



**Republic v Abshir (Criminal Case 16 of 2019)
[2023] KEHC 1501 (KLR) (Crim) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1501 (KLR)

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

**CRIMINAL
CRIMINAL CASE 16 OF 2019**

JM BWONWONG'A, J

FEBRUARY 27, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

NADIFO MOHAMED ABSHIR ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the offence are that on February 24, 2019 at 3 00 am at Eastleigh 1st Avenue 10th street opposite Casino estate in Starehe Sub County within Nairobi County, the accused murdered Ismahan Abdisalan Sheikh Omar.
2. She pleaded not guilty to the charge. She testified on oath and did not call any witnessing her defence.

The case for the prosecution

3. The prosecution called eleven (11) witnesses in support of their case.
4. Balisan Abdi Salati (Pw 1) testified that she was a friend of the accused for over 10 years. On February 24, 2019 at around midnight, the accused called her and informed her that the deceased had died. She did not disclose the cause of death. In the morning in the company of Hawa Ibrahim Salat (Pw 2) and Rahma Abdi Ali (Pw 3), they went to the house of the accused, who lived with the deceased in Eastleigh. Upon arrival, they found the body of the deceased covered in clothing and on top of the bed. They called an ambulance and the body of the deceased was escorted to Masjid Noor Mosque for burial rites.
5. In cross-examination, Pw 1 told the court that it was the deceased's grandmother, who requested the accused to live with the deceased. She also testified that there that there was no grudge or ill will between



- the two. She also testified that she did not see the body of the deceased as it was covered and she was still in shock. In addition, the accused did not accompany them to the mosque, as she was left behind to take care of her children.
6. Hawa Ibrahim Salat (Pw 2) gave similar evidence to that of Pw 1. On cross-examination, she told the court that she did not know whether there was grudge between the accused and the deceased. She maintained that accused did not inform them what had caused the death of the deceased.
 7. Rahma Abdi Ali (Pw 3) testified that on the fateful day, she went to the accused's house in the company of Pw 1 and Pw 2. She told the court that she did not see the body of the deceased since it was covered. The accused informed her that the deceased had a heart attack. On cross-examination, she testified that she only arrived at the scene, when the deceased's body was being put into the ambulance.
 8. Hamdi Mohammed Khalif (Pw 4) testified that on February 24, 2019, at around 6.30 pm she received a phone call from a nephew of the accused (Ali). He informed her that the deceased was dead. She called the accused who confirmed the information and the cause of death was a heart attack. The accused also told her that the deceased's body had been taken to Masjid Noor Mosque. She visited the mosque, where she found Pw 1, Pw 2, and Pw 3. She was informed by one of the women that the deceased died from a heart attack. However, she was later informed that the deceased had been attacked by a superpower gang.
 9. She told the court that the body of the deceased had injuries on the face, temple, and cuts on both legs. Most of the body was also burnt. She reported the incident at Pangani Police Station and she accompanied the police to the accused's house. In cross-examination, she testified that she is an aunt of the deceased. She did not know of any grudge or issue between the accused and the deceased. She testified the deceased's grandmother trusted the accused to live with the deceased.
 10. Fouzia Mohamud (Pw 5) told the court that she is a resident of Kakuma and the mother of the deceased. The deceased was 14 years old. She testified she was undergoing treatment for mental illness and could not take care of the deceased. She also testified that the accused called her and informed her that her daughter had died. It was her testimony that the deceased was of good health. When she returned from Kakuma, the deceased had already been buried. She did not know the cause of death. The accused complained that the deceased was practising 'devil worship' in her house. She also suspected the accused of being a devil worshiper.
 11. Ali Hassan Guyo (Pw 6) testified that he was the caretaker in the building, in which the accused and the deceased resided in Eastleigh 10th Street. When he reported on duty on February 24, 2019 at around 10.00 am there were chaos in the building. The police were also present and were searching the premises of the accused. The accused was then arrested and the police took away the blood-stained clothes.
 12. In cross-examination, he told the court that he did not know whether there existed grudge between the deceased and the accused. Further, he never witnessed the killing of the deceased and did not see her body.
 13. No 91408 PC Charles Karanja Njoroge (Pw 7) told the court that he took over the investigations from PC Munene, who had received the report at Pangani Police Station. In the company of PC Munene, he visited the scene of crime. The accused had already been arrested. He drew a sketch plan of the plot, where the body of the deceased had been removed from. During the interrogations, the accused told the police that the deceased was assaulted by a group called 'super power'. That he investigated the allegations, which he concluded were unfounded. No murder weapon was recovered from the accused.
 14. There was no eye witness to the commission of the crime. That he conducted investigations leading up to charging the accused with murder.



