



**Republic v Were (Criminal Case 39 of 2015)
[2023] KEHC 3781 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 39 OF 2015**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

ALI INGOSI WERE ACCUSED

JUDGMENT

1. 2 witnesses testified in this matter. None of them witnessed the assault on the deceased, by the accused. PW1 was at her home on the material day, when she heard screams from the home where the accused lived. She found the accused at the scene, saying he had finished him. The deceased lay dead in a bedroom. PW2 was also not at the scene, when it happened. He was informed about it, and he went to the scene. He found the deceased dead, and the accused at the scene, saying that he had finished him. When PW2 spoke to the accused, he narrated to him how he snuffed life out of him, by strangulation, using the ngeta hold.
2. No other witnesses testified. Crucially, the pathologist did not take to the stand, and, therefore, there is no evidence as to the cause of the death of the deceased.
3. I put the accused on his defence. He chose to remain silent.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
5. On whether the deceased died, I have the evidence of both PW1 and PW2. They both saw his body. That is sufficient proof that the deceased in fact died. As the pathologist did not testify, there is no direct evidence on the cause of his death. The testimonies of PW1 and PW2 did not help much in that direction. They did not describe the state of the body they saw. Did it have injuries? If not, did it have marks of any sort? PW2 testified of the accused alluding to strangling the deceased, but the witnesses did not describe the state of the body, for the court to assess whether the story by PW2 was credible.



I have no basis of holding and finding that the deceased was strangled to death. The only conclusion that I can make is that the cause of death was not established. Naturally, as the cause of death was not established, the issue of causation and malice aforethought would also not arise. PW1 and PW2 placed the accused at the scene, alleged that he admitted to assaulting the deceased, but no concrete evidence was led to establish the cause of death, and without such evidence, there would be no basis for finding and holding that the accused caused the death.

6. It is my finding and holding that a case has not been made out against the accused person herein, to the required standard, of proof beyond reasonable doubt, that the accused person herein caused the death of the deceased herein, and did so with malice aforethought. I accordingly find him not guilty, and acquit him, under section 322(1) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of Salim Shikoba Angachi, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya.
7. The accused shall be set free, if he is still in remand custody, unless he is otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Shifwoka, Advocate for the accused person.

