



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CRIMINAL CASE NO 23 OF 2017

REPUBLIC..... ODPP

VERSUS

JAMES MUINDE MUSYOKA
ACCUSED

JUDGMENT

1. The accused person James Muinde Musyoki was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The Particulars were that on the 26th day of August, 2017 at about 7:00 am at Kivani Village, Mukimwani Sub-location Kalimani location in Mbooni East Sub-County, within Makueni County he murdered Musyoki Muinde.
2. He was brought to court on 28th August 2017 but due to his mental illness the plea was taken on 3rd April 2019 and he pleaded not guilty

3. The matter proceeded before HON Dulu J on the 10th of March 2021. The prosecution called 7 witnesses – 4 were heard by Hon. Dulu J, I heard 3 when I took over the matter.
4. Upon the close of the case for the prosecution, the accused was put on the defence. He gave sworn testimony and did not call any witness.
5. Defence Counsel Mr. Hassan submitted that the prosecution had failed to establish its case beyond reasonable doubt and the only option available for the court was to find the accused not guilty and to acquit him.
6. Pw 1 Annah Syombua Sammy testified that 126th August 2017 at 7:45 AM she was going to the neighbors and passed by her uncle James Musyoki Muinde's place as the road passes there. She saw his head near the kitchen door and there were blood stains on the head. Shocked, she ran back and called her husband Sammy Mutie. PW1 said that when she saw the deceased one side of his shirt was missing .They rushed there and when her husband saw the deceased who was his uncle, he called Peter Ngami the homestead chairman and MUINDE, the accused who is a son of the deceased also came. She did not know where the accused came from. The assistant chief

and many other people also came and it was during this time that someone commented that the accused person had changed clothes. Pw1 confirmed that she had seen the accused wearing different clothes the previous day. The area chief came with police officers and it was suspected that the accused person had killed his father. A search for the accused clothes ensued and they found in the pit latrine pieces of a shirt, a vest and trouser and a pair of shoes. An axe was found behind the kitchen and it had blood stains. PW1 further testified that when she saw the deceased his head had some cuts and appeared crushed on some parts the deceased was lying on his back with his face up and one of his sides appeared to be swollen, she was of the view that he appeared to have been assaulted. She identified the clothes and shoes that were recovered from the pit latrine ones the accused person had been wearing the previous day. She said that the deceased had lived alone until three weeks earlier when the accused person had come home from Nairobi where he had been living.

7. On cross examination she told the court that when the clothes were recovered from the pit latrine, she identified them as

the ones that the accused had been wearing the previous day because she had seen him in the same. She said she did not hear any screams from the home of the deceased and that they were neighbours. That when she first saw the body of the deceased the accused person was not there. That he came afterwards and did not escape or try to escape but remained with them but it is when other people came and the assistant chief was present that some young men began to ask why the accused person had changed the clothes, he had worn the previous day.

8. PW2 Anthony Sammy Mutie told the court that he is husband to PW1 and on the 26th August 2017 he was at home when his wife left for the neighbors but shortly thereafter, she came back and stood at the gate and called out to him . He joined her and they went to his uncle's place. Near the kitchen he saw his head which was bloodstained and that he had a cut on his head, his shirt was blue in color and blood stained . He had a pair of long trousers. He knew that accused lived with his father and so he called out but there was no response as the other sons were in Nairobi and his wife had died some time ago

9. Because he did not have his phone PW2 called for help then he went to his house and picked the phone and called the chairman of their village and elders and the daughter of the deceased.
10. The assistant chief came and other people as well . People began to ask where the accused was. When he came, he was arrested as there were some people who were saying he was the one who had killed his father. There was a search that led to the pit latrine where they accused clothes were found. PW2 said the door of the house of the deceased was broken and the latch was removed from outside.
11. On cross examination he confirmed that the door of the deceased was broken from outside; that when they were there the head of the deceased was still bleeding; that the door to the house of the accused was not locked; that the axe was picked from the tree which the accused was cutting; that when they looked for the accused in the homestead at first he was not there; that when they asked he had gone he said he had gone to look for another young man to assist him to cut the tree ; he said they did not hear any commotion before this

and that the accused had been assisting his father with house activities.