15. Dr. Muriuki Ndegwa (Pw 8) of the Ministry of Health in the Department of diagnostics and forensics told the court that on February 25, 2019, he performed a post-mortem examination on the body of the deceased. The deceased was a female adolescent aged 15 years in good nutritional status, slender and medium height. She had multiple bruises and abrasions on the trunk, upper limbs, head and on the face. The head and face were swollen. At the request of the family of the deceased, Pw 8 did not dissect the body of the deceased.
16. Pw 8 then carried out a limited post-mortem examination at the request of the Muslim family of the deceased. The cause of death was due to multiple injuries due to blunt force trauma.
17. He produced the post mortem report dated March 1, 2019 as a prosecution exhibit Pexh 1.
18. In cross-examination, he told the court that he did not cut open the body of the deceased at the request of her relatives. He testified that he did not perform a toxicology test and could not also know whether the deceased died from a heart attack or not. He was of the view that he had the discretion to perform the limited post mortem examination. He maintained that the bruises and abrasions were not consistent with a heart attack.
19. Amina Ali Kassim (Pw 9) a mortuary attendant at Masjid Noor Mosque, told the court that the deceased was brought by an ambulance in the company of three ladies. She could not identify them as they were in 'buihuis'. She was asked to wash the body which had injuries on the head. The relatives of the deceased were called and the matter was reported to the police station, whose officers took the body.
20. Joshua Munyao Mutuku (Pw 10) testified that he was an ambulance driver and was the one who took the body of the deceased from a building on 10th Street in Eastleigh to the Mosque in South C. He was paid for his services and left after he had completed his task.
21. No 80081 CPL Godfrey Munene Njagi (Pw 11), the investigating officer told the court that on February 24, 2019, he received a report that the body of the deceased had been taken to a mosque in South C for burial rites, but the cause of death raised questions. In the company of Inspector Koech and PC Karanja, he proceeded to the scene of crime where they found the accused. At the scene, they took photographs and recorded statements. Upon inquiry, the accused informed them that the deceased had died from a heart attack but had visible injuries. They arrested the accused together with Pw 1, Pw 2, and Pw 3 but found no incriminating evidence against them. He proceeded to charge the accused after the conclusion of his investigations.

The case for the defence.

22. At the close of the prosecution's case, this court made a determination that the accused had a case to answer under the provisions of section 306 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. She was put on her defence and decided to give sworn evidence. She did not call any witness in her defence.
23. In her defence, the accused denied killing the deceased. She testified that she had lived with the deceased for six months After she was brought by her grandmother and mother, who was her cousin. That the deceased used to spend time with a group known as 'superpower' whom she thought were dangerous. She testified that when the mother of the deceased left for Kakuma, a boy (Abdirizak) and two girls (Ilhan and Hafsa) came to see the deceased. The deceased followed them. At around 7.30pm, when the deceased came home, her face was covered. She could only see her eyes as she was dressed in a hijab. After she had had her supper, the deceased went to sleep.



24. She testified that around midnight, she woke up and uncovered the deceased. She had injuries on her left ear, forehead, eyelid and body. She asked her the cause and she said that she had been stabbed with a knife by the group known as ‘superpower’. Her clothes and beddings had blood stains. At that time, she called the mother of the deceased and her grandmother. They advised her to take the deceased to hospital. She told the court that due to a language barrier, she was unable to take her to the hospital. Her language barrier was that she did not know both Swahili and English. In the morning, she rang Pw 1, Pw 2 and Pw 3. She informed them the deceased appeared dead. She covered the body. After they arrived, they called an ambulance. She stayed behind.
25. Later in the day, police arrived. They questioned her and she informed them what the deceased had told her, that is, that the injuries were inflicted by ‘superpower’. She told the court that her son Munisar who was 14 years old was present during the entire period. That he recorded a statement at the police station, which was produced as Dex 1 (a).
26. In cross-examination, she told the court that the deceased was a member of the ‘superpower’ gang. However, she did not report her to the police. Further, that she lived with the deceased and her two children all who were present in the night of February 24, 2019. She told the court that when she discovered that the deceased was not breathing, she was in shock and could not scream. That it was not the first time that the deceased had come home with injuries inflicted by the alleged ‘superpower’ group. The previous time, the injuries had healed without being taken to hospital.

