



**Republic v Muindi alias Rasta (Criminal Case 35 of 2014)  
[2024] KEHC 12019 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12019 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 35 OF 2014  
MW MUIGAI, J  
OCTOBER 3, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**KIOKO MUINDI ALIAS RASTA ..... ACCUSED**

**JUDGMENT**

**Background**

1. The Accused person herein Kioko Muindi alias Rasta has been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the Accused on 28<sup>th</sup> May, 2014 at Sabaki area within Athi River Township in Athi River District of Machakos County murdered Bernard Mwanza Mumo alias Mugai Mutemba.
2. The Mental Assessment Report dated 18/06/2014 and filed in Court on 24/06/2014 found the accused person Fit to Plead. The Accused person herein took plea on 31/07/2014 whereof after the charges were read out to him in a language that he understood he pleaded Not Guilty. A plea of Not Guilty was entered on his behalf.
3. The Accused person was represented by Mr. Kamanda Advocate while the State was represented at different stages of trial by Mrs Abuga, Mr. Machogu and later Mr. Mwongera.
4. The hearing took off and the Prosecution called a total of Ten (10) witnesses.

**Evidence**

5. Pw.1 Washington Wambua Peter of Sabaki area in Mlolongo testified that he works as a laborer in the construction Industry. On 29<sup>th</sup> May 2014, upon arrival at the construction site where he was working with the accused person Kioko Muindi alias Rasta and deceased Bernard Mwanza the foreman whose name he could not remember instructed him to go and call Bernard Mwanza Mumo (the deceased)



from his house which was about 300 meters from the construction site. He called him but he did not answer. He moved closer to the fence and he saw his body looping down with a knot on the neck. The fence was made of barbed wire. He was already dead as he had a knife stuck in the neck. He then ran to the Sabaki police post to report what he had seen and the police went to the scene. At the scene there were a spade, a wood with stains of blood on it and a metal rod. They went to the accused house which was about 500 meters from the deceased's house. They were with Charles Kimanthi, the village elder and an Askari. In the house they found two blood stained T-shirt behind the door. His door was open but he was not there. Later he recorded a statement with the police.

6. On Cross Examination by Mr. Kamanda for the Accused person, he stated that he used to work with both accused and the deceased and two more workers, Njoroge and Amin. Both Njoroge and Amin had arrived earlier on that day. The deceased's house was not far from the construction site. The deceased's body was outside his house in open ground. The police arrived at about 8 am. Before the police carried away the body, we went to the accused house from where we took the aforesaid T-shirts. The accused was not in his house. They went to his house with police and village elder. When the accused tried to run away he was blocked and arrested by the crowd. The accused was also with the crowd at the deceased's house then ran away from the deceased house we recovered two blood stained t-shirts from the accused house. The truth is that the accused was not present when we recovered the t-shirts. The blue apron was recovered from the house of the deceased. The apron belongs to the deceased. He used to wear it to work.
7. Pw2 Charles Kimathi Michemi a resident of Sabaki in Athi River, Machakos County testified that he is a construction worker as well as a farmer. He is the chairman of Sabaki village. On 29-5-2014 at about 7 am a neighbour called Alex Kinjama called him and informed him that a person had died at the site. He proceeded to the scene which was about 500 meters from his house. At the scene he found many people and saw a knife stuck in the deceased neck. Next to the body was a green pipe together with a spade and a metal rod. There was also a log of wood which the body lay . The knife was a kitchen knife and it was blood stained. There were many people at the deceased's house among them was Alex who had called me and Washington Wambua (Pw1). The Accused person was already arrested by the public. The police put him in their vehicle he directed the police officer to the house since he knew where it was. The accused's house was about 300 meters from the deceased house. At the accused's house, they found two red t-shirts were under the bed. The door to the Accused person's house was not locked. Later he recorded a statement with the police.
8. On Cross Examination by Mr. Kamanda for the Accused person, he told the Court that the knife shown to him in Court is the one he saw stuck on the neck of the deceased on the material date. When the police came the accused was already arrested by the crowd. When the police came he took one of them to the accused house. From accused person after recovering the t-shirts they went to Ndwiga's house since he was the deceased's neighbour and we wanted to find out if he had any information, Inside Ndwiga's house we found a slaughtered rabbit and there were also blood stains outside Ndwiga's house. The police officer then arrested Ndwiga and took him to police station.
9. Pw3 Josephat Mwalavu Muinde a resident of Mombasa and doing electronics testified that he knew the deceased herein who was his nephew. On 12/6/2014 at Machakos Level Five Hospital he identified the body in the company of Regina Ndunge Mumo. The doctor performed a post-mortem examination on the body. He later recorded his statement.
10. On cross examination he said that he identified the body of the deceased on 6<sup>th</sup> and was present when the body was dissected.