12. On reexamination he told the court that the gate to the deceased's home had an opening for people to pass as members of the home stead and that the accused told him he had gone to call his friend that morning after he started cutting the tree; He said the way the blood was oozing from the deceased he had been attacked at about 6:00 AM.
13. PW3 Muli NGANGI testified as the family chairman that on the 26th of August 2017 at 8:00 AM he was informed by PW2 that Musyoki had been killed when he arrived at the scene the assistant chief ,the police and many neighbors had already arrived and he saw where the deceased was lying on the side; he had a cut on the face and many cuts and he saw blood oozing; he saw that he did not have shoes ; he had blue T shirt and a pair of trousers .He identified the blood stained T shirt. He said that the neighbors saw the accused they became furious as they suspected that he was the culprit. On cross examination he said he did not witness the recovery of the clothes or the killing of the deceased .

14. PW4 Elizabeth Waithera OYIEGO the government analyst after setting out her credentials testified that on the 7th of September 2017 and the government chemist laboratory in Nairobi, they received from number 58194 Corporal Peter MWANGI items from MBOONI CID with an exhibit Memo form. MARKED D1, D2 and D3 WERE A GOLF stick, Two broken pieces of stick and an axe, respectively. MARKED E1, E2 and E3 were a piece of torn light blue shirt, blood sample in a bottle, and fingernails and hair of the deceased Musyoki Muinde respectively; G1, G2, G3, G4 were a white vest , pair of green trousers, Pair of black sport shoes with shades of black and orange, piece of light blue cloth; F1, F2 and F3 were two fingernails and hair of suspect James Muinde Musyoki , black sports shorts , blood sample in a bottle of suspect James Muinde Musyoki.
15. She testified that she was required to examine the items and determine the presence and origin of blood stains
16. She found that the Shirt E1 was heavily stained with human blood, the vest G1 and the cloth G4 were moderately stained with human blood, the pair of trousers G2 and the pair of shoes G3 and the sticks D1 and D2_were lightly stained with

human blood , And the axe D3 and the shorts F 2 one not stained with blood.

17. She generated DNA analysis and the DNA profile from the shirt E1 the vest G1 and the pair of trousers G2, the pair of shoes G3 ,and the cloth G4 all matched the DNA profile from the blood sample E2 from the deceased. She produced the report as exhibit number 7a and the exhibit memo as number 7 b
18. PW5 no. 233941 Police Constable Frederick Ndambuki to testify that on 26th August 2017 he was attached to Kalimwani Police Post. At about 9:00 AM he learned from the assistant chief that a person had been found dead in Mukimwani area and the assistant chief required him to escort him to the scene. After viewing the deceased, he asked for the accused person who he was told was living with him and he was told he was at another house nearby and then he saw the accused person coming looking very sad and shocked that his father had died he told the court that the accused told him that he had woken up and gone to the shamba. He said he was satisfied with what the accused had told him but people followed him saying that it was the accused who had killed his

father and he arrested him . Another neighbor came and said that they had seen him going to the Shamba. The neighbors also recovered an axe which he identified in court he said the neighbors wanted to lynch him and they took him on a boda boda together with the axe to the Police Post.

19. On cross examination he said the axe was brought by a neighbor who said it was from the shamba of the deceased; he said he saw that the axe had blood ; that the accused was arrested because he was living with the old man who was seen coming from the shamba where the axe was found; he said he did not know the owner of the axe.
20. PW6 Emmanuel Laiposha a consultant at Makindu Sub County Hospital conducted the postmortem and prepared the postmortem report on 4th September 2017 at Makueni County Referral Hospital at 8:30am. He said it was the body of a male African 74 years of age with visible scalp cuts, bruises ,and blood clots on the head, fractures of the left humerus, bruises on the chest.
21. Internally he had bilateral 4th rib fractures, massive intra thoracic hemorrhage of approximately 1.5 liters and multiple scalp bruises and deep cuts. Cause of death was severe head

and chest injury secondary to sharp and blunt objects. He produced the postmortem report as Pexhibit no.8. On cross examination he said the injuries could have been sustained in a fight.

