



**Republic v Agoi & another (Criminal Case 4 of 2017)
[2023] KEHC 24617 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 24617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 4 OF 2017
MN MWANGI, J
JUNE 30, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

THOMAS CHITUMBUA 1ST ACCUSED

ARTHUR AGOI 2ND ACCUSED

JUDGMENT

1. The accused persons Arthur Agoi and Thomas Chitumbua were jointly charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. This Court later allowed the amendment of the information on 12th May, 2022. Based on the said information, the particulars of the charge were that on unknown dates between the 23rd and 24th October, 2016 at Timbini area in Kinunguna Sub-location in Ribe Location, Rabai Sub-County of Kilifi County within Coast Region, they jointly murdered Tabu Hamisi Chengo. The evidence adduced against them was through 5 prosecution witnesses.
2. PW1 was Saidi Hamisi Mwachenga, a resident of Mikindani. His evidence was that on 28th October, 2016 at 3.30 p.m., he was called by his sister who informed him that their mother had been called the day before and she had left home but had not returned. PW1 stated that he had called their mother but he did not get through to her on phone and they reported to the police.
3. He stated that 3 days later, they were told that there was a body that had been found at Kinunguna. He testified that on going there, they found that it was their mother's body. He saw that her head and chest were swollen and her legs had been tied with a rope. He also saw marks on the left side of her body. He stated that he attended the postmortem examination.
4. PW2 was Polycarp Hesketh Chevende. His evidence was that on 28th October, 2016 at 8.30 a.m., he was called by his brother in-law by the name Kalume who told him that his wife had gone missing



for 2 days and he was looking for her. PW2 stated that he started searching for her and her body was recovered. He indicated that her body was swollen and she had cracks on her head. He stated that he was present during the postmortem examination.

5. PW3 was Kadzo Kalume. Her evidence was that she used to live with her mother (the deceased) and that on 23rd October, 2016 at 9.00 a.m., while at work, her mother received a call and she informed PW3 and that she was going to Timboni, but PW3 did not accompany her. PW3 stated that at night, she called her mother but she did not take her call. That she called again and the person who picked the call said that it was a wrong number. She then called her brother Saidi (PW1) and informed him of the same and they went to Mwaweza to record statements. She stated that their mother never returned home. She later saw her body at Makadara (Coast Province General Hospital).
6. PW4 was Sergeant Patrick Otieno Ochuma who was attached to Bondora Police Station at Rabai Sub-County at the time he testified in Court. He stated that he had previously worked at Rabai Police Station and that on 24th October, 2016, the deceased Tabu Hamisi Chengo was reported to have been killed at Kinunguna Sub-County. That the report was to the effect that she was murdered on 23rd October, 2016 and abandoned at a grazing field by unknown people. He also stated that the matter was recorded in the OB of Rabai Police Station and that his fellow police officers went to the scene and took the deceased's body to Coast Province General Hospital.
7. It was PW4's evidence that on 17th January, 2017, he took over investigations from Sergeant Muthini and when acting on a tip off, he realized that Arthur Agoi's (the 1st accused person) telephone No. 0792126031 had made a call to the deceased's telephone No. 0704156649 on 23rd October, 2016 at 9.42 a.m. PW4 referred to a call log from Safaricom printed on 19th December, 2016. PW4 testified that after going through the call logs, he went to the 1st accused person's house at Kinunguni area accompanied by PC Mungania and PC Abdallah of DCI Kaloleni.
8. He stated that after introducing themselves to the 1st accused person, they asked him about the telephone conversation between him and the deceased, but he did not give a satisfactory response as he said that a person he could identify asked for his phone (mobile phone) to make a telephone call. He was then arrested.
9. PW4 testified that they arrested the 2nd accused on 23rd January, 2017 within Ribe area and after checking his call data, they found that he was in possession of the deceased's mobile phone IMEI Model No. 35515860420070.
10. PW4 produced a small black Nokia mobile phone in Court and a Safaricom phone log printout. He stated that they recovered the Nokia mobile phone from the 2nd accused person's pocket at Ribe area in Makungeni village. It was PW4's evidence that the Safaricom call logs record showed that the phone belonged to the deceased and her name was shown on the call log print out as Tabu Hamisi Chengo. That they took the 2nd accused person to Rabai Police Station after arresting him.
11. PW4 stated that with regard to the 1st accused person, the call which he made to the deceased connected him to her as he requested her to go to Bondora area to sell to him lemons. PW4 testified that a boda boda rider who dropped the deceased at Timboni area in Kinunguni, at Kambe, in Ribe gave them that information. PW4 also stated that the deceased's body was recovered 1½ kilometers from where she was dropped and that the 1st accused person who was from Vihiga County used to work in a farm close to where the deceased used to live. It was PW4's evidence that the deceased only received one call on that day and it was from the 1st accused person. PW4 stated that the deceased had an injury on her head caused by a blunt object but he did not establish the motive behind the deceased's death.



