



**Republic v Musau & another (Murder Case 72 of 2023)
[2025] KEHC 698 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MURDER CASE 72 OF 2023
DR KAVEDZA, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MUSAU 1ST ACCUSED

ROBERT KIBORORO 2ND ACCUSED

JUDGMENT

1. The Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, Chapter 63, Laws of Kenya. The particulars of the charge were read to the Accused Persons and the Accused persons pleaded not guilty to the charge. A plea of not guilty was entered and the matter was set down for hearing. The Prosecution called a total of 10 witnesses (herein referred to as PW1-PW10).
2. PW1 was Jackson Ouma Ochillo, a brother to the deceased. He testified that on 3/5/2020 he met the deceased who was in good health. However, he was called on 4/5/2020 at 6 am by his uncle and went to the deceased's residence. Upon arrival, he found people at the residence and his brother laying down, dead. He examined him and found that he had several injuries. He also testified that the deceased lied beside the tarmac road. He proceeded to report the incident to John Saga Police Station before being referred to Muthaiga Police station. He went back with the police to the scene, the public carried the body to Muthaiga Police station before the same was taken to City Mortuary. He also testified that on 6/5/2020, he identified the body of his brother and a post-mortem was conducted. On cross examination, PW1 testified that he did not witness the incident and therefore did not see who injured his brother.
3. PW2 was Chief Inspector John Ihugo No. 2xxxxxx2. He testified that he as the Officer Commanding Station of Muthaiga Police station and that on the material day, he prepared a list of the officers to



- be deployed on patrol to enforce the covid-19 curfew directions of the Minister of Health. Je testified that on the evening of 3/5/2020, he patrolled the mathare area with the following officers under his command: Police inspector Musau (1st accused person), Corporal Mwangi (2nd Accused person), Corporal Mutisya and Police Constable Munga.
4. PW2 testified that they patrolled the area firstly aboard a landcruiser and then on foot patrol save for the driver. He testified that upon walking for some metres, there were several diversions and the team broke up to different semi-teams constituting: Group 1- Sgt Fanando and PC Munga; Group 2- PW2 and Cpl Mutisya and Group 3- 1st and 2nd Accused persons.
 5. PW2 also relied on a sketch of the area that was produced by PW11 as PEx 3 (a). He testified that the Sketch showed 3 routes that were marked as R1, R2 and R3. He further testified that the Accused persons were on Route 3 while the incident happened on R2 which was manned by himself and PC Mutisya. It was also his evidence that his group and that of the accused persons were the first to converge. They were later joined by group 1. He testified that no one was arrested and no incident was reported by either group.
 6. PW3 was Mrs Evelyn Ochweda, the wife of the deceased and now widow. She testified that on the evening of 3/5/2020, the deceased left the house to use a public toilet. She requested him to come back with vegetables for supper. However, he did not return home. Despite her calling him, he did not answer his phone before the said phone went home. She further testified that it was only on 4/5/2020 when she received a phone call informing her that her husband was dead. She testified that she positively identified the body at the scene.
 7. PW 4 was Mr Ochieng Ochola who testified that from his hiding point, he could see police officers beating the deceased using Rungu and rubber whips. He testified that at first, he saw the police vehicle driving behind the deceased before two officers jumped off and started beating the deceased. He testified that he saw the 2nd accused person beating the deceased. He further testified that he did not see the 1st accused person. But from where, he was hiding he could see the 2nd Accused person because of his long nose, eyes and brown in colour complexion. He knew his name, the following day when people were calling his name. Controverting his earlier statement, during cross examination he changed tune and testified that he did not see any vehicle and he did not record the same in his statement. Further that he did not give the description of the officer to IPOA. During the reexamination, he testified that he was in bush and he did not see any vehicle.
 8. PW5 was Willis Omondi Barasa, a boda boda rider. He testified that on 3/5/2020 at around 7.00 pm, together with friends saw police from Muthaiga Police station following them, with a police vehicle behind them. He testified that they ran in different directions and they went to UB40 direction. As they were hiding, they saw police officers beating a man with a rungu and whips. They later came out of hiding together with other members of the public and went to the road where the deceased was being beaten. They identified the deceased as Waingo. The time was 8.00 pm. He left and went home. In the morning at around 5.00 am, he returned to the place and found the deceased still lying down, dead. He testified that it was his first time seeing the police officers and that in the morning, he identified Mwangi. During cross examination, he testified that counsel Mwangi together with other officers. He also testified that they were at the road marked R2 and that Waingo was beaten at R2 and not any other place. Further that the police were walking while the vehicle was ahead of them.
 9. PW6 was Ms. Beatrice Adhiambo Otieno. She testified that she was a business lady and on the material day, she went to buy vegetables at Mradi area. She testified that she met the deceased who was going to buy vegetables. He warned him about the curfew. After he left her, he saw a police vehicle before two uniformed officers jumped out and started beating the deceased person. She testified that she wanted



