



REPUBLIC OF KENYA



**Republic v Onyoni (Criminal Case 31 of 2020)  
[2023] KEHC 92 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 92 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 31 OF 2020  
TM MATHEKA, J  
JANUARY 19, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LUSALIAH MORAA ONYONI ..... ACCUSED**

**JUDGMENT**

1. On the night of August 11, 2020 about midnight Thomas Muragwa Mose, the Senior Assistant Chief Kirandi Sub Location was sleeping in his house when he received a call from one John Muhia, a Nyumba Kumi elder. John was reporting that Rosalia Moraa aka Blackie had reported to him that she had found her friend one Charles on the road near her house, dead. He told John to tell Rosalia, that if her friend was already dead, to guard the body till morning when other action would be taken.
2. The next morning he went to the scene. He testified that he found a crowd that had already formed and people were threatening to beat the accused. He warned them he would arrest anyone who beat her. He observed that the body lay on its back. Both legs were inside one trouser leg, the head was turned a bit, there was some blood from the mouth, and it appeared to have been dragged from somewhere. He also observed that he appeared to have been hit with something. He said they found dry blood stains in Rosalia's house including her bedroom.
3. On cross examination he told the court that it was not in his statement that he had made those observations with respect to the body of the deceased because nobody asked him. That his role in this case was to tell the court that he had called the police and all he said in his statement was that the police arrived..
4. He admitted that upon being called by the Nyumba Kumi he told him categorically that he would not go to the scene at night, because he did not have security, and was not armed. That there could have been other killers. That there had been people drinking at Rosalia's until 10:00pm that night. That he



- had not arrested the drinkers. That he was not asked about the drinkers so he did not tell the police about them.
5. On the same date August 11, 2020 at 8.00 a.m., PW2 Gishon Okeyo Nangoiya received a phone call from the wife of his brother Charles Omari Nangoiya that he had been found dead. When he arrived at his home at Kaundo Village in Molo, he found that the body had already been taken to the mortuary. He attended the post mortem on August 19, 2020 where he identified the body.
  6. On cross examination he said he did not know one by the name Rosalia Moraa or whether she had a relationship with his brother. He only knew that the body was found near her home.
  7. Felix Michael Omari PW3 told the court that he was rang by his brother John Omari on August 11, 2020 at 7.00 a.m. He told him that their father had died. He was at Kaundo Village. He went and told neighbours what his brother had told him. He then accompanied the same brother to Satiatim where their father was said to have died.
  8. Upon arrival, he saw a crowd, people were screaming, he moved close there, and when he saw the body he conducted prayers. He said he noticed injury on the eye, bleeding from nose and mouth, injury on left arm. Police came, examined the body, took photos and removed to Molo Mortuary.
  9. He testified that when the police arrived they also went to Rosalia Moraa's house. He said he knew her as his father's mpango wa kando. That his father used to frequent Moraa's house and he suspected that she had been involved in his father's death. He said that he entered Moraa's house with the police, and that they found blood and took photos of the blood.
  10. On cross examination he said where Moraa's house was, there were other houses but the body was found nearest Moraa's house. He said he did not know how many houses there were because it is a village, however, he said it was Moraa's rented house. He insisted that he saw blood in Moraa's house and he knew that that blood belonged to his father because his father used to go to Moraa's house often. That when he saw his father's body on the road side he was still bleeding. Asked what he had to show that it was his father's blood, he said the CID officers took samples of the blood. He took photos with his own phone. That he saw a trouser on the bed but did not know whose trouser it was. He said his father's body was fully dressed.
  11. He testified that Moraa was mob injusticed by the crowd on suspicion she had killed his father but denied participating in the beating. He denied that he had any grudge against Moraa for being his father's mpango wa kando. He said his father left home on August 8, 2020.
  12. Eunice Njeri Chege PW4 was Moraa's neighbour and Sakaitim. Her testimony was that on August 10, 2020 at 11.30 p.m. She was sleeping when Moraa went to her house and told her that she had found her "Mzee kwa barabara amekufa". She said she knew Moraa's "mzee" as Charles or Muriseru.' She said she had seen Charles the day before he died at Moraa's, that her house in across the road from Moraa; about 10mins /5 mins walk.
  13. Upon receiving this information from Moraa she woke up her husband, they all went to John Muhia the Nyumba Kumi, who rang PW1the chief, 'Mose' who refused to come and told them to go and sleep.
  14. She said she too was a tenant and had found Rosalia and her mzee the deceased living there, but the mzee had another boma where he would go and then came back.