12. Dr. Nafisa Seif testified as PW5. She produced a post mortem report signed by Dr. Rambei of Coast Province General Hospital, where she was also working. She stated that the post mortem was done on 28th October, 2016 at the said Hospital, and from the said report, blood was oozing from the deceased's nostrils and she had scalp haemotoma. She indicated that the deceased had a skull fracture from the frontal part of the skull to the parietal lobe to the occipital region. She stated that the cause of death was severe head injury caused by a blunt object due to assault resulting in a linear skull fracture.
13. When put on his defence, the 1st accused person, Arthur Agoi gave a sworn defence. He denied knowing the deceased and also denied having called her on 23rd October, 2016. He claimed that a person whom he had seen at his neighbour's home on a certain day is the one who asked for his phone to make a call. He stated that on the day the said person borrowed his phone to make a call, that was the 2nd time for him to see that person. That he acceded to the request and the person made a call to someone he did not know. The 1st accused stated that after he was arrested, he got to know the name of the said person as Thomas Chitumbua, the 2nd accused person.
14. The 1st accused stated that he explained to the police that someone had asked for his phone to use and that he had seen the said person at Daniel Atuti's house doing some manual work and that when the said Daniel Atuti was arrested, he told the police that it was the 2nd accused person who had been doing manual work at his home. The 1st accused person denied having killed the deceased.
15. The 2nd accused person, Thomas's Chitumbua Duni gave a sworn defence. He stated that he was living at Ribe in Pendeza village where he was working as a farmer and plumber for Jackson Dzomba, at Kinunguni, Ribe. He denied any involvement in the deceased's death. He admitted having been found in possession of the deceased's mobile phone. He stated that on the morning of 25th October, 2016, Reuben Katama went to his house and told him that he was selling the phone in issue for KShs.400/= because he had financial problems and he also told him that the phone was his.
16. The 2nd accused person stated that after he was arrested, he took the police to Reuben's place of work on 24th January, 2017. He stated that Reuben was not found and he has never been arrested to date. The 2nd accused person admitted having asked the 1st accused person for his mobile phone in the year 2016 in order to call his sister but he could not recall the date or month. He stated that on calling his sister she was not available as she was "mteja". He denied having called the deceased as he did not know her.
17. On being cross-examined, he stated that he used to work in Tiribe at the 1st accused person's neighbour's home, and he used to see the 1st accused person from time to time and that he assisted him only once with his phone.
18. Mr. Muthomi, Prosecution Counsel, filed written submission on 16th October, 2020 and relied on the case of *Republic v Joseph Wamwea Gitere* [2019] eKLR on what constitutes malice aforethought in a case of murder.
19. The Prosecution Counsel also relied in the decisions in *Republic v Tubere S/o Ochen* (1945) EACA 63, *Ogelo v Republic* [2004] 2 KLR 14 and *Nzuki v Republic* [1993] KLR 171 on what constitutes malice aforethought.
20. Mr. Muthomi submitted that the evidence on record clearly shows that the body of the deceased was found with a swollen chest and head. That the postmortem conducted revealed the cause of death as severe head injury that had resulted to linear skull fracture. He urged this Court to find that that malice aforethought was established by the manner and severity in which the deceased was killed.



