



**Republic v Nakola (Criminal Case 15 of 2017)
[2024] KEHC 16853 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE 15 OF 2017**

**K KIMONDO, J
JULY 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

EZEKIEL SAITABU NAKOLA ACCUSED

JUDGMENT

1. Grace Wangari Mwangi (hereafter the deceased) was killed and her body interred in a shallow grave. The spot was behind the cow-shed. The killer had disguised it well because the carcass of a cow had been buried there a few days earlier. The top was also covered with a heap of sand and some banana stems.
2. The accused was employed as a farm hand or watchman and shared the compound with the deceased. He and a daughter-in-law, Monicah Muthoni, were the prime suspects. Monicah was however acquitted by the court on 9th June 2022 for lack of evidence.
3. The Information charged the accused with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on 20th March 2017 at Karega Sub-Location, Kigumo Location, Kigumo Sub-County within Murang'a County, he and his former co-accused murdered the deceased.
4. The prosecution called twelve witnesses. Mathew Waweru Mwangi (PW1) is a son of the deceased and lived a few meters from his mother's house. On 20th March 2017 at 18.30 hours, he found the deceased's house locked. When he checked later at 20:00 hours, the lights were on.
5. The following day, the house was still locked which heightened his suspicions. Calls to the deceased's cell phone went unanswered. When he enquired from the accused, he said that the deceased left the previous day carrying a kiondo. Another watchman, Laibon, was away on leave. According to Nicholas Nyagah (PW2) the two guards used to live in some quarters near the cow sheds.



6. Another witness, Nicholas Irungu Njuguna (PW5), a veterinary officer, went to the deceased's house on 20th March 2017 to collect his dues. There was no answer at the door. The accused told him that the deceased was not in.
7. On 22nd March 2017, PW1 went around the nearby Muthithi trading centre enquiring from some people whether they had seen the deceased. It was negative. He then got in touch with his brothers Felix Mwangi (PW4) and Bishop Muiru, but the two had also not heard from the deceased.
8. They decided to break into the deceased's house but found nothing of interest. PW1 locked up the house with a different padlock and made a report of a missing person at Kigumo Police Station. Searches in nearby mortuaries were negative.
9. The police arrested the accused and recovered the deceased's Nokia phone (exhibit 2) under a mattress in his house. PW1 was later summoned to Kigumo police station where he identified a Skylight decoder and remote (exhibit 3) and 2 gas cylinders (exhibits 4 & 5). He said he used to see the items in the deceased's house.
10. Exhibits 3, 4 and 5 were recovered from Elizabeth Nyambura (PW9), the accused's girlfriend at Gakera. She testified that the accused gave her 2 mattresses; one was new and the other one old. In March 2017 he gave her a TV decoder, plastic seats and stools. The decoder was for GOTV but which they later switched to SkyLife. He also gave her the remote controls.
11. On 24th March 2017, the accused called her and informed her that the decoder was required by Kigumo police. She took it there. The police later went to her house and collected the other items above. Under cross-examination, she clarified that the initial decoder was for GOTV but that the accused later bought the SkyLife one.
12. PW3 was Felista Wambui Irungu. She operated an Mpesa shop at Karega shopping centre. On 21st March 2017, the accused, who was well known to her as a customer, withdrew Kshs 1050 from the deceased's mobile wallet. The deceased would occasionally send him to withdraw money from her mobile line. She produced the Mpesa booklet number 45XX8 and sheet number A68XXX14 (exhibit 6).
13. According to PW4 he was informed by PW1 on 25th March 2017 that the deceased was missing. When he went to the scene on 26th March 2017, he found many people and police officers. The remains of the deceased were exhumed from behind the cow shed in a shallow grave of about 3 feet. He said a cow had been buried there two weeks earlier and that the body was lying next to the cow. The body was removed to the Lee Funeral Home in Nairobi.
14. PW6 was Corporal Peter Makau. On 22 March 2017, he received the report of a missing person from PW1. At about 9:00 pm, he informed CI Aden and IP Wainaina (PW8) that the accused had received Kshs 95 from the cell phone of deceased. PW6, IP Wainaina, Cpl Maina (PW7) and Cpl Wathiga went to home of deceased and arrested the accused.
15. They interrogated him until midnight when he opened up and said he had killed the deceased and buried the remains within the compound. They took him back to his house the same night and recovered the deceased's cell phone Nokia 1208 under a mattress. It had no Sim card. The accused had led them earlier to the cowshed area where the body was eventually found. There was a heap of sand and banana stems on top. PW6 guarded the scene until the next morning when he was relieved by some colleagues.



