



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Musa (Criminal Case 36 of 2016)
[2025] KEHC 11655 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11655 (KLR)

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

CRIMINAL CASE 36 OF 2016

EN MAINA, J

JULY 31, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT MUTISO MUSA ACCUSED

JUDGMENT

1. The accused person is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the night of 25th August 2016 at Kalamba village, Muthetheni Location, Mwala Sub County within Machakos County, the accused person murdered Pauline Munini Nthitu
2. The accused person pleaded not guilty to the Information whereupon the prosecution proceeded to call five witnesses to prove its case.
3. SGT Joshua Maundu (PW1), testified that on 25th August 2016, at 2030 the accused person went to the police camp and reported that he had been involved in a fight with some other persons and that he feared he had injured his mother in the process. PW1 stated that he and the area Assistant Chief immediately proceeded to the home of the accused where they found his mother lying on the ground, approximately ten metres from the house. She was bleeding on the head and whereas she was still breathing she could not talk. It was his testimony that it was already dark but they lit the scene with their head lights. He also stated that there was a bloodstained hammer at the scene. He identified the hammer in court. He told the court that they took the accused and his mother to Muthetheni police post and then. She later succumbed to the injuries.
4. Nelson Mainga Mumeni (PW2), the area Assistant Chief's testimony was that on 25th August 2016 around 8 pm, he was at Miu market when he met PW1 who told him about the report that had been made to him by the accused. PW1 wanted him to identify the accused which he promptly did as he



knew him very well and even knew his home. He confirmed that he accompanied PW1 to the home of the accused person where they found his wounded mother and a hammer which they suspected to have been used to inflict the injury. PW2 testified that he identified the victim as Pauline Munini Nthitu. She could not talk. They proceeded to Muthethini police station and then to Masii and later Machakos Level Five hospital. It was his testimony that the woman later died.

5. Elizabeth Mutei Musa (PW3) stated that the deceased was her mother and that on 2nd September 2016 she identified the body of the deceased for purposes of post-mortem. That the post mortem revealed injuries on the skull and ribs. She told the court that a neighbour had called her to tell her that her mother had been cut severally by her brother Musee who is the accused herein. She stated that she did not witness the incident. She also alleged that they had an unresolved land dispute with their uncle Stephen Mbithi.
6. NO. 36960 CPC Sylvester Karrisa (PW4) stated that on 25th August 2016 he was at Muthetheni police post when at about 2030 hours PW1 went there with a wounded woman and the accused. The witness was however stood down before he completed his testimony after it became apparent that the accused was suffering from a mental illness. When he was recalled he testified that the accused was initially charged with assault but when the victim died the charge was changed to murder.
7. The next witness was Bernard Midia (PW5). The pathologist who conducted the post mortem of Pauline Munini Nthitu on 21st September 2016 at Kenyatta National Hospital upon the request of PC. Sylvester Karisa. He told the court that the deceased had a surgical incision on the left side of the head, injuries on the left side of the forehead measuring 3 cm, on the right side a wound measuring 3 cm and on the back of the right ear 3 cm. He stated that the deceased had a depressed compound skull fracture; the nervous system had subdural haemorrhage; there were signs of raised intracranial pressure and there was a right temporal cerebral laceration. He concluded that the cause of death was a head injury due to blunt force trauma. He produced the post mortem report.
8. After the close of the prosecution's case the court found that the accused person had a case and he was placed on his defence. He elected to give sworn evidence and to call one witness.
9. The accused reiterated that he did not kill the deceased. He contended that he had a loving relationship with his mother; that on 25th August 2016 he was selling used clothes in Kajiado/Ngong; that he went home in Miu location/Machakos on 9th April 2016 and found his children where had been taken away by their mother. Further, that they were being visited by people at night but he did not see them. He testified that he went to Miu Police station and reported. He asked for OB number and was told to leave. He testified that he took the deceased to Yatta DO's office and asked for an OB and it was his mother who spoke. That they were told to go back to Miu and when they got there, they found the police officer recorded and made report. He ask for the OB and was told that he would have the OB ready anytime even in phone. On 11th August 2024 he wrote to the Officer in charge of Miu police station and they went to the officer in charge in Muthetheni. He produced two letters dated 11th April 2024 as exhibits.
10. He contended that on the material day, he was in his house at 8 p.m; that he left his mother milking the cows and when he went outside he found four people near his mother. It was dark and they were attacking his mother. He ran away to Miu Police post and made a report. He said he was not scared as those men who kept coming home had harassed them for so long. He stated that his family does not get along with his uncle Stephen Mbithi Malua. That the said Stephen Mbithi recorded a statement but did not testify in this court, they have had a land dispute as was confirmed by Elizabeth Mutei Musa (PW3).