15. She said on cross examination that she did not see Charles on August 10, 2020, she saw him on 9<sup>th</sup>, she did not see him on 10<sup>th</sup> at Moraas. She said when Moraa went to her house, she was with another neighbour, she said Moraa was in shock but was not screaming.
16. PW5 John Muhia, the Nyumba Kumi told the court that on August 10, 2020 at 12.06 a.m. he was called out by Rosalia Moraa, Eunice Njeri and her husband Gitau and another neighbour by the name Gitau. They told him about Charles. He rang PW1 the chief about what Moraa told him, the chief told him to tell Moraa to go sit next to her husband's body, and the rest of them to go and sleep till the next day. They all left for their houses. The following day he went to the scene. He saw the crowd about 8 to 10 m from Moraa's house. He did not reach the body.
17. He said he knew Moraa and the deceased as a couple, they were friends, he would see them together, they were also his neighbours. He said he did not see them on August 10, 2020. On cross examination he said he knew that the mzee had his wife and children but was also living with Moraa. He said his house was one acre from Moraa's house, and that the road was about 300 m away from Moraa's house. He said the home of Eunice is one acre from that of Moraa. He said he knew Charles as a friendly person. He had not heard that he had enemies. He did not see Charles on August 10, 2020.
18. PW6 Dr. Risper Mutindi, the Medical Officer Molo Sub County Hospital conducted the post mortem on the body of Charles Omari on August 19, 2020 at Molo Mortuary. It was the body of a male African, 55 years old. He had no visible external injuries, blood oozing from ears and nose. Massive contusions on the head caused by blunt object, contusions on the inner scalp, on the brain, between the parietal lobes and occipital lobes. He appeared to have lost a lot of blood, the large intestine was pale. Her opinion was that the cause of death, was traumatic brain injury from blunt object/severe hemorrhage. On cross examination she said that a blunt object injury, hemorrhage and brain injury could result from a fall. She said the loss of blood was from the ruptured vessels in the brain.
19. PW7 Polycarp Lutta Kweyu was from the Government Analyst Laboratory, Kisumu. On October 15, 2020 he received samples for analysis. These were
  - i. Long sleeved navy blue jacket – P. Exhibit 2
  - ii. Nails of Charles Omari Nangoiya – P. Exhibit 3
  - iii. Soil suspected to have blood – P. Exhibit 4
  - iv. Hair of Lusalia Moraa Onyoni – P. Exhibit 5
  - v. Blue jeans trouser – P. Exhibit 6
20. He found that the stains on the jacket, trouser and soil were all human blood. The DNA profile on these matched that of the nails of Charles Omari Nangoiya. The DNA profile from Rosalia did not match any of the above. He produced his report – P. Exhibit 7 together with the Exhibit Memo.
21. PW8 No. 112795 PC Juma Mweni attached to DCI Molo was the investigating officer in this case. On 11<sup>th</sup> August 2020 at 9.00, the DCIO Molo, a Chief Inspector Yattani directed him to investigate this case that was reported by the Chief of Sakaitim village one Thomas Mose. Accompanied by his 2 colleagues and the police driver, they proceeded to the scene. There was a crowd. He saw the body on a feeder road. It lay facing up. He said, “kulikuwa na mtafaruku wakiwa na gadhabu. They wanted to lynch the accused after finding blood in her house.”
22. He testified that they rescued her from the crowd. She led them to her house which was nearby. He said that it was a room. That the room was disorganized as though there had been a mtafaruku inside.