16. On 24th March 2017, he was given new leads by Cpl Maina (PW7). The two went back to accused's house and found the keys for deceased's house on the table (exhibit 8). They also recovered a jembe outside his house (exhibit 9). Leah Wanjiru Mwangi (PW11), a neighbour to the deceased, said the jembe belonged to her household.
17. According to PW7, as they searched for the body in the shamba, the accused nudged him aside and disclosed that he had buried the deceased in the compound. PW7 informed IP Wainaina (PW8) and the accused repeated the same answer saying he feared for his life. He pinpointed the spot and implicated his co-accused claiming she was to pay him Kshs 10,000. They took him away and left PW6 to guard the scene. Under cross-examination, he conceded that what the accused said did not amount to a confession. But he said a formal confession was recorded later by Chief Inspector Festus Okoth. The latter however did not take to the stand.
18. PW8's evidence was largely along the lines of PW7 save to add that he recovered Kshs 3,850 from the accused's pockets. The accused claimed he was paid the money by the co-accused. PW8 however doubted that version. The witness produced a Nokia Phone (exhibit 11) belonging to the accused and some two pieces of clothes: a petticoat (exhibit 13) and another one found around the deceased's neck (exhibit 14).
19. According to Lucy Muiro (PW10) she visited the deceased on 19th March 2017 and gave her Kshs 3,000. Her other key evidence related to the strained relationship between the deceased and her daughter in law (co-accused) but who, as I stated earlier, was acquitted.
20. The police obtained an order to exhume the remains. On 26th March 2017, a postmortem examination was conducted by Dr. Oduor Johansen. The original report was produced with consent of the defence by PC Kosgey (PW12) under section 77 of the *Evidence Act*. It concluded that the death resulted from "asphyxia due to ligature strangulation".
21. When the accused was placed on his defence, he protested his innocence. In his sworn evidence, he stated-

I learnt that the deceased's body was found near the place where the cow was buried. I had visited that place for 5 days. There was some digging around and some footsteps. My co-worker denied he had interfered with the place. I had no problem with salary. I had no sexual relationship with deceased. We had a normal relationship of worker/employer. I never showed the police where deceased was buried. I showed them where I suspected something near where the cow was buried. I had not told the police that deceased had gone to visit anywhere.
22. When cross-examined, he said he had been employed by the deceased for over 10 years. He said he bought a mattress at a shop styled Nduka Njega but did not call the shopkeeper as a witness. He said that it was normal for deceased to send him to do Mpesa transactions and that he had her PIN. Regarding the scene, he said that a cow had been buried in the area but he suspected some activity was going on at the spot. He enquired from his co-worker, a herder known as Mubeya, but who denied it. The accused said that the gas cylinders referred to by witnesses were in Bishop Muiro's house.
23. Learned counsel for the accused filed final submissions dated 19th April 2024 with two authorities annexed.
24. I take the following view of the matter. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.