21. It was submitted by the prosecution that there was ample circumstantial evidence to point to the accused persons as the ones who caused the death of the deceased. Mr. Muthomi relied on the decision in *Abang'a alias Onyango v Republic* Criminal Appeal No. 32 of 1990 and *Sawe v Republic* [2003] KLR 364 on circumstantial evidence.
22. On the issue of the 2nd accused person having been found in recent possession of stolen property, Mr. Muthomi relied on the decision in *Samuel Muraya Mangi & another v Republic* [2010] eKLR and the case of *Matu v Republic* [2000] eKLR.
23. He submitted that the 1st accused person, made a phone call to the deceased on the date in issue, which is confirmed by the safaricom print out that was produced as an exhibit. He further submitted that the deceased's phone was recovered from the 2nd accused person who could not explain how he came to be in possession of the said phone.
24. Mr. Muthomi stated that the Investigating Officer testified that the 2nd accused person had informed them that he had bought the phone from one Lugwe but in his defence, he said that he bought the phone from one Katama from Ribe, but he could not take the police officers to the alleged seller.
25. Mr. Muthomi urged this Court to invoke the doctrine of recent possession after taking into account the period of time between the commission of the alleged offence and the date of arrest of the 2nd accused person. He also stated that the foregoing is also supported by the fact that the deceased was not found far from the area the accused persons used to live, which leads to the conclusion that they were involved in the death of the deceased.
26. Mr. Muthomi stated that it was not a coincidence that the deceased was called a day before she was killed and only for her phone to be found with the alleged caller who could not explain how it came to be in his possession. He prayed for the accused persons to be found guilty of the charge of murder and for them to be sentenced accordingly.
27. The learned Counsel for the 1st accused person, Mr. V. Omollo filed written submissions on behalf of his client on 28th October, 2020. He submitted that the 2nd accused person acknowledged that he indeed borrowed the 1st accused person's mobile phone on 23rd October, 2016, but he denied having called the deceased as he had called his sister.
28. Mr. Omollo submitted that there was no direct evidence that the 1st accused person caused the death of the deceased. He urged this Court to consider if the evidence adduced meets the test laid out in the case of *R v Kikering Arap Koske & another* (1949) 16 EACA 135 and *Sawe v Republic* [2013] KLR 364.
29. Mr. Omollo contended that the prosecution had failed to present a chain of evidence so complete as not to leave a reasonable ground for a conclusion consistent with the innocence of the 1st accused person. He relied on the case of *Mwendwa v Republic* [2006] 1 KLR 133, on what a Court has to look for in a case that rests on circumstantial evidence.
30. Mr. Omollo submitted that the prosecution had failed to prove the case against the 1st accused person beyond reasonable doubt. He stated that suspicion however strong cannot provide a basis for inferring guilt, which must be proved by evidence. He stated that the doctrine of recent possession does not apply to the 1st accused person as he was not found in possession of any stolen property.
31. Ms Odhiang, learned Counsel for the 2nd accused person filed written submissions on 29th October, 2020. She submitted that there was no eye witness account to the offence allegedly committed by the 2nd accused person and that the only link between him and the alleged offence is the mobile phone.



- She contended that the prosecution failed to prove malice aforethought on the part of the 2nd accused person.
32. She stated that the prosecution had failed to show how the 2nd accused person had caused the death of the deceased and that he was responsible for the same. She also stated that PW6, the Doctor, indicated that the cause of death could not be ascertained due to decomposition.
 33. She submitted that if this Court is to infer guilt on the part of the 2nd accused person, then the Court must be satisfied beyond reasonable doubt that he committed the offence. She further submitted that suspicion however strong cannot be the basis of inferring guilt which must be proved beyond reasonable doubt.
 34. Ms Odhiang stated that just because the 2nd accused person was found in possession of the deceased's phone does not prove that he caused her death. She contended that the prosecution was relying on suspicion to infer guilt on the 2nd accused person whom she claimed had been consistent and truthful as regards the events leading to his arrest.
 35. She stated that the 2nd accused person had a good defence as he informed the police that he bought the phone from Lugwe Katama but no arrest was made. She stated that the 2nd accused person had withstood the test of cross-examination and had remained consistent. She urged this Court to dismiss the charge and acquit the 2nd accused person.

