



REPUBLIC OF KENYA



**Republic v Mukola & 2 others (Criminal Case 13 of 2016)
[2025] KEHC 1605 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 13 OF 2016
AC BETT, J
JANUARY 24, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

JACOB MUKOLA 1ST ACCUSED

SIMON WESONGA ASWANI 2ND ACCUSED

LEVI MANYASA 3RD ACCUSED

JUDGMENT

1. The Accused persons Jacob Mukola, Simon Wesonga Aswani And Levi Manyasa are jointly 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 3rd day of March 2016 at Simuli Village, Sirgoi Sublocation, Bunyala Central Location, Navakholo Sub-County within Kakamega, the three Accused persons jointly murdered Morris Tevesi Mukola.
2. The Accused persons entered a plea of not guilty to the charges and the case proceeded to trial. The Prosecution called five witnesses out of the nine witnesses it intended to call.
3. PW1 was the Pathologist Dr. Dixon Mchana. He stated that on 7th March 2016 at Kakamega County General Hospital, he conducted an autopsy on the body of Morris Tevesi Mukola which was identified by Amos Muruli and Otunga Mukola. His findings were that the deceased, who was an African male in the mid forties had suffered open fractures involving the left forearm in the middle; the big bone; on both legs, multiple stab wounds on both lower limbs, and extensive bruises on both lower and upper limbs. He formed the opinion that the cause of death was extensive limb injuries secondary to mixed force trauma following assault. The witness produced the postmortem report which he confirmed to have duly filled and signed after performing the autopsy. He attributed the injuries to both sharp and blunt objects with weight.



4. PW2 was the area Assistant Chief at the material time. His testimony was that on 4th March 2016 at around 7.30 a.m., he received a call from the Manager, CDF, Navakholo Constituency who was calling to report an incident at the home of Stanley Mukola in which there was trouble between the said Stanley Mukola and the deceased who was his son which resulted in an alarm being raised whereby some responders who included the three Accused persons subdued the deceased and confined him in the kitchen where they locked him up who was found dead outside the kitchen the next day. PW2 said that he proceeded to the scene where he found a multitude baying for the blood of the deceased's father. He confirmed that the deceased had injuries on the head and the hand. PW2 further testified that he arrested the 1st Accused and took him to the police station and later went back and collected the deceased's father and also took him to the police station then took the OCS to the scene. According to the witness, the deceased was troublesome when drunk.
5. PW3 said that he received a call in the morning of 4th March 2023 from one Silvanus Wanyama who informed him that there was trouble at Simuli. At the time, he was a village elder. He took a boda boda to the scene and as he approached the deceased's home, he heard people wailing. He learnt that the deceased had been killed. He saw three blood stained wooden planks in the kitchen. On learning that PW2 had taken the 1st Accused, he followed him. PW3 testified that their effort to locate other suspects were fruitless and they decided to take the 1st Accused to the police station. They then went back for the deceased's father whom they learnt, had been threatened with beating. The witness testified that he observed the deceased and noted that he was bleeding on the head.
6. PW4 was the police officer who received the report on the murder incident on 4th March 2016. His evidence was that on the said date, he was at Navakholo Police Station when PW2 reported the incident of murder. PW2 was accompanied by the village elder who testified as PW3. He testified that PW2 and PW3 had arrested the 1st Accused who is a brother to the deceased when they went to the police station to make the report. PW4 said that he was informed that the three Accused persons had assaulted the deceased the night before because the father to the deceased had explained to them that the deceased had threatened him while drunk. The witness said that he booked the report and together with other police officers, accompanied PW2 and PW3 to the scene where they found the body of the deceased lying outside the kitchen with multiple injuries on the head, hands and legs with his clothes blood stained.
7. PW4 further testified that two witnesses, namely Silvanus Wanyama and Levy Buluma informed him that they had witnessed the three Accused persons beating the deceased before locking him in the kitchen under the watch of the deceased's mother and father. The deceased's body was removed from the kitchen by members of the public who had intended to take him for treatment. The witness further stated that photographs of the scene were taken then the body of the deceased was moved to the mortuary where a post mortem was later done. According to him, the father to the deceased, was taken to the police station to safeguard him from members of the public who wanted to harm him. Later, the 2nd and 3 Accused persons were arrested with the aid of the informers and close relatives.
8. PW5 was Silvano Bulchokhe Wanyama who said that he is a cousin to the deceased. He testified that on 3rd March 2016, he sent the deceased who was with him at his home to the shopping centre to fetch him a razor blade. The deceased went on a bicycle at around 5.30 p.m. About 10 minutes later, PW5 said that he heard cries of distress from the compound of the deceased father. A person was crying, "they are hurting me". He went to check what it was. On arrival he found the deceased seated. There were three people with a walking stick. He asked what was going on. The three said that they were disciplining the deceased for showing contempt to his parents. They told him to keep off a family matter. One had a walking stick. PW5 identified the three Accused persons as the people he saw that day. According to