11. In cross examination, the Accused stated that on 28th August 2016 he was at home with his mother. He had gone home on 9th August 2016 and stayed until 14th August 2016. He had visited his children who used to live with his mother at home but found that they had been taken by their mother with whom he was estranged. He reiterated what he had said about being visited by four men. He claimed to have told his wife about it. He also stated that he was being threatened on phone when he went to the club and they went with his mother to the D.O to report that people were harassing him.
12. His witness Virginia Kalekye Musa who is his sister testified that between 9th and 14th August 2016 the accuse and the deceased indeed went to Miu AP Chief's post and reported that some people were threatening the accused. They did not get any help so they went to Muthetheni A.P post but still did not get any assistance. She was aware they went to those police posts as she is the one who took the documents to the officers but they declined to stamp them.
13. It was her testimony that before 25th August 2016 she lived with the accused in Ngong and that he was not okay mentally because at times he would start crying and if you asked him why he would just tell you to leave it. She stated that they were in the process of taking him to hospital when this incident occurred. She stated that between 2018 and 2021 he was not in a good place mentally because even the doctor had said he was not well. On 25th August 2016 she received a call from her elder sister Jacinta Mwendu who said their mother was in hospital at Kenyatta and that she was in a critical condition.
14. She too stated that Stephen Mbithi Malua was their paternal uncle and that they have a land dispute. She stated that the relationship between the accused and the deceased was very cordial.
15. Parties proceeded to file submissions. Prosecution submissions are dated 7th April 2025 while the accused's submissions are dated 3rd April 2025.
16. Learned prosecution counsel relied on the case of Republic vs. Mohammed Dadi Kokane & 7 Others (2014) eKLR and Mombasa High Court Case Number 42 of 2009 Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang and submitted that ingredients for the offence of murder had been proved beyond reasonable doubt. Counsel submitted that the accused person was at the scene of the crime and that the defence that he was attacked by unknown person was not supported by any evidence. It was contended that the accused person had malice aforethought because he inflicted injury to the deceased by hitting her with a hammer on the head. That the circumstantial evidence placed the accused person at the scene of the crime and lastly, that the evidence of the defence did not displace the prosecution's case.
17. Learned Counsel for the accused submitted that the prosecution did not prove their case beyond reasonable doubt as there are evidential gaps and contradictions; that the evidence is too flimsy to sustain a conviction. Counsel submitted that the cause of death was blunt force trauma and that there were glaring inadequacies, inconsistencies and contradictions for example, PW1 and PW4 indicated that the accused person confessed but the said confession fell short of the requirements for a confession as provided in Sections 25 and 29 of the *Evidence Act*. PW1 was not of the required rank, the confession and OB number were not produced. Further, that the witnesses who saw the harmer confirmed that it did not have blood stains in court; that the said hammer was not subjected to forensic examination; that there is no direct or eye witness testimony linking the accused person to the crime.
18. It was also contended that the accused person and his mother had a cordial relationship and there was no malice aforethought. Further, that there are 6 mental reports on record to indicate that the accused person is mentally unstable. They are dated 21/05/18, 17/01/2019, 01/07/2019, 29/01/2020, 26/02/2020 and 27/07/2020. To support its case, the defence relied on the cases of *Bukenya vs Uganda*



[1974] EA 349, Republic vs Willian Nyangoro Olenyo and 2 others [2017] e KLR, Republic vs Paul Langat [2022] e KLR, Elisha Andai Karani vs Republic [2020] e KLR.

