



**Republic v Musee (Criminal Case 63 of 2016)
[2024] KEHC 2647 (KLR) (Crim) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 63 OF 2016**

**LN MUTENDE, J
FEBRUARY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOHN KIOKO MUSEE ACCUSED

JUDGMENT

1. John Kioko Musee, the Accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence being that on the night of 17th June, 2016 at Komarock Estate Phase 3 B in Nairobi East Sub-County within Nairobi he murdered Francis Mwaanza Mutisya alias Brown (Deceased), information that is denied by the accused.
2. To prove the case, the State called seven (7) witnesses. PW1 Lucia Wayo Mutisia, the deceased sister testified to have received a call from an unknown number on 18th June, 2016, a caller that turned out to be a friend of the deceased Wambua who told her that her brother had been injured and had been rushed to Modern hospital which was next to where the deceased sold miraa at Komarock.
3. Upon arrival she found the deceased in much pain such that he could not speak. He lay on his back and his clothes were stained with blood, his head was bandaged which also had blood and his neck showed foot marks. He was injured on his leg and he could not bend or sit. He had blood on his mouth and his eye was red and swollen. He was to be moved to a government facility. Some three young men present mentioned John wa Nyama as having been with the deceased.
4. PW1 called her brother Maurice and her elder sister who later came with a vehicle and took the deceased to Mama Lucy hospital. They passed by the deceased place of work and saw blood on the fence, some 50 meters from the work place. At Mama Lucy Hospital they were referred to Kenyatta National Hospital where the deceased was admitted.



5. Subsequently she visited the deceased on 23rd June, 2016 and found him having undergone surgery of the head. They spoke and the deceased who said he was okay told her that he was assaulted by Johnny wa Nyama whom she knew as the person who sold meat next to the deceased place of business, he also said he would make a report upon discharge from hospital.
6. She alluded to her elder sister having visited the deceased in hospital on 25th June, 2016 and told her that the doctor recommended discharge. Then on 27th June, 2016, the deceased wife who went to visit told them that his condition was not good and the deceased died that evening. That she called the three young men on 1st July, 2016 and told them to report the matter at Kayole Police Station.
7. On cross examination she said the head injury was as if an axe was used, the leg injury was caused by a blunt object and neck injury was by a foot mark. She denied that the cracked head injury was caused by motor bike.
8. PW2 Antony Wambua Mutisia the deceased younger brother went to Mama Lucy Hospital together with the deceased wife. Following recommendation, they took him to Kenyatta National Hospital where he was admitted for three (3) days before surgery could be done. By then the deceased could talk and was waiting for head surgery but he succumbed. He alluded to the deceased having said that he had a disagreement with a person called John, at his place of work, an individual he had known before. That the issue concerned rent for the kiosk which resulted into him being beaten by John and the youth said they knew John. They stayed for 14 days before the post mortem was conducted and he reported the matter to the police and later learnt that John had been arrested.
9. PW3 Mary Nduti Mwanza, the deceased wife told court that she accompanied PW2 to Mama Lucy hospital and found the deceased on a wheel chair who was eventually taken to Kenyatta National Hospital. His eye was swollen and he could not see. They spoke the next day and the deceased said a customer, John wa nyama had beaten him. He told her that he would report the case after he had healed. The next day he repeated the same statement. He further told her on that Saturday that he would be discharged and that he would report the assault to Kayole Police Station. She said that the deceased constantly talked about the issue of John.
10. That when his condition worsened on Monday, the deceased said that he was about to die and that if he died they should report John. The deceased was unable to talk that afternoon.
11. PW4 Doctor Timothy Onyuma carried out a postmortem on the body of the deceased and concluded that the cause of death was a head injury and blunt force trauma which caused bleeding into the brain.
12. PW5 No 85703 PC Vincent Ayieko was on patrol with his colleague PC Oketch and Enock Rop when they came across a crowd which had arrested John Kioko on allegation that he was wanted by the police for the offence of murder. They rearrested him and took him to Kayole Police Station to protect him from the mob that comprised around 60-100 people that were subjecting him to mob justice.
13. PW6 Patrick Kinyita Gikubu, testified to have been in company of Musa and John Wambua when he was called to a bar near Modern Hospital on 18th June, 2016 at around 5:00am, and upon learning that the deceased, his friend was assaulted he went to Modern Hospital to see him. That after the deceased was discharged and taken to Mama Lucy hospital they went back to the scene and saw blood opposite the place where the deceased sold miraa. That he later found him at his shop and he said that the deceased left the shop at 9:30 pm in the company of John wa Butchery arguing over a debt of Ksh 80/=.
14. PW 6 called accused at 4:00pm and asked him to buy him miraa then put the phone on speaker and the accused told him that he would buy for him miraa from somewhere else but not from a prostitute that he had beaten ..if he were not dead!