- to scream but she was advised by her colleagues against it. She did not go to check on the deceased but decided to go home. It is only the next day that she had cries from the widow that she realised that the deceased was dead. She testified that the beating took thirty minutes. During, cross examination, she testified that she could not identify R2 and R3 on the sketch. Further that it is not true as noted in her statement that she hid in the corridor but she hid in the plot and that she only peeped through the hole.
10. PW7, PW8, PW9 were policer officers, Cpl Tapheth Mutisya, PC Reagan Munga Ndune and Sgt. Samuel Fanando respectively. They were police officers attached to Muthaiga Police station and were on patrol together with the accused persons on the said date. PW7 reiterated the testimony of PW2 who was the OCS, on the division of officers as well as the routes pursued. He only added that the area was dark without electricity and that they used torches. He testified that they were all in blue uniform save for Sgt Fernando who was in a jungle uniform in green colour. He testified that the 1st accused person did not go to take the body in the morning but the 2nd accused did. At the scene, he had one person asking the 2nd accused person if he was at work the previous night. When he answered in the affirmative, the person said basi wewe ndio uliua huyu mtu. Immediately, the crowd started shouting ni yeye. During cross examination, he testified that the vehicle followed R2 and he was on R2. Further, that the body was lying on R2 which he has patrolled together with PW2. PW8 and PW9 made similar averments. Also indicating that the accused persons were only armed with a pistol and AK47 rifle.
 11. PW10, Dr Peter Muriuki Ndegwa, who was the pathologist. He concluded that the cause of death was exsanguination (Haemology) secondary to chesty injuries due to blunt force trauma. He testified that this was caused by blunt objects which can include a rungu and stones. Further that the injury could not have been caused by a gunshot. He concluded that there were no injuries on the head.
 12. PW 11, Benedict Otieno, is an investigator in the Independent Policing Oversight Authority (IPOA). His evidence was mainly that he did not visit the scene of crime but only recorded statements post the fact.
 13. PW12 was former police officer Kariuki Mwangi, no 5xxxxxxx1 who testified in the same line as the testimony of PW 2, 7, 8 and 9.
 14. The Prosecution closed the case at this stage. Justice Hon. Bwonwong'a delivered a ruling and found that the Accused Persons had a case to answer. The accused persons were placed on their defence and they chose to give sworn evidence.
 15. DW1, was the 1st Accused Person, IP Daniel Mutunga Musau. He testified that he was an inspector attached at Muthaiga station. On 3/5/20, he proceeded on a patrol together with 6 officers. He testified that he had a pistol while Cpl Mwangi had an AK 47 rifle. He also testified that the OCS confirmed that they were wearing the blue uniform. He confirmed that he was in group 3 together with the 2nd Accused person and they took route 3. Further that, they returned back to the station with no incident being reported. He testified that he was not on duty on 4/5/20 and he could not therefore testify as to the happenings on that day. He also testified that they were not armed with whips but only guns. Further that to his knowledge, the 2nd accused person is not the tallest but Cpl Mutisya is. Also, that no ID parade was conducted.
 16. DW2, was the 2nd Accused person, Cpl Robert Mwangi, who testified in a similar line as the DW1. He also indicated that he only had an AK 47 as indicated in the arms register and he did not have a whip. He further testified that he did not know the accused person, did not see him on that night and as such, there was no reason to kill him. He testified that he was not the tallest in the team and ID Parade was not conducted. He testified that the area was in darkness and no lights at all. The only mulka mwizi is at Juja road, No. 10. When he was at the scene, that's when a person asked him if he was on duty, the



previous night. Upon answering in the affirmative, the people there started shouting that he was the one who had killed the deceased.