- He said they found a blood stained jacket, fresh blood on the soil on the floor. She could not explain this and they arrested her. The accused was detained at Molo Police Station. After the charge and cautionary statement in which she was unable to explain anything the investigating officer charged her with murder. His view was that the fresh blood found in the house and the exhibits taken to government analyst were evidence, dhahiri, shahiri that the deceased was killed in the house, then taken out to mislead the investigation.
23. On cross examination he told the court that the body was on a feeder road used by members of the public. He said he did not find even one witness who said they saw the deceased in Moraa's house that fateful night neither did he recover a murder weapon. He said Moraa's house was not a rental house but the house where she lived. He did not have any document to prove she owned the house. He said that when he searched the house he did not find any document that belonged to the accused, that there was a bed and blankets, that no witness identified the clothes there as belonging to the accused.
  24. He said he took charge of the scene when they entered the house. He said that he took photos using his phone as the scenes of crime personnel were not present, that he forwarded the photos to scenes of crime. However he had not made an affidavit as required by section 106 of the [Evidence](#) though he claimed that the photos were certified.
  25. He confirmed that at the scene when he collected the samples he did not prepare an inventory or any document which the accused signed to confirm that the items were collected from her house, he said he scooped the soil from the floor of the house with a plastic container which he did not send to the government analyst with the soil. He said the exhibit memo said "blood soaked soil scoop in khaki envelope found in the house of the accused." He said he meant soil scooped from the house of the accused. He said he did not know that PW3 the son to deceased said he took photos with his phone. He confirmed that nothing that belonged to Moraa was blood stained. Reading from his statement he said a blue jacket with blood and soil soaked with blood were found at the scene, however there was nothing about the trouser. He said in his statement he had not mentioned the ownership of the jacket, he denied that the blood stained clothes were the ones the deceased was wearing. He said he did not have the photos from inside of the house, he did not recover the clothes worn by the deceased for forensics. He did not recover the weapon either. There was no blood at Rosalia's door, no blood trail from her house on the path to where the body lay. He confirmed that the deceased would take traditional brews that were sold in that village. He said that accused also sold the said brews. He denied that she was charged because she sold traditional brews, he explained that he forgot about the trouser because they were in a hurry to leave the scene. He denied fixing the accused.
  26. On re-examination he said he knew the house of accused from the chief, the suspect and son of the deceased. He said he did not recover any photos. He denied that deceased was from a drinking spree and was beaten, and he framed the accused. He said there was fresh blood of the deceased in accused's house.
  27. On the basis of the foregoing evidence Lusalia Moraa was charged with Murder Contrary to section 203 as read with section 204 of the [Penal code](#), where it was alleged that on August 10, 2020 at Sakaitim Village Molo Sub County she murdered Charles Omari Nangoiya. She denied the charge.
  28. In her sworn statement of defence she told the court that true she was in a relationship with the deceased since 2019. That she was aware he was married with children, but his wife and children did not know her. She and the deceased were not living together but he would come and go. She said she had three children, 22 years old girl and 14 year old twin boys whom she lived with.
  29. On the night of August 10, 2020 at about 10.00 p.m. she heard noise outside. When she went out she heard that it was coming from the shops, and there was another neighbour who was also outside,



