



**Republic v Samuel & 2 others (Criminal Case 4 of 2019)  
[2023] KEHC 24496 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE 4 OF 2019  
REA OUGO, J  
OCTOBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LABAN NYAATA SAMUEL ..... 1<sup>ST</sup> ACCUSED**

**NANCY BOCHERE SAMUEL ..... 2<sup>ND</sup> ACCUSED**

**DANIEL MOGAKA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Laban Nyaata Samuel, Nancy Bochere Samuel and Daniel Mogaka are charged with the murder of Alvina Nyabuari Moracha contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the night of 23<sup>rd</sup> and 24<sup>th</sup> September 2018, at Mariba Village, Nyamecheo sub-location, Nyamecheo Location in Kenya Sub- County within Kisii County, murdered Alvina Nyabuari Moracha.
2. The prosecution called ten (10) prosecution witnesses in support of their case.
3. Alice Rabera Mogute (PW1) testified that the deceased was her daughter and a Form 4 candidate. On 23<sup>rd</sup> September 2018, the deceased was reading and she asked Emma Nyanchoka to prepare supper. They ate and went to sleep. She woke up at 1.00a m. and found the lights on and thought the deceased was still reading. However, the deceased was not in the house but the gate was locked. She did not find the deceased phone and boots that she wore in the house. PW1 waited for the deceased until 5:00 a.m. At 7:00 a.m. PW1 went to the shamba and upon her return, she heard that a person was found at the pond. She went by the pond and the deceased body was pulled out all muddy. They poured water on the body and PW1 identified it as the deceased. She later learnt that the deceased had a friend called Laban. On cross-examination, she testified that the deceased was in a boarding school but had been sent home for school fees. She denied knowing that her daughter had other male friends.



4. Evans Okemwa Morichando (PW2) testified that he is a farmer. On the 24<sup>th</sup> September 2018 morning, he saw that there was oil in his fish pond. He went to check out the fish pond saw the deceased's hand and realized that there was a body there. He told people and they began screaming. The police came and removed the body. After the body was removed, he got to know that it was his brother's daughter who had been strangled and thrown in the pond. On cross-examination, she denied knowing that the deceased was in other relationships. She stated that the deceased had a SIM card and had used her ID card to register it. She stated that the number 0724251472 was her grandmother's number.
5. Emma Nyanchoka Moracha (PW3) testified that the deceased was her sister. The deceased and the 1<sup>st</sup> accused were in a secret relationship in 2014. They made their relationship open in 2016. In 2015/2016 she got to know that the 1<sup>st</sup> accused was married. On 23<sup>rd</sup> September 2018, she was at home and left the deceased reading at 10:30 p.m. On 24<sup>th</sup> September 2018 they did not see her sister and her books were also not there. She went to see her friend and PW1 called and told her that the deceased's body was found in the fish pond. The deceased had a phone and she registered the line in PW3's name. On cross-examination, she testified that she wrote 3 statements. Her first statement was about what happened between the 20<sup>th</sup> to 23<sup>rd</sup> of September 2018. In the second statement, she explained her relationship with the deceased. The third one was after the 3<sup>rd</sup> accused had been arrested. She denied seeing the deceased being picked up by a silver car.
6. Vincent Mabu (PW4) testified that he is the lead Security liaison officer at Airtel (K) Network Ltd. He explained that his role is to liaise with the Directorate of Criminal Investigations (DCI ) and generate data upon request while ensuring integrity is maintained. The DCI had been given front-end access to the database that generates data. Once the DCI generates the data, all uploads and downloads are left within Airtel's server. He received a letter from Inspector N. Wambugu from the DCI Kenya requesting IMEI and the incoming and outgoing data of Mobile No. 0789688573 ('airtel number'). It also requested the geographical location of the subscriber and any other relevant information. The owner of the said mobile number was Nancy Samuel it was registered on the 17<sup>th</sup> of September 2019. The ID No. used to register the number was 29696610. He checked the data that was generated in 2018, certified it, and checked the registration details of the subscriber. According to the call data records of 23/9/2018 and 24/9/2018, there were several communications between 0708926117 and 0789688573. On 23/9/2018 at 22:22 hours there was a lot of communication between the aforementioned numbers. The location of the Airtel line on 23/9/2018 shows that the holder of the phone was at Kitengela Prisons, then moved to Kitengela, Kamuyu, Mia Mahiu, Ntulele, Moloti, Sotik, Keroka, Nyansiongo and Nyamache. At 23:01 hours the holder of the airtel number was at Kenya. The communication between the holder of the Airtel number and the holder of 0708926117 stopped on 24/9/2018 at 09:26 hours. PW4 also noted that prior to the 23<sup>rd</sup> of September 2018, there was a lot of communication between the two numbers with the Airtel number being at Kitengela prison throughout. PW4 testified that the information produced in court was generated from a computer over the period which information was regularly fed and the printouts were generated from a computer make 'HP' ProBook 431 G6 and printed via Kyocera. PW4 complied with the provisions of sections 65 and 106 (a) and (b) of the *Evidence Act*.
7. James Mokabi (PW5) testified that he works at the law enforcement liaison office at Safaricom Ltd. He received a formal request from the DCI office of Kenya via letters dated 6/10/2018 and 1/10/2018 requesting data pertaining to phone no. 0708926117 and 0708370310. PW5 testified that the 2<sup>nd</sup> accused person is the owner of phone number 0708370310 which she was using in Kitengela and Athi River. The other number, 0708926117 was registered under Emma Nyanchoka Moracha ( PW2). On 23<sup>rd</sup> and 24<sup>th</sup> September 2018 there were several communications between the two lines. He also testified that they could not tell the location of the numbers.