15. Later, on 24th June, 2016 at about around 10:00 pm -11:00pm he saw accused drinking at Rhydmyz Bar which was opposite Section 3A. PW6 called Fabian, the deceased brother and told him that he had spotted the person who had assaulted the deceased. They kept the accused busy at Rhydmyz bar. That Fabian came at 12:00pm and sat next to the accused and asked him why he hit the deceased and the accused responded that the deceased was hit by a motor bike and he fell on the road side. The deceased brother said they should call the police but the accused jumped over the iron sheet roof and escaped. That later John of wines and spirits called Fabian and told him that the accused was at the District officers' office at Kayole and had gone to report that he had been attacked and his money had been stolen.
16. PW6 learnt of the deceased passing on and subsequently got information that the accused had been arrested and taken to the police by a mob.
17. PW7 NO. 236878 Inspector Samuel Kirichu the Investigating Officer upon taking over investigations from the regular police established that the accused owed the deceased Ksh 80/= and when the deceased demanded payment they disagreed. That they were ordered to leave the pub at Komarock Phase III, a wines and spirits pub. Afterwards Paul and PW6 were called by someone in a land cruiser and informed that someone was lying at a roundabout, and they took the deceased to Modern Hospital.
18. Upon being placed on his defence he opted to give unsworn evidence. He testified that the deceased used to do business with him and they had disagreed. That he was arrested by the public at 5:00pm while carrying meat to the slaughter house following allegations that he had killed someone. He was taken to his house by the police where he changed his clothes and he was later taken to the Police Station on advice that he was going to record a statement. However, he was placed in custody as they waited for the victim to record his statement.
19. That the deceased brother came to identify him at the station after he was told that there was a person who had killed his brother at the station, however he failed to identify him.
20. He was taken to the slaughter house at around 11:30am and people identified him as the person who was there for 11 years. He told the police to call the manager of the slaughter house who similarly confirmed that he knew him. He was taken back to the Police Station but he did not record any statement, instead he was given papers to sign which he declined despite being threatened with a gun because he did not understand the papers. That he was later taken to the butchery where he worked, and had employed a young man called Ben Wambua, he showed the police the records.
21. Further he urged that PW4 claimed the fight was because of Ksh. 3000 /= yet, he used to stay in a one bed room house and paid Ksh. 6000/= rent and Ksh. 6000/= for the business. Additionally, that he never fled and went to work every day, the vehicle he was arrested in was taking meat to hospital.
22. Submissions were filed that I have taken into consideration. It is urged that suspicion and speculation cannot be a basis of conviction and the contradictions in the prosecution case make the case weak and not water tight. That there was no scene visit, eye witness or data technology to confirm if the accused communicated with the deceased or anybody to incriminate him. That looking at the postmortem, the deceased seemed to have been assaulted by more than one person. That the offence was committed on 17th June, 2016 but the arrest was on 5th August, 2016 but nobody arrested him earlier on contrary to allegations that he had disappeared. That the evidence as to when he was arrested was conflicting. That the case was based on weak evidence and the demeanor of the accused during trial of weeping should not be disregarded.



23. Section 203 of the Penal code defines the offence of murder as where;
- Any person who of malice aforethought causes death of another person by an unlawful act or omission...
24. In Anthony Ndegwa Ngari -vs- Republic [2014] eKLR, the elements of the offence of murder were listed as follows:
- a. The death of the deceased occurred;
 - b. That the accused committed the unlawful act which caused the death of the deceased; and
 - c. That the accused had malice aforethought.
25. Therefore, issues for determination are as follows:-
- Whether death occurred
- Whether an unlawful act was committed resulting into the death
- Whether the accused was the perpetrator
- Whether the act was of malice aforethought
- The effect of the contradiction and inconsistency on the case
26. Being a criminal case, the prosecution is obligated to prove each and every ingredient of the information beyond reasonable doubt. On the question of death evidence was tendered of the deceased having been in hospital prior to his demise. He succumbed while admitted at Kenyatta National Hospital. The cause of death was concluded to be head injury due to blunt force trauma. This was proof of death having occurred.
27. There was no direct evidence adduced that would place the accused at the scene of incident. As correctly submitted by the defence, there were no eye witnesses to the act that caused injuries sustained by the deceased that he succumbed to. PW 6 was called to the hospital by his friend John of wines and spirits who told him that the deceased had been rushed to hospital after he had been assaulted. John of wines and spirits also known as John Wambua who was not a witness had informed PW1 and PW 2 that the deceased and the accused were at his bar when they had an argument and they left together.
28. PW 6 referred to a John who was selling charcoal at the roundabout area, who similarly was not called as a witness in the case .The said charcoal seller allegedly saw the accused and the deceased at the roundabout arguing.
29. The Investigating Officer testified that PW6 and Paul Mbitio who again was never called to give evidence were at the round about and were called by a person driving a Landcruiser and informed of someone lying at the place, it happened to be the deceased who they rushed to hospital.
30. The Investigating Officer's account was contradiction of PW6's evidence since PW6 was not at the round about and did not take the deceased to hospital.PW6 did not tell court how he was called and told of the person injured at the roundabout.
31. Under Section 143 of the *Evidence Act*, the prosecution has discretion to call witnesses and whatever evidence they opt to avail but the law is that the evidence must prove the charge and where necessary evidence is omitted the court has power to draw adverse conclusions and this omission must be



interpreted and resolved in favour of the accused. In *Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR* the Court of Appeal held that:

“The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case- see *Bukenya & Others Vs Uganda (1972) EA 549*.”

32. It is notable that the omissions did not affect the charges since none of the witnesses saw the accused attack the deceased. This case therefore rests on circumstantial evidence and depends on surrounding circumstances and chain of events.
33. Evidence was adduced of the deceased statement to his relatives and wife when they visited him as to the cause of death and identity of the assailant. The 3 witnesses all testified and were indeed consistent that the deceased told them that he had been assaulted by Johnie ‘wa’ Nyama. Looking at the injuries sustained they are not consistent with being hit by a motorcycle. This is appreciated by the defence who attribute it to being assaulted by several people. The accused theory that the deceased was hit by a motor bike is hence unsupported.
34. PW3, the deceased wife testified that the deceased even intended to report the incident once he recovered and when he realized that he was about to die told his relatives to report the incident. A deceased statement made prior to his death on the cause or person associated with his death is acceptable and admissible in evidence.
35. Section 33 of the *Evidence Act* provides that:
 33. Statements, written or oral, of admissible facts made by a person who is dead,are themselves admissible in the following cases –
 - a. when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;
36. The law on death declaration is settled, there have been different views on whether corroboration is necessary. However, the key word is that caution must be exercised before the court solely convicts the accused based on a dying declaration
37. In *Okale -vs- Republic (1965) E.A. 555 at 558*, the Court of Appeal held as follows:
 - i. “The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from *Field On Evidence (7th Edn.)* has repeatedly been cited with approval:
 - ii. “The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed The deceased may have stated his inferences from



facts concerning which he may have omitted important particulars, from not having his attention called to them.' (Ramazani bin Mirandu (3); R. v. Okulu Eloku (4); R. v. Muyovya bin Msuma (5)).

- iii. Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R. v. Ramazani bin Mirandu (3); R. v. Muyovya bin Msuma (5)). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy (ibid.).
- iv. It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. v. Elighu Odel (6); Re Guruswami (7)), and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. (See, for instance the case of the second accused in R. v. Elighu Odel (6) and R. v. Epongu Ewunu (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. (See also Dala Mkwai v. R. (9) (1956) 23 E.A.C.A. at p.613)

38. In *Musili -vs- Republic* [1991] eKLR, the Court of Appeal also held that:

“...In our view this was a strong evidence of a dying declaration made immediately after the fatal assault and given by witnesses who were found by the learned trial judge to be witnesses of truth and credibility. The law in Kenya relating to acceptance of dying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect – (U) R v Elighu s/o Odel and another (1943) 10 EACA 90.

However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and that too great weight should not be attached to dying statements which should be received in evidence with caution (T) R v Ramzani bin Mirandu (1934) 1 EACA 107, (T), R v Mgundulwa s/o Jalu and others (1946) 13 EACA 169, (K) Pius Jasunga s/o Akumu v R (1954) 21 EACA 331.”

39. In the instant case, the deceased statement was not cross examined and the accused was also not present when it was made. It would call for testing its credibility. However, the deceased statement was corroborated by further circumstantial evidence.
40. PW6 testified that they trapped the accused in attempt to arrest him when he called the accused on his mobile number asking him to buy him miraa /khat. The accused told him that” he was willing to buy but not at the prostitutes place “..that “he had beaten him and wondered if he was not dead”
41. The allegation may have been proved had it been recorded, but further evidence established that the accused and PW6 later met at Rhydms bar where PW 6 saw him drinking. They made him stay at the place until the accused was confronted by Fabian the deceased brother. The accused escaped after police were called. Witnesses also testified how he had closed business after the deceased death. The accused was later rescued from a mob justice of a crowd of about 60-100 people.