17. On 23 October 2024, parties adopted their written submissions.

Analysis and Determination

18. I have considered the evidence for the prosecution and for the defence. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence.
19. In *Republic v Andrew Muecha Omwenga*, Maraga J (as he then was) considered the provisions of section 203 of the *Penal Code* and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

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

20. The ingredients of the offence of murder as provided in Section 203 of the *Penal Code* and which therefore the prosecution is in this case required to prove beyond reasonable doubt are: -

- (a) The death of the deceased and the cause of that death.
- (b) That the death was as a result of an unlawful act.
- (c) That the accused was the perpetrator of the unlawful act.
- (d) That the accused had malice aforethought.

(See also the case of *Antony Ndegwa Ngari v Republic* [2014] eKLR).

Standard and burden of proof

21. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington v DPP* 1935 A C 462. Similarly, in *Bakare v State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.



22. On the other hand, the burden of proof always rests with the prosecution/state. It is a constitutional imperative under Article 50 (2) (a) that an accused person has a right to presumption of innocence until the contrary is proven beyond reasonable doubt.

a) The cause and death of Vitalis Owino Ochillo

23. That Vitalis Owino Ochillo was killed/died is a fact that was proven by both the Prosecution witnesses and the Defence Witnesses. The deceased was identified by the wife, brother and residents of the area where he lived. Further, the Investigating officer produced photographs of the scene and of the deceased. Also, PW10, the pathologist produced a postmortem report that confirmed the cause of death as having been hit by a blunt object. I am therefore convinced that Vitalis Owino Ochillo died and the cause of death has been ascertained.

b) Proof that the accused persons committed the unlawful act which caused the death of Vitalis Owino Ochillo

24. The *Constitution of Kenya* celebrates the presumption of innocence as the foundation of the right to fair trial. It is on this basis that the burden lies on the prosecution to demonstrate beyond reasonable doubt that the accused person(s) committed the offence. It is a settled position of law that where there is a doubt that is in line with the presumption of innocence, a court of law should give a benefit to the accused person(s). This position is in line with the famous position of the Learned Author William Blackstone's famous maxim states, "It is better that ten guilty persons escape than that one innocent suffer" (Blackstone, *Commentaries on the Laws of England* [9th edn, 1783] reprinted 1978).
25. The burden is therefore on the state to ensure that sufficient evidence is demonstrated before a a guilty verdict can be returned an accused person. The standard is not about suspicions. This is because criminal proceedings end up in loss of liberty, punishment, thus highly limiting freedoms. As such, Justice Nyakundi expressed himself in *Republic v Daniel Charo Katana* [2021] eKLR as follows;
- "It is therefore trite that the state should prove its case so strongly that the evidence leaves the trial Court with the highest degree of certitude based on such evidence. It is to be noted that the concept of reasonable doubt in our criminal justice system is not based upon a sympathy or a whim or prejudice or caprice or sentimentality, jelly fish of a Judge or Magistrate seeking to convict or acquit another human being of the commission of the offence. It is an approach to hold the state to the highest standard of discharging its burden of proof in criminal cases beyond reasonable doubt. It is not a conjecture or a fanciful doubt. It is based on admissible and material evidence to dissuade the trial Court from acquitting an accused person."
26. So, what was the evidence adduced by the Prosecution? The prosecution called a total of 12 witnesses. PW1 was the brother of the deceased. His evidence was only material on whether the deceased was properly identified. PW1 did not witness the killing of the deceased and therefore his evidence cannot be used to identify the perpetrators. Same conclusion can be reached for PW3 who was the widow. She only went to the scene after she was called by neighbours. PW4, PW5 and PW6 evidences were fraught with suspicions and inconsistencies. For instance, the witnesses claimed that they were hiding at different places but saw two police officers beating the deceased. On one hand PW4 stated that he saw the police officers jumping and attacking the deceased, whereas PW 5 stated that the lights of the vehicle were off and the police were on foot patrol.
27. Second, PW5 testified that he was with his friends, which friends, were not called to testify and the prosecution did not make any effort to explain who and where they were. The same applies to PW6



who testified that she was observing together with another woman as the police assaulted the deceased but the woman she was with was not called to the witness stand.