11. Pw4 No. 84372 Pc Letoya Kaparo currently attached at Central Bank of Kenya Nairobi testified that initially he was based at Athi River Police Station carrying out investigations. On 29/5/2014 he was on duty standby at the station when the OCS CIP Gitau instructed him to accompany him to Sabaki area about 6 km from the station. There was a semi-permanent house and a fence. A report had been received of the presence of the body of a certain person. On arrival they found two AP officers who were stationed at a nearby post. They were led to where the body lay. They found the body of a male adult with injuries with a knife stuck on the neck. They organised for photographs to be taken. Photos of the scene were taken and exhibits collected. They escorted the body to Machakos Level Five Hospital mortuary for preservation. He also escorted two suspects to the police station. The two had been arrested by AP officers. He later recorded his statement.
12. On Cross Examination by Mr. Kamanda for the accused person he said that they found the body about four meters away from the house. He did not know the occupant of the house. The photographs were taken by a contracted photographer. The T-shirts were handed over to him by the AP officers and he could not tell from which house they had been recovered. Only one of the two suspects who were handed to him by the Ap Officers was in Court.
13. Pw5 No. 236591 - Anthony Katuku, Police Officer currently under the Rural Border Patrol Unit based in Somali border testified initially he was at Athi River police station. That on 29/5/2014 at 8000 hours he was on patrol at Sabaki area when he received a report from one Washington Wambua who came to lodge a report that he had gone to wake up his colleague only to find him lying on the ground stabbed with a knife on the left neck.
14. They accompanied him to the scene around Sabaki area and upon arrival they found the deceased and saw that his throat had been slit and had a stab wound on the right eye. He alerted the OCS Athi River over the incident. Officers arrived at the scene and the said Washington Wambua pointed to him the person who was last with the deceased. He then arrested the person as a first suspect. Upon interrogating him he claimed his name was Kioko Muindi alias Rasta. He conducted further investigations and learnt that one Moses Ndwiga owed the deceased some money. He proceeded to the said Ndwiga's place and arrested him as a second suspect. They then went back to the scene and the body was collected. He escorted the two suspects to Athi River police station. Photographs were taken and exhibits collected from the scene of crime.
15. On Cross Examination by Mr. Kamanda for the Accused person he stated that he arrested one Moses Ndwiga but he is not before Court. Moses Ndwiga was arrested because he had a debt due to the deceased. They saw blood stains on Moses Ndwiga's clothes and his house was approximately 800 meters from the scene. The accused herein was alleged to have been the last person seen with the deceased at night around 11 pm. Washington Wambua left accused with the deceased that night. He suspected accused participated in the murder. The knife was stuck on the neck of the deceased.
16. Pw6 No. 219941 Cpl Godana Guyo Salesa currently attached at Athi River Administration police testified that on 29-5-2014 he was working at Sabaki area when a report was made by one Washington Wambua that somebody had been killed. He and his colleague Anthony Munene proceeded to the scene being led by the said Wambua. The area was within Sabaki. They found that indeed somebody had been killed. There was a knife stuck on the neck. There was a metal rod and a green plastic pipe near the body. He alerted his superior Stephen Mathu of the new development. He then began investigations and learnt from the members of public that the deceased had last been seen in company of one Rasta. He then proceeded to the residence of the said Rasta led by Wambua and the clan elder. It was within Sabaki area. At the house of the Rasta the accused person herein, they found two t-shirts hung inside the house and they had blood stains. They picked the two t-shirts and



proceeded to the scene. They learnt from one Moses who was a chang'aa dealer was suspected to have information regarding the death of the deceased and they went to see Moses Ndwiga's house and they saw bloodstains near the gate and Moses Ndwiga who claimed that the blood was from a rabbit that he had slaughtered. They checked the house and saw rabbit meat. They arrested the said Ndwiga and took him to the scene. The OCS came and picked up the body plus the two suspects. He later recorded his statement.

