



**Republic v Musyoka (Criminal Case 33 of 2016)  
[2024] KEHC 14083 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14083 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 33 OF 2016**

**FR OLEL, J**

**NOVEMBER 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MESHACK KIMONDIU MUSYOKA ..... ACCUSED**

**JUDGMENT**

**A. Introduction**

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) of the Laws of Kenya. The particulars of the offence were that on 24<sup>th</sup> May 2016 at Mathingau Trading Centre, Mathingau Sub location, Kinyaata location, Yatta Sub County jointly with others not before the court murdered SAMMY MASULU.
2. The accused person was first arraigned in court on 6.9.2016, and eventually took plea on 30.01.2017. He pleaded not guilty and the case proceeded to full trial with the prosecution calling twelve witnesses.

**(b) Facts at Trial**

3. PW1 Lydia Muniyiva Musyoka testified that she was also known as Lydia Muniyiva Katia, a farmer who resides in Mathungau. On the night of 23.05.2016, while she and her husband were asleep, their house door was knocked three times but before that, they had been alerted by their dogs' barking. The ones who were knocking then said "Mzee unatuchelewsha" as they demanded that the door be opened. Before they opened the door, she peeped through a space on the door and saw many people, who she did not know seated outside the door. She asked her husband if she could open the door and he authorized her to do so.
4. It was her testimony that when she opened the door Kimondiu Musyoka (points at the accused) came and held her husband's hand. He then asked the accused what was going on, and he told him that, he



would know his fate later. There was moonlight on the said night and she was able to recognize the accused through his voice and by physical appearance as he was a person born in their village and had known him since he was a young boy.

5. The crowd took her husband outside and locked the house from outside leaving her inside. She peeped through the window and saw the accused and the other people holding her husband and were pushing him headed towards Mathingau Market. At about midnight, she called her grandchildren who were in the third home from hers, but within her home and they opened the door for her. She then called her son's wife, Nthambi and a neighbor called Ndunge who came alone. They woke up other neighbors and then walked towards Muthingau Market while screaming and calling for help. When they reached the market, they were chased away and pelted with stones by the wild crowd who had joined the group that came to pick up her late husband.
6. It was her testimony that after a while when they went back to Mathingau market, they found that the mob had lit a huge fire over her husband's body in the middle of the shops and he had been consumed by it. They called the police, who came, put out the fire, and took the deceased body to Mathingau mortuary. She further stated that she had no grudge against the accused person and lived well as village mates. she had also not heard of any dispute between the accused and the deceased husband before this incident and did not know why her husband was burnt.
7. Upon Cross-examination, she testified that on the night of 23.05.2016, she was woken up by noises of people knocking on her door and asking her husband (in kikamba) to open the door and get out quickly as he was delaying them. There were many people and when she looked through the window she did not recognize any of the people as it was dark but there was moonlight. At the market, she did not know any of the people throwing stones at them and when they returned the second time, she did not see the accused person and did not know who burnt her deceased husband. Be that as it may, the accused was amidst the group that came to her home and took her husband away. He was putting on a white shirt and black trousers, but could not recognize the other people whom he was with as they were wearing black clothes.
8. After the incident, several persons were arrested but later released. The accused was not amongst this group as he was arrested later and she did not agree with the police investigation finding that the public Mob had killed her husband, nor did her daughter Gladys instigate the arrest of the accused person. The distance from her house and where her husband was burnt was not very far as one could be heard screaming from her house at the market. Many people heard their screams and came to find out what was happening.
9. PW1 further denied any knowledge of shops being broken into on the material night at the Mathingau market or her husband's involvement in these break-in incidents. When the crowd came to pick up her husband, her grandchildren were in their house but were too afraid to speak, while her son's house was within the said compound but on the far end of the farm and they could not hear what was going on. She reiterated that her husband was picked up from his house and was not caught breaking into shops at the Market. The persons, who picked him up were the ones referring to him as a thief, but to her knowledge, he was not one and was burnt for nothing.
10. Upon Re-examination, she reiterated that on the material night, the accused was wearing a white shirt and black trousers, while the other persons he came with were seated outside and wore black clothes. she had explained what happened to the police and they recorded what she said. If there was a mistake on her statement, then the police were the ones responsible for the same.
11. PW2 Francisca Nthambi Mutiso testified that she was a peasant farmer based at Mathiangau. On the material night, she was asleep, when she heard her mother-in-law calling her from outside her house.



She opened the door and found her outside her with her two grandchildren Mwangi and Mwangeli, who were her children. She told her that the father-in-law had been picked up by a crowd of people. She took her phone and called Elizabeth Ndunge to inform her what happened. They also decided to walk towards the road to attract the attention of fellow villagers, who came to assist them. She then sought the Phone number of Assistant Chief David Mwamisi and informed him about what had happened but he just expressed shock but said nothing.

