



REPUBLIC OF KENYA



**Republic v Mutie (Criminal Case 120 of 2017)  
[2024] KEHC 17246 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 120 OF 2017**

**TM MATHEKA, J**

**APRIL 24, 2024**

**BETWEEN**

**THE REPUBLIC ..... PROSECUTOR**

**AND**

**EMMANUEL MWONGELA MUTIE ..... ACCUSED**

**JUDGMENT**

1. The accused person Emmanuel Mwangela Mutie is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. It is alleged that on the night of 2<sup>nd</sup> and 3<sup>rd</sup> March 2017 at Ngumo Village, Kibwezi Sub-County within Makueni County he murdered Thomas Kiema Kamuya.
3. The accused denied the charge before Hon. C. Kariuki J. on 30/05/2017.
4. The matter was part heard before Hon. Ong’udi L.J (PW1) on 24/09/2019 and PW2, 3, 4, 5, 6 and 7 were heard by Hon. Dulu J – the prosecution closed its case on 28/11/2023.
5. On 14/02/2023, Hon. Dulu J. found that accused had a case to answer and was put on his defence.
6. I took over the matter on 31/03/2023 upon my transfer.
7. The delay to proceed with the defence hearing was occasioned by the accused’s insistence that upon his arrest there was a torch that was recovered from him, with which he was taken to remand prison and surrendered prisoner’s property. The records at the remand prison did not support the claim, and despite the accused and his counsel, the prosecuting counsel inspecting the prison records and confirming the position – the accused person persisted on this position at some point his counsel (Mr. Hassan) dropped out of the case for want of instructions.
8. He was assigned new counsel and the matter proceeded for hearing on 18/10/2023.



9. The case for the prosecution was set out by PW1 – the wife of the deceased who stated:
- I am Wambua Mutie Getrude from Ngumo village of Mtito Andei ward. I am a teacher at Kivutine primary school. I recall 2/3/17 I woke up early and prepared myself. My husband Thomas Kiema was a bodaboda man. I went to school leaving him preparing. I returned at 3pm but he had not returned. We waited for him upto 8pm but he never returned. The next day the children left for school the next morning. After a while Nduta Kiema my daughter aged now 14 years came home running saying my husband’s motorbike was on the road but he was not there.
10. I ran to the road. The motorbike was near the accused’s home. He is Mwongela our neighbour. I found the motorbike there. I checked around and saw my husband’s body a few metres from there. He had a big cut on the head and neck and hand. Just near there, was the accused’s wife and children standing at a nearby shamba. I was surprised.
11. I screamed so loudly but they never reacted. Other neighbours came. That’s when accused’s wife came. I never saw the accused. The village elder Florence Mwendu was called and she came. She called the police who came and took the body.
12. There was a stick near the bike and it was taken by the police. The body was taken to the Makindu mortuary. A postmortem was conducted. I attended it with his brother Peter and one Charles. I recorded my statement with the police. The deceased was aged about 44 years. I later sold the bike. I don’t know who killed him but I suspect Mwongela.
13. On cross examination by counsel for the accused she stated
14. My husband used to return home by 7pm latest. By that time I had no phone so we did not communicate. He had a phone. Our nearest neighbour used to arrive late. At the scene were footprints to the deceased’s shamba. I could not know whose footprints they were. There was a donkey tied next to the bike. The donkey belonged to the accused. They were 10 metres apart. The accused’s wife was 20 metres from the bike. She was with her children only. It’s the accused’s children who told mine that they had seen the deceased’s bike. In my statement I have talked of neighbours children not Mwongela’s in particular, but he is a neighbor. I confirmed he was dead. The accused and deceased were friends. He told me one day that the accused had told him he would kill him one day. I do not know what work the accused used to do. All I know is that they were good friends. I even asked him that one day. Accused’s wife used to do casual jobs. She is no longer there. I became unconscious after the incident and was hospitalized for a week. Accused took himself to the station .I asked his wife where the accused was that morning. She told me he had gone to look for jobs a week before. I had seen her and him cutting grass, the previous day so she was lying. The stick/club found next to the bike had been broken into two pieces. From mine to accused’s is 1 ½ kilometres. There is no one between. Accused’s house was burnt. I do not know by who.
15. John Nthiwa Ndiku, acting chief at the time was only called to the scene. He did not know the name of the accused/ that of the deceased.
16. PW3 Fredrick Ndaisi a teacher at Ngibuni primary school – testified that on 3/3/2017 a body was found near the school. He did not know the deceased but school children gave the name Kiema.
17. PW4 Julius Nzomo Mutua went to the scene after being rang by the village elder – he said the deceased was neighbour of the accused. That deceased was boda boda rider – that they found a piece of stick at the scene near the body of deceased.