17. On cross examination by Mr. Kamanda for the accused person he said that the said Rasta was among the crowd at the scene and it was claimed by the members of public that he had been the last person in company of the deceased. He searched Rasta's house and recovered two t-shirts which had bloodstains. He did not know the source of the bloodstains. Members of public claimed that one Moses Ndwiga usually had several people at his home at night. He saw rabbit meat at the home of Moses Ndwiga but did not see a live rabbit. Ndwiga claimed his dog had killed the rabbit. Moses Ndwiga's house is about one kilometre from the scene. He arrested Ndwiga due to the bloodstains near his house. He was not the investigating officer. The body of deceased was photographed the same day and he was present.
18. Pw7 NO. 75255 Cpl Jane Mumo attached at DCI Athi River Sub County testified that on 29/5/2014 there was a case which had been reported at Sabaki Police Post. It had been reported that the body of a deceased person had been found in that area. A police officer had already visited the area and arrested the suspect and had scene of crime personnel take photographs and remove the body. The accused herein was handed over to him to investigate before he later visited the scene as well as the accused's house within Sabaki area.
19. The accused led him to his house while officers from Sabaki police post namely Godana Katiku entered the deceased's house where he recovered an apron. They then proceeded to Sabaki police post where statements were recorded and it was from there that he learnt that the accused and deceased had been engaged as construction labourers in the area and the two had been together before the incident. Later he witnessed the post-mortem on the body of the deceased by Dr. Okinyi at Machakos Level Five Hospital. He also recovered several exhibits from PC Kaparo. After investigations he charged the accused herein with the offence. He did not manage to establish reasons why the accused stabbed the deceased.
20. On cross examination by Mr. Kamanda for the Accused person he said that he could not recall the date he visited the scene. He did not visit the accused's house since PC Kaparo and his team had already done so. He gathered accused had been arrested from among the crowd gathered around the body of deceased. PC Kaparo had arrested accused and another Ndwiga was alleged to have had a dispute with deceased over some debt. The said Ndwiga was later discharged by the Court on a date he could not recall. Ndwiga had butchered a rabbit and there were bloodstains at his home. He could not vouch more on the debt dispute between deceased and Ndwiga as the clan elder had resolved the debt dispute.
21. Pw.8 Dr. John Mutunga based at Machakos level 5 Hospital testified that the post mortem Report of Benard Mwanza Mumo was conducted/prepared by a former colleague, Dr. Okinyi, who had had already left the hospital/Country. He stated that he was conversant with his handwriting. He has worked with him for over 5 years and hence understood his writing well as well as his signature. According to the post mortem Report externally the face of the deceased was swollen on the right side and had a stab wound 1 – 2 cm on the right auxiliary area and stab wound on the right leg 1 – 2 cm. It was a gaping wound. There was a stab wound on the skull measuring 1by 1 cm at the head. Internally the lungs were normal, there was a carotid vessel, the lower kidney muscles were examined and the doctor found liver and kidney were pale and muscles were pale and did not have blood. As a result of the examination the doctor formed the opinion that the deceased died of hemorrhagic stroke – loss of blood due to the stab wounds.



22. Pw.9 Henry Kiptoo Sang a Government Analyst testified that he prepared a report in respect of these proceedings. On 13/06/2014 he received the following samples for analysis from Cpl. Jane Mumo of CID Athi river namely; (a) blood sample of the deceased marked (A), (b) blood sample of the accused marked (B), (c) 2 red t-shirts marked C1 and C2 respectively, (d) one knife in a dark envelope marked D1, (e) Green plastic pipe marked D2 and (f) Blue Apron marked E.
23. Upon analysis the following was established that the 2 red t-shirts C1 and C2 were stained with human blood. The knife D1 and Apron E1 stained with human blood. The plastic pipe D2 slightly stained with human blood. He conducted the DNA analysis and found the blood stains of the 2 red T-shirts marked those of Kioko Muindi (the accused herein), the blood stains on the knife D1 and the pipe D2, Apron E matched those of Bernard Mwanzia Mumo (deceased).
24. Pw.10 No.237709 IP Virginia Wanjiku based at DCI Muranga Crime Scene previously based at DCI Headquarters testified that on 16/06/2014 she received 1 CD marked F with an exhibit memo form from Pc Peris Njonjo for analysis. She processed the photographs taken by Scenes of Crime at the scene and the Certificate.
25. On 27/07/2022 the Prosecution closed its case.
26. This Court delivered its Ruling on Case to answer on 01/11/2022 and found the evidence on record disclosed commission of the offence of murder and the Accused person was to be placed on his defense Under Section 306 CPC.
27. The Accused elected to give a sworn statement without calling any witnesses.