12. They divided themselves into groups and went to the Mathingau market but did not get anyone, they just found a smoldering body that had no clothes. The assistant chief and police arrived and took the body which was burnt beyond recognition to Matuu mortuary. Her mother-in-law told her that one of the youths who came to her house to pick up her husband was the accused. She knew him and his family. Though he was not from the same village, they shared a common market. She also knew the accused as he was behind her in school and had known him for a very long time. She further confirmed that they had found the deceased body at about 5.00 am to 6.00 am, but it was picked up by the police between 3.00 to 4.00 pm.
13. Upon Cross-examination, PW2 stated that her husband was known as Daniel Mutiso Sammy and the accused home was past the market, about one hour, and ten minutes' walk from their home. She and the accused attended the same school, though the accused was behind her in class and she did not know when he finished school. Further, both attended AIC church -Mathingau Sunday school, while growing up, thus he was a person well known to her. On the material day, her husband was away working at Kitengela and came home two days after the incident had occurred. She also did not know, what her mother-in-law had recorded in her statement to the police, but she had informed her of having seen the accused as being amongst the persons, who drugged her father-in-law out of the house. she had mentioned it when they had come back from the Mortuary. PW2 concluded her evidence by stating that on the material night, there was enough moonlight and one could use it to identify a person.
14. PW3 Gladys Kawewe Kivuva stated that she was a housewife and was also known as Martha Mulandi. On 20.05.2016 her father sent her sister-in-law to call her as there was an issue, he wanted to discuss with her. Upon arrival, he informed her that Mwanzia Matata had gone to his home on 19.05.2016 and informed him that he had been sent by anonymous persons to pass a message that if they did not stop being friends with the said Mwanzia Matata, they would be lynched as it was alleged that they were witches. After passing this message, he told her to go report the matter to the area Assistant Chief Wamisi.
15. On 23.05. 2016 about 2.00 pm she went to Mathingau shopping Centre and was carrying out her own business when she coincidentally met her father, who informed her that earlier on the said date, he had met one Muia Musembi, who started abusing him that he was a witch. He had reported the matter to the Assistant Chief and sent Musembi's brother to warn him to desist from further abusing him. On 24.05.2016 in the morning her sister-in-law, PW2 went to her residence at about 6.00 am and informed her that her father was picked up by a mob at night and had been lynched at Mathingau market. They went to the market and confirmed that indeed their father had been burnt beyond recognition. They found police officers, the Area Assistant chief, and a group of people and later took the body to Matuu Hospital mortuary.
16. Upon Cross-examination, PW3 confirmed that her mother was staying with her father and that their grandchildren normally went to their house in the evening, but she was not aware if they used to sleep at their grandparent's house. Their last born Kyalo, worked and resided in Nairobi, where he operated a boda boda. She reiterated her earlier testimony, regarding the warning her father had received, and confirmed that her late father had not disclosed, the person (s) who had sent his friend Mwanzia, to warn him.



17. The market, where her father had been lynched had shops and several families resided within the said market, but she did not know any person, who had witnessed the Mob lynching. From their home to the Market, there were several homes, and the Market was about 7 kilometers away from their home, while the accused home was a further 7 kilometers away after the Market. PW3 further confirmed that the deceased was burnt using pieces of wood, and at the scene, they had identified his shop keys found next to his body. The police documented the incident scene and eventually, the body was removed and taken to the mortuary at about 9.00 am. She also confirmed that PW1 did not inform her about identifying the accused as one of the persons who had come to their home to pick up the deceased. Upon reexamination, she reiterated her earlier evidence and confirmed that she did not know of any person, who witnessed the incident nor did she hold any discussions regarding this incident with her mother, PW1.
18. PW4 Elizabeth Ndunge Katenge stated that on 24.05.2016 at about 01.00 hrs she was asleep when she heard her phone ring and on receiving it, she realized it was her neighbor PW2, who informed her that PW1 had told her that her father in law had been picked up by some young people from his home. They met and proceeded to the home of their next neighbor, Mr.Munyao, and woke him and his family (all sons) up. PW1 reenacted what had transpired and as a group, they decided to walk to the main road. Upon reaching the main road they started screaming to alert other neighbors, who responded to their distress call. Once a good number of neighbors had gathered, they walked towards Mathingau market where they found a body burnt beyond recognition. They returned home and on 28.05.2016 went to the police station at Kithimani and recorded her statement.
19. Upon Cross Examination, she stated that she found PW2 and PW1 by the roadside and PW1 did not mention to her any particular person alleged to have been in the group of the persons who had abducted her deceased husband. She told them that “Mzee was picked by unknown people”. They were not from the same village as the accused and on the material night, there was moonlight though not very bright as it was during the rainy season. Also when they arrived at the Market, they did not find anybody, save for the burnt body. She did not see the accused person and later she was informed that various people had been arrested but did not know them.
20. In re-examination, PW4 reiterated that she had asked PW1 who picked the deceased from home, but she had said that she did not know them. From their home to the market was a distance of more than 2 ½ km, and from the market to the accused’s home was also about 2 km. On the material night, there was moonlight, but it was not bright; it was just slight. Later, she was informed that the accused had been arrested in relation to this incident.
21. PW5 Richard Munyao stated that on 23.05.2016, he had gone to visit his uncle the deceased herein about at noon at Mathungau Market. When he arrived, he found him with Kanye Mutinda, who was helping him repair the cattle cart. His uncle urged him to extend his visit, but due to his commitments, he returned to their home at Yatta. The following morning at 6.00 am a neighbor, Paul Kiunga called him and informed him that the deceased was killed at night. He called his cousin Kivitu Mwathi and rushed to his uncle’s home, did not find anybody, and decided to go to Mathingau market. Enroute he again met Mzee Kangethe, who was with his uncle the previous day and he told him that he was with the deceased later in the evening at the local Bar and they had quarreled and exchanged words with a certain drunk boy, who later left and went home.
22. They proceeded to the market where he found many people including the police and next to his uncle's shop found his body, burnt beyond recognition, and later escorted his uncle’s body to the mortuary. He stated that his father and the deceased were first cousins and that he did not know the accused