8. PW5 further testified that there was communication between phone numbers 0708370310 and 0789688573 on 23<sup>rd</sup> September 2018. There were several communications between the two numbers from 21:22 hours on 23/9/2018 to 05:37 hours on 24/9/2018. He testified that the computer which he used to retrieve the data was regularly used in the ordinary course of business and the documents before the court were true copies and the soft copies were available. He complied with sections 65 (8) and 106 (b) of the Evidence Act and signed the certificate, Pexh7.
9. No. 64103 Sergeant Alfred Ruto (PW6) testified that he is stationed at DCI Kenyena. On 24/9/2018 they received a report that a body was in a fish pond in Mariba village Kenyena sub-county. They proceeded to the scene and noticed a human hand in the water. The body was submerged in the fish pond. The first photo shows the hand of the deceased. The body of the deceased was retrieved and they took pictures of the body. On 26/7/2018 a post-mortem was conducted and it was revealed that the cause of death was strangulation. They also suspected that the girl had been raped and took a vaginal swab for further analysis at the government chemist. He took statements from witnesses but because he was engaged in an assignment out of the country, he handed the investigations to CIP Wambugu. He later prepared an exhibit memo with the buccal swab of the 1<sup>st</sup> accused person and sent it to the government chemist so that he could compare the DNA of the 1<sup>st</sup> accused person and any foreign DNA found in the deceased's body. According to the government chemist report dated 10/5/2019, there were no DNA similarities between the foreign DNA genetics found in the deceased's body and those of the 1<sup>st</sup> accused person. He testified that they arrested the 3<sup>rd</sup> accused person in Nairobi City Stadium.
10. On cross-examination he testified that he was the initial investigating officer and took statements of Caleb Oguoka and Tommy Oguoka. According to the statement of Caleb, on 22/9/2018 at 7:00 p.m., a vehicle stopped at the deceased person's gate and she was seen boarding the vehicle. On 23/9/2018 the same vehicle picked up the deceased but the said Caleb did not read the registration number. He also learnt that the deceased had a relationship with the 1<sup>st</sup> accused. That the 2<sup>nd</sup> accused knew of the relationship and she was against it. That the 2<sup>nd</sup> accused was in constant communication with the deceased.
11. No. 236162 Chief Inspector Wambugu Nicholas (PW7) testified that on 24/9/2018 he received a report that human fingers were seen protruding from a fish pond and he assigned the matter to Sergeant Ruto who visited the scene and caused a postmortem to be conducted. The cause of death was asphyxia due to strangulation. They wrote to Safaricom requesting data from mobile no. 0708926117 registered in the name of the deceased's sister, Emma. They established that on the material night, the deceased was in constant communication with 2 mobile numbers, 0708370310 and 0789688573 both registered in the name of Nancy Bochere. According to the data line 0708370310 remained in Nairobi while the other number 0789688573 advanced from Kitengela and arrived at Kenyena at 01:00 hours and was used to communicate with the deceased. Following the information received from their intelligence and call data they arrested the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. PW7 established during his investigations that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were married but the 1<sup>st</sup> accused had an affair with the deceased. The 2<sup>nd</sup> accused gave him a condition that he could only save the relationship by getting rid of the deceased and so they procured the services of the 3<sup>rd</sup> accused person. The arrest of the 1<sup>st</sup> and 2<sup>nd</sup> accused person led to the arrest of the 3<sup>rd</sup> accused person. PW7 testified that they wrote to Safaricom and Airtel to receive information on the call data. On cross-examination, he was referred to the statement of Caleb and he testified that they did not find the vehicle that picked the deceased and that it was the 1<sup>st</sup> accused person that had a motive to kill the deceased.