Analysis and determination.

19. This court has evaluated the evidence and the submissions by both sides carefully.
20. The accused person was charged with the offence of murder contrary to section 203 as read together with section 204 of the penal code which provide as follows;

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

204. Any person convicted of murder shall be sentenced to death.”
21. The elements of the offence of murder which the prosecution was required to prove beyond reasonable doubt are the death of the deceased, that the cause of death was by an unlawful act or omission, that the death was with malice aforethought and that the accused person in court participated in caused that death.
22. The said elements were restated in the case of Republic v Andrew Omwenga [2009] eKLR where the court held that;

“It must be proved that he caused the death of the decease 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 the 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.”
23. In this case the fact of death and that the death was caused by an unlawful act are not in doubt. The accused himself admits that his mother died and that she was assaulted. The post-mortem report also confirmed the fact of death and also that death was as a result of blunt trauma. The pathologist testified that the deceased had several injuries on her head. It is my finding that those injuries are consistent with an assault which is an unlawful act. Evidence consistent with an assault was also given by PW1, PW2 and PW3.
24. I am also satisfied that the element of malice aforethought was proved beyond reasonable doubt. This is in view of the nature of the injuries inflicted upon the deceased. Whoever inflicted those injuries must have known that the same could cause her death or must have intended to cause her grievous harm.
25. As to whether the accused caused the unlawful act which led to the death of the deceased, the prosecution submitted that their case is built on circumstantial evidence. The prosecution’s case rests upon the report made by the accused to PW1. The other premise is that the accused was the only person who was with the deceased when she was killed. The prosecution’s case rests entirely on circumstantial evidence. This despite that a neighbour who it is alleged told PW3 that the accused had assaulted the deceased, could have been called as a witness. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, the Court of Appeal stated as follows in regard to circumstantial evidence-

“Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord



Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.

.....

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 Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* 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 the guilt of the Subject;
- 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.”

26. The question in this case is whether the evidence in this case meets the tests laid in the above case. My finding is that it does not. From the evidence before the court. This is given that the accused’s alleged report that he had assaulted his mother is not a confession. Secondly his claim that they had been attacked by four men and that the said men had been harassing them and they had reported to the police was not investigated to confirm if it was true or not. It is therefore highly probable that it is someone else other than the accused who assaulted the deceased. No proper documentation of the crime scene was done and there was no evidence of whether there were homes close to that of the deceased. Forensic evidence which could have been of great help in this case was not adduced. The hammer found at the scene was not taken for analysis and hence there is nothing that could connect it to the accused person.
27. Further, there is doubt as to whether the accused person perpetrated the crime because two scenarios play out before the court; either the Accused person killed the mother and ran to the police post to report the case leaving the crime scene intact or that the accused person and the mother were indeed attacked and as he ran to get help, the perpetrator continued to barter the deceased and ran away. Whenever doubt arises in the mind of the court, the benefit of that doubt goes to the accused not the prosecution and this case is no exception.
28. The mental status of the Accused person was evidently not stable during the trial and even when he was found stable, he could not identify the people he alleged to have attacked them.
29. On the other hand, the evidence of the Accused person that they were being harassed and that they had reported the matter was corroborated by his sister DW2.



30. From the evidence of the sisters of the accused person, the family only had an issue with their paternal uncle over land but there is no mention of the accused and the deceased having an issue. The testimony of the two plus that of the accused are in sync. Whereas motive is not a relevant factor, it is nonetheless noteworthy that there was no evidence to indicate that the accused person had any reason to kill the deceased.
31. The upshot is that the circumstantial evidence in this case does not irresistibly point to the guilt of the accused person and is not therefore sufficient to sustain a conviction and in the premises, I find him not guilty of the offence of murder and acquit him.

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

E N MAINA

JUDGE

In presence of

Miss Nyauncho for the State.

Mr Makula for the accused.

Miriam Court Assistant/Interpreter.