- person and never saw him at the market. Upon Cross-examination, he confirmed that in 2016 he was a police officer but was not involved in the investigations. He also did not know who burnt the deceased.
23. PW6 Munyoki Mutunga stated that on 23.05.2016 at around 11.00 pm he was at home in Mathingau when Munywoki Mbithi came and told him screams were emanating from the village. They gathered as many villagers and went to Mathingau market, where he found that his uncle had been burnt by the mob outside at the Market. The deceased and his father were stepbrothers.
  24. Upon cross-examination, he confirmed that he was not certain about the time he went to sleep, but assumed it was about 11.00 pm. From their home to the market would normally take about 1-hour walk and by the time they reached the market, the incident had occurred and they found many people milling around the area, though he did not see the accused person. PW6 further confirmed that he was later arrested by the police concerning this incident and released without any charge being preferred against him. He did not know who burnt the deceased.
  25. PW.7 Damaris Mwendé stated that she is a businesswoman Mathingau Market, and had an eatery/ hotel within the said Market. On 23.05.2016 at about 5.00 p.m, she arrived at her place of work from her farm and found many people at the market. She met Kivuva Peter who informed her that there was a young man called Muia Musembi who had committed suicide. She closed her shop and they proceeded to the scene – Muia’s home near the market. She was with Damaris, Muia, Josephine Philip, Ndunge Muya, and many other villagers. When they arrived at the young man’s house, they found that he had hanged himself inside the house, using a rope, his feet were about to reach the floor. The deceased was a person well known to her, a regular customer at her hotel, and her sister too was married in that home. She went back to her business and later in the evening went home at about 8.30pm.
  26. The next day she woke up at 6.00 a.m. and opened the gate and saw many people at the market. They were students of Mathingau High School as well as Mathingau primary school students who were milling around burnt object, which discovered, was the body of the deceased herein. It was burnt beyond recognition and PW1 confirmed to her, that indeed that was her husbands’ body. He had been dragged away from his home the previous night by many people.
  27. The Assistant Chief David Mwamisi and the police arrived at the market and started to interrogate PW1, who explained how the husband was taken away by many people. Later the police took the body away. On the night, when the incident occurred, she did not hear anything as she were tired and was dead asleep, though the incident occurred about 50m away from her house. She also knew the accused, as he too was her customer, and on the pervious day had seen him amongst the crowd that went to view “Musembi’s body”, the one who committed suicide.”
  28. Upon cross-examination, she stated that there is nothing wrong with going to see a person who has committed suicide. Many people went to see, the person who had died, including the accused. She stated that the accused had a white shirt and black trousers. she saw him on the road as he was ahead of her among many other people, though near her. As regards the second incident, where the deceased was lynched, she did not hear anything untoward occur at night as she was deep asleep and had taken diabetic medicine. The accused home was not too far away from Mathingau and his home from the Market was on a different direction from the deceased home.
  29. Upon Reexamination, she stated that many people went to see the young man who had committed suicide and the accused, was amongst them. The following morning, she was the first person at scene of the incident with the School children, the Chief came around 7.00 a.m and the deceased’s wife (PW1) came at about 8.00a. She was not aware if she had been there earlier.



