



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 19 OF 2018

REPUBLIC

.....PROSECUTOR

VERSUS

SIMON MUTISYA MUIA.....ACCUSED

PERSON

JUDGEMENT

1. The accused person is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 13th and 14th July 2018 at Sun Blaze Bar in Athi River Sub County within Machakos County, the accused person murdered CHRISOPHER WAMBUA alias MELA (deceased).
2. The accused pleaded not guilty to the charge whereupon the prosecution called eight (8) witnesses to prove its case. After considering the evidence adduce by the prosecution this court found the accused had a case to answer and put him on his defense. The accused elected to testify on oath and did not call any other witness.
3. Briefly the prosecution witnesses testified as follows; PW1 Samuel Nduva Kimulu stated that the deceased was his elder brother and was running a butchery in the name and style of

“Guest House Butchery” in Athi River. He himself resided in Thika. On 14th July 2018, he received a call from the deceased’s colleague one Kasimu, who informed him that his brother had been killed at Sun Blaze Bar. He rushed there only to find the body had been taken to Machakos Level Five Hospital mortuary where he went and confirmed it was indeed his brother. He was in the company of his cousin Mutua Kitonga. He further stated that on 19th July 2018, he attended the post-mortem with a cousin one Bernard Mutua Muasya and a police officer; that the deceased had six stab wounds on the neck; that he did not witness the events leading to his brother’s death: that the deceased’s body had been thrown behind the bar and that he was informed that the murder weapon was a knife.

4. PW2, Faith Katone Makau, stated that at the material time she was a waitress at Sun Blaze bar; That the accused also worked in the bar but as a night guard; that on 13th July 2018 she was at work at the bar; that the deceased, who she knew as Wambua or Mela went to the bar at about 9pm. There were other patrons whom she named Councillor and Julius in the bar at the time. She stated that the accused requested to be served a soft drink which he took as he chewed “muguka”(khat). The other two patrons went about drinking their beer. She stated that when she closed the bar at around 2.00 am, Councillor and Julius left the bar but the deceased was left behind drinking. It was her testimony that when she left, the deceased and the accused were the only persons in the bar.

5. PW2 further testified that when she went to the bar the following day, she found a crowd of people milling around the bar and learnt that somebody had been killed. She raised the alarm and soon village elders arrived at the bar followed by officers from the Criminal Investigations Department (DCI). They escorted her to Athi River police station and then back to the scene which was at a field behind the bar where the body of the deceased had been dumped. She stated that the body lay face down. She recognised the body as that of the deceased because he was in the same clothes he was wearing the previous night. It was her testimony that she did not know if the accused was involved in the death of the deceased; that she was not aware of any quarrel between the accused and the deceased; that the accused usually reported for duty at 6 pm and leave at 6am; that at night he stayed inside the bar; that the only keys he kept were for the gate; that the deceased was a regular customer and that on that night he had joined the accused. However, she did not know if it is the accused who killed the deceased.

6. Kyalo Kikuvi, PW3, testified that he went to the bar with his friends on the material night; that they stayed there until 1.00 am and that they left the deceased, PW2 and the accused there. He stated that the accused person opened the door for them to leave the premises. The following day, he went for a funeral only to get a call from a son of the bar's proprietor that somebody had been killed in the bar. He stated that when he

went back to the bar, he learnt that it was the customer, Mela, whom they had left there that had been killed. He stated that the previous night the deceased had arrived in the bar quietly and sat next to the accused and both chewed khat. He was not aware if there was a grudge between the accused and deceased.

7. Pw4, Julius Kioko Wambua, testified that he was that friend who was in the bar with PW3 on the material night. He confirmed that Faith Katoni(PW2) was the waitress they found in the bar and that they also found Mutisya (the accused) who was the watchman. He also confirmed that the deceased found them in the bar and that the accused, deceased and PW2 remained behind when they left. The following day he got a call from PW2 who told him that somebody had been killed at the bar. When he went there, he found a large crowd and police officers. He learnt that Mela was the one who had been killed. He stated that he was not aware of any grudges between the deceased and accused and contended that he had never personally disagreed with the accused. He stated that on the material night, the deceased joined the accused at his table and they chatted since they had been buddies. He stated that the deceased's body had been thrown over the perimeter fence of the bar.