#### **Defense Hearing Sworn Statement**

28. Dw1 Kioko Muindi alias Rasta told the Court that he works as a mason at Mlolongo. On 28.05.2014 he was at Mlolongo – Sabaki working at a site with five others among them the deceased herein Mwanza Mumo fetching water. They closed work at the site at 3.00 p.m. and left for Mlolongo to meet their boss for payment purposes. They were paid their dues. At around 5 p.m. after being paid the Accused and the deceased herein went to Gossip Bar to drink ‘Trigger’ drink. The accused then left the bar to his place at Sabaki and left the deceased behind. He arrived home at around 6.45 p.m. his house is about 1km away from where the site is while the deceased lived near the site at about 200 Metres away. The following day at around 7.00 a.m. he left his house for work and on reaching near the deceased house, he saw police officers taking the deceased body and they were asking who worked with the deceased and he volunteered and he was taken to Athi River Police Station to record a statement. The other workers refused to record statements. He was kept at the Police Station for 2 hours and then he was arrested as the police conducted their investigations. He was later charged with the offence. He heard the evidence adduced by the witnesses in Court that the deceased clothes were found in his house. The same is not true because the clothes found in his house were his and he is the one who had left them there. He further stated that he has a problem of nose bleeding and he uses the clothes for mopping blood when he nosebleed. The accused had known the deceased for 4 months and they were friends. He was not involved in the murder.
29. On cross – examination by the ODPP he stated that he was working with the deceased at the site/ plot. On 28.05.2014 he went together with the deceased and other workers to Mlolongo. He was not arrested by the members of public he volunteered himself to go to Athi River police station to record a statement. He reiterated that the t-shirts found in his house being bloodstained are his. He suffers from a nose bleeding problem but he did not produce any medical record in support.



30. On re-examination he told the court that he had tried to get help for his nose bleeding condition but was told the same cannot be cured.
31. The Accused closed his case on 24/11/2022 without calling any witness.
32. On the same date 24/11/2022, this Court directed the parties to file their written submissions. Each party was to have 21 days each.
33. The state filed their written submissions dated 2<sup>nd</sup> February, 2023 while the Accused person filed his submissions dated 1<sup>st</sup> February, 2024.

## **Written Submissions**

### **Prosecution's Submissions Dated 02/02/2023**

34. The Prosecution availed Ten (10) witnesses in order to prove its case and raised the following crucial issues for determination namely;
  - a. Was the accused involved in the murder of the deceased?
  - b. Did the accused have malice?
  - c. Was the cause of death as a result of the injuries inflicted?
35. On the issue of whether the accused was involved in the murder of the deceased the testimony of Pw1 clearly places the accused person as the last person to be seen with the deceased.
36. Reliance is made in the Nigeria Court case of Moses Jua -vs- The State [2007] [PELR CA/11/2006] where the Court while considering the last seen doctrine held that:-

“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 an inference that the accused killed the deceased.”
37. On the issue of whether the accused had Malice, Section 206 of the Penal Code provides that 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 caused 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.



38. In the instant case it is evident that the deceased met his demise as a result of the injury he sustained at the neck and the lower body.
39. On the issue of whether the cause of death was as a result of the injuries inflicted Pw8 (Dr. Mutunga) testified on behalf of Dr. Fredrick Okinyi and informed the court the cause of death was hemorrhage on the neck caused by stabbed carotial vessels.
40. Reliance was made in the case of Ronald Nyaga Kiura –vs- Republic [2018] eKLR wherein paragraph 22 it is stated as follows:-
- “It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.”
41. Also in the case of Ramanlal Bhat -Vs- Republic [1957] EA 332 at 334 and 335 relied on by the state the Court stated as follows:-
- “It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
42. Similarly in R. v. Jagjivan M. Patel & Others 1, TLR, 85 the Court stated;-
- “All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the Court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”
43. It is submitted that the evidence adduced by the accused person did not cast doubt the prosecution cogent evidence before this Court. The Accused was in company of the deceased on 28.05.2014 at Mlolongo where they enjoyed themselves where he left the deceased and proceeded home. The accused failed to avail any witnesses to corroborate that indeed he left the deceased at the bar. Therefore, the accused evidence is merely an afterthought which does not cast doubt the prosecution’s cogent case by virtue of evidence of PW1.
44. The Prosecution finally submitted that by availing testimonies of Ten witnesses as well as documentary expert evidence it has proved its case beyond reasonable doubt and the accused ought to be convicted of the offence of Murder contrary to Section 202 as read with Section 203 of the Penal Code.