30. PW.8 SGT. ROMANO ROKAI NIROI, stated that he was an Administration Police Officer based at Machakos, but previously he was based in Yatta. On 25.05.2016 at around 7.00 a.m., he received a phone call from Assistant Chief Mathingau location who told him there was an incident at Mathingau market, where a person was lynched at the market and he requested for police assistance. He immediately took action, and accompanied by a colleague APC Daniel Mbugua they took G.K. motorbike and headed to Mathingau Market. They arrived at the scene at about 7.30 a.m. and did not find anyone but saw someone's head and stomach burning. They called Kithimani police station and five other officers came to assist them. They helped them put off the fire and collected the body, which was taken to the Mortuary. The family of the deceased and the chief was there and there was no one else.
31. The body was still smoldering but you could see the hand, intestines, the head, and bones. They collected pieces of wood, tyres from the incident scene and preserved them to be used later as Exhibits. The OCS Kithimani and OC Crime told him that a suspect was mentioned called Meshack Kimondiu Musyoka alias Kamangu and requested that if he saw him, we should inform them. Later, on 15.08.2016, while on normal patrol at the market, he saw the accused, and called his colleague who came and they apprehended him. He identified himself as Meshack Kimondiu Musyoka and on the following day took him to Kithimani police station.
32. Upon cross-examination, PW8 stated that when they arrived at the Incident scene, with his colleague, they found the smoldering body of the deceased covered with pieces of wood and tyre wires. The body was in front of shops at the market, nobody else was there when they arrived and other people/villagers arrived later. Further, he could not recognize all family members of the deceased save for the daughter, who was crying and also they did not get any report about a person who had committed suicide. After about one month, Deputy OCS Yatta called him and informed me to help them apprehend the suspect, and eventually, they apprehended him in August 2016.
33. Upon reexamination, PW8 stated that he was informed about the incident by the Assistant Chief who arrived at the scene later. After a while, in June/July, Deputy OCS Yatta instructed him to help trace and apprehend the suspect. Upon receiving the report he sought information from the chief who told him that the accused was not around, but later found him at the market by coincidence.
34. PW9, DR. Muli Simon Kioko stated that he was a qualified Medical doctor from the University of Nairobi, where he graduated in 1988 with a Bachelor in Medicine and Surgery. On 30.05. 2016 he performed a post-mortem on the body of the deceased, which was preserved at Median Hospital Mortuary situated in Matuu town. The deceased's body was of a naked, African male aged about 80 years old. He was of a medium body frame, about 5 feet 2 inches, and the body was burnt beyond recognition.
35. It was his testimony that upon opening the windpipe, he found that he was alive at the time of death because there was soot in the windpipe and he had died from 100% burns. He filled in the post-mortem form signed and dated it on the same date 30.05.2016. The said post-mortem report was produced as Exhibit 3 The deceased body was identified by Mutinda Sammy aka Munguti Sammy. Upon cross-examination, he stated that the deceased body was identified by three people, two from the family and a police officer. They identified the deceased through his teeth and also based on information received from the society where he resided.
36. That the body was burnt beyond recognition by the public and it was his expert opinion that when a person dies from burns the windpipe has soot. He had not indicated in his report that the deceased body was recognized through the teeth and no further D.N.A. examination was carried out on the deceased tissue as he was lynched in his home area and what transpired was known. Finally, he had determined the deceased age from his National identity card which his relatives came with. Upon re-



- examination, PW9 confirmed that the deceased body was identified by the three people and that teeth do not burn unless it is very fierce fire.
37. PW.10 MUTINDA NZIOKA stated that the deceased was his father and on 30.05.2016 he was at home and later went to Matuu Funeral Mortuary to identify his body for purposes of Post-mortem. when he arrived, he saw his body and identified him from the face as the other parts were completely burnt. He was with his brother Raphael Munguti during this process. The doctor did the post-mortem and formed the opinion that his father was burnt while still alive.
  38. Upon Cross-examination, he confirmed that he was not present when the body was being burnt, and later saw his father's body at the mortuary, though it was not easy to recognize the body, as the legs and arms were completely burnt but his head was not completely burnt, One side still had the skin on the right side. The body also had a scar on the side which was not burnt and he denied identifying him through his teeth. Upon re-examination, he stated that he was Joel Mutinda Musyoka, Joel was his baptismal name, noted on his identity card. Sammy was his father and he also used his father's name to identify himself.
  39. PW11 KIOKO SAMMY stated that on 24.05.2016 at about 8.00 am, he was at work in Nairobi when he was called by Dan Mutiso who told him that there was an incident at home and that some people had picked up his father, took him to Mathingau Market, where they killed him. He came home the following day and upon arrival, found that the deceased body had been taken to Matuu mortuary. He met Mbithi Mutinda, his cousin who told him that his father's friend Mwanzia Matata had told him that some people had been threatening his father. He passed later relayed this information to the police.
  40. Upon Cross-examination, he confirmed that Mbithi Mutinda never recorded his statement with the police, but he had personally passed on the information, which was to the effect that "Masaku" and "Tuta" had threatened to burn the deceased if he continued being a friend to Mwanzia Matata. The persons he had reported unfortunately were not arrested for threatening his father and as at the time he was in court, he still did not know who participated in lynching his father
  41. PW12 CPL. ISAIAH TUNOI stated that at the time of the incident, he was based at Yatta Police Station, crime office. On 24.05.2016 at about 9.00 a.m. he was called by IP Jeremiah Okello, Who informed him that the Assistant chief of the area, one David Mwamisi had called him and told him that a person had been killed at Mathingau Market, and requested him to accompany him to the incident scene. They went there and met the Chief, AP Police officers manning the Area and he confirmed that they found that a person had been burnt, though it looked like he had been beaten about 50 meters from where he was lynched .
  42. They collected various items that were used to beat the deceased such as broken sticks, blood-stained stones, and broken wooden stalls for selling vegetables which were damaged. The body had been burnt beyond recognition and they found a small wire which seems to have been used to tie him. They also found tyre wires and the remaining firewood which were still smouldering. The deceased bunch of Keys was also next to the body. They collected all the items from the scene and took the body to Matuu for post-mortem examination.
  43. Initially when investigations commenced, they arrested Nicodemus Mutisya, Mwanzia Matata and Francis Musyoka Mwanzia. They applied to have them held in custody for 21 days, but the court granted them 10-day custodial orders for purposes of concluding investigations. They recorded witness statements, and then sought advice from the ODPP but were advised that they did not have sufficient evidence to charge them. During the initial investigations, the accused disappeared but was later arrested on 19.08.2016 by AP officers stationed at Mukutano Ap Camp and later was escorted to Yatta police station. They sought and got approval from the ODPP and instituted the charges he was facing.