8. PW5 Chief Inspector Wanjohi, was the Deputy DCIO Athi River at all times material to this case. He testified that on 14th July 2018 at around 8.00 a.m. which was on a Saturday, he received

a call from one Chief Inspector Simon Mpaku the Deputy OCS Athi River police station who informed him that there was a dead body of male adult person lying at a plot behind Sun Breeze Bar & Restaurant in Athi River. He mobilized his officers Inspector Karanja, PC Chepkwony and PC Saichima and they went to the scene and confirmed that there was a dead body of a male African lying dead on the said plot. The body had injuries that he suspected were caused by a sharp object. After questioning people at the scene, he learnt that the primary scene was in the bar and directed PW2 to lead them there. He stated inside the bar there were blood stains on the floor and the walls and the seats were turned upside, signifying a struggle. He testified that there was also a bucket and a mop at the scene and signs that someone had tried to clean the bloodstains. He stated that he came to the conclusion that the deceased had been killed in the bar and his body thrown over the wall into the field where it was found in the morning.

9. He testified that the scene was visited by Chief Inspector Maurice Ounda of the scenes of crime who documented it.
10. He testified that he found a khaki paper with miraa and a bottle of whisky in the bar and that nobody seemed to know what happened in the bar after PW2 left. His investigations revealed that the accused who had been left in the bar with the deceased, lived in Kitengela. They first went to his mother's house where they were given directions to his house. They went there and found his wife and another woman but the accused was not there. When they questioned the accused's

wife, she allegedly told them that he had gone there in a hurry that morning, changed his shoes and left after taking tea while standing. He claimed that she also told them that he got restless upon receiving a call from his workmate called Faith. PW5 stated that they conducted a search in the house and found a blue and white pair of sports shoes underneath the bed. The shoes seemed to be stained with blood. They took an inventory which was signed by those present during the search. On 21st July 2018 he got word that the accused had gone back to his house. He first deployed a team of officers to go there to secure the place. He joined them later. He stated that when they confronted the accused, he admitted he was the watchman at the bar. After taking possession of his clothing, shoes and a bunch of keys and taking another inventory, they went to the bar with the accused and using the keys which they recovered from him opened the door of the corridor used to access the bar. After that they went and booked him in at the police station. Further investigations were conducted by Inspector Karanja.

11. PW6, Inspector George Karanja, stated that he was one of the officers who went to the scene on 14th July 2018. This was upon receiving a call from PW5. He stated that they were given a chronology of events by PW2 who also showed them where the deceased sat chewing miraa with the accused person on the fateful night. He stated that there were blood stains from the bar all the way to where the body had been dumped. The

body was taken to Machakos Level 5 Hospital mortuary for preservation mortuary pending investigations.

12. PW6 elaborated that they involved community policing officers Juma and Dominic Mutinda and the mother of the accused in searching for him. They did not find him on their first visit to his house but they recovered a pair of shoes with blood stains. He confirmed that an inventory was done. At this time, the accused person had already fled. They managed to get him on 19th July 2018. He also stated that at the bar there was a blue bucket with a pink lid with bloodstains. That bucket, the pair of shoes taken from the house of the accused and a blood sample of the accused were taken to the Government Chemist for analysis. He contended that they prepared 3 different inventories; Inventory prepared at Chui house - accused person home 1 pair of shoes and light blue sports shoes. Inventory prepared at the bar after the arrest of the accused person and another inventory prepared at house in Kitengela. He (PW6) prepared the 2nd and 3rd inventory while Chief Inspector Wanjohi(PW5) prepared the first one.