him, the 2nd Accused, whom he knew as Beresia only, is the one who had a walking stick. The witness said that he urged the Accused to stop as they had disciplined the deceased enough. He said that he did not see any injuries on the deceased. The deceased was pleading for mercy. The witness said that he took his bicycle and left. This was after the Accused had left the deceased alone. PW5 testified that the next day, he heard screams from the deceased's compound and went there in response. He found the deceased had passed on. He then made a call to PW2 and PW3 to inform them of the incident although the father to the deceased had told him to commence funeral arrangements.

9. PW5 said he later recorded a statement at the police station regarding what he had witnessed. According to him, the 1st Accused is a brother to the deceased, the 2nd Accused is a cousin to the deceased's father while the 3rd Accused is a maternal cousin to the deceased. On cross-examination, PW5 stated that he witnessed the 2nd Accused assaulting the deceased. The 2nd Accused had a walking stick. The 1st Accused was standing apart. He also conceded that nowhere in his police statement did he say that he found the 2nd Accused assaulting the deceased. He said that he recorded that on arrival at the homestead, "he found the deceased writhing in pain while the three men Jacob Mukola brother to deceased, Mbelesi an uncle to the deceased holding a walking stick and Manyasi, a cousin to the deceased standing while shouting to the deceased accusing him of not respecting his parents and they were out to discipline him."
10. PW5 also said that he did not know whether the deceased left the homestead later after he had left. He stated that when he left the homestead, he did not see any injuries on the deceased who was seated.
11. The Accused persons each chose to give sworn statements in their defence.
12. The 1st Accused who testified as DW1 denied committing the offence. He said that on the material date, he arrived home from the market while in company of his co-Accused to find a commotion. His father was holding a walking stick and quarreling because the deceased had insulted the 1st Accused's step-brother. The 1st Accused learnt this from his mother Alice Nachocho Mukola who is now deceased. The 1st Accused testified that he and the 2nd Accused went towards the place where the commotion was and separated the deceased and their father. The deceased sat down and the father stepped aside. The deceased called the 3rd Accused to assist take him to his house to rest. DW1 and the 3rd Accused assisted the deceased who could walk to his house. The deceased was slightly inebriated. DW1 then went to his home. The next day in the morning, the 1st Accused's mother knocked on his door and asked him to check whether the deceased was alive or drunk. On checking, he found the deceased dead. On cross-examination, the 1st Accused stated that it was his father who assaulted the deceased. He insisted that the father used to assault the deceased because the deceased used to insult his step-mother. He denied disciplining the deceased on that day. He said it is possible for an 80 year old man to assault a young man and since the deceased had taken alcohol, it was possible.
13. The 2nd Accused testified as DW2. He testified that on the material day, as he was going home, he met the 1st and 3rd Accused persons along the way. They proceeded to their homes together as the 1st Accused's home was on the same route as theirs. Along the way, they heard noise emanating from the 1st Accused's home. They decided to make a detour to check what the commotion was all about. There, they found the 1st Accused's father Stanley Mukola in a state of combat with the deceased. The 2nd Accused said he is the one who separated the two while the 1st Accused went to ask his mother what the fight was all about. He said that the 1st Accused assisted him separate the two after which the deceased's father left with his walking stick leaving the Accused lying there. The 2nd Accused said that he decided to go home leaving Mzee Stanley who is the deceased's father, Alice, Dinna and the 1st Accused. According to him, by the time he left, the deceased had already stood up. Later, he heard