12. Doctor Brian Ayara was PW8. He produced the post-mortem on the deceased on the 26<sup>th</sup> of September 2019. He formed the opinion that the cause of death was asphyxia which is a lack of oxygen due to strangulation with 2/3 fracture dislocation.
13. No. 78257 CPL Charles Kitui (PW9) testified that he is a scene of crime officer. On 24<sup>th</sup> September 2018 at 2:20 p.m. he accompanied Sergeant Ruto of DCI O Kenyenyia to the murder scene at Mariba Mangenche Location in Kenyenyia sub-county where the body of the deceased was found in a fish pond. The deceased wore a red and black dress, red jumper, and white panty. She had no visible injuries except blood stains on her mouth and left cheek. PW9 took the following photographs:
  1. Photo No. 1 – general view of the fish pond
  2. Photo No. 2 – a close up view of the position of the pond with the deceased's hand protruding
  3. Photo No. 3 – general view of the deceased after being retrieved from the water beside the pond
  4. Photo No. 4 is a closer facial view of the deceased for identification
14. PW9 produced the photographs as Pexh 3 (a) – (d). On cross-examination, he testified that there was a crowd of people at the scene and that the fish pond was man-made.
15. Caleb Ogwoka Atoni (PW10) testified that the deceased was his cousin and that they lived in the same compound. He testified that on 22/9/2018 he saw a small silver car enter the gate and the deceased entered the vehicle. They drove off. He also recalled that it was the same vehicle that dropped her off. On the following day, 23/9/2018 he also saw the same vehicle pick up the deceased. He did not see the registration number. Afterward, he was informed that the deceased was found dead in the fish pond.
16. At the close of the prosecution case the accused persons were placed on their defense.
17. Laban Nyaata Samuel testified as DW1. He testified that the deceased was known to him as he used to carry her. DW1 lived in Nairobi with his wife and while escorting his wife to work he met the police who told him to lie down, beat him and asked if he had a gun. He was then taken to Athi River and the following day to Kenyenyia. He testified that the police beat him up and asked him to confess to killing the deceased but he declined. That on day the incident happened he was in Nairobi with his children. The police also arrested his father and asked for Kshs 70,000/- for his release. DW1 testified that he was friends with the deceased's elder sister, Vena Moracha, who used to ask for school fees.
18. Nancy Bochere Samuel (DW2) testified that she stays in Kitengela and works for a company called Hella. On 22<sup>nd</sup> and 23<sup>rd</sup> September 2018 she was in Kitengela. Her father-in-law informed her that the deceased had died. After 2-3 months they were arrested and the police asked for her phone. She did not have a phone but a line. The police told them that they were thieves and that they had guns. They told the police they had no guns and were taken to Athi River and then to Kenyenyia. She testified that the number 0708370310 was her line but she later got another number 0706154224. She also had an Airtel line but did not recall the number. She also testified that she had lost her identity card and did not know whether it was used to register another line.
19. Daniel Mogaka Ondimu (DW3) testified that he did not know the deceased. He testified that he stays in Kaloleni in Nairobi and was arrested 1 years after the case was commenced. He testified that he had not been named by a single witness and that he was not involved in the murder. On cross examination, he testified that he knew the 1<sup>st</sup> and 2<sup>nd</sup> accused person. He also testified that he doesn't stay in Kitengela.