#### **Accused’s Submissions Dated 1/02/2024**

45. It is submitted that there is no single witness linking the accused to the offence as no witness testified to the effect that he saw the accused person with or in company of the deceased.



46. Pw5 Anthony Katuku told the Court that Pw1 (Washington Wambua) told him that the accused was last seen with the deceased but Pw1 never mentioned in his testimony that he saw the accused with the deceased on the night before the deceased demise making the evidence of Pw5 baseless and ought not to be believed.
47. Pw6 Cpl. Godana Guyo testified that he carried out investigations and members of public informed him that the accused was the last person to be seen with the deceased however no witness ever testified that he saw the deceased with the accused.
48. The T-shirts recovered from the accused person house belonged to the accused and even the DNA profile from the said T-shirt matched that of the accused person.

### **Determination**

49. The Court considered the evidence on record the submissions with regard to the charge and the issue for determination is whether the evidence on record confirms commission of the offence of murder by the Accused person or not.

### **Evidence Taken by Different Trial Courts**

50. In the case of *Joseph Kamau Gichuki vs Republic Criminal Appeal 523 of 2010* cited in Nyabutu & Another, the Court stressed that;

“By dint of Section 200(1) (b) of the CPC, a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely, but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete trial..... See Ndegwa vs R (1985) supra. In this case the Trial Judge passed on after having fully recorded evidence of 7 witnesses....in fact [he] had summed up to the Assessors. The trial, moreover, was not a short one but a protracted one which had taken 5 years to conclude. The passage of time militated against the Trial being started de novo.....”

Section 200 (1)CPC that provides;

- (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
  - (a) .....
  - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

Section 201 CPC provides;



- (2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.

51. The evidence on record was recorded by various Judges during their tour of duty; LJ L. Mutende in 2014, Muriithi J, E. Ogolla J in 2015 and D.K. Kemei J 2016 – 2019 and finally this Court all took down the evidence on record. On 21/10/2021, the Court had previous proceedings typed and availed to parties. Section 200 & 201 CPC was applied and the Accused on 14/12/2021 opted to proceed from where the matter stopped. This Court considered the evidence on record in its totality to engage in determination of the matter.

52. The Accused person was/is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence entails;

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

53. In Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR the elements of the offence of murder were listed by Hon. M. Odero, LJ. as follows: -

- 1) The fact of the death of the deceased. [mens rea]
- 2) The cause of such death.
- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
- 4) Proof that said unlawful act or omission was committed with malice aforethought. [actus reus]

54. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought as follows:

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

- (a) An intention to caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- (c) An intention to commit a felony.
- (d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

55. In the case of Nzuki vs. Republic [1973] KLR 171 the Court of Appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

- “(i) The intention to cause death;
- (ii) The intention to cause grievous bodily harm;



- (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”

56. This Court gleaned the Trial Court record that disclosed the following;

### **1. The fact of the death of the deceased.**

57. PW 8 Dr. John Mutunga of Machakos level 5 Hospital testified that the post mortem Report of Benard Mwanza Mumo was conducted/prepared by a former colleague, Dr. Okinyi, who had had already left the hospital/Country. According to the post mortem Report externally the face of the deceased was swollen on the right side and had a stab wound 1 – 2 cm on the right auxiliary area and stab wound on the right leg 1 – 2 cm. It was a gaping wound. There was a stab wound on the skull measuring 1by 1 cm at the head. Internally the lungs were normal, there was a carotid vessel, the lower kidney muscles were examined and the doctor found liver and kidney were pale and muscles were pale and did not have blood.
58. As a result of the examination the doctor formed the opinion that the deceased died of hemorrhagic stroke – loss of blood due to the stab carotid vessels

