



**Republic v Kisilu (Criminal Case 149 of 2017)
[2024] KEHC 1828 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 149 OF 2017
GMA DULU, J
FEBRUARY 28, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER KOMU KISILU ACCUSED

JUDGMENT

1. The accused person herein stands charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence are that on the night between 12th and 13th April 2015 at Kiseki village, Kisau Location, Mbooni East District within Makueni County jointly with another not before court, murdered Cosmas Mutua Matheka.
2. He has denied the charge.
3. In their effort to prove their case, the prosecution has called seven (7) witnesses.
4. PW1 Levy Mutunga is a minor aged 14 years who tendered evidence on affirmation, but was not sworn.
5. It is his evidence that he was a Class 7 pupil at Double Vision Primary School and that on 13th April 2015 at about 7;00a.m he left his grandmother’s house and walked 80metres away to the house of his grandfather Cosmas Mutua Matheka who lived in a separate house.
6. On arrival there, he saw the door closed but not fully locked and he opened it just to find his grand father lying dead on the floor. Next to the body was water poured on the ground, a cabbage and some chemicals, and that he smelt the chemicals.
7. He then ran to inform his grandmother Teresia Matheka about what he had seen, and thereafter the grandmother went to the scene alone.



8. In cross-examination, he stated that the chemical smelt like cow's medicine, and he noticed no foam in the mouth of his grandfather. He stated that he saw his grandfather last at 7:00pm in the night of 12th, and that though he knew the accused person as a neighbour, he did not see him the night before.
9. PW2 was Teresia Matheka who testified that she was the wife of the deceased, and that on 13th April 2015 at about 7:00a.m her grandson Levy Mutunga (PW1) went to the deceased house in the homestead, and on entering the house found the deceased lying dead, and that beside the body was a chemical container used in cattle deeps.
10. It was her evidence that on receiving the information she went out and screamed and Naomi Muthina came to help her, and on arrival at the scene Naomi also screamed and neighbours gathered. She further stated that she told Naomi to call the Assistant Chief who came and called police from Mumbuni Police Station who took the body to Wote Hospital mortuary.
11. In cross-examination, she stated that her house was about 80metres from the house of the deceased, and that on the night of 12th April 2015 the deceased retired to bed at 8:30p.m after they had taken supper together. She stated that she retired to bed at 9:30p.m and did not hear any noise coming from deceased house. She confirmed knowing the accused person as a relative, but said that she did not see him on 12th April 2015 near her home.
12. PW3 Naomi Muthina Mutisya a daughter of PW2 stated in evidence that on 13th April 2015 at 7:00a.m she was woken up and escorted a visitor Gladys Kyalo.
13. As she walked on the road, she heard wailing behind her from her son Levy (PW1). She then also proceeded back home to the house of the deceased about 70metres from the house of her mother (PW2).
14. On arrival, she found her mother seated and the deceased lying dead with injuries on his shoulder, neck and head. She clearly saw those injuries since they escorted the body to Wote hospital.
15. It was her further evidence that she called the Sub-Chief on phone Mr. Fredrick Mutua who came and called the police. It was her further evidence that neighbours also came to the scene before the police arrived and took the body to Makueni (Wote) Hospital mortuary. It was also her evidence that on 24th April 2015, she attended the post mortem examination of the deceased in the company of MCA Jackson, and identified the body for purposes of post mortem examination.
16. In cross-examination, she stated that on 12th April 2015 she went to sleep at 10:30p.m, and that was the time the deceased also left to go to sleep. She did not hear any screams from the house of the deceased. She also stated that she knew the accused person as a cousin of her uncle, and that on the night of 12th April 2015 she did not see the accused person anywhere near the home. She also confirmed that chemicals were placed near the head of the deceased, and that the door to the deceased's house was not broken.
17. PW4 was Fredrick Musyoka the area Assistant Chief of Mwana. It was his evidence that on 13th April 2015 at 7:30a.m, while at home, he received a phone call from Muthina Kisilu a niece of the deceased who told him that the deceased had been found dead at Kiseki. He then rushed there to a homestead next to the market and found family members present.
18. He then opened the door to the room and found the body on the ground but not notice any visible injury on the body, but saw a bottle near the head.
19. It was his evidence that he then reported the incident to the area Chief and the police. Thereafter, the police came to the scene, viewed the body and took it to the mortuary. It was his further evidence that



