



Republic v Mbithi (Criminal Case 15 of 2018) [2025] KEHC 11629 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CRIMINAL CASE 15 OF 2018

EN MAINA, J

JULY 31, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

NICHOLAS WAMBUA MBITHI ACCUSED

RULING

1. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The information states that on 5th March 2016 at Lema village, Kyamatula Sub-location, Yathui location, Mwala Sub-County within Machakos County, the accused murdered Stanley Mwanzia Mukilya.
3. The accused pleaded not guilty to the charge and in an endeavour to prove its case the state called twelve witnesses.
4. The sum total of the evidence adduced by the Persecution is that Stanley Mwanzia Mukilya was a boda boda rider; that he used to ply his trade within the village from which he and the accused hailed from; that the motor cycle which he operated was not his own but was owned by Stanley Kathuli Mulu (PW2) and that he lived in his parents home. The court also heard that the said Stanley Mwanzia was alive and well upto about 7 p.m. on 5th March 2016 when his phone and his trail went dead. According to Stanley Kathuli Mulu (PW2) the accused did not pick his call at 7 p.m. when he (PW2) called him to take his wife home. He got another rider who did it. Two days later, Stanley Mwanzia was still missing and it was then that his father Dominic Mukilya Mutua (PW1) was contacted and when he confirmed that his son had indeed gone missing he reported the matter to the police.
5. The court further heard that about four months later on 9th July 2016, remains suspected to be those of Stanley Mwanzia Mukilya were discovered in a thicket on a piece of land belonging to one Kanyeke Kyamu somewhere in a place called Wamunyu. According to Josephat Musyoka Kavemba (PW3) a



herdsman, what he stumbled upon was skeleton resembling that of a human being. Next to the remains was a jacket which was later to be identified as belonging to the deceased. The Criminal Investigations Officers (CIO) from Masii were alerted and they went to the scene. They then removed the remains together with the items that were at the scene. PW3 told the court that the jacket had been devoured by ants.

6. The remains were subsequently profiled through DNA using the mother of Mwanzia's specimen and according to Government Analyst Henry Kiptoo Sang (PW10) it turned out that the remains were those of Stanley Mwanzia Mukilya, the deceased in this case. It is instructive that the land in which the remains were found belonged to the father of the accused.
7. After the discovery of the remains of the deceased a search for the motor cycle begun which is what led to the arrest of the accused and his being charged with this offence. According to the witnesses this happened when an accident involving a motor cycle Registration No. KMDS 594 T occurred in Voi. That motor cycle was the one that the deceased had been operating with. According to PW2 he travelled to Voi and positively identified the motor cycle as the one he had employed the deceased to ride. It turned out that the person who was riding the motor cycle at the time of the accident was one Titus Mbithi (deceased) who happened to be a brother of the accused person. The said Titus Mbithi died instantly in the accident that occurred on 1st May 2016 at Voi along the Mombasa - Nairobi Highway. This culminated in a search being conducted at the home of the accused's parents on 28th July 2016 leading to recovery of more clothes belonging to the deceased and mud flap with the inscription "Akuku Danger" which the deceased had affixed to the motor cycle.
8. Further investigations revealed that on the day the deceased went missing he had been spotted ferrying the accused and his brother Kazee. According to Nzioki Muanga (PW4), he too is a boda boda operator, and was waiting for passengers at Yathui Market when he saw the deceased heading towards Wamunyu with the accused and his brother Kazee as his passengers. Charles Mutunga (PW5) another rider testified that he last saw the deceased at 1 p.m. on the 5th March 2016. He stated that he saw the deceased ferrying two passengers who were going for a funeral and the accused was not one of them. He did not see him after that even through he (PW5) remained at their waiting area from 3 p.m. to 5 p.m.
9. The accused is said to have been arrested in Voi, where his father has another home, and subsequently charged with this offence.
10. In support of its case the Prosecution produced the results of the DNA, the mud flap on which is written Akuku Danger, clothes which were identified by witnesses as the ones the accused wore at the time he disappeared and which were later found at the scene.
11. After the close of the prosecution's case learned Counsel for the prosecution and the defence – Mr. Nthiwa and Miss Nyauncho consented to filing written submissions on whether or not the accused has a case to answer. Ms Nyauncho submitted that the prosecution had established a prima facie case sufficiently to warrant this court to place the accused person on his defence. On his part, Mr. Nthiwa submitted that the prosecution had not discharged its burden and the accused should be acquitted at this stage. Therefore, the issue for determination at this stage is whether or not the prosecution has made out a prima facie case against the accused person sufficiently to warrant him to be put on his defence. A prima facie case has been defined as one where a reasonable tribunal properly directing itself to the law and evidence would convict the accused person even were he to remain silent when put on his defence. (see the case of *Bhatt v Republic* [1957] EA 532.



12. The ingredients of the offence of murder are the death of the deceased and the cause of the death, that the accused committed the unlawful act that caused the death of the deceased; and that the death was of malice aforethought. (see the case of Anthony Ndegwa Ngari v Republic [2014] eKLR.

The above elements must be proved beyond reasonable doubt and the onus of proof lies upon the prosecution.

