



**Republic v Muli (Criminal Case 20 of 2017)
[2024] KEHC 14528 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 20 OF 2017
MW MUIGAI, J
NOVEMBER 18, 2024**

BETWEEN

REPUBLIC STATE

AND

JOHN ZULU MULI ACCUSED

RULING

Background

1. The accused herein John Zulu Muli is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the accused on 3rd September, 2017 at Machakos AP Line, in Machakos County murdered Benson Wambua Kakula alias Mukulima.
2. The Mental Assessment Report dated 26/09/2017 found the accused person Fit to plead. The Accused person herein took plea on 28/09/2017 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 by the Trial Court.
3. Due to the latest mental assessment report dated 13/11/2018 the plea was taken afresh on 15/11/2018 and he pleaded not guilty.
4. The Accused person was represented by Mr. Kituku Advocate while the state was represented by Mr. Machogu and later Mr. Mwongera.
5. The hearing took off and the prosecution called a total of eleven (11) witnesses.
6. PW.1 SGT Fidelis Kilonzo told the court that he knew the accused who was his fellow colleague and on 3/09/2017 at 8.30 a.m. a junior colleague Humphrey Juma rushed to him claiming that the accused was almost killing somebody they should rush there quickly. Upon arrival they found somebody lying on the ground bleeding and the accused was shouting and claiming that someone had eaten his food.



- He stated that they managed to subdue the accused and escorted him to Machakos police station and rushed the injured person whom he did not know before to hospital. He stated that later he entered accused's house and saw bloodstains on the floor as well as cooked rice stew. He stated that later he learnt the injured person had passed on while in hospital.
7. Upon cross - examination, he stated that he recorded his statement on 8/09/2017 which only alludes to a fight going on. He stated that his statement was silent on his evidence that the accused was claiming that the deceased be removed or else he would kill. He did not know how the fight broke out. He did not recover any weapon. He stated that the items were strewn all over the room indicating a struggle. He stated that he apprehended the accused but did not see any injuries on him but learnt from my colleague that the accused had a wound on one of his fingers. He stated that there were no assault weapons at the scene. he stated that he was the accused's senior and used to report to his junior officer. He was not aware that accused had any mental illness
 8. Upon re-examination he stated that he was alerted that there was fighting at the house of accused. He heard accused claiming that the deceased should be removed or else he would kill him for eating his food.
 9. PW.2 CPL. John Kamau stated that the accused is a fellow colleague who used to reside near my house. On 3/09/2017 they were on duty when he received a call from Sgt. Kilonzo who alerted him of a fight at accused's house. He rushed there and they arrested accused whom they escorted to Machakos police station.
 10. As he left the police station he came across their land cruiser and was requested to board. Inside the said vehicle, the deceased was lying on the floor and had some cut wound on the head and was bleeding. He stated that he had not known him before. He proceeded to Shalom Hospital where they left the deceased to undergo treatment. After four hours they received a report that the deceased had died. He stated that he had never disagreed with the accused person before.
 11. Upon cross examination, he stated that he met Sgt Kilonzo on the way and not at the scene and it was then that he saw accused already under arrest by Sgt. Kilonzo. He saw accused who appeared drunk and was staggering. He did not see any injuries on the accused but he had some bruises. The deceased was bleeding from the mouth. He stated that he had not known accused's mental state since I was only one week old at the station and had not worked together with the accused.
 12. Upon reexamination, he stated that he met Sgt Kilonzo at 8.30 a.m. while accompanied by the accused. That the deceased was bleeding from the mouth and from the head.
 13. PW.3 IP Benson Kamau stated that the accused is a fellow colleague who used to reside within the AP Line. On 3/09/2017 at 8.30 a.m. he received a call from Sgt. Kilonzo who alerted him of an incident within the AP line. He rushed there and found a large crowd but by then Sgt. Kilonzo had escorted the accused to the police station. He found the deceased lying down and bleeding from the mouth and head. Some of my officers were also at the scene. They rushed the deceased to Shalom hospital for treatment. He stated that he later established that the accused had been the assailant. Later after about five hours he was informed that the deceased known as Benson Wambua had died.
 14. Upon cross examination, he stated that the deceased was injured. He stated that he did not witness the incident and his statement does not mention names of the deceased. That they did not recover any assault weapons at the scene. he stated that he was not aware of anything to the effect that accused had mental problems as I had not worked with him.
 15. In re-examination, he stated that the deceased's wife later furnished his names.



