



**Republic v Mogaka (Criminal Case 6 of 2021)
[2023] KEHC 23921 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 6 OF 2021
REA OUGO, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOEL MOGIRE MOGAKA ACCUSED

JUDGMENT

1. The accused person, Joel Mogire Mogaka, is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) (Cap 63 of the Laws of Kenya). The particulars of the offence are that on the January 14, 2021 at Omosasa sub-location, Tendere location in Gucha sub-county in Kisii County murdered Hyline Nyambusi Nyakwara.
2. The Accused pleaded not guilty to the charge. The prosecution called ten witnesses. The accused in defence denied committing the offence and also relied on the testimony of Denis Shimba Nyabuto (Dw2). The evidence adduced was as follows:
3. The deceased and the accused were husband and wife. Sarah Celestine Liamayaga (Pw1) worked for them as the house help to their two children. She testified that the deceased always made calls to inquire about the well-being of the children and on the material day she rang her at 5:50 pm. asking how the children were fairing on. She told the deceased that the children were well and the deceased informed her that she was at the bus stop waiting for a vehicle. At 6:30 pm. Pw1 heard a voice of a woman outside the gate. She rushed outside to see what was happening and met 2 people outside but was unable to identify them as their faces were covered with scarves, 'vitambaa'. There was some light and it was not yet dark. One of them ran and entered the store. She went near the store and found a man holding the deceased's bag. Pw1 asked him if there was any problem and the man told her to get back to the house. She went back to the house and after 5 minutes the accused person came to the house. He asked if the deceased had arrived. This was around 7:00 pm. and it was unusual for him to be at home that early as he would ordinarily get back home at 9:00 pm.



4. The accused person asked Pw1 for the keys to the gate and instructed her that she should lock the door and not open it even if anyone knocked. The accused then left. After a short while Pw1 heard the deceased's voice from the store. She could not see the store from the house and she feared going out. She sounded like someone in distress and Pw1 got worried. She called her sister Veronica Celestine and narrated to her what had happened. At 8:00 pm. the accused knocked on the kitchen door and entered the house. He asked if the deceased had come and she responded to the negative. He told her that he was outside with the deceased's father and that they would go look for her. Pw1 called Rebecca to come get her as she sensed that something sinister would happen. The day before the incident, the deceased said that she had been frustrated by the accused and that she would look for alternative accommodation.
5. Pw1 testified that it was unusual for the deceased to be out this late as she is usually in the house between 5:00-6:00 pm. and in case of any delays she gets to the house by 8:00 pm. Rebecca sent Kerima to pick up Pw1. Obuba Samwel Kerima (Pw4) testified that she was informed by Rebecca that Pw1 was in need of his assistance as she was locked in, in her employer's house. Pw4 in the company of Justus Masese Obunga, Ndege Nyakaba and Freddie went to the accused person's home. He saw the accused person's vehicle at the road and the accused was walking towards the vehicle which was a Probox. The accused person saw them across the road and called for them. Pw4 went to where he was and he saw 2 people inside the vehicle at the back seat. There were security lights and the light from the motorcycle was also on. The accused person was well known to him as he knew him as pastor. He told him that they had been called by Pw1. The accused person led Pw4 to the house while the others remained outside. The door was locked from inside and they asked Pw1 to open the door. Pw1 told the accused person that she wanted to leave and that she would return if the deceased returned.
6. Bernard Otieno Orwa (Pw2) testified that he is the principal of Bomariba and knew the deceased who was a teacher in the school. He had received a call from Mr Nyamboga that the deceased had made a cry for help as she had called saying that she was in danger and locked inside the store that was within her compound. He called No. 110692 PC Nancy Nyamoita Mose (Pw3) and updated her of the situation. Pw3 knew the deceased and on the material day, she saw the deceased at the police station. The deceased wanted to see the in-charge as she had information that the accused had made a report that the deceased wanted to kill herself and her children. After an hour of waiting, the deceased left as she could not wait any longer given that she was a lactating mother. At 9:00 pm. Pw3 received a call from Pw2 who asked her to assist the deceased who had been locked in the store. Pw3 set out to go and help the deceased and was directed to her house with one of the teachers she met. As she indicated to enter the compound, a Probox KBY was reversing from the compound ready to leave. Pw3 followed the vehicle from behind. The vehicle passed Ogembo and proceeded to Itumbe. The accused was driving the car and he took a path that was before Simba Hill Petrol Station. Pw3 was driving slowly. Her petrol got finished. She then testified that she saw the vehicle speeding and it passed them and was heading to Kisii. She called a security guard while she was at Magena to inquire if they had received any patient and were informed that they had received a body of a lady who had allegedly taken poison. She knew the security guard as they came from the same place and had met him at the hospital whenever she sought treatment. She went to Kisii and informed the OCS who allowed her to go to Christamariane Hospital in the company of other officers. When they arrived at the hospital they found the accused person in the company of a man and they arrested them.
7. The deceased's father Moses Nyakwara Bakora (Pw6) testified that he received a call from the accused person informing him that he was at home looking for the deceased and found her in the store having taken poison. He told him that he was taking him to Lenmek Hospital. He again called stating that she was rejected at Lenmek and that he went back home and was planning to go to Kisii town. Pw6 called again and the accused told him that he had a puncture. Pw6 told him to get another vehicle as