from the villagers that Mzee Stanley's home was in mourning. The 2nd Accused denied assaulting the deceased saying that he had no reason to do so.

14. On cross-examination, the 2nd Accused said that the 1st Accused assisted him separate the fighting duo. He said that when he left, the deceased had no injuries and he did not see any stab wounds on the deceased nor any blood. He denied assaulting the deceased as part of instilling discipline but stated that the father had said that he was tired of the deceased because he was insulting.
15. The 3rd Accused testified as DW3 and also denied assaulting the deceased. He said that on the material date they were headed to their respective homes with his co-Accused when they heard some noises and on going to check, found Mzee Stanley fighting with his son, the deceased. The 3rd Accused stated that as he stood, his Aunt Alice called him and informed him that whenever the deceased was drunk, he would bother his father and step mother. The 3rd Accused said that shortly after, he got out of his Aunt's house and found the deceased seated down. The 2nd Accused had left by then as had Mzee Stanley and the deceased's step mother. The 1st Accused was standing not far from the deceased. According to the 3rd Accused, the deceased did not look badly injured and at his request, the 3rd and 1st Accused assisted him get up wherefore he walked to his house and on reaching his door, said he was alright. The 3rd Accused testified that he went his way only to wake up to screams the next day between 7.00 a.m. and 7.30 a.m. when he learnt that the deceased had passed on.
16. The duty of the prosecution in a murder trial is to prove all the ingredients of the offence beyond reasonable doubt. Where there is doubt as to the guilt of the accused, the accused should benefit from that doubt. The Prosecution is therefore under duty to adduce compelling evidence that leaves little doubt in the mind as to the guilt of the accused who has a right to be presumed innocent until proved guilty. See *Woolmington v. DPP* [1935] AC 462.
17. The elements of murder that need to be proven under Section 203 as read with Section 204 of the *Penal Code* are as follows:-
 - (a) That the person who died is the deceased.
 - (b) That the death was unlawfully caused.
 - (c) That there was intent to kill the deceased, or to cause him grievous harm, or to commit a felony.
 - (d) That the accused person indirectly or directly participated in the commission of the offence.
18. The essential elements of murder were expounded in the case of *Republic v. Kipkemei* (Criminal Case E040 of 2021) [2024] KEHC 2388 (KLR) when the court stated:-

“...what followed was for the prosecution to prove the elements of the offence beyond reasonable doubt which comprise the following:

 - i. Death of a human being.
 - ii. Unlawful causation of that death.
 - iii. The said unlawful causation having been done with malice aforethought.
 - iv. The participation of the accused in causing the said death.”



Analysis And Determination

Whether the Prosecution has proven that the person who died is Morris Tevesi Mukola

19. I have analysed the evidence led by the prosecution and I am persuaded that the deceased Morris Tevesi Mukola is the person who died. The prosecution was able to prove, through the evidence of the Pathologist, that the deceased was positively identified by two people being Amos Muruli and Otunga Murula after which an autopsy was conducted by the witness to ascertain the cause of death. The evidence by the Pathologist on the identification of the deceased was not challenged by the Accused persons.