- they received information that a boda boda (motor cycle) rider had brought two people in that area, and that the accused person whom he knew before as his villager, was later arrested.
20. In cross-examination, he stated that his home was more than 1km from the deceased's home. He stated that the bottle near the deceased was for ticks spray, and that the deceased was a retired officer who had married but was separated. He stated also that the accused person was a neighbour of the deceased, but worked in Nairobi.
 21. He further stated that he knew of no existing land dispute between the deceased and the accused person. He also denied buying land from the deceased. He denied seeing a letter dated 28th March 2014, and maintained that he had never been summoned to the Chief over land.
 22. PW5 was Benson Muia from Nthumbi Kisau a butchery operator, whose evidence was that on 12th April 2015, he met a boda boda (motor cycle) operator he did not know who asked for Peter Kisilu's phone number, whom he knew as a former school mate.
 23. He testified that when he asked the rider why he wanted the phone number, he said that he had luggage for Peter Kisilu, which had been left behind by two passengers he had carried, and one of whom was Peter Kisilu. The witness then asked that man to leave the luggage with him for Peter Kisilu to collect but the rider refused, and continued drinking at a bar.
 24. Next day, he heard that a certain old man Cosmas had been killed in the village. It was his evidence that the deceased was his good customer at the butchery who liked liver meat. The next day, the Assistant Chief asked him for the phone number of a boda boda rider, which he did not have, and later became aware that the accused person, a clansman had been arrested for this murder, though he did not see him on the night of 12th April 2015. He stated that the boda boda rider showed him a bag with Peter Kisilu's names.
 25. In cross-examination, he stated that he closed the butchery at 10:00p.m and passed by a bar. He stated that the accused lived in Nairobi, and that the deceased's home was not near the market. He stated also that he was not aware of any existing grudge between the accused person and the deceased. He stated that he knew Peter's phone number because they both participated in family contributions.
 26. PW6 Dr. Solomon Musiu Maundu testified in respect of a post mortem report prepared by Dr. Loiposha who had travelled to Cuba for training. Post mortem was done on 24th April 2015 on the body of Cosmas Mutua Matheka – the deceased.
 27. The findings were visible bruises 6x4 cm on the face, bruise 1xcm on chin caused by a sharp object, bruises on the neck 1xcm. Cause of death was blunt injuries on the neck, and head and probably strangulation. He produced the signed post mortem report form as an exhibit. He stated also that the injuries noted could not have been self-inflicted.
 28. In cross-examination, he maintained that the injuries could not have been self-inflicted. He stated further that ordinarily bruises are caused on a live body, because of flow of blood.
 29. PW7 was No. 86390 PC Elphas Magut who took over investigations from Cpl. Vincent Sululu. It was his evidence that on 13th April 2015, a case of murder was reported by the Chief Kisau Location Mr. Mutinda. According to the police record, PC Mureu and IP Wambua and Cpl. Sululu proceeded to the scene and found a dead body lying on the floor, and nearby was a bottle of pesticide and cooked cabbage, but no external injuries were observed.
 30. According to him, the police later received information regarding a land dispute between the deceased and the accused. From the scene, the police took the body to Makueni hospital mortuary, and on 24th