44. He produced the following items as Exhibits;
- a. Thin wire that remained from the burnt tyre – P. Exh 4.
  - b. Thick wire that was used to tie the legs – P.Exh.5.
  - c. Partly burnt firewood – P. Exh. 6
  - d. Broken sticks used to assault the deceased – P.Exh.7.
  - e. 2 blood stained stone – P. exhibit 8.
  - f. Photos – P.Exh.9
45. He did not know the accused and had not met him before his arrest. Upon cross-examination, he stated that the 3 persons were initially arrested based on the reports they had gathered from the initial investigations, but upon review, the ODPP believed that they did not have evidence to sustain the charge. He stated that the initial investigations mentioned several people, Nicodemus Musyoka, Francis Munyoki Mwanzia and Mwanzia Matata, but the OB does not mention that one person was at large. He recorded his statement on 30.05.2016 and did not mention that a suspect had fled and/or was at large.
46. He also confirmed that the accused was brought to court on the strength of investigations conducted by IP Okello who was the officer who interrogated the accused and recorded his statement. PW12 confirmed that the deceased body was burnt beyond recognition, but no DNA was done because it was common knowledge that the deceased had been dragged from the house and lynched. He also confirmed that he did not mention a bunch of keys in his recorded statement nor did he produce the keys as an exhibit.
47. In re-examination, he confirmed that investigations are a continuous process and when they came to know of the other suspect, they proceeded to arrest him. From the investigations diary, three persons were arrested and they came to know of the 4<sup>th</sup> suspect later because he had disappeared.
48. At this point the prosecution closed their case and the accused was placed on his defence.

### **C. Defence Case**

49. DW1 MESHACK KIMONDIU MUSYOKA stated that he understood the charge he faced, and averred that, it was not true. He was arrested on 18.08.2016 at Makutano market, his home market because he was playing with a live snake. Earlier on the said date, he was working for Nzioki Mang'ee, who had retained his services for the day. He found a snake that was moving, he picked it up and carried it to the market. People then gathered and a police officer ordered him to release the snake and then handcuffed him. He stated that he believed that he was arrested for handling the snake.
50. He knew the police officer, who arrested him as he was based at Makutano Police Post, and on the following day he was taken to Kithimani police station. After three days he was arraigned at Machakos court, where he met a police officer called Tauri, who interrogated him regarding the incident, involving the deceased and informed him of the charges he was likely to face. Eventually after 18 days in custody, on 06.09.2016, he was charged with the offence of Murder.
51. He confirmed that he knew that the deceased had been burnt since the information was all over Mathingau Market, which was a neighbouring sub-location about 15Kms away from their home, while from Mathingau to the deceased's home, was about 30 Kms. From their home, one had to pass through Mathingau Market and then proceed to the deceased home, they both resided in the