13. Pw7, Dr. Waithera Githendu, a Consultant Pathologist at Machakos Level 5 Hospital stated that a post mortem was performed on the body of the deceased on 19th July 2018 and on examination the deceased clothes were blood stained and body well preserved. He had six stab wounds on the neck; three on the left and three on the right side; stab wounds stitched blood vessels and blood clots.; he had a stomach

abrasion on the left side of the stomach and had lost a lot of blood leading to severe pallor. The stomach, chest, and head were all normal. The doctor concluded that Christopher died from excessive loss of blood. In other words, exsanguination and multiple stab wounds on the cervical neck. She stated that there was no sign of struggle.

14. PW8, Elizabeth Waithera Onyiego, a Government Analyst, testified that on 24th July 2018 at Government Chemist Nairobi she received two swab sticks-A1 and B-from the murder scene, a mopper ,A4 - Blue bucket, a blue-green right sport shoe (indicated as from the suspect's house); a Blue -green left leg sport shoe (indicated as being from the suspect's house); a blood sample indicated as of deceased and a blood sample and a blood sample in a bottle indicated as that of the suspect. The exhibits were delivered to the Government Chemist by George Karanja a police constable from the DCI Athi River. She testified that upon analysing the specimens she found that the mopper, bucket lid and bucket were slightly stained with human blood as was the pair of shoes marked B1 and B2. More specifically her findings were that;

- a. The DNA profile generated from the blood stains on the shoes B1 & B2 matched the DNA profile generated from the blood sample indicated a of deceased B3 - Christopher Wambua.
- b. Blood stains on the swabs items A1 & A2, Mopper A3, bucket lid A4, Bucket A5 did not generate a DNA profile. She produced the Report on 2/12/2020 and

stated that there was no profile that matched the DNA profile of the accused.

The post-mortem report, the exhibit memo form and the report of the government analyst were some of the exhibits tendered in evidence.

15. When the Accused person was put on his defence he elected to testify on oath. He was the only defence witness. He begun by confirming that he was the night watchman at Sun Blaze bar in Athi River at the material time but also stated that he doubled up as a room attendant. He also confirmed that Faith Katone Makau (PW2) was his workmate. He stated that on the material night, to wit, 13/14th July 2018 he reported to work at 6pm and found Faith and other customers in the bar. As was his usual routine, he switched on the lights and ensured that the rooms were clean. Thereafter he went to the counter and told Faith that if she needed him, he would be at his normal station. At around 7.30, she called him as there was a customer who wanted a room. He went and took the customer to the room and then went back outside. He contended that during his tenure at the bar he only interacted with Faith and a customer called Julius. He stated that at about 7.30pm Faith called him and he went and took a customer to the room.

16. It was also his testimony that it was Faith who introduced him to Christopher Wambua alias Mela and that at about 10.30pm she gave him a big size Krest soda, to take to Christopher Mela, who was sitting next to PW3, which he did and went back outside as his main concern was with those who were

getting into the bar. He stated that PW3 and Julius stayed for a while and told him they had had enough and wished to leave. He opened the door for them and they left. He stated that it was then that the deceased went and sat at the counter near Faith; that she then gave him the keys to the counter and said she was going to sleep in room no 9 and if he needed her, he could call her. He stated that he left Christopher at the counter and escorted Faith and when he went back, Christopher told him he wanted to leave. He opened the door for him and he left. He contended that Christopher, the deceased was in a good state when he left.

17. He further testified that come morning, he went and called Faith and handed over Kshs 4,350, took a masai shuka and at about 7am headed to his house in Kitengela where he lived with his wife. He stated that he heard about the deceased at about 11am when his wife called him on phone and told him that his mother was calling him to which he said he would go when he woke up. He went and his mother sent him to their home in Kenyatta-Katangi. Whilst there, his mother called him and told him that his wife and Faith had been arrested and taken to Athi river police station. He sent his cousin Kimeu to follow up and he told him that it is him they were looking for concerning a man who has been found dead where he worked.