- they stood listening. They then walked towards the noise, and about 50m from where they had been standing they found the deceased. She identified him. She told the neighbour to accompany her to the chief but he said they go to Nyumba Kumi. What transpired thereafter is the testimony of PW1, PW4 on record.
30. The next day she raised alarm. Neighbours came. She said she had last seen him on August 10, 2020 at 7.00 a.m. she denied there being any blood in her house. She said she and the deceased never quarreled or fought. She denied committing the offence. She said she was arrested because he was found near her home.
  31. On cross examination she testified that she told Eunice Njeri her nearest neighbour what she had seen, that she went to house of Eunice Njeri with one Gitao. She said when she heard the screams she was not with Gitao in her house but found him going to his home. She said that the deceased used to drink traditional brews in the area.
  32. Has the prosecution established the charge of murder against the accused person beyond a reasonable doubt?
  33. Each side filed written submissions. For the prosecution it was submitted that they had established the ingredients of murder; Fact of death of the deceased and its cause Caused unlawfully by the accused With malice aforethought.
  34. It was argued that the deceased could not have inflicted the injuries on himself, it was urged that the case for prosecution was premised on circumstantial evidence. The prosecution cited *Simon Musoke vs Republic V.R.* [1958] EA 71, on the three tests that circumstantial evidence must satisfy;
    1. The circumstances from which an inference of guilty is to be drawn must be cogently and firmly established.
    2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
    3. 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.
  35. The prosecution argued that from the evidence on record the accused murdered the accused in cold blood, dragged the body to where it was found and started a mission to cover up, by calling a passerby one Gitao with whom they went to the house of Eunice Njeri.
  36. The Prosecution totally relied on the evidence of the investigating officer, and the government analyst about the finding of the deceased's blood in the house and argued that instead of offering an explanation the accused simply denied the blood in her house and the blood stained jacket.
  37. With respect to malice aforethought, it was argued by the prosecution that the type of injury and the location of the injury, showed that the person who caused it intended to kill the deceased, section 206 of the *Penal Code* was relied on.
  38. The defence on its part set out seven (7) issues for determination.
    1. Whether the ingredients of murder have been satisfied.
    2. Whether the accused person caused the unlawful death of the deceased.



3. Whether the circumstantial evidence adduced by the prosecution was sufficient to prove the charge against the accused.
4. Whether samples for evidence were collected properly.
5. Whether the contradicting evidences produced by the prosecution witnesses jeopardizes its case.
6. Whether the failure by the prosecution to call crucial witnesses jeopardizes its case.
7. Whether the prosecution has proved its case beyond reasonable doubt.

39. It was argued that the prosecution had failed to prove murder as defined by section 203 of the [Penal Code](#). That the said Eunice Njeri the nearest neighbour to accused had not seen the deceased at accused's house, there was no evidence of argument or fight witnessed between the two, no eye witness to the causing of the injury. Counsel relied on Criminal Case (Murder) No. 3 of 2018 [Republic vs Anthony Wambua Willy](#), the court established that,

“The prosecution must prove all ingredients of the offence of murder in order to sustain a conviction thereof. As per the ingredients provided for under section 203 as read with section 204 of the [Penal Code](#), the prosecution must prove beyond reasonable doubt that there was death of a human being and that it was unlawfully caused with malice afterthought either directly or indirectly by the accused.... The court found the accused not guilty of the offence of murder.”

Defence also cited [Republic vs Ismail Hussein Ibrahim](#) [2018] eKLR where the court acquitted the accused person and, in its reasoning, established that the prosecution did not show the court that the accused person had any intention of killing the deceased.

40. It was also argued that there was no evidence that the accused caused death of deceased, no trail of blood from her house to where the body was no tracks/marks of dragging from her house, no evidence that she had dragged the body, and that the prosecution failed to show how, if it was true that the body left Moraa's house, how it reached where it was found.
41. On whether the circumstantial evidence was sufficient, it was argued that no DNA of the accused was found on deceased or vice versa. That the allegation that there was a blood stained jacket found on the bed, and no blood, that there was blood stained soil in khaki envelope. The defence theorized that these clothes could have been planted in the house.
42. The defence argued that the case for the prosecution fell short of the standards for circumstantial evidence and cited [Sawe vs Republic](#) where the court stated;

“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of [Mary Wanjiku Gichira vs Republic](#) (Criminal Appeal no. 17 pf 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.”