- opposite directions from Mathangau Market. He knew several people who resided at Mathingau Market, especially motorcyclists but denied knowing a person named Kamango. He referred OB No. 33 for 26/05/2016 which states that those arrested were Nicodemus Musyoka Musembi, Francis Musyoki Mwanzia and Mwanzia Muteti and stated that he was not aware of their arrest. He produced the OB report as Exhibit D1 and further recalled that Pw7 (Damaris Mwendu) had stated that she saw him on the material day, but PW1 did not identify him. On the day of the incident, he worked for Musyoki and spent the night at their home sleeping until morning. He prayed to be acquitted.
52. Upon cross-examination, he stated that it was normal for him to play with snakes in marketplaces and that on the material day he got arrested, he had found a poisonous snake on the way from Peter Kilonzo's home and took it to the market. That was not the first time for him to handle a snake, and he knew some people who gathered to watch him handle/play with the snake. He denied being present when the deceased was killed, nor did the deceased at any point refer to him using his nickname as alleged by PW1. He denied knowing Mr Muya Musembi but heard him being mentioned in these proceedings, they were not from the same village and the Musembi he knew was from a different village.
53. The deceased was not his age mate and knew him as a person known for pushing cattle cart. He had in past instances also given him work requiring cattle drawn cart. He also did not go to the deceased home upon hearing of his death. He reiterated that on the material night, he was asleep at home with his father, mother and other siblings namely Musyoka Kimondiu, Lydia Mweu Musyoka, Mwaniki Musyoka and Mbula Musyoka.
54. Upon Re-examination he stated that he went with the snake to Ngangani market as well but not Mathingau. Ngangani is between Makutano and home. He stated that he is known by people because of snakes and affirmed that Muya Musembi is not known to him and he heard about the death of Sammy, not Muya Musembi.
55. The accused party herein, did not call any further witness and his case was closed.

#### **D. Accused Person's Submissions**

56. The Accused person while relying on the case of Anthony Ndengwa Ngari vs Republic (2004) eKLR submitted that based on the analysis of the prosecution evidence, no eye witness or person positively identified him at the scene of the incident, where the deceased was murdered by many people and lynched. There was also no evidence that the accused handled any of the exhibits admitted into evidence. PW1's identification of the accused was not safe, as she did not state how she identified the accused without the possibility of error or whether she knew the accused before the incident. The intensity of the light at her house was not analyzed nor did she tell the group that immediately gathered that she had identified the accused as being amongst the persons who picked her husband. The initial report made to the police also had no mention of the accused person as being a suspect involved in the murder, except for the three persons earlier arrested.
57. Further, there was evidence that the deceased had been threatened but there was no report to the police about it. The accused counsel urged the court to find that there was no direct or circumstantial evidence which proved the accused involvement in the murder and urged the court to make a finding that the prosecution had failed to prove the charge against the accused beyond any reasonable doubt and proceed to acquit him under section 215 of the Criminal Procedure Code.
58. The prosecution did not file any submissions and relied on the evidence presented on record.



## **F. Determination**

59. I have considered the evidence and submissions on record and the question which arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused murdered one Sammy Maundu, the deceased.

60. Section 203 of the Penal Code defines the offence of murder as follows:

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

61. In the case of Republic v Okwara (Criminal Case E015 of 2023) [2024] KEHC 1360 (KLR) the court stated as follows;

“Mens rea in murder cases takes the form of malice aforethought, and the elements are set out in section 206 of the Penal Code. They relate to intention and knowledge. Intention to kill or cause grievous harm or to commit a felony. Knowledge that the act or omission causing death could cause such death, and being indifferent to the consequences of the act or omission. Intention and knowledge are mental elements. One forms an intention, in their mind, to do or not to do something, and has knowledge, within his mental faculties about something. So, the mental element for the offence of murder is either intention or knowledge.

Has the prosecution adduced evidence to establish such intention or knowledge, that the accused had formed an intention to kill or cause grievous harm or to commit a felony, or knew that whatever he was doing was likely to cause death, but remained indifferent to the consequences? Well, the mens rea of an offence is usually to be inferred from conduct or action, being a mental element, unless the intention is voiced by the perpetrator.”

62. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -

- a. the death of the deceased and its cause;
- b. that the accused committed the unlawful act which caused the death of the deceased; and
- c. that the accused had malice aforethought.

63. I will now proceed to interrogate each issue.

### **i. The death of the deceased and its cause.**

64. PW9, Dr Simeon Kioko conducted the post-mortem and made a finding that the cause of death was cardiopulmonary arrest due to 100% (Total body) burns. It is also not denied that the deceased body was burnt beyond recognition, this was confirmed by PW1- PW8, PW10- PW12 who all saw the body. This court therefore finds as a fact that the deceased died as a result of being lynched by the public on the night of 23.05.2016

### **ii. Whether the accused committed the unlawful act which caused the death of the deceased:**

65. The only evidence that has been tendered that links the accused person to the murder is that of PW1, who stated that he was amongst the group that came to pick up the deceased from his house, and he came held the deceased's hand and when the deceased asked him what was going on, the accused told



him that he would know later. That was the last time the deceased was seen alive. PW1 further testified that he knew the accused through his voice as he had been born in their village and had known him since he was young.