18. He went back after 2 days and police officers went for him. He was taken to Athi river police station where he was interrogated and later taken to the laboratory where his

blood specimen was taken. He admitted that he was the last person to be with the deceased. He told the court that he did not hear any commotion after Christopher left.

19. Learned counsel for both sides consented to sum up their cases by way of written submissions. The submissions were duly received. In summary Learned Prosecution counsel submitted that the evidence of PW2, PW3 and PW4 places the accused person at the scene of the crime, a fact he did not deny. That he was the last person to be seen with the deceased making him culpable for the offence and the accused person having failed to give a reasonable explanation, then the court should draw an inference that he is the one who killed the deceased. In addition, that there was strong circumstantial evidence as there were blood stained on shoes that were recovered from the house of the accused, which blood matched the DNA of the deceased.
20. Counsel contended that the accused person had malice afore-thought since he inflicted injury on the deceased by stabbing him severally on the neck. Counsel asserted that the prosecution had proved its case beyond reasonable doubt. Counsel placed reliance on the case of **Republic vs Mohamed Dadi Kokane & 7 others [2014] eKLR**, the case of **Republic vs Daniel Musyoka Muasya and 2 others**, and the case of **Moingo & Another vs Republic v [2002] KECA 6 (KLR)**.

21. Miss Kwamboka, learned Counsel for the accused, submitted that suspicion cannot form a basis for a conviction, no matter how strong. Counsel urged this court to acquit the accused stating that the prosecution did not prove the charge beyond reasonable doubt. Counsel argued that proof of death was undisputed but that the accused person played no role in the death. That none of the prosecution witnesses saw the accused either committing the alleged murder, in possession of a murder weapon or even heard the accused threaten or have an altercation with the deceased.
22. Counsel contended that the circumstantial evidence that relied upon by the prosecution is porous and therefore holds no water and/or form any basis to pin the accused for the murder. Further, that no inventory or exhibit memo of the shoes was produced as an exhibit and it is rather wishful thinking to assume that indeed the shoes were recovered from the accused's house; that the analyst report revealed that no DNA sample collected from the shoes matched that of the accused and the buckets and mops generated no DNA profile. In addition, if the alleged shoes belonged to the accused and had been worn by the accused at the time the murder took place then the clothes collected from accused's house presumed to have been worn by the accused ought to have been subjected to analysis and be found to have been soiled by the deceased's blood. Also, the fact that the deceased had no defence wounds or signs of struggle on his body and that no screams or cries for help were heard really puts the prosecution assertion that the accused murdered the

deceased by stabbing him into question. In any case, there were lodges within the bar and PW-2 who resided within the precincts of the bar would have heard some commotion and/or cries for help. In support of the submissions, reliance was placed on the cases of **Stephen Nguli Mulili vs Republic [2014] eKLR, Dpp V Woolmington, (1935) UKHL 1, Tubere s/o Ochen vs. Republic [1945] 12 EACA 63, Sawe vs. Republic [2003] KLR 364 and Ahamad Abolfathi Mohammed & Anor vs. Republic [2018] eKLR Edwin Wafula Keya v Republic, Court of Appeal [2005] eKLR**

Analysis and determination

23. The Accused person has been charged with the offence of murder contrary to **Section 203 of the Penal Code** which provides as follows:

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

24. There is a long line of cases on what constitutes the elements for the offence of murder ingredients of murder. In the case of **Republic v David Ruo Nyambura & 4 others [2001] KEHC 826 (KLR)**, the court stated;

“There are three ingredients of murder which the prosecution must prove beyond reasonable doubt so as to earn a conviction, namely:

(a) The death of the deceased, and cause of that death.

***(b) that the accused committed the unlawful act which caused the deceased's death and
(c) that the accused had malice aforethought."***

25. In the instant case, the death of the deceased, Christopher Wambua alias Mela, is not disputed. There is oral evidence and medical evidence in the form of a post-mortem report documenting that death. The element of death was therefore proved beyond reasonable doubt.