18. PW 5 No. 236540 CI Moses Murithi Marete was the incharge CID Mtito Andei at the material time. He visited the scene with his team upon receipt of report from the chief to the OCS who briefed him. At the scene they found unattended motorbike KMCU 070V, broken stick – some meters away body of Thomas Kiema – there were 3 deep cuts on the neck and one on the head – they took the stick as the murder weapon. There were foot prints at the scene which led to the home of the accused person. They found on the deceased his mobile phone, Kshs.100/= identity card, voter’s card, motorbike plug.
19. This witness testified that on 11/03/2017 the accused went to the station and told them he had killed the deceased. That time he was the Investigation Officer the accused was handed over to him. He testified that accused told him he killed deceased because he suspected him of having a love affair with his wife.
20. This witness testified further that the accused person then took them to the place where he had killed the deceased which was where the body was found – that the weapon was never recovered, that he handed over to the police a torch he had at the time of committing the offence – the torch and stick were produced as evidence.
21. This witness testified:

From investigation, it was at night and nobody witnessed the killing. Neighbours suspected him though. The suspect is in court - points at accused in the dock.
22. On cross examination he said:

People from the village suspected him. The chief inspector did not record a confession. We recorded a statement from his wife. She is not a witness. Nobody else identified the torch as his, there was no need. I did not take fingerprints of the torch. We went with accused to the scene and his home. At this home thing were burnt by the community. I did not produce the diary and minutes of investigations. Sketch map - no footsteps recorded.
23. Photos were taken to be produced by scenes of crime officers. We did not recover the other part of the stick. By the time he took me to the scene, many people knew the scene. You would be wrong to say the accused went to police to report that his house had been burnt. It was the community that conformed the love affair. Witnesses ought to have testified on the affair.
24. PW6 Dr. David Kasanga produced the postmortem report which confirmed the cause of death.
25. PW7 Florence Mutunga told the court that the deceased was killed at night, the place had no light and was bushy.
26. In his defence accused made a sworn statement. He told the court at the material time he was walking away from home. He came home on 11/03/2017 and found that his home had been razed to the ground. There was no one at home. Neither his wife nor his children. He went to report to the police. He told the court he did not kill the deceased, he did not tell the police he did it. He told the court that the DCI planted the case on him.
27. On cross examination, he said he was home on 4/3/2017 but did not go to the home of the deceased though his wife mentioned that there was some bad news

– that the time he had at home from his place of work at Supati Flowers was little. He confirmed that he was told the body of the deceased was found around 500 metres from his (accused’s home)but deceased’s home was around 3 ½ - 4 kilometres from the home. He said



on 11<sup>th</sup> he was going home for the funeral – he said upon arrest police took him to Tsavo, Katheka Kai then to his home. He denied killing the deceased. He closed his case.

Parties agreed to file final submissions.