25. There are three key ingredients that must be present: first, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.
26. There is no doubt about the death of the deceased. Doubt is completely erased by the post mortem report (Exhibit 7). In the opinion of the pathologist, the death resulted from “asphyxia due to ligature strangulation”.
27. From that evidence, I find that the death was unlawful. The next question then is whether the Republic has proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased.
28. In the absence of an eye witness or an admissible confession, this case is entirely built atop circumstantial evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused “incapable of explanation upon any other reasonable hypothesis than that of his guilt”. *R v Kipkering arap Koske & another* 16 EACA 135 (1949).
29. See also *Sawe v Republic* [2003] KLR 364, *Mutua v Republic*, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, *Republic v Richard Itweka Wahiti*, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.
30. It bears repeating that circumstantial evidence is good evidence. But the burden of proof that the accused murdered the deceased lay squarely with the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.
31. It is not in dispute that the accused was employed as a guard or farmhand at the deceased’s homestead. He had worked as such for 10 years. He resided in the same compound with the deceased. His wages were however paid by one of the deceased’s sons, Bishop Muiru. So much so that his identification was never in doubt.
32. The deceased went missing on 20th March 2017. Efforts to trace her by her close family members proved futile. A report of a missing person was hence made to Kigumo Police Station on 22nd March 2017.
33. I find that there are a number of incriminating pieces of evidence that link up the accused to the murder. The first piece is that on the date when the deceased went missing on 20th March 2017, the accused was living with her in the compound. The accused and another guard, Laibon, resided in some quarters near the cow sheds. But the evidence at the trial was clear that the other guard was away on leave during that period. The claim by the accused that it was another worker or Mubeya who had tampered with the place a cow had been buried is a red herring.
34. Furthermore, on 21st March 2017, the accused lied to PW1 that the deceased had left the previous day carrying a kiondo. He gave the same misleading information on 20th March 2017 to the veterinary officer, Nicholas Irungu Njuguna (PW5), who had gone to the deceased’s house to collect his dues.
35. The second incriminating piece of evidence is that on 21st March 2017, he withdrew Kshs 1050 from the deceased’s mobile wallet. It is true that the deceased would occasionally send him to do such transactions and trusted him with her PIN credentials as confirmed by PW3. But by that date, the deceased was missing and buried in a shallow grave near the cowshed.
36. Thirdly on 22nd March 2017, the accused had received airtime worth Kshs 95 from the cell phone of deceased into his mobile phone. Like I stated, the deceased was long dead. Her cell phone was at all material times in the custody of the accused and was recovered hidden under a mattress in his quarters.



37. The fourth important fragment of evidence is that after his arrest, and as the police and the public combed the shamba for the deceased's remains, he pulled PW7 aside and pinpointed where he had buried the deceased. PW7 informed Inspector Wainaina (PW8) and the accused repeated the same story. He said he now feared for his life.
38. It is at exactly that spot where the deceased's body was exhumed the following day entombed in a shallow grave next to the carcass of a cow. The grave was a cleverly disguised: It was the spot of the buried cow; and, it was conveniently covered with a heap of sand and some banana stems.
39. I must add that what the accused told PW7 and PW8 does not rise to the threshold of a confession. However, and according to PW8, the accused recorded a statement under caution and inquiry before Chief Inspector Festus Okoth but which was never produced. The latter never took to the stand.
40. The fifth important piece of circumstantial evidence came from his girlfriend, Elizabeth Nyambura (PW9). In March 2017, the accused gave her several household items including a TV decoder, remote, two mattresses and two gas cylinders. According to PW8, the items were stolen from the deceased's homestead.
41. The totality of the circumstantial evidence is thus overwhelming. When I juxtapose it against the testimony of the accused, I readily find that the defence is a sham and completely evasive. The chain is complete and the accused is the only one who strangled the deceased and buried her remains behind the cowshed. He then tried to cover up the heinous crime while continuing to steal from her mobile wallet and spiriting away various household items to his girlfriend's house in Karega.
42. For all those reasons, I find that the conduct of the accused is inconsistent with his plea of innocence. From the set of circumstances that I have highlighted, the accused had malice aforethought as defined in section 206 of the [Penal Code](#). The deceased died as a direct consequence of his conduct.
43. The entire corpus of circumstantial evidence points irresistibly and exclusively to the guilt of the accused. I find no defence or hypothesis that exonerates him.
44. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty. The accused, Ezekiel Saitabu Nakola is hereby convicted.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JULY 2024.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

The accused person.

Ms. Muriu for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Mbuthia for the accused instructed by J. N. Mbuthia & Company Advocates.

Mr. E. Ombuna, Court Assistant.

