



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mutinda (Criminal Case E016 of 2020)
[2024] KEHC 1111 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E016 OF 2020
A. ONG'INJO, J
JANUARY 26, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MUTUSE MUTINDA ACCUSED

JUDGMENT

Introduction

1. The accused Mutuse Mutinda faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that Mutuse Mutinda on the 23rd day of October 2020 at Miritini Estate in Jomvu sub-county within Mombasa County murdered Judith Mueni Mwanzia.
3. The prosecution called 10 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, No. 106210 PC Job Ochieng', said that he was at Jomvu Police Station working under Anti-Crime Department. That on 22.10.2022 at about 1920 hours he branched by Mama Mboga's place at Miritini Estate when Mama Mboga who was seated at her kiosk called him. PW1 said that the Mama Mboga was known to him before as he had handled her case involving MGR Chama money and that the Mama Mboga's real name was Judith Mwanzia. PW1 said that Mama Mboga told him that she needed his help and that she knew he was a police officer. That she told him that she had a problem with her boyfriend who was known to PW1, the accused herein. That Mama Mboga told PW1 she had chased the boyfriend when he wanted to kill her through a road accident.



5. PW1 informed court that on 29.9.2020, Judith told him that when they were driving Motor Vehicle Registration No. KCY 188C Probox, the driver intentionally hit a track that was in front on the side where Judith was seated and she suspected that he wanted to kill her. That when PW1 called her twice through phone number 0717210181 which she had given him, the calls went unanswered. That PW1 sent her a message introducing himself and Judith called him back a few minutes later. That she told him the boyfriend she chased had returned and locked himself in the bedroom and a knife had mysteriously disappeared. PW1 said that he advised her to go and report to the police for him to liaise with his colleagues on patrol to assist her. He said that he did not follow up to know whether she had reported and that when he woke up the next day, he learnt that she was no more.
6. PW2, Moses Muo Wambua, said that he used to reside in Miritini with his aunt Judith Mueni Mwanzia and that his aunt had a boyfriend known as Mutuse, the accused in the dock. PW2 said that he lived with his aunt from April 2020 in a 2-bedroom house which was on the 1st floor. He said that one bedroom was hers while the other bedroom was occupied by her children and that PW2 used to sleep in the sitting room. PW2 said that during his stay with his aunt, he experienced disputes between her and the accused from time to time. That while at her aunt's kiosk where they were selling together with the accused, the accused told him that one day he would crash his aunt on a trailer. That before 2 days lapsed, the accused rammed onto a trailer when he was driving the deceased's motor vehicle. PW2 said that he informed his aunt about the issue before the accident happened.
7. PW2 testified that the accused and the deceased went to meet the parents and she told them that she did not want Mutuse in her life. That PW2's aunt returned and told him that she was done with the accused and after 3 hours the accused arrived. That the deceased went to the house and PW2 stayed at the Kiosk with the accused up to 9.30 pm but he was not talking with the accused. That when they went to the house, the deceased had showered and that the accused also entered the house and went to the bedroom. That while in the sitting room, PW2 heard the deceased telling the accused that she did not want trouble.
8. PW2 said that on 22.10.2020 at about 9.00 pm, he had dinner and went to sleep. That PW2 heard his aunt tell the accused that they had spoken and concluded everything at home and that she did not want issues in the house. That PW2's cousins by the names Mercy, Mary and Moses were also in the house. PW2 testified that the deceased was in the bedroom with the accused and her son Moses aged 3 years old and that he heard his aunt shout out his name and say "Muo! Muo! Ninadungwa na kisu!" That when they went to open the door, it was locked from the inside. That PW2 tried to break it and that Mercy also woke up and went to help him but it was not possible. That PW2 asked the accused to open it but he told him to wait. That when the accused opened the door, he told PW2 that "Muo wacha mimi niende" PW2 said that he looked inside the bedroom and saw his aunt and that he called her out but she did not respond. He said that lights were on in the bedroom and that his aunt was hanging on the bed.
9. PW2 further informed court that when the accused found the door locked, he went to the kitchen and took another knife with a blue handle and went demanding for the key. That PW2 ran into the children's bedroom and locked it from the inside but when the accused overpowered him, he threw the key at him. That the accused picked the key, opened the door and ran away after dropping the knife on the floor. PW2 said he went to call neighbours and thereafter, he went with his cousin Mercy to Jomvu Police Station and reported the incident. He said the police accompanied them to the house, processed the scene and took the body to the mortuary. PW2 testified that there was a pool of blood under the bed and that PW2 does not know at what time the child Moses went to the children's bedroom from his mother's bedroom. That when the police went to the house, they conducted a search and recovered a knife under the bed and that it was a knife they were using to cut vegetables at the kiosk. PW2 identified