26. The cause of death is also not in question. According to the pathologist who performed the post mortem death was as a result of excessive bleeding due to stab wounds on the neck. The court heard that the deceased had been stabbed on the neck six times; thrice on each side. This evidence was not disputed and clearly therefore the cause of death was proved beyond reasonable doubt as well and I must also add that the nature of the injuries inflicted upon the deceased point to an unlawful act.

27. The second element is proof that the death was caused by an unlawful act of the accused person. From the evidence, it is not in dispute that the accused person and the deceased were at Sun Blaze Bar on the night of 13th and 14th July 2018. The accused conceded that he was on duty in the bar that night. He also acknowledges that the deceased was also in the bar. The prosecution witnesses claim that the accused and the deceased sat together and partook of muguka, a substance in the nature of khat. However, the accused seemed to dispute this because according to him, the deceased sat with PW3 and

when PW3 left the deceased went and sat near Faith. I see nothing in the evidence to suggest that the three witnesses namely PW2,3 and 4 had any reason to fabricate evidence against the accused person and I therefore find it a fact that the accused interacted with the deceased on that night. He himself told this court that at some point he was sent to serve the deceased a soda and therefore, the testimonies of PW2,3 and 4 cannot be farfetched. Moreover, the most crucial evidence is that the accused and the deceased were both in the bar on the fateful night.

28. As to whether the accused committed the unlawful act which resulted in the death of the deceased, there is no direct evidence. None of those called by the prosecution witnessed the circumstances culminating in the death of the deceased. The evidence against him is purely circumstantial. It is trite however that circumstantial evidence is at times the best evidence. That was as was stated in the case of **R V Taylor, Weaver & Donovan [1928] CR. App R 21**, cited with approval by the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)**, where the court stated:

***“It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics.*”**

It is no derogation from evidence to say that is circumstantial.”

29. The first piece of circumstantial evidence in this case is that the accused was the last to be seen with the deceased. It is noteworthy that he admits to have been left alone with the deceased. However, he alludes to Faith and a certain customer being in rooms in the bar at the time. At the same time, he contends that it was him who let the deceased out of the bar and that the deceased was in a good state when he left. It cannot therefore be that his allegation is that the deceased was killed in the bar by someone who was in the bar other than himself. It remains a fact therefore that the accused was the last person to be with the deceased. There is also forensic evidence that a mop, a bucket and bucket lid which were in the bar were stained with human blood. This leaves no doubt in my mind that the unlawful act which culminated in the death of the deceased was committed in the bar. From the totality of the evidence, it is doubtful that there was any other person in the bar at the time other than the accused. PW2, whose evidence strikes me as trustworthy and reliable as it is corroborated by PW3 and PW4, told this court that she left the accused with the deceased when she left and did not go back until the next morning. She did not know of any other person who was left in the bar. In any event, as I stated earlier there is no contention by the accused that the killer could have been someone else. Instead, he says that the deceased left the bar alive. My finding is that he did not and that the person who killed him can only be the accused. In the case of **Marita v Republic (Criminal**

Appeal 280 of 2018) [2023] KECA 580 (KLR) the Court of Appeal stated;

“The Last Seen Doctrine essentially provides that if a person is the last one seen with the deceased just before his death or within a reasonable period of his death and no other person could have intervened in between them, then the presumption can be taken that he (the person who was last seen with the deceased) is the author of the crime causing the deceased’s death. In such a case, the burden of proof shifts to the person last seen with the deceased to negate this fact and if he is not able to give a lucid and sufficient explanation about his innocence then the presumption becomes even stronger. Ideally, for the Last Seen Doctrine to safely apply, the duration of the accused and deceased last seen together and the recovery of the dead body should be minimal. This, rules out the possibility that another person intervened. In cases where there exists a significant time gap between the time the deceased was last seen with the accused person and the time when the body was recovered, the presumption is considerably weakened.”

