themselves as brothers to the deceased and gave misleading information that the deceased died as a result of an accident with a motorbike. The fact that the accused persons lied to the morgue attendant that the deceased died of an accident clearly shows that they both had something to hide. A Crime.
46. Nguli Musee (PW6) perhaps was the prosecution’s star witness in this case. He stated that he was a village elder with the responsibility of being in charge of “Nyumba Kumi” or an informal village groups formed by many local administrations in this country to assist the area chiefs and Sub-chiefs in addressing any security issue arising from the areas they live in. He stated that on the material date he arrived at his home drunk and slept. He stated that around 10pm, his wife woke him up and told him that someone was screaming outside the house. He stated that he peeped and saw the deceased crying for help as the accused persons assaulted him. He stated that he recognized the accused persons as they are cousins and that in fact the 1st accused threatened him when he opened the door to let the deceased into the house. He told the 2 to go home and leave the deceased but the 1st accused threatened him telling him to go back to the house unless he wanted to “see blood”. PW6 was categorical by that time he gotten sober and he saw the 1st accused armed with a walking stick while the 2nd accused had a piece of wood. He was certain about that fact and stated that there was moonlight besides solar light in his house. He also recognized the voice of 1st accused when he threatened him. He stated “I heard him (1st accused) clearly. I know him well. I can recognize his voice even in darkness...”
47. PW6 further stated that he was known in the village as a village elder with some responsibility. He stated “...the deceased may have run to my house because I was a village elder (Nyumba Kumi)”. He was candid that he saw both the accused persons pull away the deceased when he attempted to let him inside his house for safety.
48. He further stated that he never knew the deceased well but knew both the accused persons. He had no grudge against them and though he says that the 1st accused later on beat him up after the incident, that could have been in an attempt to silence him in view of the statement he had recorded at the police station. He observed that, “the 1st accused beat me later and I reported to the police.” He was also categorical that Kyalo was not present during the incident. He stated the accused persons pulled the deceased toward the home of 1st accused which was 600 metres away from the home of PW6.
49. This court has considered the defence put forward by both the accused persons. The first accused, Stephen Ngonde Ilai (DW1) who was commonly referred to by prosecution’s witnesses as “Ngande” denied committing the offence and stated that he found the deceased injured and decided to take him for treatment in the company of his brother the 2nd accused herein. However, when pressed under cross-examination on why he gave out a wrong number when asked by mortuary attendant to give his details, he retorted that he gave out his “other number” and when pressed further he stated that the number was not working and blocked. This court finds that the 1st accused was not only being evasive in his answers but was trying in vain to prove his innocence. Furthermore, when confronted during cross-examination on why he disposed off the deceased’s clothes on the road when heading back home from the mortuary he denied the claim and stated that he handed over the clothes to one Paul Ilai but



- the said Paul Ilai was never called to rebut the evidence given by PW1 in respect to the unceremonious disposal of clothes last worn by the deceased on the date.
50. In regard to Katiwa Ilai (DW2) the 2nd accused herein, this court finds that though he tried in vain to establish alibi, I find that he was too evasive in answering questions and his demeanor during his defence portrayed him as a man who had something to hide. At the same time, he also distanced himself from the narrative given by the 1st accused (his brother) and in the process kind of threw him under the bus so to speak. The basis of my findings are as follows;
- a. For one, he stated that the 1st accused called him and told him that he had differed with the deceased, a person he had denied knowledge of. He stated that he never knew him despite the obvious evidence looming out that the deceased worked for his mum.
 - b. He also stated that he came to learn about the death of the deceased after 3 days. He did not elaborate about the incident that gave him basis to count the number of days it took him to learn about the demise of the deceased. How did he know the exact date the deceased died to categorically state that he learnt about the demise 3 days later? When this court pushed him to give an explanation he replied “...The first accused came to my home 3 days after the incident...” when this court prodded him to explain what the incident was about he got fidgety and replied, “the killing incident... I did not ask him why...”
 - c. He also stated that the 1st accused had reported to him that he (1st accused) had quarreled with the deceased. This is how he put it “...the 1st accused came and told me that he had quarreled with the deceased and he took him to hospital. He himself told me that...on 29th April 2018.”
51. It is clear from the evidence given by the 2nd defendant that there was an altercation or a fight involving the accused and the deceased. What both accused persons really avoided in their defence is the evidence given by PW6.
52. PW6 stated that he saw both the accused persons attacking the deceased and that the deceased ran to him for rescue. He stated that he tried rescuing by opening the door for the deceased to go in and further tried to persuade the assailants to leave him (deceased) alone but they pulled him away and that “after 2 days I heard that Paul Syengo (deceased) had died and was in mortuary”. He was firm stating that he was an old man and was not lying when put to task during cross-examination. This court has no reason not to believe him given the fact that even the accused persons never gave any reason why he would lie. The narrative he gave was quite consistent and illustrated clearly how the deceased met his death.
53. This court finds that the evidence given by PW1, PW2, PW3 & PW6 when taken cumulatively clearly links both the accused persons with the unlawful act that caused the death of the deceased. The evidence clearly points to the 2 accused persons and there is no evidence that negates the drawing of inference from the circumstantial evidence.
54. The 2nd accused tried to distance himself away from the crime but gave convoluted defence where on one hand he stated that the deceased was attacked by his co-accused owing to some quarrel difference but on the other claiming he did not know the deceased. I do not see why the 1st accused and PW1 would both state that the 2nd accused was present and took the deceased body to the Morgue. The mortuary attendant also saw both of them plus the driver (PW1).
55. This court finds that the prosecution’s case in respect to the element of actus reus is proved beyond reasonable doubt by the circumstantial evidence tendered by the prosecution. The evidence points to accused persons and no one else as the perpetrator of the crime.
- 56.



(iii) Mens Rea

The prosecution did not tender direct evidence showing that the accused persons harboured ill motive. The only evidence in regard to motive was given away by the 2nd accused who gave incriminating evidence against the 1st accused. He stated that the 1st accused reported to him that he had quarreled with the deceased and that the deceased as a result was in bad condition requiring treatment.

A motive or malice aforethought can be inferred from the nature of injuries meted out on a body of a deceased person.

Section 206 of Penal Code states;

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

- a. an intention to cause death or to do grievous harm to any person, whether that person is the person actually intend 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 body harm is caused or no or by a wish that it may not be caused...”

57. The medical evidence tendered by Dr. Munyoki (PW7) shows that the deceased suffered several injuries to the head, hands and legs. The external postmortem examination on the body revealed big lacerations and abrasions to the nose eye left cheek and legs. The doctor noted injuries to he hands and opined that they were caused by the deceased trying to use his bare hands for defence against the assault. The evidence given by PW6 regarding the weapons used is consistent with the findings by the doctor during autopsy. The cause of death was fracture of thorax and contusion of the neck vessels due to blunt trauma force.

58. The above medical findings demonstrate that the accused intended to cause severe injuries and possibly death to the victim, the deceased herein. This court is satisfied that the element of mens rea is established and proved by the operation of Section 206 of the Penal Code. This finds that the prosecution’s case against both the accused persons has been proved beyond reasonable doubt. It is only them who know what quarrel or beef they had with the deceased. This court may not probably get to know what insensed them so much that they inflicted several and severe injuries to the deceased who must have suffered a painful death as a result.

Both the accused persons are found guilty and are hereby convicted of the charge of Murder of the deceased herein.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RD DAY OF OCTOBER, 2024

Hon. Justice R. K. Limo

JUDGE