Whether the Prosecution has proven that the death of the deceased was unlawfully caused

20. The Pathologist who testified as PW1 stated that he conducted an autopsy on the deceased on 7th March 2016 at the Kakamega County General Hospital. On examination, he found that the deceased had open fractures involving the left forearm in the middle, the big bone; on both legs, both bones, multiple stab wounds and the lower limbs and extensive bruises on both lower and upper limbs. He formed the opinion that the death was caused by extensive limb injuries secondary to mixed forced trauma following assault. The probable type of weapon used was both sharp and blunt objects with weight. The witness produced a post-mortem report.
21. To ascertain the cause of death, courts normally rely on a post mortem report which is produced by the Pathologist. This was the opinion of the Court of Appeal in *Ndungu v. Republic* [1985] eKLR when the court stated:-

“Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined.”

22. It is apparent from PW1’s evidence that the deceased was assaulted. The court in the case of *Republic v. Kipkemei* (Supra) held that:-

“The elements of unlawful Acts in homicide cases have this common features;1.A deliberated act which is unlawful (e.g. an assault)2.The act is a dangerous act in that it is, from an objective standpoint, one which as sober, reasonable and responsible person of the perpetrator’s age and gender, would inevitably realise in an act which is likely to cause the deceased some physical harm, albeit no serious harm, and3.The unlawful, dangerous act cause death (even though death or harm or any kind is not intended).”

23. Based on the foregoing, the death of the deceased has been proved to have been caused by the unlawful act of assault. Clearly, excessive force was employed in the assault of the deceased therefore inflicting fatal injuries upon his body. I find that the Prosecution has proven the element of unlawful cause of death of the deceased beyond reasonable doubt.

Whether there was an intent to kill the deceased, or cause him grievous harm, or to commit a felony

24. The deceased’s body exhibited multiple injuries that were the result of assault. According to the Pathologist, the deceased’s nails, lip and tongue appeared bluish in colour. Palour of the nails, lips and tongue, also known as cyanosis is caused either by poor blood circulation or poor lung function. The



indication was that the deceased had open fractures involving both lower and upper limbs, multiple stab wounds, and extensive bruises on both lower and upper limbs. Each injury was by no means, minor. Clearly, the deceased was subjected to severe assault with weapons that could cause fractures.

25. The nature and extent of the injuries can only lead to the conclusion that the assailants intended to at the very least, cause grievous harm to the deceased. In *Carilus Omondi Mboga & another v. Republic* [2019] eKLR, the Court of Appeal, citing with authority the case of *Republic v. Tubere s/o Ochen* [1945] 12 EACA 63 when determining the elements to be considered in order to establish whether there was malice aforethought stated as follows:-

“The court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered: the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

26. Based on the foregoing, it is my considered view that the prosecution was able to prove the existence of malice aforethought in the death of the deceased.

Whether the Accused participated in causing the said death

27. Having settled the issue of the cause of death and whether there was malice aforethought, the other issue for my consideration is whether the prosecution proved that the three Accused persons are the ones who assaulted the deceased and inflicted the fatal injuries on him.
28. The only eye witness to the assault was PW5 who narrated to the court that after hearing cries of distress from the deceased's home, he went to check and found the deceased seated while the Accused persons were there saying that they were disciplining him for being contemptuous to his parents. According to the witness, he saw the 2nd Accused assaulting the deceased. However, on cross examination, it emerged that the witness never informed the police that he witnessed the assault. The witness also testified that by the time he left the scene, he did not see any injuries on the deceased.
29. PW5's evidence is unreliable in view of the fact that being the only eye witness who testified in court, it emerged that his version of the events as narrated to the court was different from the version of events he narrated to the police. Moreover, whereas the post mortem report shows that the deceased suffered extensive injuries to the upper and lower limbs, PW5 professes not to have seen any injuries. The injuries suffered by the deceased were obvious injuries. The stab wounds must have resulted in some bleeding which would have been difficult to miss by the witness since according to him, the deceased had white trousers.
30. Further, PW2 stated that apart from the walking stick, he did not see any other weapon. The nature of the injuries suffered by the deceased could not have been inflicted by the walking stick alone. The Pathologist, PW1, stated that he concluded that the injuries were inflicted using a sharp object and a blunt object with weight. It is doubtful whether the walking stick would qualify to be referred to as a blunt object with weight.
31. I have carefully considered PW5's evidence and I have concluded that the injuries inflicted upon the deceased could have been inflicted long after PW5 had left the scene. Since the fatal injuries were most likely inflicted after PW5 left the scene then the court will have to rely on circumstantial evidence in its determination as to the culpability of the Accused persons.