13. In this case, the death of the deceased is not in doubt. It has been proved beyond reasonable doubt that the deceased disappeared, that remains were discovered not very far from his home and next to the remains were clothes which he wore the last time he was seen and more importantly upon a DNA analysis of the remains the same matched those of the deceased's mother.
14. That the death was a result of an unlawful act, was in my considered view also proved beyond reasonable doubt, through evidence of the theft of the motor cycle with which he used to operate. Evidence was adduced that the motor cycle was recovered in Voi where it had been involved in a fatal motor accident. The rider hailed from the same village with the deceased person and it was upon the disappearance of the deceased, that the motor cycle which was also missing was recovered. That the motor cycle was stolen where theft is defined as taking something with an intention to permanently deprive its owner of it, which also demonstrated by the concealment of its mud flap in a pit latrine. The person who hid it there definitely, did not want it to be discovered. This evidence all points to the fact that the deceased was killed; that the deceased met his death as a result of an unlawful act.
15. The next element the prosecution is required to prove that the accused person committed the unlawful act which caused the death of the deceased. As correctly submitted by Counsel of the state, there is no direct evidence that the accused person committed this offence; the evidence is all circumstantial.
16. To succeed the inculpatory facts must irresistibly point to the guilt of the accused person and must not be explained on any other hypothesis other than his guilt. The inculpatory facts being that the accused was sighted riding on the motor cycle of the deceased on the day he went missing; that the remains of the deceased were discovered four months later in a thicket in a shamba belonging to the father of the accused; that the motor cycle which the deceased was operating boda boda business with, was recovered in Voi; that the motor cycle was in the possession of a brother of the accused person who died in a fatal accident involving the motor cycle and further that mud flap which distinctly belonged to the motor cycle. See the case of Kariuki Karanja v Republic [1986] KLR 190 where the court stated:-

“(2) In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.

(3) An aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”

17. As held in the case of Kariuki Karanja v Republic (supra) the burden of proving the facts which would justify the inference of guilt against the accused lies upon the prosecution. In this case it has been proved beyond reasonable doubt that the remains of the deceased were found in a property belonging to the accused's family four months after his disappearance. It was also proved that the motor cycle which the deceased used to operate with and which went missing at the same time as the deceased was found in the possession of the accused's (deceased) brother, and it was also proved that a mud flap that had



been affixed to that motor cycle by the deceased was found in a pit toilet within the homestead of the accused's family. The prosecution also led evidence that at about 5 p.m. on the day the deceased disappeared, the accused person and his brother were seen being carried on his motor cycle. This was the evidence of PW.4. The evidence against the accused person is therefore made up of an aggregation of separate facts and the question then is whether, taken together, the same are consistent with his guilt.

18. I have carefully considered the evidence of the prosecution witnesses and my finding is that without the evidence of identification, the other inculpatory facts would not suffice to sustain a conviction against the accused person. Firstly, the place where the deceased's remains and the mud flap were found were not exclusive to the accused person and there is no evidence that he was personally responsible or connected to them being in the places they were found. Secondly, the stolen motor cycle was in the possession of the accused's brother, now deceased, and there is no evidence that their act contributed to that either. The only evidence which would have jelled this evidence together is the allegation that they were seen being carried by the deceased, at about 5 p.m. on the day he disappeared.
19. The evidence of identification was by Nzioki Muanga (PW4). Apart from him the prosecution called Charles Mutunga (PW5), also a boda boda rider, but his evidence was that the last time he saw the deceased was at around 1 p.m. on the material day as he ferried people to a funeral in the village. He was categorical that he did not see the deceased with the accused even though he was at the area where they used to wait for clients upto 5 p.m. The only evidence on identification therefore is that of a single witness.
20. In the case of *Murumba and Another –v- Republic* [1986] KLR 356 the Court of Appeal cautioned that in evaluating the evidence of a single identifying witness, the court must ensure beyond reasonable doubt that the witness was honest and unmistaken about her identification. In this case there is evidence from PW4's fellow boda boda (PW5) that although he was at the same waiting bay at the time PW4 alleges to have seen the accused with the deceased, he did not see them. This court is therefore at a loss as to whether to trust the evidence of PW.4 much as it was still day time when he allegedly saw them. In the absence of credible evidence that the accused was seen with the deceased there is no evidence to tie up the other separate fact which taken separately do not irresistibly point to the accused person. This is more so given that even his mother was mentioned as having been seen with the deceased on that day yet she is not an accused person in this case and neither is his father yet it is upon his land that the remains of the deceased were found. It is also probable that it is the accused's brother, now deceased, who committed this crime. The involvement of the accused has to be proved beyond reasonable doubt. Suspicion however strong cannot provide the basis of inferring guilt (see the case of *Sawe v Republic* [2003] KLR 364. To put the accused person on his defence on the evidence adduced, would in my view, be tantamount to asking him to prove his innocence which is irregular.
21. The upshot is that this court finds that there is no evidence that the accused killed the deceased and accordingly records a finding of not guilty and acquits him under Section 306 (1) of the *Criminal Procedure Code*. He shall be released from custody forthwith unless otherwise lawfully held.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

Mr. Wekesa for Nthiwa for the accused person



The accused person

Geoffrey - Court Assistant