The written submission of the prosecution

27. The prosecution did not file any written submissions. The prosecution is not allowed by law to file written submissions, since the prosecution was not conducted personally by the Director of Public Prosecutions in terms of section 310 as read with section 161 of the *Criminal Procedure Code*. Section 310 of the *Criminal Procedure Code* provides as follows:

“If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall, subject to the provisions of section 161, be entitled to reply.”

28. Additionally, section 161 of the *Criminal Procedure Code* provides as follows.

“In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply:

Provided that the Director of Public Prosecutions when appearing personally as advocate for the prosecution shall in all cases have the right of reply.”

The written submissions of the accused.

29. Mr Abdullahi learned counsel for the accused submitted that the prosecution had failed to discharge its burden of proof beyond reasonable doubt. Further, that the prosecution did not lead either direct or circumstantial evidence sufficient to prove the lesser offence of manslaughter. Learned counsel argued that the evidence that the prosecution sought to rely on against the accused was that the deceased was living with the deceased. This evidence was not cogent enough to link the accused to the death of the deceased. He cited the case of *Pius Arap Maina v Republic* [2013] eKLR, where the court held that the prosecution must prove a criminal charge beyond reasonable doubt. In addition, any evidential gaps in the prosecution’s case raising material doubts must be resolved in favour of the accused.



He urged the court to acquit the accused.

Analysis and determination.

30. I have carefully considered the entire evidence adduced by the prosecution and the defence, together with the submission of the defence counsel and the authorities relied upon. The prosecution has the burden of establishing the guilt of the accused person to the required standard of proof beyond reasonable doubt. Section 203 of the *Penal Code* provides thus:

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

31. In the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the Court of Appeal observed that the elements of the offence of murder required to be established by the prosecution are:

- a) “That 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.”

32. Starting with the first element, PW 8 produced in court a post mortem report which established that the deceased died as a result of multiple injuries due to blunt force trauma. The evidence of PW 4 who also saw the body of the deceased confirmed her death. There is no doubt that the death of the deceased occurred. This court shall examine the evidence of what caused the death of the deceased later in this judgement.

33. Turning to who caused the death of the deceased, the prosecution majorly relied on the circumstantial evidence of the fact that the deceased died in the accused’s house to establish the guilt of the accused person. In *Abamad Abolfathi Mobammed and another v Republic* [2018] eKLR, the Court of Appeal in respect of reliance upon circumstantial evidence observed that:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr App No 32 of 1990*, this court set out the conditions as follows:

“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 the guilt of the Subject;
- (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.”



34. In the instant case, there was no eye witness to the murder. PW1, PW 2 and PW 3 testified that the accused called them on the fateful night to inform them that the deceased had passed away. When they went to her house, the next morning, she informed them that she believed that the deceased had died of a heart attack. PW 5 the mother of the deceased, told the court that the accused had informed her that the deceased was involved in ‘devil worshipping’. The investigating officer did not inform this court how he came to a decision to charge the accused. Other than the evidence that the deceased was living and died in the accused’s house, no other evidence was produced to connect the accused to the offence.
35. On the issue of cause of her death, PW 8 testified that the deceased’s body had multiple cuts on her temple, upper limbs, head and face. He testified that he did not cut open her body during the post mortem on the insistence of the deceased’s family. He also admitted that he did not conduct a toxicology examination, neither did he explore the allegation by the accused that the deceased may have suffered a heart attack, so as to rule out the same. As it stands, the evidence by PW 8 that the deceased died due to multiple injuries caused by blunt force trauma was not cogent. It is at the request of the relatives of the deceased, who are Muslims, that he performed a limited post-mortem.
36. In *Dhalay v Republic* [1995-1998] 1 EA, the Court of Appeal held that:
- “while Courts were obliged to give proper respect to the opinions of experts, such opinions were not binding on the Courts. Expert evidence had to be considered along with all other available evidence and, where there was a proper and cogent basis for rejecting an expert opinion, a Court was perfectly entitled to do so. A trial Court had the duty of deciding whether or not it believed the expert and giving reasons for its decision.”
37. Based on the foregoing authority, I find that the evidence of Pw 8 was speculative at best and not cogent, given the fact that the doctor admitted that: he did not cut open the deceased’s body; he did not conduct a toxicology examination; he did not rule out the allegation by the accused that the deceased may have suffered a heart attack before she died. His evidence was therefore not convincing. I therefore reject his evidence that the deceased died due to multiple injuries caused by blunt force trauma.
38. The accused in her defence, testified that on the material day the deceased left with three visitors and later came that evening, had supper and went to bed. The accused woke up at around midnight and noticed the cuts on deceased’s body. She also testified that she had not noticed the cuts earlier, as the deceased was covered up in her hijab. The accused further testified that she called the deceased’s mother PW 5, which fact was confirmed by PW 5. She also informed PW 5 that she believed that the deceased was involved in ‘devil worshipping’. The accused testified that the deceased told her that the cult-like group had inflicted the cut wounds on her.
39. The investigating officer failed to investigate the allegation that three persons who had earlier visited the deceased and left with her earlier that day so as to explore if there was any truth to the cult allegations or what had transpired before the deceased came back home. Further, the accused’s son, who was present at the house that night, and who recorded a statement with the police was not brought to court to give his account of what happened that night.