66. It was her further evidence that on the material night, there was adequate moonlight and when she peeped out of the window, she saw the accused holding her husband, while the other people were pushing him towards the direction of Mathingau Market. Under cross-examination, PW1 reiterated that on the material night, it was dark, there was moonlight, but there were no clouds or rain. she did not recognize any of the people apart from the accused who was wearing a white shirt and black trousers, the others who came to pick up his husband were far and it was the accused who pulled her husband, alongside others who were wearing black clothes and she was not able to recognize them.
67. PW1 was referred to her witness statement, and she confirmed that it was not mentioned therein that she had identified the accused as the person, who had worn a white shirt and black trousers. According to her she told the police so, but did not know why they did not record the same. PW2 also stated that her mother-in-law had told her that she saw the accused amongst the persons who picked up the deceased, but in cross-examination recanted her earlier evidence and stated that “she told me my father-in-law was picked by many people. At that time she did not mention anyone.”
68. PW7 also testified she had a hotel business at Mathigau Market and that on the material day at about 5.00 pm, while at the market, they got information that a villager had committed suicide and out of curiosity rushed to the scene, where they confirmed the unfortunate incident. The accused was amongst the persons who were in the crowd and he was wearing a white shirt and a black trouser.
69. The accused in defence denied committing the offence. he stated that on the material day, he worked for Musyoki and at night went home and slept until morning. He later heard about the incident which had occurred but was not present nor was he amongst the persons who lynched the deceased.
70. The issues which arise from the above summation is whether the accused was properly identified by PW1 as being amongst the persons, who picked up the deceased from his home, and if so if he has a duty to explain what happened subsequently thereafter, under the doctrine known as the “last seen with” doctrine.
71. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. Evidence from eyewitnesses plays an important role in all contested cases. However, it should be noted that human memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Further, the said witness may be mistaken yet come across as both honest and compelling. The risk of wrongful conviction in eyewitness identification cases is high and can result in injustices. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it.
72. To avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proved and that the identification of the accused is both truthful and accurate.
73. As was held in *Charles O. Maitanyi v Republic*, it is necessary to test the evidence of a single witness respecting identification, and, the absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic* the court held that evidence relating to identification must be scrutinized,



and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

74. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. The court in *Kariuki Njiru*( *Supra*) stated that in evaluating the accuracy of identification testimony, the court should also consider such factors as: -
- a. What were the lighting conditions under which the witness made his/her observation?
  - b. What was the distance between the witness and the perpetrator?
  - c. Did the witness have an unobstructed view of the perpetrator?
  - d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?
  - e. For what period of time did the witness actually observe the perpetrator?
  - f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?
  - g. Did the witness have a particular reason to look at and remember the perpetrator?
  - h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?
  - i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?
  - j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?
  - k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?
75. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.
76. The trial court in assessing the demeanour of a witness is also expected to make a finding as to the integrity, honesty, and truthfulness of such witnesses, not his or her boldness or firmness. The Court of Appeal in *Toroke v Republic* had this to say: -
- “It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification.”



77. Finally, the trial court also has to take note that visual identification in criminal cases can cause a miscarriage of justice and must be carefully tested. In *Wamugunda Vs Republic (1989)KLR 424* at page 424 the court had this to say.

“where only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely Make it the basis of a conviction.”

78. A similar position was reached in *Nzaro Vs Republic (1991) KAR 212* where Hancox CJ, Gachuhi and Cockar JJA held that

- i. “Before accepting visual identification as a basis for conviction, the court had a duty to warn itself of the inherent dangers of such evidence.
- ii. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was

79. PW1 alleged that she saw the accused enter her house and pull the deceased out by his hand. She knew him by his voice as he was born in their village and had known him since he was young. Further, there was moonlight, which aided her identification. Under cross-examination, she further stated that the accused was wearing a white shirt and black trousers, though she did not state this in her statement recorded at the police station after the unfortunate incident had occurred. PW7 also testified that she had seen the accused earlier in the evening, when they went to view the body of a villager who had committed suicide and confirmed that, he was wearing the same clothes as alleged by PW1.

80. PW1 did not specify if there was any light inside her house, which aided her in identifying the accused, but stated that there was “moonlight” and saw the accused pull the deceased out of the house. PW2 her daughter-in-law, was the first person she went to contradicted PW1's evidence and confirmed in cross-examination that “she told me my father-in-law was picked by many people. At that time she did not mention anyone. In reexamination she again contradicted herself and stated that, “ she informed me later about seeing the accused later after we came back from the mortuary.”