30. Similarly, in the case of **Mungai v Republic**[2021] **KECA 51 (KLR)** the court stated;

“14. The presence of a dead woman half buried in a house, with a shovel, a panga and a knife with the sharp items stained with the blood of the blood group of the deceased, are facts which the law of evidence recognizes as being especially within the knowledge of the appellant as the owner of the house who was present at the material time and was obligated to explain. Falling in the same category are the bloodstains that were found on the appellant’s shoes and shirt. Only he could explain the ghoulish find of the body and the damning presence of the deceased’s blood on his personal apparel.

15. Once a person so situated fails to offer a plausible explanation for such accusative evidence linking him to the commission of the crime, section 119 of the Evidence Act permits the court to presume the existence of any fact which is likely to have happened, regard being had to the common course of natural events and human conduct.

16. The law on circumstantial evidence is quite settled that all the inculpatory facts must lead irresistibly to the conclusion of the guilt of the person accused and that there should be no co-existing facts or circumstances that weaken that inference or that are capable of explanation on any reasonable hypothesis consistent with his innocence. See Rex v Kipkering Arap Koske & anor [1949] 16 Eaca, 135, Simon Musoke v Republic and John Chebii Sawe v Republic[...]

18. It has been stated and is worth repeating that calling evidence circumstantial does not lessen its value or lower its probative force. The co-existence of relevant facts can form a chain so strong and so complete as, to leave no doubt

whatsoever as to the perpetrators guilt. With respect, this in one such case”.

31. The chain of events in this case points strongly to the accused person as the perpetrator of this crime. The inculpatory evidence is rendered even more irresistible by the fact that a pair of bloodstained shoes was recovered in his house the same day as the body was found which fact he admitted during cross examination. The forensic investigation conducted on those shoes revealed that the blood on the shoes was human blood whose DNA matched that of the deceased. During cross examination the accused admitted that the shoes were recovered in his house. With due respect therefore, the absence of an inventory is not a relevant factor.

32. In the ***Marita case(supra)*** the court of Appeal analyzed a number of cases and concluded as follows;

“This court has laid out, quite stably, in a number of authoritative decisions, the governing principles in utilizing circumstantial evidence to secure a conviction. The cases include Abanga alias Onyango v Republic, Criminal Appeal No 31 of 1990 (UR), Sawe v Republic [2003] KLR 364 (supra), Mwendwa vs. Republic [2006] IKLR 137, Wambua & 3 others v Republic [2008] KLR 142, Peter Mugambi v Republic [2017] eKLR, and [Dorcas Jebet Ketter & another v Republic](#). The guiding principles crystallized in these cases are that:

i. The inculpatory facts must be incompatible with the innocence of the accused.

ii.They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

iii.There must be no other existing circumstances weakening or destroying the inference.

iv.Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.”

33. Finding that the accused killed the deceased and that the death was by an unlawful act is not sufficient to convict him for the offence of murder. To convict him for the offence, the court must be satisfied that he acted of malice aforethought. Section **206 of the Penal Code** defines malice aforethought as follows:

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

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;

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;

an intent to commit a felony;

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.”

34. In this case malice aforethought can be easily discerned from the nature of the injuries which were inflicted upon the deceased. There were six stab wounds to the neck and clearly the accused even if he had no intention of killing the deceased, he must have had intention to cause him grievous harm. Even knowledge that the act could lead to death or grievous harm is sufficient to infer malice aforethought and it is obvious that the accused must have had such knowledge. Motive is not an element of this offence and it need not have been proved.

35. There is nothing in the testimony of the accused to warrant this court to come to a conclusion that he was acting in self-defence or that he was provoked as would warrant this court to conclude that he was justified in ending the life of the deceased.

36. The up shot therefore, is that the charge against the accused has been proved beyond reasonable doubt. I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Judgment signed, dated and delivered virtually on this
25th day of September 2025.**

**E N MAINA
JUDGE**

IN THE PRESENCE OF:

Miss Kaburu for the State.

Miss Kwamboka Advocate for the accused.

Geoffrey Court Assistant/Interpreter.

The accused (online from Machakos GK Prison).

ORIGINAL