- April 2015 Cpl. Vincent Sululu and relatives of the deceased attended the post mortem examination of the deceased.
31. It was his further evidence that on 30th May 2015, Cpl. Sululu received information that the accused person was at home and he went and arrested him while driving a car at Mbumbuni. In cross-examination, and on being shown a letter from Muya & Company Advocates addressed to Mutua Musyoka on an alleged trespass, he admitted that it was crucial evidence. That was the prosecution case.
 32. When put on his defence, the accused person tendered sworn defence testimony and called one witness DW2 Francisca Muthoka his wife. He stated that he did not kill the deceased, and was surprised that he was implicated for killing someone on the night of 12th – 13th April 2015; as he left Nairobi on 13th April to his rural home, as he was an employee of Access Kenya Ltd.
 33. According to him, on 13th April he was phoned by his wife and informed that his cousin had died. He thus proceeded to his cousin's rural home, and later the police came and took away the body. He stated that he did not have any reason to harm the deceased. He was cross-examined by the Prosecuting Counsel at length.
 34. DW2 was Francisca Muthoka the wife of the accused person and a teacher at AIC Katuanyaa Secondary School – in Machakos County. It was her evidence that Cosmas (the deceased) was a cousin of the accused.
 35. It was her further evidence that on 12th and 13th April 2015 she went to their family rural home with the children, and on 13th April 2015 in the morning, she heard screams. She later found that the cousin of her husband had been killed, and she then phoned her husband who came at 9a.m – 10a.m. She was later shocked to hear that her husband was implicated in the death of Cosmas. She was not cross-examined.
 36. This is a case of murder. Under the provisions of Section 107 of the *Evidence Act* (Cap.80), the prosecution had the burden to prove the allegation they brought against the accused person, under the principle that he who alleges must prove.
 37. This being a criminal case, the prosecution had the burden of proving all the elements of the offence beyond reasonable doubt – see *Woolmington =Versus= DPP (1936) AC*, and *Sawe =Versus= Republic (2003) eKLR*.
 38. I now go to consider each of the elements of the offence. Did the deceased die? The evidence of PW1 and PW2 and PW3 is clear. They are relatives of the deceased. PW1 went to the house of the deceased within their homestead in the morning at 7a.m on 12th April 2015 and found him dead on the floor. He screamed and PW2 and PW3 were attracted to the scene and saw the lifeless body of the deceased.
 39. The Assistant Chief and police were called and they came to the scene. Police later took the body to the mortuary at Wote hospital.
 40. Post mortem examination conducted by Dr. Loiposha was testified to by PW6 Dr. Solomon Maundu and established that the deceased died of blunt injuries on the head and possible strangulation. I find that the prosecution proved beyond reasonable doubt that the deceased died.
 41. Was the death unlawful? No possible reason has been given to justify the death. The serious injuries and bruises suffered could not be self-inflicted as found by the doctor. I find that the prosecution proved beyond reasonable doubt that the death of the deceased was unlawful.
 42. Was the death caused by the accused person. No one testified to witnessing the incident resulting in the deceased's death. Nobody saw the accused person in that homestead or killing the deceased that night.



43. It is thus a case of circumstantial evidence. As was stated in the case of Joan Chebichii Sawe v Republic [2003] eKLR and the earlier case of Republic v Kipkering arap Koske & Another 16 EALA 135 – in a case hinged on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In the case of Sawe (supra) also the Court of Appeal emphasized that mere suspicion however strong, cannot be a basis for sustaining a conviction in a criminal case.
44. From the evidence on record herein, there is no evidence which in any way connects the accused person, who worked in Nairobi with the death of the deceased person that night. In all the evidence on record, there is no single witness who mentioned him with regard to the events that happened in that rural area on the night of 12th and 13th April 2015. The mere allegation by PW5 – Benson Muiya that an unknown motor cycle rider said on 12th April 2015 told him that he had the bag of the accused person, even if true does not connect him to the death of the deceased. The allegation of a land dispute was not established by evidence. I find that the prosecution did not prove beyond reasonable doubt that the accused person caused the death of the deceased.
45. Was the death caused with malice aforethought? Malice aforethought is defined under Section 206 of the Penal Code (Cap.65) as an intention to cause death or do grievous bodily harm. In my view, with the blunt injuries suffered by the deceased with signs of strangulation, the death of the deceased was caused with malice aforethought as an intention to kill was clearly proved through the severe injuries inflicted on the deceased.
46. To conclude, for the reason that have I found that the death of the deceased was not connected with the accused person herein, I find that the prosecution did not prove the charge of murder against the accused person. I thus find the accused person herein not guilty of the offence charged, and acquit him of the charge of murder accordingly.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2024 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Accused

Mr. Maingi for accused

Mr. Kazungu for State