16. PW.4 Veronicah Wambua stated that the deceased herein was her husband. On 3/09/2017 at 11.00 a.m. she received a call from Kalanzoni Catholic Church requesting her to go there as her husband had been attacked. She was directed to proceed to Machakos Police Station and she called her son James Muthama who works at Mulley's Supermarket and directed him to go check on her husband at the Machakos hospital.
17. She stated that she left home in company of Musau Mulinge and proceeded to Machakos level five hospital in search of her husband however, they did not find him. They checked on some bars within the town but did not find him there. They later went to Machakos Police Station where the OCS later informed them that her husband had been beaten by a certain police officer and later learnt that he had succumbed to the injuries and were advised to go view his body at the mortuary.
18. She told the court that she did not enter the morgue but her sons did and confirmed that indeed their father had died.
19. PW.5 Dr. Waithera Githendu a Consultant Pathologist at Machakos Level Five Hospital referred to a post mortem report dated 12/09/2017 and told the court that they performed a post mortem on the body of the deceased. That the body was partially decomposed, had excessive blood loss, multiple skin tears on right left and scalp superficial skin injuries on lower limbs, back chest shoulders and upper limbs. She stated that the weapon on these must have been blunt in nature. Further, that on internal examination he had multiple rib fractures on left and right side. There was internal bleeding on the chest measuring about 1.25 Metres. He had a depressed skull fracture leading to internal bleeding on the left side. The other systems were normal.
20. In her opinion the cause of each was head and chest injuries secondary to blunt force trauma. A sample of blood was taken for purpose of ruling out alcohol intoxication. She stated that a normal fall would not cause such serious fractures.
21. Upon cross examination, she stated that the investigating officer requested for the blood samples and she did not have results of the blood test. She stated that a serious fall and rolling over severally can result into such injuries.
22. PW.6 was Dick Kakula who stated that the deceased is his younger brother. On 31/09/2017 he was called by widow/wife of Wambua that Wambua was injured and he was in hospital. At 4 p.m. during the day he told the wife of Wambua he was on the way and when he got to hospital Level 5 he was called again and told that Wambua was in the mortuary. He went to the mortuary and saw him.
23. Upon cross- examination, he stated that he was told what happened, he did not witness.
24. PW.7 James Muthama Wambua stated that on 31/09/2017 at around 11.00 am, he was at work when he got a call from his mother Veronica Wambua that she was called and informed his father was beaten/ shot and rushed to hospital. He asked for permission from work and went to Shalom hospital and Machakos Level 5 hospital but did not find him. Later he met my mother and his friend and they went to the police station to enquire his whereabouts. He stated that they went to Machakos police station where the OCS informed them that their father was at the mortuary.
25. He went to the mortuary identified his father who had head bruises and the chest and bruises on the hands. We went home, discussed the matter and the next day they went to the police station and to the scene of the incident. On 12/09/2017 they identified the body of their late father at the mortuary. He stated that the doctor who did the post mortem told them that he was stabbed with a sharp object on the head. He stated that he knew him by name and learnt that he was a suspect in this case.
26. Upon cross examination, he stated that he was hit with a blunt object.