- the deceased was hurting. After a few minutes, the accused called Pw6 and informed him that he was at Christamarriane Hospital. He heard the accused person, who was on the other side of the line say 'Doctor, please assist the sick person'. Pw6 managed to get to town and proceeded to their home and the children informed him that the accused had been arrested over the death of the deceased.
8. Silas Makori Nyakwara (Pw5) testified that the deceased was her sister and that on the material day at around 3:00 pm., she had called him that she was on her way to Magena Police station to make an inquiry. At 8:00 pm. he got a call from his mother informing him that the accused had called Pw6 and told him the deceased had taken poison. Pw5 called the accused person who told him that he suspected that the deceased had taken poison as he found her in the maize store and was on his way to Lenmek Hospital. He called him again and he told him that the deceased was not talking. Pw5 called the accused person yet again who told him that he had a puncture at Kiogoro as he was heading to town because the deceased was rejected at Lenmek Hospital. Pw5 went to town and to the police station and was told that the deceased had died. They went to the home of the deceased and the accused in the company of police officers. At the store there two pieces of braided hair, blood stains on wood, a knife and a cloth with blood stains which were collected by the police.
 9. Dr Joseph Ssebbowa (Pw7) testified that he is general medical practitioner with a degree in medicine. He recalled that on January 14, 2021 he received the deceased at the hospital. The deceased was brought to the hospital by 2 people who identified themselves as the husband and brother of the deceased. The husband informed him that the deceased had taken poison at 6:00 pm. The deceased had bruises on the forehead, arm, face neck and shoulder. She was already dead on arrival.
 10. No 59497 PC William Bunuka Bellio (Pw11) was the Investigating Officer in this case. He testified that on the morning of January 15, 2021 at 3:00 am. he received a call from the DCI, Mr Lutta requesting him to visit the scene. They entered the home of the accused person and the deceased and found the security lights on. The right side of the gate had a store that was open. He entered inside the store and found no one in the store. He believed that there must have been a struggle at one of the corner of the store. He recovered a black jumper believed to belong to the deceased as the same was identified by her family members who were at the scene. He also recovered her maroon shoes. There was also a panga and knife at the scene but they were both clean. There was a rope and a handkerchief. Pw11 also recovered a small tritioic substance in a bottle which was later sent to the government chemist for analysis. There was also fresh blood on the floor of the store. The door to the house was locked with a padlock and when they broke the padlock they found 2 children who were taken in by the relatives who were at the scene. The following day they went to the station at around 11:00 am and found the accused person and one Fredrick Obure Ogutu had been arrested. They went to the hospital and the accused person gave him the key to his car in the make of Probox silver colour reg. KBY 3XX that had been used to ferry the deceased. The vehicle was processed by the scene of the crimes officer. There was a towel found at the dashboard of the vehicle. During his investigations he discovered that on January 10, 2021 the accused had made a report that the deceased had threatened to commit suicide and kill the children. The accused person was alleging that the deceased was having an affair with a colleague and that they had had disagreements. He accompanied the family members to Christamarriane for the post-mortem and charged the accused person.
 11. No. 236879 Inspector Leyrice Ligaka Mukutsi (Pw10) testified that he is attached at the Crime Scene Investigations at Nyamira county trained and performing crime scene investigations. On September 21,2021 while stationed at Kisii he received a request from Pw11 that he should process exhibits, that is, photographs to be produced in court. He proceeded to the scene and took photographs of the main house, of the store which was within the compound; photographs of the deceased while at the



mortuary and during post-mortem and photographs of motor vehicle KBY 3XX Toyota Probox. The photographs were marked as exhibits P11 (a) to (l) and Pexh12.