43. Counsel urged that the circumstantial evidence fell short of the standard.
44. It was also argued that the samples for DNA were not properly collected, and the Exhibit Memo indicated that the soil sample was found in a scoop already in the house.
45. The investigating officer did not have proof that the house where he allegedly found these items belonged to the accused or whose jacket it was that was blood stained. Photographs allegedly taken of the scene were not produced to support the allegations of blood stains or signs of alleged struggle; that prosecution witnesses contradicted themselves; no eye witness of the murder, no evidence of motive.
46. The defence also argued that crucial witnesses were not called and relied on [\*Peter Nyamu Mutithi vs Republic\* \[2021\] eKLR at Nairobi Criminal Appeal 13 of 2020](#) the learned judge cited with approval the case of *Bukenya vs Uganda* where the court stated:

“In our view, the failure by the prosecution to call crucial witnesses weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the applicant which we hereby do.”
47. Citing [\*Republic vs Zablon Misiko Bisburu\* \[2019\] eKLR](#), counsel argued that prosecution had failed to discharge its burden of proof.
48. I have carefully considered the evidence, the submissions by counsel and the authorities cited. The issue is whether prosecution has established beyond a reasonable doubt that the accused person did murder the deceased as alleged.
49. The fact of death is proved, the post mortem report indicates that the deceased died as a result of hemorrhage and injuries to the brain following blunt trauma.
50. Who caused the injuries? The prosecution point a finger and the accused person, for 2 reasons, she had a relationship with the deceased and the body was found by the accused near her house, both facts are not denied. What is denied is that the accused caused the death of the deceased.
51. The prosecution must prove that the accused actually caused the death? Their case is based on circumstantial evidence. Having no eyewitness to any fact that could have led the accused to killing the deceased the question then becomes whether all the other facts point only to the accused person?
52. To begin with there was one person the name Gitao who accompanied the accused to PW4 and 5's houses. The prosecution did not call him though his presence was acknowledged by both witnesses as the person who accompanied the accused after stumbling upon the body. The court was denied his evidence as to the circumstances surrounding the discovery of the body by the accused that night. Is it possible that his testimony would have supported that of the accused person? He was the first person to see the accused person that night when she found the body the Nyumba Kumi confirmed that he was in the company of the accused and the neighbours. His statement was not recorded, and he was not called.
53. PW1 the assistant chief testified that there were people drinking in Moraa's house that night until 10:00pm. This is the assistant chief so he must have had intelligence that Moraa was selling the traditional brew and there were drinkers in her house that night. He told the court that nobody asked him about these people. Clearly there were more people the police could have questioned as to the activities of the accused and the deceased that night but they did not.