This court in the case of *JOO v Republic* [2015] eKLR, held that:

“It is not lost to this court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled, proof beyond reasonable doubt hence this case cannot be an exception. This



court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

40. After assessing the entire evidence in the instant case, as required by the persuasive decision of the Court of Appeal in *Oketch Okale v Republic* (1965) EA 555, I find that the circumstantial evidence adduced by the prosecution did not point exclusively to the accused as the perpetrator of this offence. The chain of circumstantial evidence that would have pointed out exclusively to the accused as the perpetrator of the crime, was broken by the gap created by the son of the accused. The fourteen-year old son of the accused was taken by his father to Hargeisa in Somaliland after this offence was committed.
41. The prosecution failed to prove beyond reasonable doubt that the deceased died due to multiple injuries caused by blunt force trauma.
42. As stated earlier, the evidence by the pathologist (Pw 8) was speculative and not convincing. Secondly, other than the fact that the deceased lived with the accused, no evidence was led to prove that she killed the deceased, or was the one who inflicted injuries found on deceased’s body. The accused testified that it was not the first time that the deceased had come home with cut injuries, which she believed were inflicted upon her by a cult. Further, the accused’s son, who was said to be at the house on the material night was not called as a witness in this case. The failure of the prosecution to bring the son of the accused to give evidence in court created a gap in the chain of circumstantial evidence. The evidence of the accused was that the son was taken to Hargeisa town in Somaliland after this offence was committed.
43. Furthermore, the prosecution did not even make any attempt to get Munisar, the son of the accused to testify through video conference in view of the new technology that is in place. The prosecution also did not make any attempt to have the evidence of the son (Munisar) taken by a court in Somaliland pursuant to a commission issued by the High Court in Kenya; because the evidence of the son was
- “necessary for the ends of justice, and that the attendance of the witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable...”
- in terms of section 154 (1) of the *Criminal Procedure Code*.
44. The investigating officer did not explain to this court how he came to the decision of charging the accused with the offence of murder. The prosecution witnesses testified that they were not aware of any existing grudge between the accused and the deceased that would have caused the accused to kill the deceased. I am aware that the prosecution is not required to prove the motive in criminal cases. This is clear from the provisions of section 9 (3) which provides as follows:
- “(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”
45. In the premises, I find that the circumstantial evidence adduced by the prosecution has not met the threshold of proof ascribed by the Court of Appeal in the case of *Abamad Abolfathi Mohammed* (*supra*). The prosecution failed to establish the charge of murder contrary to section 203 as read with section 204 of the *Penal Code* to the required standard of proof beyond reasonable doubt.



46. I find that the Accused person is not guilty of murder and is therefore acquitted pursuant to the provisions of section 322 (1) of the [Criminal Procedure Code](#) with the result that she is hereby set free unless she is otherwise held on other lawful warrants.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Ms Peris Maina for the Republic

Mr. Abdullahi for the accused.

The accused in person.