12. Damaris Bonareri Nyabua (Pw8) testified that she is the holder of a Bachelor of Science in Microbiology from the University of Nairobi. She received an exhibit memo from Pw11. She received stomach adult content marked exhibit 'A', a liver sample marked exhibit 'B', a clotted blood sample marked exhibit 'C' and a small bottle containing some substance labelled noratraz marked 'D' which was suspected to contain poisonous substance. She had been requested to find out whether there was any poisonous substance in the exhibit marked 'D' and if there is poison in exhibits marked 'A', 'B' and 'C' that relates to 'D'. Pw8 did a toxicology screening and found that there was no chemically poisonous substance that was detected in 'A', 'B' and 'C'. Organophosphates-based pesticide was detected in exhibit 'D'. She noted that exhibits 'A' and 'B' were preserved in formalin. On cross-examination, she testified that organophosphates are poisonous in nature.
13. Dr Leah Omboyi Okuoro (Pw9) testified that she is a pathologist at Kisii Teaching and Referral Hospital and has a postgraduate degree at the University of Nairobi. She testified that on January 20, 2021 she went to Christamarian Hospital for a post mortem on the body of the deceased. The deceased was dressed in a flowered green yellow and orange white blouse and a black skirt. On external examination, she had cyanosis on the fingernails meaning that there was lack of oxygen in the body. The body had no jondis. The deceased had bruises on the right arm near the shoulder measuring 5x5cms, linear abrasion on the mid upper arm measuring 10x1cms. She had abrasion on the cubital fossa stretching to the middle region of 11 by 10cms. There was also an abrasion on her neck above the right clavicle measuring 1x1cm. On the anterior she also had an abrasion measuring 5x1cms. On the right nosolabial region, the area between the neck and nose, she had sustained an abrasion measuring 1x1cm. There was a linear abrasion on the right and left forearm. The lower part of the right leg also had an abrasion measuring 5x2cms while on the thigh region was one measuring 5x2cms. The left leg also had an abrasion. Pw9 saw blood clots on the arteria neck where the thyroid gland is. As a result of the examination, she formed an opinion that the cause of death was asphyxiation due to mechanical threat to breath. The mechanical threat was due to haematomas at the cricothyroid cartilage. She took a blood sample for toxicology.
14. She also produced the second post-mortem report that was done by Dr Ndubile. According to Dr Ndubile the deceased had signs of struggle and sustained defence injuries on the upper limbs bilaterally and also in the right arm. He also noted extended Y-shaped incision on the anterior chest and abdomen from the previous autopsy. On internal examination, his positive findings were in the respiratory system where he noticed that there was a fracture cricoa and thyroid bone with haematoma on the surrounding soft tissue. All other internal organs were grossly unremarkable and the spinal code was not extended. Pw9 testified that Dr Ndubile formed the opinion that the cause of death was asphyxia due to manual strangulation. He took out blood cloths, stomach content and part of the liver as samples.
15. Joel Mogire Mogaka (Dw1) testified that on 14/1/2021 he came home at 8:00 pm and met his caretaker David Simba Nyabuto (Dw2). Dw2 told him that he wanted his weekly pay and further told him that there were visitors who entered the compound at about 6:00 pm claiming that they wanted maize and went straight to the main house. Dw2 told him that the deceased had already arrived. When he got home he asked Pw1 whether the deceased had arrived and she kept quiet. It was unusual that the deceased had not arrived home by 8:00 pm He checked the store but it was locked from the inside, however, the store is usually not locked. In that confusion, he called the deceased's father Pw6 thinking that the deceased could be with other relatives. Pw4 then came and found him in the company of Kerina Obuba and Ndege aka Giteri. He went with Pw4 to the house and Pw1 then opened the door. They left with Pw1 who left with her luggage. He then went to check the store and found that the door was



opened and the deceased lying there not responding. There was a bottle of pesticide next to her and he called the neighbour Mr Ogutu to help him carry the deceased. He took her to the hospital and during that time he was followed by a white vehicle. He testified that there was no violence in their home.

16. Dw2 testified that on the material day, he finished his work at 6:00 pm and the deceased got home thereafter at 6:10 pm Giteri then came in the company of 4 people claiming that they wanted maize. They entered the compound and Giteri left. The accused came home at 8:00 pm and found Dw2 at the gate and he paid him.

Submissions

17. The prosecution relied on the evidence on record. The defence submitted that Pw1 had seen the masked men earlier and that by the time the accused person came home, the assailants had already killed the deceased. It was submitted that the persons who killed the deceased must have been the men in the company of Pw4. The evidence of Dw2 was that Pw4 had come to the deceased home at around 6:00 pm They submit that Pw1 and Pw4 were working together to kill the deceased. The evidence of the accused that he thought the deceased was poisoned is attributed to his state of shock when he found the deceased unconscious next to her in a bottle of poison.