### **2. The cause of such death.**

59. On 29<sup>th</sup> May 2014, PW1 went to call the deceased Bernard Mwanza Mumo. PW1 called but he did not answer. He moved closer to the nearby fence and he saw the deceased's body looping down with a knot on the neck. The deceased had a knife stuck in the neck. He reported to Sabaki Police Post and the police went to the scene. At the scene there was a spade, a piece of wood with stains of blood and a metal rod. Charles Kimanthi Village Elder and Police Officer went to the Accused person's house which was about 500 meters from the deceased's house. They found two bloodstained T-shirt behind the door.
60. PW2 Chairman of Sabaki village, on 29/5/2014 at about 7 am a neighbour called and informed him that a person had died at the site. At the scene he found many people and saw a knife stuck in the deceased neck. Next to the body was a green pipe together with a spade and a metal rod. There was also a log of wood which the body lay. The Accused person was already arrested by the public. At the accused's house, they found two red t-shirts were under the bed. The door to the Accused person's house was not locked. Later he recorded a statement with the police.
61. PW4 & PW5 are Police Officers who attended to the incident. On 29/5/2014. They found the body of a male adult with injuries with a knife stuck on the neck and saw that his throat had been slit and had a stab wound on the right eye and photographs were taken. The body was taken to Machakos Level Five Hospital mortuary for preservation. They arrested and escorted two suspects to the police station.
62. PW5 was informed by PW1 Washington Wambua pointed to the Accused who was last with the deceased; Kioko Muindi alias Rasta. He arrested one Moses Ndwiga who owed the deceased some money.



63. PW6 AP arrested the Accused person as the deceased had last been seen in company of one Rasta, the Accused person. At the house of the Rasta the accused person herein, they found two t-shirts hung inside the house and they had blood stains and took them as exhibits. He also learnt of Moses a chang'aa dealer was suspected to have information regarding the death of the deceased and at Moses Ndwiga's house and they saw bloodstains near the gate he claimed that the blood was from a rabbit that he had slaughtered. They checked the house and saw rabbit meat.
64. PW7 went with the accused led her to his house, while officers from Sabaki police post namely Godana Katiku entered the deceased's house where he recovered an apron which was taken for analysis at Government Chemist.
3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, [mens rea] and lastly.
4. Proof that said unlawful act or omission was committed with malice aforethought. [actus reus]
65. PW1 stated that he worked with the deceased and Accused person at a nearby construction and lived near each other. PW1 visited and found the deceased near his house and found him stabbed on the neck and gouged out left eye, spade, piece of wood and bloodstained knife. The Investigators and Arresting Officers obtained information from public that the Accused person was the last person with the deceased. They searched the Accused person's house and they found 2 shirts and later a blue apron which were analysed.
66. PW9 relied on Exhibit Memo Form and Government Analyst Report Exhibit 8. The samples presented for analysis were in the following result; the 2 red T-shirts C1 and C2 were stained with human blood. The knife D1 and Apron E1 stained with human blood. The plastic pipe D2 slightly stained with human blood. Pw9 conducted the DNA analysis and found the blood stains of the 2 red T-shirts matched those of Kioko Muindi (the accused herein), the blood stains on the knife D1 and the pipe D2, Apron E matched those of Bernard Mwanza Mumo (deceased).
67. PW 10 produced photographs taken at the scene and processed by PW10 who prepared the Certificate. The photographs that show the deceased in blood stained clothes and knife firmly in his neck and left eye gouged out there was a green plastic pipe, spade and piece of wood at the bloodstained scene.
68. The Accused person's Defense was a sworn statement was that on 28.05.2014 he was at Mlolongo – Sabaki working at a site with five others among them the deceased herein Mwanza Mumo fetching water. They closed work at the site at 3.00 p.m. and left for Mlolongo to meet their boss for payment purposes. They were paid their dues. At around 5 p.m. after being paid the Accused and the deceased herein went to Gossip Bar to drink 'Trigger' drink. The accused then left the bar to his place at Sabaki and left the deceased behind. He arrived home at around 6.45 p.m. his house is about 1km away from where the site is while the deceased lived near the site at about 200 Metres away.
69. This Court finds that from the evidence on record no direct evidence was adduced as to who caused the death of the deceased. However, the undisputed facts are that the Accused person and the deceased and PW1 worked at the construction site and lived nearby. They knew each other well.
70. The Prosecution established the Accused person was last person seen with the deceased. The Accused in his sworn statement confirmed the same that on the fateful day after work, they were paid they went to drink together. He alleges that he left the deceased at the Bar but this was not confirmed by any other independent or corroborating evidence on record.