28. Counsel for accused filed on 10/11/2023. The State did not file any.
29. It is submitted for the accused that the prosecution has not proved its case beyond reasonable doubt to warrant a conviction.
30. The elements of a charge of murder were clearly laid out in the case of Anthony Ndegwa Ngari –vs- Republic (2014) e KLR, as follows:
31. That the death of the deceased occurred;  
That the accused committed the unlawful act which caused the death of the deceased; and
32. That the accused had malice aforethought.
33. The death of the deceased was proved - see postmortem  
– and evidence of those who found the body.
34. The death was unlawfully.
35. Who killed him? The accused was the suspect because
  - (i) Proximity of body to his home,
  - (ii) Alleged affair with his wife.
36. The plethora of authorities is that no amount of suspicion can amount to proof. The standard of proof in criminal cases is beyond a reasonable doubt
37. The finding of the body near the home of the accused and the suspicions expressed by the wife remain suspicion's as nothing from the scene was attached to the accused. No finder prints or DNA was found to connect him to the death yet his home was just nearby and the deceased's m/bike and the suspected murder weapons were at the scene.
38. This was the holding in the English case of R –vs- Taylor, Weaver an Donovan (1928) Cr. App. R 21 where the Court held: -  

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 of evidence to say that it is circumstantial.”
39. Joan Chebichii Sawe v- Republic [2003] eKLR, the Court of Appeal held as follows:  

In order to justify on circumstantial evidence, the inference of guilt, 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. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused”.
40. Even on circumstantial evidence the I.O availed nothing.



41. The state appears to have been reliant on the accused's alleged confession. Section 25 of the [Evidence Act](#) defines a confession as follows: -
- A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence”.
42. With respect to confession made to a police officer the Act states section 29 prohibits the admission of the same unless they are taken in accordance with the laid down procedure:
43. No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is—
- a. of or above the rank of, or a rank equivalent to, Inspector; or
  - b. an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.
44. In this case the I.O told the court that the alleged confession of the accused person was not recorded by the inspector.
45. On the issue of malice aforethought – Section 206 of the [Penal Code](#) States
206. 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.
46. The prosecution needed to establish a connection between the accused and the deceased – some relationship that would establish malice aforethought.
47. The State tried through C.I Marete to bring the angle of a love triangle but other than the alleged suspicion which was faceless coming from unknown members of the community there was no single witness to this allegation.
48. The State also tried the confession route but did not produce the alleged confession. The I. O simply conceded that there was no confession as none had been taken from the accused in the proper manner in accordance with the laid down procedure on the [Evidence Act](#).
49. The casual manner in which the I.O treated the alleged confession is scary. He testified on oath that the accused told him he killed the deceased. He then proceeded to fail and neglected to present the accused to the relevant authorities to take down the confession. The conclusion here can only be that there was no confession and the I.O lied on oath.



50. The I.O never brought down forensics to the scene – never took any of the items found at the scene to forensics for DNA or any other scientific testing, never had the deceased’s phone which was at the scene examined to just find out whether he may have communicated with anyone that evening that could have led to some leads to the murder. Even in the sketch plan he drew he omitted significant evidence like alleged footsteps leading from the scene to the home of the accused person.
51. The pathologist testified that there were deep cuts a kin to slaughter could not have been caused by a stick but there was no serious search for the weapon.
52. The IO did not carry out investigations and if he did the same was not reflected in this case.
53. The accused’s defence that he went to the police station on 11/03/2017 to report the razing of his house to the ground is not disputed. The wife to the deceased, the I.O both confirmed that the accused’s house was indeed razed to the ground. Both said it was faceless members of the community but there was no effort even to investigate that crime. What if the actual killers did that to derail investigations in the murder?
54. For a case that was presented on circumstantial evidence, the prosecution failed to tick the boxes as set out in Sawed v R. too many unanswered questions and leads left handing which could have pointed to other persons on top of the accused’s persuasive defence.
55. In the end, the mathematical precision that is required of circumstantial evidence did not fall into place –and I found insufficient evidence to say that the charge against the accused and the evidence presented equals to the guilt of the accused for the murder;
56. I find hence the charge is not proved. It is demised and the accused’s person is acquitted accordingly.
57. He is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED ON 24/04/2024**

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

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