DETERMINATION

36. The issues for determination are: -
 - i. If the accused persons killed the deceased; and
 - ii. If they did so, if they had malice aforethought.
37. The evidence adduced in this case is straight forward. PW4, Sgt. Patrick Otieno, the Investigation Officer took over investigations from Sgt Mithuni. His evidence was that after the death of the deceased, when acting on a tip off, he found out that the 1st accused's mobile phone No. 0792126031 made a call to the deceased's phone on 23rd October, 2016 at 9.42 a.m. The deceased's mobile phone number was 0704156649 as per the call log from Safaricom printed on 19th December, 2016, which he produced as an exhibit. He testified that on interrogating the 1st accused person about the call log showing that he made a call to the deceased, his response was that a person had borrowed and made a call on his mobile phone. PW4 stated that they arrested the 1st accused person as his explanation was not satisfactory as he did not give the name of the person who borrowed his phone on 23rd October, 2016.
38. PW4 also stated in cross-examination that the 1st accused was trembling when they were questioning him about the phone and the call made to the deceased and he was behaving suspiciously. PW4 also stated in his evidence that a boda boda rider had informed them that the 1st accused person had called the deceased and requested her to go to Bondora area to sell lemons to him and that the said boda boda rider is the one who had dropped the deceased at Timboni area, which is near Kinunguni. PW4 also testified that the deceased's body was recovered about 1½ kilometres from where she had been dropped.
39. The evidence against the 2nd accused person was that he was arrested on 23rd January, 2017 within Ribe area and after checking his call data, they found that he was in possession of a Nokia mobile phone IMEI Model No. 355158060420070, which PW4 produced in Court. PW4's evidence was that they recovered the said phone from the 2nd accused person's pocket and that the Safaricom call logs showed that the mobile phone belonged to the deceased and her name was shown as Tabu Hamisi Chengo.



40. In his defence, the 1st accused exonerated himself from the call made from his mobile phone to the deceased's mobile phone on 23rd October 2016 and implicated the 2nd accused person as having been the one who borrowed his mobile phone on the morning of that day, to make a call to a person unknown to the 1st accused person.
41. The 2nd accused person in his sworn defence admitted that he borrowed the 1st accused person's mobile phone but denied having called the deceased. He stated that he called his sister.
42. It is clear that the case herein rests entirely on circumstantial evidence. In the case of *Sawe v Republic (supra)* the Court of Appeal stated as follows regarding circumstantial evidence –

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”

43. Having considered the evidence adduced against the 1st accused person and the defence raised by him and as well as the defence by the 2nd accused person, it is my finding that the 1st accused person exonerated himself from the only evidence linking him to the deceased on 23rd October, 2016, being the call made from his mobile phone to the deceased's mobile phone.
44. The 1st accused person implicated the 2nd accused person as being the one who borrowed his mobile phone and made a call using the said phone. The 1st accused person said that the 2nd accused person only borrowed his mobile phone on that day. The 2nd accused person admitted having borrowed the 1st accused person's phone and that he placed a call to his sister, whose phone number he could not recall.
45. This Court's finding is that the admission made by the 2nd accused person that he borrowed the 1st accused person's mobile phone on the morning of 23rd October, 2016, and he used the said phone to make a call, weakens the prosecution's case as against the 1st accused person. Circumstantial evidence irresistibly point to the fact that the call that the 2nd accused person made using the 1st accused person's mobile phone was to the deceased.
46. Although PW4 stated that a boda boda rider who took the deceased to Bondora area told him that the deceased had informed him that she was going to sell lemons to the 1st accused person, the prosecution did not call the said boda boda rider whose evidence was crucial and essential to the just determination of this case. In *Bukenya & others v Uganda* (1972) EA 549 the then East African Court of Appeal held as follows in regard to failure to call key witnesses-