- the knife in court. PW2 said they used to leave the knife at the kiosk and that when his aunt went upcountry, the knife went missing from the kiosk.
10. PW3, Mercy Mwendu, testified that Judith Mueni Mwanzia was her aunt and that on 22.10.2020, she was at her aunt's house in Miritini with her cousin Mary aged 9 years old. PW3 said the accused went to the house when she was preparing supper and that he went to the bedroom. She said that her cousin took food to the accused in the bedroom and that the accused ate and left. PW3 testified that her aunt went to the house at 10.00 pm, had supper and went to bed. That at 1.00 am, she heard her aunt screaming and calling Muo and saying she was being killed. That when PW3 got out of the bedroom, she found Muo at her aunt's bedroom door. That they called out but there was no answer. That they asked the accused to open the door but he told them to wait.
 11. PW3 said that the accused opened the door after a while when the sitting room lights were on and that she saw blood. That the 3-year-old child ran to where PW3 was, crying, and that the accused who had gone to the kitchen went wielding a knife and started pushing the bedroom door. That Muo gave the key to the accused when he overpowered them. That the accused then dropped the knife, opened the door and left. That PW3, her cousin and the children also left the house to go and call the neighbours, and that they saw the accused run away. PW3 said they went to Jomvu Police Station with Muo and reported what had happened, that the police accompanied them back to the house and confirmed their aunt had died. That the body was collected and taken to Coast General Hospital. PW3 positively identified the accused in the dock.
 12. PW4, Richard Wambua Mwanzia said that the deceased was his lastborn sister and that the accused became her boyfriend after she separated from the father of her children. That PW4 saw the accused when they went to resolve their dispute and that when they were unable to resolve the dispute, the deceased returned to Mombasa ahead of the accused. PW4 said that on 24.10.2020 at 4.00 am, he received a phone call from his son Muo that the deceased had been stabbed by the accused. That PW4 and Mbithe, PW3's mother, travelled to Mombasa on the same day, and that they went and found the bed had blood and there was a pool of blood on the floor. PW4 said they went and identified the body in the mortuary and that the deceased had a stab wound on the left side of the chest. PW4 said that the deceased had complained that when she bought her car, a Probox, the accused had threatened to kill her and that he indeed rammed the car onto a track that was ahead of them. PW4 positively identified the accused in the dock.
 13. PW5, Irene Furaha Mwaringa, the Government Analyst at Mombasa Chemist, said that on 27.10.2020, a police officer by the name Renos Kemboi Rutto from DCI Jomvu went to the Government Chemist on 27.10.2020 with exhibits which included A1- knife-blood stained and A2- blood sample from the deceased Judith Mwanzia. That it was desired that DNA analysis of blood on the blade of knife and DNA of the blood sample established if the DNA profiles matched. That an analysis was done and it was established that the blood stains on the knife blade was DNA of a female and it matched the DNA profile from the blood sample from the deceased. PW5 said that results were in the Report which she signed on 23.11.2020 and produced as ExP3.
 14. PW6, Dr. Gabriel Mngola, Senior Medical Officer at Coast General Teaching and Referral Hospital, said that Dr. Zainab who is known to him conducted postmortem on the body of Judith Mueni Mwanzia on 26.10.2020 at the Coast General Hospital Mortuary. He said that on the external appearance, the body had a stab wound on the left side of sternum below the left clavicle approximately 3 x 4 cm. That on internal appearance, hematoma was noted on top of the chest cavity and penetration noted through the left 2nd to 3rd intercostal space. That there was fracture of the left 3rd rib with massive hemothorax noted. That a stab wound was noted to have penetrated through the heart. That there was massive hemoperitonium with ruptured liver and perforated stomach. That as a result of the