27. PW.8 Dr. Chris Ngolo a medical Officer from Shalom hospital Machakos stated that the patient was received at casualty on a report of assault and was unconscious and he was not alert . That initial resuscitation was done and was not successful and the patient was declared dead.
28. PW.9 Humphrey Jumba stated that he knew accused person as a colleague police officer whom we worked together in 2017 and we were neighbours as AP Officers – Machakos. That on 3/09/2017 at 7 a.m. he was going home for work night duty and when he reached near his house he heard screams and a distress call from the neighbouring house and before he came near, he saw a middle aged man come out bleeding on the head and was screaming for help. He came out from the accused persons house/ home and made a few steps and the man fell down. Behind him, came the accused persons and he had a stone in his hands and he said “leo nakumaliza” and he decided to restrain his colleague to stop him throwing the stone and hitting the victim/man on the ground.
29. He stated that other colleagues came to the scene and wanted to find out what happened. They held the accused person who was very angry and he called Chief Inspector Simon Muli and reported this incident. He told the court that at the time the accused person was very angry but not drunk. The accused person was arrested and the victim was taken to hospital. He stated that they were neighbors with the accused person were neighbours and there were various scuffles before with the accused person and it did not escalated like this incident.
30. In cross examination, he stated that Benson Wambua Kakula alias ‘Mukulima’ was a gardener/casual in their our area. That he was not working in the houses it depended on who gave him work, some told him to go work in the house and others did not. He stated that he saw the said Wambua Kakula alias ‘Mkulima’ in the accused person’s house. He stated that Benson Wambua had come to clear the compound and on this day he was coming to finish the work. He found the scuffle in the house and not outside, the Accused and victim came out of the house following each other. He told the court that in his statement he said that the accused said “utasema mimi ni nani ghasia wewe” and in court I said he said “leo nakumaliza”. That words are different but mean the same thing.
31. He stated that he could not tell what caused the fight/scuffle what stated and what caused the incident. He was not aware if the accused person was injured on that day. He knew the accused person for 8 months did not know if he had a medical condition. He stated that John Zulu did police officers duties and he was not aware that the accused had/his mental illness for a long time and was treated nor that he has gone for rehabilitation at the Administration college.
32. PW.10 Sgt. Peter Wafula recalled that in 2017 he was attached at DCI Machakos Sub-County where he was performing investigation duties. On 3/09/2017 at 14.00 hrs he was instructed by DCIO Rhoda Kanyi to take over and investigate a serious assault that turned into murder by which time APC John Zulu had been arrested and was in custody in Machakos police station in relation to this matter. He was alleged to have beaten one Benson Wamba alias ‘Mkulima’. The deceased was rushed to Shalom Machakos Hospital and died while undergoing treatment. Pw10 stated that he called Inspector Maurice Ndunda officer Scenes of Crime and in company of OCS Machakos Chief Inspector Asadi re-visited the scene Machakos AP Police Line.
33. He stated that he interviewed APC Victor and APC Humphrey, the immediate neighbours to the accused person and they alleged that morning they heard and saw the accused person assign the victim some casual work and thereafter they heard commotion from the accused person. On coming out they saw the deceased bleeding on his face and he fell down a few metres from the accused person’s house and the accused person was holding a stone in his hands and tried to hit the deceased who was lying helplessly on the ground. The officers reported the matter and escorted the deceased to Shalom Machakos Hospital and he was unconscious. He stated that they entered the accused person’s house