22. PW7 number 66532 CPL Philip Rotich was at the material time at MBOONI EAST DCI. They received a murder report on 26th August 2017 around 8:00 AM From the area chief. Together with crime personnel they proceeded to the scene, found the deceased lying in a pool of blood near the door of his kitchen, the blood was fresh the incident was still fresh it appeared that there had been some struggle as there was blood in the main sitting room they had visible deep cut injuries on the head, on the rib cage and a broken left hand; it also emerged that he was living with his only one son James Musyoki Muinde who was seen emerging from their farm near the compound and he could not give an account of what had happened and members of the public wanted to lynch him and he was whisked away. Clothes were recovered from the pit latrine which were blood stained and PW1 confirmed that the accused was wearing the same the previous day there was a piece of light blue shirt similar to the one that deceased

was wearing; That the accused told him he had gone to cut trees to burn charcoal; they recovered an axe which had smears of blood stains about 50 to 60 meters away from the body and two pieces of broken sticks which had blood stains ,black sports shoes believed to be those of the accused ,a white vest , and trouser confiscated shirt from the deceased and an axe which had blood stains and shorts they were all escorted to the government analyst together with an exhibit memo.

23. When the postmortem report revealed that the cause of death, together with the signs of struggle at the scene where the deceased had collapsed and the accused person's lack of an explanation with regard to the items that were recovered in the Pit latrine, he concluded that the accused had murdered his father and recommended the charge of murder.
24. Cross examined by counsel for the accused he stated that the accused had recently arrived from Nairobi. He testified that axe and the sticks were used to kill the deceased despite the findings by the government analyst that they were not blood stained ;he testified that the accused did not tell him that the deceased had attacked him.

25. In his defense the accused person in a sworn statement confirmed that the deceased was his father . When the charges were read to him afresh by his counsel, he said that he could explain . He stated that on the material day there was a log, a big dry log in the shamba where he was digging which he wanted to cut up so it would clear the way for farming. He went there in the morning to cut it up. As he was cutting it up his father came and asked him *'who told you to cut that log?'* He told him *'no one'*. He said he explained he was removing it so that the maize crop rows could be straight and it would be easy to make the rows for the maize. He said his father hit him and as he was defending himself a struggle ensued and they fell down inside a gully (itwiku in Kikamba language). He said his father sustained injuries but he was not injured . He said his father was injured on the nose and began to bleed. He said he carried him and took him home and called the elders who called the assistant chief but when the chief came, they found he had died. They arrested him handcuffed him and brought him to the police. Then he was charged. He said he did not want to kill anyone. It happened by accident.

26. The issue for determination is whether the prosecution has established the ingredients for murder as provided for by s. 203 of the Penal Code which states

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

27. There must be a death , whose cause is unlawful, caused by the accused with Malice aforethought.

28. There is no dispute that there is a death. The deceased was found dead by several persons; he was certified dead by the pathologist ,a postmortem report was produced which confirmed that he had died, and not of natural causes. His body was identified at the scene by relatives who also attended the postmortem.

29. The cause of death was also established and it was not lawful as it was as a result of severe head and chest injury secondary to sharp and blunt objects.

30. So, the next issue is whether it was the accused person who caused the death.

31. According to the witnesses, none of them saw the accused person attack or injure the deceased; none of them heard

any fight or quarrel between the accused and his father. No one was aware of any issue existing between the father and the son prior to the date that he was found dead at his kitchen door. So evidently there was no eyewitness to this death, and no known grudge.

32. It is noteworthy that the first police officer at the scene observed that the accused person appeared shocked at the death of his father . And that he was satisfied with that although it is not clear what explanation the accused gave because it is not the one that was given by the accused person in his defense. Nevertheless, it is significant that there were witnesses who confirmed that the accused was seen going to or coming from the shamba that morning.

33. So, the court is left with circumstantial evidence. On this I find illumination in [Republic v Kariuki & another \[2024\] KEHC 8535 \(KLR\)](#) the court stated:

First and foremost, it is trite law that in cases dependent on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. All the facts so established should be

consistent only with the hypothesis of the guilt of the accused, and the circumstances should be conclusive and tendency and should be such as to exclude every hypothesis but the one proposed to be proved. "Circumstantial evidence must be a combination of facts, creating a network through which there is no escape for the accused because the facts taken do not admit any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (SARKAR ON EVIDENCE pp. 32 - 33). The way to deal with circumstantial evidence was stated in TOPER V. R. (1952) A.C. on Page 489 as follows:- "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Before drawing the inference of the accused's guilt from circumstantial evidence, it is also necessary to be sure that no other co-existing circumstances would weaken or destroy the inference."