“It is well established that the Director has discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to



draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

48. Going by the above decision, the inference to be drawn from the prosecution’s failure to call the boda boda rider is that if he had been called, he would have given evidence adverse to the prosecution’s case.
49. Although the 1st accused person’s mobile phone was used to call the deceased on 23rd October, 2016, he stated that the 2nd accused person is the one who used his mobile phone to call a person not known to him. Since the 2nd accused person admitted having used the 1st accused person’s phone to make a call, and he was found in possession of the deceased’s phone, I find the 1st accused person not culpable for the death of the deceased.
50. As for the 2nd accused person, he was found in possession of the deceased’s phone on 23rd January, 2017 which is barely 3 months after he borrowed the 1st accused person’s phone to make a phone call. Although the 2nd accused person denied having used the 1st accused’s mobile phone to call the deceased, this Court arrives at the conclusion that the circumstantial evidence on record shows that he lured the deceased using the 1st accused person’s mobile phone and on meeting with the deceased, he killed her and retained her mobile phone.
51. PW4 in his evidence testified that when they arrested the 2nd accused person and interrogated him, he stated that he had bought the mobile phone from one Lugwe but he did not give the mobile phone contacts of the said person. It therefore follows that for the police, with the scanty information given to them by the 2nd accused person on the person who allegedly sold to him the mobile phone they could not have done anything much to verify that information.
52. Bosire J., (as he then was) stated as follows in *Malingi v. Republic* (1989) KLR 225 at page 227, on the doctrine of recent possession-

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain the possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of a fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

53. In the case of *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v R* - Criminal Appeal No. 272 of 2005, the Court of Appeal held the following on the doctrine of recent possession-

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

54. In his defence, the 2nd accused person stated that he bought the mobile phone from one Reuben Katama. The said defence is a departure from the name that he had given the police when they



interrogated him after arresting him. The said inconsistency renders the defence put forth by the 2nd accused person unbelievable. This Court's finding is that the evidence adduced by the prosecution dislodged the 2nd accused person's defence. This Court holds that the doctrine of recent possession applies against the 2nd accused person who was found in recent possession of the deceased's mobile phone, barely 3 months after the deceased was killed. This Court holds that the 2nd accused person failed to give a satisfactory account of how he came to be in possession of the said mobile phone.

55. On whether malice aforethought has been proved, it is evident that the 2nd accused person lured the deceased and from the fact that he was found in possession of her mobile phone, it can be safely concluded that he murdered her in order to steal the said phone. It is also evident that order to cover his tracks, from the outset, he borrowed the 1st accused's phone which he used to call the deceased. The claim that he called his sister is a red herring. The inculpatory facts do not point to his innocence but to his guilt in the commission of the offence.
56. In this case, malice aforethought has been established by the extent of the injuries sustained by the deceased, which leave no doubt that the 2nd accused person intended to kill her. Dr. Nafisa who testified as PW5 on behalf of Dr. Rambei stated that the deceased had a skull fracture extending from the frontal parietal lobe to the occiput. Scalp haematoma was also noted. The cause of death was established as severe head injury secondary to blunt object/assault.
57. Based on the evidence adduced by the prosecution, I find the 2nd accused person, Thomas Chitumbua guilty of the charge of murder contrary to Section 203 as read with 204 of the [Penal Code](#). I hereby convict him for the said offence.
58. Having found no evidence to connect the 1st accused, Arthur Agoi, with the death of the deceased, I acquit him of the offence of murder. He shall be set at liberty forthwith unless otherwise lawfully held.

SENTENCE

1. I have considered the mitigation made on behalf of the 2nd accused person that he is a family man with two children and that he was the sole bread winner before he was arrested and charged. I have also considered that he has been in prison remand for 7 years as his case was ongoing. He has prayed for non-custodial sentence.
2. This Court has found the accused person guilty of having killed the deceased and has convicted him for the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Murder is no doubt a very serious offence. The deceased would also have wanted to live. She had children who came and testified in Court. This Court has to consider not only the interests of the accused person but also those of the deceased's family. I decline to give a non-custodial sentence.
3. I sentence the accused person to 20 (twenty) years in prison. Under the provisions of Section 333(2) of the [Criminal Procedure Code](#), the sentence shall be computed from 1st February, 2017 (1.2.2017), being the date when the 2nd accused person was first arraigned before the High Court for the offence of murder.

DELIVERED, DATED AND SIGNED AT MOMBASA IN OPEN COURT ON THIS 30TH DAY OF JUNE, 2023.

NJOKI MWANGI

JUDGE

In the presence of:



Accused persons present

Ms Odhiang for the 2nd accused person and h/b for Mr. V. Okumu for the 1st accused person

Ms Nyawinda, Prosecution Counsel for the DPP