## Submissions By Parties

20. On 10/02/2023 the parties herein were directed to file written submissions and only the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons complied with the directions.
21. Counsel for the 2<sup>nd</sup> accused person, Ms. Gogi, filed submissions on behalf of the accused. She submitted that no evidence had been adduced to link the 2<sup>nd</sup> accused with the offence. None of the witnesses knew the 2<sup>nd</sup> accused. The evidence of the 2<sup>nd</sup> accused person was that she was at all times in Nairobi and did not travel to the crime scene or its vicinity during the period the deceased was murdered. The 2<sup>nd</sup> accused having raised a defence of alibi, it was imperative that the prosecution place the 2<sup>nd</sup> accused person at the scene of crime. The 2<sup>nd</sup> accused person was brought to court based on circumstantial evidence. She cited the Court of Appeal decision in *PON v Republic* [2019] eKLR on circumstantial evidence and argued that there was no evidence at all that had been led by the prosecution to enable the court to make an inference that the 2<sup>nd</sup> accused was guilty.
22. She also urged this court to consider the defence of the 2<sup>nd</sup> accused person who testified that she lost her Identification card earlier on. DW2 testified that her phone number is 0708370310 and not 0789688573 that been registered by her Identification Card which was being used during the very date of the incident. The Liaison Officer from Safaricom and Airtel Networks also confirmed that it was possible for someone to misplace their Identification card and the same can be picked by someone and be used to register a telephone number. Counsel for the 2<sup>nd</sup> accused person submitted that the totality of the evidence before the Honorable court does not implicate the 2<sup>nd</sup> accused person.
23. Mr. Wesonga filed submissions on behalf of the 3<sup>rd</sup> accused person. It was submitted that the prosecution failed to adduce evidence or exhibit linking the accused to the death of the deceased. The evidence shows that the investigating officer went on an arresting spree based on suspicion. Nothing was placed before the court to link the 3<sup>rd</sup> accused person to the death of the deceased. The prosecution has therefore failed to establish its case beyond any reasonable doubt as against the 3<sup>rd</sup> accused person. They relied on the case of *Bukenye & Others v Uganda*.

## Analysis And Determination

24. The offense of murder under section 203 of the *Penal Code* is proved when “Any person who of malice aforethought causes the death of another person by an unlawful act or omission.” The prosecution must establish beyond reasonable doubt the following three ingredients in order to prove its case; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to the death; and third that the accused committed the unlawful act with malice aforethought.
25. The fact of the deceased’s death is not in contention. Dr. Brian Ayaro (PW8) testified that he works with Dr. Denis Onsembi at Kisii County and is conversant with his handwriting and signature. Dr. Onsembi conducted the post-mortem and according to his report, he established that there was bluish discoloration on the deceased body, cyanosis. There was also bleeding in both eyes suggesting a lack of oxygen. There was also a cut wound on the lower lip and multiple abrasions on the lower neck. There was a laceration on the left part of the neck and the tongue was protruding and bitten between the teeth. The deceased also had a fractured trachea. The spine bone had fractures, in the C2/C3 area of the neck. Dr. Onsembi reached the conclusion that the cause of death was asphyxia due to strangulation with a 2/3 fracture-dislocation.



26. The prosecution having proved the death of the deceased, they were also required to prove that the accused persons committed the unlawful act that led to the death of the deceased. The prosecution relied on circumstantial evidence as there was no direct evidence linking the accused persons to the crime. In *Sawe v Rep* [2003] KLR 364 the Court of Appeal held that:

“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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

27. Similarly, the Court of Appeal in *Abanga Alias Onyango v Rep* CR. A No. 32 of 1990 (UR) outlined the principles that should be applied to assess whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction 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 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.

28. PW1 and PW3 had supper with the deceased and they left her studying. PW1 woke up at 10:00 p.m. and did not find her in the house. PW3 testified that she knew the relationship the deceased had with the 1<sup>st</sup> accused person even though the 1<sup>st</sup> accused was married. PW7 who was the investigating officer testified that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons had a falling out due to the affair between the 1<sup>st</sup> accused and the deceased and when the two reconciled, they procured services of the 3<sup>rd</sup> accused person to kill the deceased.