- examination, Dr. Zainab formed the opinion that the cause of death was haemorrhagic shock due to massive haemothorax and peritoneum secondary to incision cut wound to the heart, liver and stomach. PW6 said that Dr. Zainab signed the postmortem form which he produced on her behalf as ExP4.
15. PW7, Hamisi Said Chengo, the village elder of Miritini Estate testified that on 23.10.2020 at about 2.30 am, he received a phone call from the number 0799184869 and he was informed that there was a commotion in a house of a lady by the name Judith who was a vegetable vendor. He said that he got out of bed and woke up a neighbour and they rushed to the scene. PW7 said that on arrival, they found police officers in the said house and the lady had died. That the entire body was soaked with blood and the body lay on the floor. He said that previously, the deceased had reported having been threatened by the accused and that there was a time they were in a car which the accused was driving and he rammed onto a track on the side the deceased was seated. That when the deceased reported, PW7 told her to go and report to the police. PW7 informed court that the deceased also reported that the accused bought rat and rat and wanted to commit suicide, and that the two had frequent domestic wrangles. PW7 said that he had known the deceased for about 2 years and that the accused spent time at the deceased person's vegetable kiosk and that she later learnt from the deceased that she was cohabiting with the accused.
 16. PW8, Moses Nyamai Mulu, informed court that on 23.10.2023 at about 6.00 am, he received a phone call from his father, Jackson Mulu, who wanted him to travel to Mombasa to find out what had happened. PW8 said that his father informed him that he had received information that his cousin Judith Mueni Mwanzia had been stabbed to death. That when PW8 got to Mombasa, he met his cousins Richard Wambua and Jane Mbithe, the siblings to the deceased who had travelled from Kibwezi. That on 24.6.2020, they went to the mortuary at Coast General and viewed the body of the deceased. That on 26.10.2020, PW8 was chosen to go and identify the body of the deceased for postmortem and that he was with Richard Wambua. That he later recorded his statement at Jomvu Police Station.
 17. PW9, No. 80072, Sgt. Benson Ingotsi gazetted under Notice 2017 of 2012, said that he was in court to testify and produce a certificate of photographs that he had prepared. He said that on 12.11.2020, he received a compact disc which was forwarded under Ref. DCI/CCR/1/1/Vol I/17 and signed by Hassan Dahil. He said that the letter was requesting for processing of compact disc and to prepare therefrom photographic prints. PW9 said that he prepared the photographs which were 18 in number and had been taken by the investigating officer at the scene of an accident involving a motor vehicle that appeared to be damaged. PW9 said that the other set of photographs showed the deceased with stab wounds on the neck. That upon processing of the photographs, PW9 prepared a certificate on 27.11.2020, he produced the forwarding letter dated 12.11.2020 as ExP5(a), the 18 photographs as ExP5(b), and the Certificate dated 27.11.2020 as ExP5(c).
 18. PW10, No. 87842 P.C. John Mwangi Waweru, testified that on 23.10.2020 at 2.00 am while working at DCI Jomvu, they were on patrol when they received a phone call from an officer who was on general duty at Jomvu Police Station. That there was a report by people who said their aunt had been stabbed with a knife in a house in Miritini Estate near Miritini Secondary School on the right of the Catholic Church. PW10 said that he went and found a village elder who led him to the scene. That the house was on the 1st floor of an apartment and that PW10 saw blood at the door before he entered. That in the master bedroom, he saw a woman seated on the floor against the bed. That one hand was on the bed and the other hand held the face. PW10 said the body had a red dress – ExP5(b), there was a lot of blood on the floor and a 4-year-old child was crying.
 19. PW10 informed court that he interrogated the other 2 occupants of the house who said she had been stabbed with a knife by the husband. That PW10 tried to raise the body and he saw a stab wound above



the left breast and it was still bleeding. That he was told the deceased was called Judith Mueni Mwanzia and he learnt that the accused person had escaped. He said that he recovered a blood stained knife with a wooden handle under the bed where the body was. He produced the knife as ExP1. PW10 further said that the other 2 occupants of the house gave the suspect the key to the door as he had threatened to stab them with a knife he got from the kitchen – ExP2. That PW10 called the OCS Jomvu and requested for a vehicle so that the body could be taken to hospital.