28. Third, PW4, PW5 and PW6 claimed that they observed all this from hiding spots. For some of them, they were using a hole to peep. From these holes, they claimed that they could identify the physical features of the accused persons. PW7, PW8 and PW9, prosecution witnesses told the court that it was dark and there was no lighting. That the only Mulika Mwizi light was stationed along Juja road. The position relating to identification at night was restated in the case of *John Muriithi Nyagah v Republic* [2014] eKLR, where the Court of Appeal held: -

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

29. The state did not lead evidence relating to the nature of the light, the strength of the light, its size, its position relative to the accused persons that may have sufficiently enabled PW 4, 5 and 6 to identify the accused persons. I say so because the other 3 witnesses at the scene (PW 7,8 and 9) led evidence that it was dark and they had to use their torches to see what was happening. Interestingly, PW4, 5, & 6 observed all the happenings from the comfort of their houses. One wonders why none of them screamed for help or raised an alarm that could have alerted the other officer who were on patrol along route 1 and 3. I would agree with the evidence of the accused persons that the deceased may have been killed elsewhere and the body dumped at the scene of crime. The 1st accused told the court that the body of the deceased was wet and the ground where he lay on the tarmac had water. This evidence was not rebutted. Additionally, how could the accused persons commit the offence long route 2 and quickly run to route 3, (where they had been assigned to patrol) without the other officers hearing any commotion.
30. These glaring gaps casts doubt as to whether indeed the witnesses where be able to see the perpetrators clearly.
31. Fourth, PW4, PW5 and PW6, claimed that they saw a short and tall man. One of the witnesses claimed that the tall one was brown (light skinned). This is a very basic description. But more worrying and perplexing is the action of the state. Why didn't the state conduct an Identification parade? DW1 and DW2 stated that the tallest officer was officer Mutisya. Why didn't the prosecution and the investigating team cover this glaring gap?
32. Fifth, what did the investigating team do with the weapons that were allegedly used to commit the murder? Why was the prosecution and investigating officer silent on whether the whips and Rungus used were recovered? Where does this leave the Court with the evidence contained in the Arms register and corroborated by the Prosecution witnesses 7, 8 and 9 who told the court that the Accused persons left the police station while armed with only a pistol and AK47 respectively?
33. Sixth, where was the deceased killed? PW2, through a sketch of the area demonstrated and elaborately explained the sketch of the area. In his testimony as corroborated by the officers on duty, PW7, PW8 and PW9, he divided the officers into 3 teams and assigned each team a different route. He confirmed and was corroborated by the other officers that the Accused Persons were assigned to patrol Route 3 while PW2, the OCS and Cpl Mutisya were to patrol Route 2. PW2, PW7, PW8 and PW9 (police officer) testified that the body of the deceased was found on Route 2. PW5 (a civilian) corroborated the said evidence and confirmed that the body was discovered on Route 2. That the accused persons were patrolling Route 3 was not rebutted by the prosecution.



34. So, with all these contradictions, who should enjoy the benefit of doubt? Should accused persons be convicted based on suspicions and guesses? For instance, what was the state’s response to the testimony of its witness, PW7 that the mob started accusing the 2nd Accused person based on his answer that he was on duty the previous night? It is a settled position that where a reasonable doubt exists, the doubt should be resolved in favour of the accused person.
35. Based on these loopholes in the prosecution case and how the case was handled, I am convinced that the Accused Persons were at best, mere suspects. The prosecution has a duty to adduce sufficient evidence to support its case. In the case of *Sawe v Republic* (2003) KLR 364 the Court of Appeal stated as follows
- “Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”
36. Further in *Mary Wanjiku Gichira v Republic* Criminal Appeal No. 17 of 1998 the Court of Appeal held that:
- “Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”
37. This Court cannot rely on unsupported evidence to convict the Accused Persons. While perusing the Prosecution’s evidence and testimonies, I asked myself, where is the evidence to sustain these charges? At the end, I come to the conclusion that there is no sufficient evidence to sustain the charges. It is not the role of the court to subsume the role of the prosecutor. I therefore find that the Accused Persons were not positively identified by any witness as having participated in the Killing of the deceased.

c) Proof that the accused persons had Malice Aforethought

38. Having come to this conclusion, I find it unnecessary to consider the question of whether the Accused Persons had malice aforethought. If the accused persons have not been positively identified as having perpetrated the unlawful act, it is my considered view that the question of malice aforethought does not arise.

Disposition

39. In conclusion, I do find that the prosecution has failed to prove the charge of murder against the two accused persons herein beyond reasonable doubt. The Accused persons are found Not Guilty of the offence of Murder and consequently I hereby acquit them under section 215 of the *criminal procedure code*.
40. They shall be set free forthwith, unless otherwise lawfully held.

JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:-

Ms. Maina & Timoi for the state – present

Ms. Mbugua watching brief for IPOA.



Mr. Ogando for 1st accused
Mr. Wandungi for accused 2
Accused 1 - present
Accused 2 - present
Court assistant: Achode