81. PW4 an immediate neighbor, was called and informed of what had transpired. She left her house and they passed by another neighbor's home, Mr Munyao, and woke him and his sons up, they then joined PW1 on the road. She too confirmed in cross-examination that PW1 told them that, “mzee was picked by many young men. She did not mention a particular person..... when I woke up there was moonlight but it was not bright. There was no rain that night but it was rainy season. I could not have recognized the accused if he was there” In re-examination, PW4 again clarified that, “I was told people picked Mzee. I asked who picked him but she told me she did not know.”

82. PW7 also clarified during cross-examination that she spoke to PW1 on the material morning, while at the incident scene and she did state that, “ I saw Lydia at 8.00 am she said her husband was taken by people who were not known to her. She did not say she recognized anybody. She said she did not know anybody.”

83. PW1 never mentioned seeing the accused amongst the persons, who came to her house in the first information report to the police, and nor did she state that she was able to identify the accused through his voice and the clothes he was putting on the material night in her recorded statement issued to the police. PW2 and PW4 were also her immediate neighbours who joined her on the material night



- and accompanied her to the Market. Both confirmed that she did not mention to them that she had recognized the accused as one of the assailants who had picked her husband from the house.
84. PW1 also did not clearly describe or elaborate the kind of light that enabled her to properly identify the accused person. It was her evidence that there was “moonlight” and after they had picked her husband, she peeped out of the window and saw them lead him away. PW4 also attested to the fact that on the material night, “there was moonlight but it was not bright, it was just slight. That night there was no rain..... it was dark and people were many hence you could not recognize people there.”
85. A critical analysis of the evidence adduced cast doubt as to whether, indeed PW1 saw the accused as one of the persons, who led her husband away from home on the material night and/or if there was sufficient light to enable her properly and safely identify him. PW1 did not describe her surroundings in detail, the light within her house which enabled her to identify the accused, whether her house was one-roomed or two-bedroom, how long the accused stayed within her sight, if other persons also entered the house, and her positioning to give her unhindered view of what transpired. This coupled with the fact that she did not mention to her immediate neighbours as having seen the accused and/or informed the police in her first information report that the accused was amongst the persons who led her husband away, leaves credible doubt as to the reliability of the identification evidence.
86. Finally, PW1 evidence also had a lot of inconsistencies. It was her evidence that after her deceased husband had been led away, she called her grandchildren, who were in a different house within the compound and they opened for her the door, which had been locked from the outside. Thereafter, she called neighbours to assist her and they used Ndunge’s motorcycle to round up neighbours, after they walked to Mathingau Market while screaming. As they approached, they were chased away and pelted with stones. They retreated and when they went back, they found that her husband had been lynched. PW4 in cross-examination contradicts this evidence and confirmed that they did not have a motorcycle on the material night.
87. P1 also stated that in cross-examination, “the distance from my house and where my husband was burnt was not very far. One can be heard screaming from my house at the market, many people heard our screams and many people came.” PW2 and PW3 again contradict this information and state that the market was about 6 - 7 km, while PW4 stated that, the Market was about 2.5 km away. PW1 also stated that she had seen the accused, grow up in the village, this allegation again was contradicted by PW2, who stated that she schooled with the accused, he was from a different village about one hour, ten minutes’ walk away, and that he was not their neighbour. PW4 also confirmed that they were not from the same village as the accused person.
88. Finally, PW1 also testified that after gathering with her neighbours, on the material night, they walked towards Mathagau town, while screaming and were chased away and pelted with stones by the people who took her husband. This information was not corroborated by the evidence of PW2, PW3, P4, and PW6, who were amongst the first responders and went with PW1 to the market at about 6.00 am, to find that PW1’s husband had been lynched.
89. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (see *Uganda Vrs Rutaro (1976) HCB* ; *Uganda Vs George w. Yiga (1979) HCB 217*).
90. As was noted in *Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:*
- “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not



necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

91. In the case of *Ndungu Kimanji v Republic* [1979] KLR 282 this Court said:-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

92. In this case, I have myself subjected the evidence adduced herein to intense scrutiny. There were major inconsistencies in the evidence of PW1 when considered alongside the evidence of other key witnesses as elaborated above and when considered in the totality, the veracity of the said evidence is not cogent enough to unerringly point at the accused as the guilty party. As such the accused must be given the benefit of doubt as the evidence adduced cannot found a safe conviction.

### **Disposition.**

93. In the circumstances I am not persuaded beyond reasonable doubt that the prosecution has proved that the accused committed the unlawful act that caused the death of the deceased.

94. Accordingly, it is my finding and holding that the prosecution has fail proved all the ingredients stated in the information of murder against the subject herein, Meshack Kimondio Musyoka beyond reasonable doubt and acquit him accordingly under section 215 of the criminal procedure code.

95. Right of Appeal, 14 days.

96. It is so Ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 13<sup>th</sup> day of November, 2024

In the presence of:-

Accused present in court

Mr. Mangare/Ms Otulo for O.D.P.P

Susan/Sam Court Assistant

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