20. PW10 said that when the body was removed to the mortuary, he embarked on searching for the suspect. He said that it was at 4.00 am and drizzling. That he was showed people a picture of the suspect and that while there, PW10 saw a motorbike passing and it carried someone whom he suspected was the assailant. That in the company of other boda boda riders, they pursued him and when PW10 ordered him to stop, the suspect jumped from the motorbike to run but he lost balance and was arrested. That he was taken to Jomvu Police Station for his safety. That the suspect had sustained injuries on the leg when he jumped and he was taken to hospital, and later to Changanwe Police Station for investigation. That PW10 later preferred charges against the accused.
21. PW10 testified that the deceased owned a probox vehicle which she bought from an Asian on credit and that she had indicated the accused as the next of kin. That the accused intentionally knocked the vehicle on a truck and the deceased who was in the vehicle suffered a fracture of the leg. That the accused was then charged with a traffic offence. PW10 said that the accused had severally uttered that he would one day kill the deceased and when he crushed the vehicle on a truck, his intention was to kill her. PW10 said that he recorded statements of witnesses. He identified Mutuse at the accused in the dock.

Defence Case

22. The accused, Mutuse Mutinda, gave sworn statement that the deceased was his wife, that they had cohabited for 10 years and they had 2 children, the 1st born being 9 years old and the 2nd born, Moses Mutuse aged 4 years old. He said that on 23.10.2020, he was at the kiosk in Miritini working with his wife and 3 workers. That they closed at 10.00 pm and he paid the workers. The accused said that his nephew, Moses Muo, was staying with them and that his wife left him with Moses as they were closing the business and she went to the house. He said that they carried the basin and knives used for cutting vegetables to the house. That has usual, his wife took the basin and knives to the bedroom. That the accused took a shower after which he had food/dinner with Moses Muo and that afterwards Moses slept in the sitting room as there were 6 people in the house.
23. The accused said that after Moses went to sleep, the accused took some beer from the fridge and drank from 11.00 pm to 2.00 am when he went to count the money that they had collected from the business. He said that he found the money was less by Kshs. 23,000/= and when he asked his wife about it, she told him that she was not the one who keeps the money. That the accused told her that she was the one in the bedroom where he had kept the money. The accused informed court that there was a cup which the deceased threw on the floor and it broke. That when the accused questioned her actions, she picked the two knives in the basin and confronted him. That the accused pushed her and ran out. That his wife was huge and strong. That when he ran from the bedroom, he met Muo who had come from the toilet and that he did not talk to him but opened the door and went out. The accused said that it was raining heavily and that he got out without shoes. He said that he had sustained a cut and could not walk fast.
24. The accused further said that there was a time they had come from the market with his wife when they were involved in a road traffic accident. He said that he tried overtaking when brakes failed and the steering locked, and that they then rammmed into a trailer. He said that when the accident happened, he took his wife to Port Reitz Hospital as she was in shock. That he had no intention of causing harm to his



wife. The accused said that he was arrested when going to report and that he did not know that when he pushed his wife she sustained a stab and that it was by bad luck that she sustained the stab wound.

Analysis and Determination

25. In consideration of the evidence of 10 prosecution witnesses and in consideration of the defence evidence, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

26. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’

27. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

Death of the deceased

28. There is no dispute as to the death of Judith Mueni Mwanzia.

Death was caused by an unlawful act or omission

29. The deceased suffered a stab wound on the left side of the sternum below the left clavicle. When her respiratory system was examined, it was noted that there was hematoma on top of the chest cavity with penetration through the left 2nd to 3rd intercostal space and fracture of the left 3rd rib. There was massive hemothorax, there was a stab wound that penetrated through the heart and there was massive hemoperitonium with ruptured liver and perforated stomach. Dr. Zainab who examined the body of the deceased was of the opinion that hemorrhagic shock due to massive hemothorax and hemoperitonium secondary to incisional cut wound to the heart, liver and stomach. Dr. Gabriel Mngola produced the Postmortem Report on behalf of Dr. Zainab. The nature of the injuries indicates that that they were caused by an unlawful act. The injuries were not self-inflicted or accidental.