- and everything was scattered all over as sign of commotion and there were blood stations on the floor and blood in a sufuria and outside was 1 pair of shoes with blood stains on the ground near the house of the accused person.
34. He stated that Inspector Moses Ndunda photographed the scene and he was able to collect the sufuria and open shoes and some blood samples collected from outside the Accused's house to assist in the investigations. He told the court that he recorded statements of Inspector Benson Kamau, Cpl. Kamau and Sgt Kilonzo. That he interrogated the accused person and he had visible injury a human bite on the right-hand forefinger on the right hand. Later on he escorted the accused person to Machakos level 5 hospital for treatment.
35. Later on 12th September, 2017 the body of the deceased was positively identified in the presence of IPOA Officers and Dr. Waithera performed post mortem and formed the opinion the deceased died of head and chest injuries. He stated that they liased with Shalom Machakos Report and requested for medical report where the deceased was treated before he died. Later on they were furnished with a report that the deceased was attended to before he died. During post mortem they requested for blood samples that were extracted. He stated that he prepared Exhibit Memo Form and forwarded the exhibits to Government Chemist for analysis. He stated that the Accused person is in court John Zulu APC.
36. Upon cross examination, he stated that he could not ascertain what caused the commotion. That he revisited the scene of crime and was not the 1st one at the scene. The key witnesses as the scene were APC Victor Odhiambo and APC Humphrey Jumba. He stated that APC Victor Odhiambo told him the accused person gave work to the victim to clear the compound and in their statements the commotion began inside the house. He stated that the accused person had a visible injury and I escorted him to hospital. He stated that in the course of investigations, he heard reports and allegation of the accused person's condition and the accused person not being given a gun and placed on regular duties can only be established by his superior/Supervisor. That he found that in 2015 had undergone rehabilitation course at the Administration college.
37. PW.11 Margaret Wahu Maina from the Forensic Biology Government Chemist Department stated that they received several items from Cpl. Peter Wafula 68898 DCI Machakos on 21/09/2017 that is, blood samples marked Benson Wambua Kakula - deceased, Blood sample marked John Muli, Sufuria – placed in khaki envelope 'C', 1 pair of open shoes 'D' brown in colour .Blood swab on swab stick – 'E' and Blood swab – 'E 2' which they were to examine the status of presence of blood stains and ascertain origin of blood stains.
38. She stated that upon further analysis Sufuria – item 'C' was with blood stains, the pair of shoes – stained with blood stains DNA profile obtained and she tabulated at the end of the Report. She concluded that profile item 'd' 1 pair of shoes, Item 'c' – sufuria
Swabs E1 &E2, Marked DNA profile 'A' – Benson Wambua Kakula – deceased. I forwarded only the report signed and dated 30/07/2017.
39. Upon cross examination, she stated that she is not the one who took blood samples. Nothing matched blood samples of the accused person.

Finding

40. The matter commenced hearing on 30/01/2019 by Hon. D. K. Kemei J who took the evidence of Pw1, Pw2, Pw3, Pw4 and Pw5.



41. This Court took over the matter on 01/12/2021 and proceedings were typed and parties/counsel obtained the copies of the same. The court proceedings to take the evidence of Pw6, Pw7, Pw8, Pw9, Pw10 and Pw11.
42. The Prosecution closed its case and parties/Counsel were to file Written Submissions.
43. At the Close of the Prosecution case, this Court read through the Court record and documentary exhibits produced during trial and considered the totality of the evidence.
44. In the case of Anthony Njue Njeru vs Republic Court of Appeal No 77 of 2006; the Court determined the scope and content of case or no case to answer Ruling by the Court as follows;

[Is] Was there a prima facie case to warrant the Trial Court to call upon the appellant to defend himself? It is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of prosecution the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”.

45. The issue of what is a prima facie case in criminal trials was clearly explained in RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332 at p. 334-335 where it was said:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one:-

“Which on full consideration might possibly be thought sufficient to sustain a conviction.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is:-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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.”

46. In the instant case, on record the evidence recorded is that on 3/09/2017 Pw1 rushed to the accused persons house after being called and told that he was about to kill someone where he found the accused screaming that he would kill the deceased who was on the ground bleeding.
47. This evidence is corroborated by that of PW2, PW3 and PW 9 who place the accused person who was their colleague at the scene of the crime. They say blood stains in the accused house while the deceased was seen bleeding by the said witnesses including PW4 and PW6. It only right that the accused be given a chance to tell the court what transpired in his opinion.



48. Pw10 evidence on record is that the stones marked with bloodstains were presented for analysis with the deceased's blood sample marked E2. And was confirmed to be the deceased's blood on the stones.
49. Pw5 evidence on record is that he presented the Post Mortem on behalf of his colleague who they worked together for 4 years. The Report disclosed that the cause of the deceased's death must have been blunt in nature.
50. Disposition
- (1) Upon this Court's consideration of the totality of the evidence adduced and on record, the Prosecution has proved a prima facie case ".....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."
 - (2) The evidence of witness Pw5 and Pw10 coupled with the formal witnesses Pw1, Pw2 & Pw3 Pw4 & Pw9 confirm that the deceased died from an unlawful act and places the Accused person at the scene and time of incident and the circumstances outlined target the Accused person. The evidence on record discloses commission of the criminal offence of murder c/s 203 of the Penal Code and is sufficient to warrant the Accused person to be placed on her defense
 - (3) The law requires that the Accused exercises the legal right as prescribed under Sections 306 CPC.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT
ON 18/11/2024 (VIRTUAL/ PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