Analysis And Determination

18. In this case it is not in dispute that the deceased died. Pw7 testified that he received the deceased at the hospital when she was brought by the accused person but the deceased was dead on arrival. There were 2 post-mortems that were performed by 2 pathologists, Pw9 and Dr Ndubile. They both arrived at the same finding which was that the deceased died as a result of asphyxiation. Pw9 testified that the deceased died due to asphyxiation due to a mechanical threat to breathe, a finding which was similar to that of Dr Ndubile whose opinion was that the cause of death was asphyxia due to manual strangulation. The prosecution without a doubt proved the aspect of the deceased's death.
19. The next issue the prosecution is required to prove is that it was the accused person who caused the unlawful act or omission that led to the death. Having considered the evidence led by the prosecution, there is no contention that there was no witness who saw the accused person carrying out the unlawful act or omission that led to the death of the deceased. The evidence by the prosecution is purely circumstantial. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows on the issue on the issue of circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



20. In order for the prosecution to rely on circumstantial evidence it must satisfy the three tests established in the case of *Omar Mzungu Chimera v. R* Criminal Appeal No. 56 of 1998, where the Court stated that;

It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;
 - (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (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”
21. The evidence of the prosecution is that the accused killed the deceased person while she was in the store within their compound. Pw1 testified that she heard the deceased crying out for help and that she appeared to have been locked up in the store where her voice coming from the store. The accused person had already come home but instead of staying in the house he was outside the house and instructed Pw1 not to open the door. This placed him within the *locus in quo*. Pw4 testified that he saw the accused across the road to his gate when he came to pick up Pw1. Pw3 also testified that when she went to the deceased home she saw the accused person reverse and leave the home in silver probobox.
22. The evidence of Pw1 was clear; she testified that she had known the deceased for a long time and she recognized the deceased distressed voice from the store while she was in the house. This was further corroborated by the testimony of Pw2 who testified that he received a call that the deceased had reached out to Mr Mayaka informing him that she was in danger. The only plausible explanation for why the accused did not hear his wife cry for help while he was outside the house and in close proximity to the store is if the accused person himself was the perpetrator who set out to kill the deceased. It is without any doubt that if at all the accused person and Dw2 were outside the house as they claimed in the defence, then they would have heard the struggle between the deceased and her assailants.
23. Pw9 testified that the cause of death in this case was asphyxia and Dr Ndubile also arrived at a similar finding. There was evidence to support that the deceased had struggled with her assailants. Pw7 testified that when the deceased was received by the hospital she was already dead. Pw7 noted that she had bruises on the forehead, arm, face, neck and shoulder. The post-mortem done by Dr Ndubile noted that the injuries on the upper limbs bilaterally and also on the right arm suggest that they were sustained by the deceased as she defended herself from her assailants. The investigating officer, Pw11, who went to the scene, also testified that there was evidence of a struggle at the store.
24. However, the accused person was determined to have the medical practitioners and the deceased’s father and brother, Pw5 and Pw6, believe that the deceased died of poisoning. Pw3 testified that earlier during the day she had met the deceased who told her that she was at the station following up on false allegations made by the accused that the deceased wanted to commit suicide. There was no evidence of the deceased having taken poison. Pw8 testified that after toxicological screening of the deceased’s stomach, intestines, liver and blood she arrived at the conclusion that they contained no chemical substance.
25. The deceased had also staged to the deceased family, Pw5 and Pw6 that he had taken the deceased to Lenmek Hospital, yet this was not true. According to the testimony of Pw6 and Pw5, the accused



person wanted them to believe that the deceased died because of delay in getting treatment. He told them on phone that they had been rejected at Lenmek Hospital and the deceased did not receive treatment. He also told them via phone call that his car had a puncture to further paint a picture of delay. The evidence of Pw3 who followed the accused person was that he went to Christamarriane Hospital in Kisii. Pw7 testified that the accused told them that the deceased took poison at 6:00 pm

26. The prosecution has presented before the court sufficient evidence that the accused was within the locus in quo at the time the deceased died and that the accused had access to the store. There is also further evidence that the accused tried to mislead Pw5, Pw6 and Pw7 that the deceased took poison yet the evidence points to the fact that the deceased struggled with her attackers. The deceased then died as a result of strangulation and to my mind in the circumstances, the person responsible for the death of the deceased could only be the accused person.
27. I now turn to consider if the prosecution proved that there was malice aforethought. Section 206 of the Penal Code provides that malice aforethought includes-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
28. I have considered the defence in my view, it does not displace the evidence adduced by the prosecution which clearly links the accused to the death of the deceased. Pw4 could not have murdered the deceased as alleged as he came after being called by Pw1 and left with her. The evidence of Pw3, an officer who knew both the deceased and the accused clearly narrated the events that took place from the time she saw the accused and another place the deceased's body in his vehicle, a fact he does not deny. The evidence points to the accused person as being in his compound and the one who strangled the deceased. He locked the deceased in the store and strangled to death. In my view, I find that malice aforethought was proved.
29. In the end, I find that the prosecution has proved the offence of murder beyond reasonable doubt. I therefore find the accused, Joel Mogire Mogaka, guilty of the murder of Hyline Nyambusi Nyakwara and I convict him accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS ON THIS 28TH DAY OF SEPTEMBER 2023

R.E. OUGO

JUDGE