32. It has been held severally that for an accused person to be convicted on circumstantial evidence, such evidence should not only be consistent with the accused person's guilt, but also inconsistent with the accused person's innocence. An inference of guilt cannot be drawn on mere suspicion alone. Therefore, the court has to be cautious when convicting an accused based on circumstantial evidence.

33. In the case of Joan Chebichii Sawe -vs- Republic [2003] eKLR, the Court of Appeal stated as follows:-

“...the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt.”

34. The position held by the court in the case of Joan Chebichii Sawe v. Republic (Supra) was further reiterated by the same court in the case of Ahamad Abolfathi Mohammed & Another v. Republic [2018] eKLR where the Court held thus:-

“Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 this Court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also *Sawe v. Republic* (supra) and [*GMI v. Republic, Cr. Ap. No. 308 of 2011*](#).)

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See *Teper v. R.* [1952] All ER 480 and *Musoke v. R.* [1958] EA 715). In *Dhalay Singh v Republic*, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”



35. Looking at the prosecution's evidence as a whole, the only conclusion I can reach is that the deceased had a poor relationship with his father and step mother for which the father sought to discipline him. The deceased was disciplined with a walking stick. At the time he was seen by PW5, he did not have visible injuries. The court is unable to ascertain at what point or from which person(s), the deceased sustained the fatal injuries because according to PW5, when he implored the Accused persons to leave the deceased alone, they left him alone and at that time, he did not see any injuries on the deceased. According to him, the next day, he saw the deceased's body, and the deceased's trouser had blood stains. On cross-examination, PW5 conceded that he would not know if the deceased left the homestead later.
36. The Accused persons denied committing the offence. Although they attributed the assault to the deceased's father, it is my considered view that they took part in assaulting the deceased. My strong suspicion is that the Accused persons "disciplined" the deceased by assaulting him. From the defence, I am persuaded that after the assault the 2nd and 3rd Accused assisted the deceased, who was slightly inebriated to go to his house and rest.
37. What happened after the deceased was taken to his house to rest is mere conjecture, but definitely at some point, the deceased was assaulted with a sharp object and a blunt object with weight.
38. In the absence of cogent evidence that the Accused persons later returned to the deceased's house after departure or that they were discovered with a sharp object, and a heavy blunt object, the evidence pointing to the Accused persons guilt remains tenuous. At best, it is a mere suspicion and suspicion, however strong, cannot form a basis of conviction. For a conviction based on circumstantial evidence to ensue, the facts should irresistibly point to the guilt of the accused. The evidence must not be open to other interpretation. In the present case, there are other possibilities that a subsequent assault led to the fatal injuries sustained by the deceased.
39. In the absence of the evidence of the father and step-mother to the deceased, the court finds it difficult to draw the inference that the fatal injuries were inflicted by the Accused persons. It has been held that the evidence used to convict someone in a capital offence must be credible, high quality and beyond reasonable doubt.
40. Having considered the evidence in totality, and being guided by the quoted authorities, I find that since the circumstantial evidence against the Accused persons is unable to sustain a conviction as it does not point unerringly to the guilt of the Accused persons, I have no option but to acquit the Accused persons of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is ordered that the Accused persons be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

No appearance for Ms. Namenge for the Accused persons

Court Assistant: Polycap