Participation of the accused in the commission of the alleged offence

30. The accused and the deceased were in the same bedroom on the night in question while PW2 was sleeping in the sitting room when he heard the deceased shouting and calling his name saying “Muio Muio ninadungwa na kisu” PW3, Mercy Mwendu, the niece to the deceased was also in the same house on the material night when at 1.00 am she heard screams from her aunt who was calling PW2 and saying she was being killed. Both PW2 and PW3 rushed to the bedroom where the screams were coming from and when they tried to open, the door was locked from inside. When they called out to the accused to open the door, he told him to wait but when the accused person came from the bedroom, PW1



saw the deceased person hanging on the bed. According to PW3, when the accused came from the bedroom, she saw blood in the bedroom. PW2 and PW3 went to lock themselves in the 2nd bedroom and the accused person while armed with another knife he had taken from the kitchen and went to demand for the keys to the main door so that he could escape. PW2 gave him the keys because he was threatening to stab them also.

31. According to PW4, the accused and the deceased had gone home to try and resolve their long standing dispute and PW4 had advised the deceased to use the money that he had taken from the deceased to do business and leave the deceased alone but he sneaked back to the deceased person's home in Mombasa and it was on that day that the deceased was stabbed to death. PW2 said that when the deceased returned, PW2 and the accused stayed at the grocery kiosk up to 9.30 pm but he was not talking to him. That the deceased had allowed the accused into the house and said that he would sleep in the sitting room but the accused entered the bedroom even when the deceased said that she did not want trouble.
32. There is clear evidence that the accused person was directly involved in the cause of death of the deceased. They were the only two people in the bedroom. PW2 and PW3 heard the deceased crying and calling and saying that she was being killed with a knife and the accused refused to open so that the deceased could be helped. When he came out of the bedroom, he threatened PW2 and PW3 to give him keys to the main door so that he could escape. He is the one who committed the unlawful act that caused the death of the deceased.

Malice aforethought

33. Section 206 of the Penal Code defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances: -

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

34. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of Isaac Kimathi Kanuachobi -vs- R (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”



35. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

36. The accused and the deceased had long standing domestic problems and the deceased had reported to PW1, PC Job Ochieng’ of Jomvu Police Station on the same night of 22.10.2020. PW1 advised her to report to the police station so that the police on patrol could intervene but it appears she did not make it to report to the police as she was killed on the same night. The accused had also informed PW2 that he would one day crash the deceased on a trailer with a motor vehicle that he used to drive for her and 2 days after the information, he indeed crashed the motor vehicle on a trailer causing damage on the side that the deceased was seated. It was suspected that he intentionally hit the truck that was ahead of them so as to kill the deceased. This stage managed accident was reported but the deceased pardoned the accused person.

37. PW7, the Village Elder also said that previously the deceased had reported to him that the accused had threatened her and one day when the accused was driving her, he intentionally rammed onto a track on the side that she was seated. PW7 also said that the accused had bought ‘Rat and Rat’ and wanted to commit suicide. He said that the accused and the deceased had frequent domestic wrangles. PW7 said that whenever he advised the deceased to go and report, she would retreat and this went on and on until the night that the deceased was stabbed to death.

38. The numerous stab wounds inflicted on the body of the deceased as shown in the postmortem report and the history of stalemate between the deceased and the accused as well as the threats made by the accused to the deceased are proof that the accused had planned to eliminate the deceased and malice on the part of the accused has been proved beyond reasonable doubt.

39. In conclusion, this court finds that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and is convicted accordingly Pursuant to Section 322 of The Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 26TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Mr. Masolia Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Mr. Ngiri: We do not have previous records

Mr. Masolia Advocate: I pray for a date for mitigation



Order: Mention on 15.2.2024 for Victim Impact Statement, mitigation and sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