54. The prosecution relied heavily on the allegation that deceased's blood was found in the house of the accused person. The evidence of his blood is intriguing. The PW1 who was the one who called the police said they found dry blood in Moraas house and bedroom. The investigating officer told the court that they found fresh blood in the house of Moraa. The assistant chief and those who first entered did not see any blood stained clothes.
55. The son to the deceased PW3 was categorical that he and others entered the house of the accused whom he described as his father's mpango wa kando, and he saw blood there. He did not say where exactly he saw the blood but he said he saw it there. He insisted that the blood he saw was his father's blood, put to task on how he knew, he said he just knew it was his father's blood. He stated, "we entered Moraa's house... we found blood, police and CID took photos of the blood... I knew it was my father's because he had died there... there was a trouser on the bed.... I do not know whose trouser it was...".
56. PW3 did not notice any blood on the trouser on the bed, he did not identify it as his father's trouser. The investigating officer stated that when they arrived at the scene they found a crowd that wanted to lynch the accused because they had found blood in her house, meaning that long before the police had arrived members of the public had entered Moraa's house and the scene had not been secured. He also stated that the room was disorganized, "we found a blood stained jacket, on the soil floor there was fresh blood."
57. It is noteworthy that the PW3 only mentioned a trouser he saw on Moraa's bed. It is evident that he was very keen on what was going on and he took photos, he does not mention any blood stained jacket, leave alone blood stained trouser. He said he saw a trouser, if it was blood stained he would have said so.
58. It is noteworthy that in his testimony the investigating officer only mentioned a blood stained jacket. He did not say where he found it in the house, which he said was a single room. Surprisingly the Exhibit Memo introduced the extra piece of cloth, blue jeans trouser that was blood stained. He told the court that he forgot to mention it because they were in a hurry to leave the scene.
59. Of utmost importance in this case is the photographic evidence of the scene which the police officers took why did they not produce them? These photos would have proved that there were indeed blood stains in Moraas house and that the 2 pieces of cloth were retrieved from there. This was also the evidence of the alleged disorganized room alleged to be a sign of mtafaruku by the investigating officer. This was the evidence that the prosecution intended to rely on to prove that the accused murdered the deceased yet they left it out. We can only draw the conclusion that the evidence would not have supported their theory and give the accused the benefit of the doubt created by that.
60. The DNA samples were not helpful. No clothing of the accused was retrieved to confirm whether the DNA of the deceased was on them, and even to confirm that that was her abode. If it was true as submitted that she killed the deceased and dragged his body 50m away from her house where is the evidence? There is no evidence that the clothes that had the deceased blood belonged to the accused. Whose clothes were they?
61. The investigating officer did not answer the big question as to how the accused moved he body from the house if indeed she killed the deceased in there and dragged him 50m away from her house. There was no evidence of drag marks, no evidence of blood trail, no evidence that the deceased body was indeed dragged from anywhere to the point where the body was found. The body did not have drag injuries. The clothes the deceased wore were not taken for forensic examination to determine whether the accused DNA was on them or even whether they had any drag marks on them. This evidence was crucial as it would have supported the prosecution's theory. Indeed there is no evidence that the



- investigating officer conducted any investigations with respect to the allegation that the accused killed the deceased and then dragged his body out of the house. .
62. The accused person told the court that she lived with her 3 children aged 22 and 14, in that single room. The investigating officer did not mention this nor did he question them as to whether they may have heard anything that night.
  63. There was no investigation on the movements of the deceased on the fateful night yet there was evidence that there were several tradition brew places in the area where he would go to drink the brew.
  64. The investigation officer upon finding the obvious suspect stopped there and did not conduct a thorough investigation to rule out other foul play in particular the possibility that the deceased could have been attacked while on his way to the accused's house. This is because every witness said that the deceased would come and go to the accused's house.
  65. The Postmortem indicated the cause of death to include loss of blood. The doctor who conducted the post mortem, was asked whether any of the injuries she mentioned could be caused by a fall and she said answered in the affirmative, creating gaps in the case for the prosecution, the deceased could have fallen and hit his head, could have been attacked by other people as he went to deceased's house.
  66. What was the motive for killing? There was no evidence that the accused and deceased had any quarrels or disagreement, those who testified knew them as friends, no neighbour heard any altercations. Who else would have wanted the deceased dead? What was the motive of the murder? The prosecution is silent on this without any evidence of fight or quarrel or motive, the charge of murder cannot stand.
  67. In the final analysis the question is whether the case answers to the three tests
    - a. The circumstances from which an inference of guilty is to be drawn must be cogently and firmly established. This has not been done
    - b. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused. This is clearly not the position
    - c. 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. The gaps in the case for the prosecution fail this test
  68. This case falls squarely into the caution laid out in *Sawe vs Republic*. The accused was the easy suspect. The suspicions were galore, but however strong those suspicions they are not proof.
  69. After considering the evidence for the prosecution and the defence, and analyzing the case for the prosecution the only ingredient proved is that a person was killed, a life was lost, but as to whether Lusalia Moraa also known as Rosalia committed the murder, there is sufficient doubt to warrant her acquittal.
  70. In the circumstance, I make a finding of not guilty, dismiss the charge against her and acquit her accordingly.
  71. She is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JANUARY 2023.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

C/A Jennifer



For state: Ms. Murunga

For Accused: Mr. Mongeri

Accused Present

