



**Republic v Asuma (Criminal Case 65 of 2016)  
[2023] KEHC 363 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 65 OF 2016  
TW CHERERE, J  
JANUARY 26, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DOUGLAS ASUMA ..... ACCUSED**

**JUDGMENT**

1. Douglas Asuma (accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.

The particulars of the charge are that on August 29, 2016 at Uruku GK Prison in Imenti Central Sub-County within Meru County murdered Catherine Muthoni

1. Accused denied the offence. On August 29, 2016, Janice Kawira Muchiri, a clerical officer at Uruku GK Prison met accused, a prison officer at Uruku Prison who is her former husband within the prison compound and he asked to talk to her but she stated that she was busy and would find time later in the day. Shortly thereafter, accused called her on phone and sent her threatening text messages and upon receipt thereof reported the matter to the officer in charge Mr Manyara, who gave her one week leave so that he could work out modalities of transferring either her or accused from the station. Soon thereafter, accused’s mother called her and informed her that accused had sent her a message threatening to kill himself. She was going to look for accused’s friend Mr Muchoka to calm accused when she saw accused running towards her armed with a gun. He fired towards her twice and she luckily escaped after running towards the prison’s gate but accused followed her and dragged her into his house where he undressed and beat her up. She heard several gun shots while she was held hostage but subsequently accused surrendered and handed the gun to Mr Manyara. The witness later learnt that someone she did not know had been shot.



3. On August 29, 2016, Kennedy Khaemba Kisiangani, a prison officer at Uruku GK Prison was issued with a G3 rifle serial number 94042360 with 20 rounds of ammunition. At about noon, accused approached him and grabbed the gun from him and fearing for his life, took cover. Immediately thereafter, he heard a gunshot. He heard a second gun shot and saw accused holding the gun on his right hand as he dragged his wife with the left hand. Accused held his wife hostage in his house and only surrendered three hours later having already spent 3 out of the 20 rounds of ammunition. The following day, the witness received information that one Catherine had been shot the previous day.
4. Raphael Kipchirchir Kibowen, also a Prison Officer at Uruku GK Prison was on duty on August 29, 2016 when he heard gunshots at about noon and was informed that accused who was armed had taken his wife hostage. Upon surrendering, accused handed over to Mr Manyara a G3 rifle serial number 94042360 with 17 rounds of ammunition. The witness stated that he had issued the gun with 20 rounds of ammunition to Kennedy Khaemba as shown on the Arms Movement Register (PEXH 3) and did not know how they came to the possession of accused. In cross-examination, the witness stated that accused was not issued with a gun and that 8 G3 rifles and 5 MP5 were issued for rescue purposes from which 31 rounds of ammunition were spent but the cartilages were not collected for examination.
5. C I Stephen Chacha also a prison officer at Uruku GK Prison heard gunshots at about 12.45 pm on August 29, 2016 and upon being informed that accused was holding his wife hostage went to accused's house from where he reported the matter to police. The witness stated that he did not know who shot Catherine.
6. An autopsy on Catherine Muthoni's body was conducted by Dr Ndiang'ui on September 29, 2016 after it was identified by her father Patrick Githinji Maina. The postmortem form tendered as an exhibit reveals that Muthoni suffered a fractured skull from which the doctor formed an opinion that deceased died of meningitis due to open skull fracture following a gunshot injury. According to the doctor, the bullet did not exit.
7. CPL Joshua Sila Kiveli arrested accused on August 29, 2016. He also received a G3 rifle serial number 94042360, its magazine, 17 rounds of ammunition and one spent cartilage collected from about 50 metres from where the victim lay which he submitted for examination. The examination was carried out by a firearms examiner Mr Alex Chirchir who found that the G3 was in good general and mechanical condition and was capable of being fired, the 17 rounds of ammunition and the spent cartilage were in caliber 7.62 x 51 mm and from the ejector markings and firing pin indentation on the spent and test fired cartilage, the examiner formed an opinion that they were fired from G3 rifle serial number 94042360.

### **Defence Case**

8. In his sworn defence, accused conceded that he had an altercation with his wife Janice on August 29, 2016 while he was in possession of a G3 rifle the subject of this case that was given to him by his colleague Khaemba. He conceded that he fired once after he heard gunshots but denied shooting Muthoni.

### **Analysis and determination**

9. Section 203 and 204 of the *Penal Code* under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.



10. The sections read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”

11. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that accused caused the said death and that he was actuated by malice.

**a. The death of the deceased**

12. The postmortem form PEXH 4 reveals that deceased Catherine Muthoni suffered a fractured skull from which the doctor formed an opinion that deceased died of meningitis due to open skull fracture following a gunshot injury.

**b. Proof that accused person committed the unlawful act which caused the death of the deceased**

13. Accused conceded he fired once. This was indeed confirmed by the firearms examiner who stated that one spent cartridge that was submitted to him and which he examined was fired from G3 rifle serial number 94042360. There is evidence that over 31 other cartridges were fired from other guns by other prison officers but interestingly, either by default or by design, none of them was taken for examination. The foregoing notwithstanding, the only evidence that tends to link accused to the shooting of the victim was that the cartridge he fired was collected about 50 metres from where the victim lay. The prosecution however failed to demonstrate by evidence, that deceased died from the bullet fired from accused's gun and not from any of the other 31 rounds of ammunition that were fired on that date.

14. No explanation was offered why the investigating officer did not submit the other 31 rounds of ammunition for examination and the court is entitled to make an inference that the evidence therefrom might have been adverse to the prosecution case.

15. The circumstances in this case do not point to the hypothesis that the killer shot was fired by accused and no other person. I therefore find that Prosecution has failed to prove beyond any reasonable doubt that accused committed the unlawful act which caused the death of the Catherine Muthoni.

**Malice aforethought**

16. The prosecution having failed to prove actus reus', I find that it would be futile for this court to delve into the issue of malice aforethought.

17. In the end, I have come to the conclusion that this case was not properly investigated and there appears to have been some concerted effort to conceal the culprit that caused the death of Catherine Muthoni. From the evidence on record, I find accused not guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and he is hereby acquitted.

**DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**WAMAE T W CHERERE**

**JUDGE**

Appearances

Court Assistant - Kinoti



accused - Present

For the accused - Mrs Ntarangwi Advocate

For the State - Ms Mwaniki (PPC)