34. I have considered the evidence and clearly, I do not find any other co-existing circumstances that could explain the death. The accused person was the only person living with his father in the homestead at the material time. There was no commotion heard or alarm raised in the home . There is a road passing by the home and anyone could see inside the homestead.
35. The accused's bloodstained clothes and shoes were found in the pit latrine and the blood on them was that of the deceased. The accused ceased to be a mere suspect to a person against whom there was evidence of being in contact with the deceased while he was bleeding and deliberately trying to hide that fact.
36. The Government analyst's report was clear that the clothes were stained with the blood of the deceased. How did it get onto the accused person's clothes if he had nothing to do with the injuries that led to his death?
37. This evidence establishes that even without an explanation from the accused there was sufficient evidence to convict for the killing of his father.

38. So even without the confessional explanation by the accused person, there was sufficient circumstantial evidence to tie the accused with his father's death. I am guided by what the Court of Appeal had to say in [Bosco Ndungu Kinyanjui v Republic \[2015\] KECA 189 \(KLR\)](#)

*The law regarding the nature and character of proof by circumstantial evidence has been settled by several decisions with the loci classici being **R v Kipkering arap Koske (1949) 16 EACA 135** and **Simeon Musoke v. R (1958) EA 715**.*

The law requires that circumstantial evidence in a criminal trial be narrowly examined with utmost caution while considering all the circumstances of time, place, means, opportunity and conduct, which point to the suspect as the perpetrator of the crime.

39. The evidence points at the accused only. Something happened and the accused assaulted his father leading to his death.

40. The exhibits were collected on the 28th August 2017 and presented to the government analyst on the 9th September 2017. The witnesses who first saw the axe and sticks saw blood stains. However, upon examination by the government analyst they had no blood stains. Does that rule out their use? If the accused could throw away his blood stained clothes nothing could have stopped him from cleaning up the axe leaving it with insufficient stains to draw blood for DNA profiling.
41. That being the position, the accused person decided to give his side of the story as an explanation, in his defence. That the death was accidental and followed a scuffle that landed both in a ditch.
42. According to him the only injury his father sustained was on the nose leading to nose bleeding. He said he carried his father singlehandedly from the ditch, itwiku.
43. His story that there was not an intention to kill his father on his part could be believed based on the fact that there were no known differences between him and his father .
44. Even if the injuries could also have resulted from a fall, the fall was initiated by the accused person who is younger, half

his father's age. True, the location of the cuts and bruises on the head , hand and chest was not indicated .There were no measurements of the depth and length of the 'bruises and deep cuts' set out in the postmortem report and one cannot tell on the face of the report whether they were caused by an axe or something the deceased landed on .

45. However, the I.O confirmed that there was a scuffle and there was evidence of the same in the home stead. The accused assaulted his father and caused him the injuries that led to his death.
46. There is sufficient doubt that there was no malice aforethought on his part.
47. If truly he had fallen into the ditch the accused could have called for help, he would have told the same to the police or his relatives. He would have pointed out the place where his father had fallen, he would have left him there for others to assist him to remove him.
48. His defence does not clear him of wrong doing it only establishes that there was an incident out of which his father sustained injuries and later died.

49. There was a question raised that the accused may have had mental illness at the time of the incident. He was examined on 12th September 2017. The Psychiatrist at Mathari National Teaching and referral Hospital stated that the accused had **'features of schizophrenia'** declared him not fit to plead and started him on treatment. On 18th February 2019 the Psychiatrist declared that he did not have a mental disorder and declared him fit to plead.

50. The Penal Code provides at s. 11 that *every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.*

51. At the time of arrest the accused person was calm. He was found to be ok by the first witnesses at the scene and none testified to any erratic behaviour or conduct. Hence on the date of the alleged offence there is nothing before me to show that the accused ought to be brought under the purview of the provisions of s. 12 which states

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind

incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

52. In the end I find that the prosecution established that the accused caused the unlawful death of his father without malice afore thought. In the circumstances, the charge of murder is reduced to man slaughter c/s 202 as read with s. 205 of the Penal Code .

53. I find the accused person guilty on manslaughter c/s 202 as read with s. 205 of the Penal Code and convict him accordingly.

Dated, signed and delivered, virtually on 8th January 2026

**Mumbua T Matheka
Judge**

CA Mr. Chrispol

Accused: Present at Makueni Main

for State: Mr. Musyoki

Mr. Hasan for the accused