42. Although no direct evidence placed him at the scene and linked him to the death, the evidence viewed in its entirety establishes a chain of events which if placed together with mathematical precision proves the accused guilty.
43. In *Erick Odhiambo Okumu -vs- Republic* [2015] eKLR while citing the test of circumstantial evidence established in *Abanga alias Onyango -vs- Republic*, CR. APP. NO 32 OF 1990, the Court of Appeal held that:
- a. “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.”
44. The accused opted to give unsworn evidence which could not be tested by cross examination, though within his right, remained unexplained. His whereabouts on the night of 15th June, 2016 when the deceased was assaulted.
45. He does not dispute that the deceased was his friend, and, that PW6 was a close friend as well and they drank together. Instead, his evidence corroborates the prosecution’s case when he told court he worked with the deceased and they had disagreed on work related issues. PW6’s evidence of how the accused told him he had brutally beaten the deceased also remained unexplained.
46. On the question of existence of malice aforethought, this is a necessary ingredient in case of murder.
47. Section 206 of the Penal Code provides that:
- Malice aforethought shall be deemed to be established by evidence proving any one 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 of 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 the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
48. In *Nzuki -vs- Rep* 1993 KLR 171 the Court of Appeal held on the importance of proving malice aforethought and also set out the principles of determining whether intention to commit murder is proved as follows:
- “ 1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.



2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions
 - a. To cause death;
 - b. Cause grievous bodily harm; and
 - c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately.
3. Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder."

49. In *Chesakit Matayo-vs- Uganda Criminal Appeal No. 95 of 2004*(2009)UGCA 21, the Court of Appeal in considering the ingredient of malice aforethought stated as follows:

"...The learned trial judge also considered the case of *Uganda Vs John Ailing (1992-93) HCB 80* which has the definition of what constitutes malice aforethought and what factors are to be considered. These include the part of the body injured, type of weapon used, the extent of bodily injuries and conduct of the accused. The fact that at the appellant aimed at the heart and trunk of the 1st and 2nd victims respectively, the use of a gun which is a deadly weapon and the fact that the appellant ran away to Kenya were evident signs of the existence of malice aforethought....." (Emphasis added)

50. Herein, PW1 said that she could see visible foot marks on the deceased neck, his leg was injured and he could not sit or bend, his eye was swollen such that he could not see. He was in so much pain that he could not talk. He could not be discharged until surgery was done.

51. Upon the autopsy being conducted the Pathologist found the deceased having sustained abrasion on the forehead, right knee, on the dorsum of the right foot, both eyelids were bruised. There was depression of the forehead, the scalp bone had fractured. The head had subgaleal haematoma, depressed skull fracture on the frontal and parietal bones, fracture of the right cerebral medial fossa. The brain had subdural and epidural subarachnoid bleeding, and, frontal lobe contusion. There is no doubt that the assailant had intention to maim and permanently disfigure the victim which was grievous harm, hence the intention to kill him.

52. On the question of contradictions and inconsistent testimony; In *Philip Nzaka Watu -vs- Rep. (2016) eKLR* the Court of Appeal held that:

"In evaluating discrepancies contradictions, omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter...the court ought to give some allowance for possibility of loss of memory human reconciliation and difference in interpretation of events which is common to human beings. The evidence cannot be perfect and minor contradictions should not be given weight...However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive



the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

53. The contradiction on the place of the incident did not affect the case, PW7 testified that during investigations they visited the scene in the company of the accused. In his defence, the accused corroborated this by stating that he went with the police to the place and he also showed them his butchery and the former place of work and even called his former manager. He also admitted working with the deceased and therefore there is no doubt they knew each other and closely related.
54. The accused has also stated that the incident was at night and also that the deceased was drunk and his judgment impaired when he made the statement.
55. I do caution and warn myself of the danger of relying on the deceased declaration. I do note that the time of the offence is also not relevant, what is relevant and found to have been satisfactory to inform a conviction is the surrounding circumstances and deceased statement which was consistent and corroborated. Further the medical history and the post mortem did not indicate that the deceased was intoxicated. The statements were made at different stages when he had recovered and also when he was about to die proving an element of consistency. Suffice the deceased could not have been mistaken.
56. Lastly, on the identification of the assailant, all witnesses testified that the deceased identified John wa nyama as the person who beat him. He also stated that they had a disagreement, a minor disagreement over work. The same evidence is seen in the defence when the accused stated that he disagreed with the deceased over work.
57. The deceased wife also stated how the deceased and the accused worked close to each other and the accused was his customer, she had known him and seen him at the work place. She identified him in court. PW5, the arresting officer also identified the accused as the person they had rescued from the angry mob and had been attacked on claim of murder of Brownie.
58. The Investigating Officer and the accused went to the scene during the investigations and later to the butchery where he worked. The accused also stated that he was ferrying meat when he was arrested. There is no mistake that the accused was the attacker and John wa nyama the deceased referred to on his death bed.
59. In the upshot, the prosecution has proved beyond reasonable doubt that the accused with malice aforethought caused the unlawful death of Francis Mwaanza Mutisya alias Brown. He is guilty and convicted as charged.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22ND DAY OF FEBRUARY, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms. Ogweno for ODPP

Ms. Celina Odembo for the Accused

Court Assistant – Fatuma /Habiba