71. The Court looked at the photographs taken at the scene, the knife stab on the neck, stab wounds on the face and stomach, gouged eye and bloodstained clothes and ground. The scene and body of deceased disclosed commotion and deliberate and intentional infliction of devastating stabs with intention of death. The deceased died a violent death from unlawful acts. These injuries could not be self-inflicted by the deceased I find malice aforethought as provided in Section 206 of the Penal Code is proved.
72. The cause of death as depicted in the Post Mortem Report from multiple stab wounds as exhibited by photographs and as a result of the examination the doctor the deceased died of hemorrhagic stroke – loss of blood due to the stab carotid vessels.

### **Circumstantial Evidence**

73. In the case of Muhdhar Said *Jumaan vs Republic Criminal Appeal 119 of 2022* (Gatembu, Nyamweya & Odunga JJA) stated;
 

“Proof in criminal cases can either be by direct or circumstantial evidence. When a witness such as an eye witness asserts actual knowledge of a fact that witness is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences maybe drawn is circumstantial evidence.”
74. In the case of Republic vs Abolfathi Mohammed & Anor Petition 39 of 2018, the Supreme Court considered circumstantial evidence as follows;
 

“... 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, ...”
75. In the case of *Musili v. Republic CRA No.30 of 2013* (UR)
 

“to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.”
76. In spite of lack of direct evidence there is circumstantial evidence presented by the prosecution that discloses that the deceased and Accused person were seen together the previous day/evening/night as was confirmed by Police Officer PW5 that PW1 saw the Accused and deceased together. The Accused admitted the same fact in his defense but stated that he left the deceased in the Bar but could not prove the same by any other evidence other than his evidence on oath.
77. Coupled with the fact that Accused and deceased worked lived and interacted together as shown by the evidence, the fact that the deceased was the last person with the deceased leads to the conclusion that in the absence of any explanation by the Accused he is found culpable. He had the knowledge opportunity and intention to occasion grievous harm and/or death.
78. Stephen Haruna V The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009
 

“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.

79. See also *Igabelle v. State* (2006) 6 NWLR pt.975 pg.100." Per Adekeye, J.S.C (Pp. 30-31, paras. F-B).

80. *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006

“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.”

81. Although the T shirts recovered from the Accused ‘s house that were blood stained and taken to Government Chemist for analysis were found to have the Accused person’s blood, it is more than coincidence that the T-Shirts were blood stained right after the deceased’s death; recovered from the deceased’s house on the morning the deceased was found dead. The Accused Person stated in his Defense that the shirts recovered were his and that he suffered nose-bleeding. The act of deceased’s nose-bleeding was not supported by any medical evidence to confirm diagnosis and/or treatment.

82. The Government Analyst Report of 22/12/2015 indicated that the blue apron Item E discovered/ retrieved from the Accused’s house was found to contain deceased’s blood. The Accused person did not explain the presence of deceased’s blood on the apron found in his house as provided by Section 111 of *Evidence Act*.

83. This is direct proof that connects the Accused person with the deceased’s death, how did the deceased’s blood get into the Apron found in Accused’s house, they were together earlier that evening in a bar, did the deceased visit the Accused on the fateful night? Was there commotion/altercation that resulted in blood stains on the apron in Accused person’s house and Accused person’s shirt each with their own blood?

84. The totality of the evidence on record disclose strands that connect the Accused person to the deceased’s death. The Accused knew the deceased worked at the construction together, lived nearby, on the fateful day were in each other’s company after work they were paid and went to the Bar. The next day, deceased was found violently murdered and bloodstained clothes found from Accused person’s house with blood of both Accused and deceased.

85. In the case of *Libambula -vs- Republic* (2003) KLR 683 the Court of Appeal stated:

“We may pose, what is the relevance of motive here?

Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of *Evidence Act* Cap 80 Laws of Kenya.

Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”

86. The Accused person was in close proximity with the deceased in terms of work residence and recreation and thus had intimate knowledge of each other and thereby harboring revenge or angry/hurt feelings



against the deceased as exhibited by the vicious attack and several stab wounds on the deceased that depicted premeditation.

87. The Accused person's defence amounts to a mere denial and did not cast doubt on the prosecution case. This Court finds the Accused person guilty as charged.

**JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT ON 3/10/2024 (PHYSICAL/VIRTUAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In the presence of:

Kioko Muindi alias Rasta - the Accused person

Mr. Kamanda - for the Accused

Ms Koech - for the State

Geoffrey/Patrick Court Assistant

Court:

Presentence Report proceedings.

Further Mention on 30/10/2024.

**M.W. MUIGAI**

**JUDGE**