29. The prosecution relied on the data calls obtained from Safaricom and Airtel. The deceased had a phone and procured a Safaricom line which was registered in her sister’s name. The 2<sup>nd</sup> accused person had two registered lines, 0708370310 (Safaricom) and 0789688573 (Airtel). The evidence of PW4 and PW5 was that the two numbers registered in the name of the 2<sup>nd</sup> accused remained in constant communication with the deceased from 23<sup>rd</sup> to 24<sup>th</sup> September 2018. PW4 also testified that according to their call data, the holder of the Airtel line on 23/9/2018 moved from Kitengela to Kenya. The telephone records reveal that the holder of the Airtel number registered in the name of the 2<sup>nd</sup> accused person was in constant communication with the deceased once it got at Kenya. PW5 also testified that there was communication between the holder of the 2<sup>nd</sup> accused person’s Airtel line and her Safaricom line between 23<sup>rd</sup> to 24<sup>th</sup> September 2018.



30. After carefully evaluating the evidence from the call data of Safaricom and Airtel, it is clear that the 2<sup>nd</sup> accused person contacted the deceased on the night she died. There was also evidence that the 2<sup>nd</sup> accused person was in contact with the holder of her Airtel line who at the time was in Kenya. The prosecution evidence does not implicate the 1<sup>st</sup> accused person or show his involvement. Although PW10 testified that the 1<sup>st</sup> accused quarreled with the deceased over the phone, the call data did not suggest the same. PW6 also testified that once they retrieved the deceased's body from the pond, they obtained a vaginal swab. According to the government analyst, the deceased had sexual intercourse however, the foreign DNA found in her body did not match those of the 1<sup>st</sup> accused person. Similarly, there was no evidence to show that it was the 3<sup>rd</sup> accused person who had travelled to Kenya and communicated with both the deceased and the 2<sup>nd</sup> accused person.
31. In my view, the prosecution proved that the 2<sup>nd</sup> accused person on the material night was in constant communication with the deceased and the holder of her Airtel line. I reject the defense by the 2<sup>nd</sup> accused person that her identity card was stolen and used to register the Airtel line on account of the several phone calls between her two lines on the material day.
32. As previously noted, the prosecution case is based on circumstantial evidence. The content of the communication between the deceased, 2<sup>nd</sup> accused, and the holder of the Airtel line remains unknown. In order for the court to render a conviction based on circumstantial evidence, it is important that no other circumstances exist that could undermine the chain of circumstances being relied upon.
33. The prosecution's case also introduces another scenario involving another possible perpetrator of the offense. PW10 testified that on 22<sup>nd</sup> and 23<sup>rd</sup> September 2018, the deceased was picked up from their home in Kenya by a silver vehicle. He testified that their homes are in one compound and they use one gate. The evidence by PW10 points to the fact that the deceased was last seen leaving the house in a silver car. PW7 also stated that he did not make further investigations in regard to the silver car. The question the court is grappling with is whether the prosecution proved its case beyond reasonable doubt, given the circumstances. The court in *Republic v Davis Muriuki Kinyua* [2021] eKLR had this to say on the standard of proof, beyond a reasonable doubt:

“The reasonable doubt standard remains an important canon under Criminal Law and transcends intercontinental jurisprudence. The full instruction given in Webster by the Massachusetts Court is as follows:

“What is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and Judgment,



of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt.”

At all material times the Court should not hesitate or decline not to convict where the state has dutifully failed to proof beyond reasonable doubt all the elements of the offence charged against an accused person.”

34. In this case, there was a real possibility that the deceased was killed by the person who picked her up in the silver car as the deceased was last seen by PW10 leaving their home in the silver car. According to both PW6 and PW7, the investigations into the silver car was abandoned. Although the frequent phone calls between the 2<sup>nd</sup> accused and the deceased on the material night, as well as the presence of the holder of the Airtel line owned by the 2<sup>nd</sup> accused within the locus in quo, suggest the possibility of the 2<sup>nd</sup> accused's involvement in the murder, however, there was further evidence that the deceased left with someone in a silver car on the material day thereby casting doubt on the prosecution case.
35. In the end, I find that the prosecution failed to prove its case against the accused persons beyond reasonable doubt. Consequently, I find the accused persons Laban Nyaata Samuel, Nancy Bochere Samuel, and Daniel Mogaka not guilty of the charge of murder and are hereby acquitted forthwith. They shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF OCTOBER 2023**

**R.E. OUGO**

**JUDGE**

