



REPUBLIC OF KENYA



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**Republic v Buruk (Criminal Case E016 of 2021)
[2023] KEHC 25729 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E016 OF 2021
WM MUSYOKA, J
NOVEMBER 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMWEL OMBIMA BURUK ACCUSED

JUDGMENT

1. The accused herein, Samwel Ombima Buruk, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, the particulars being that on the night of 6th August 2021, at Amerikwai Sub-Location, South Teso Sub-County, within Busia County, he murdered Betty Akelo.
2. 6 witnesses testified for the Republic.
3. PW1, Alice Njenga Ngoizi, was the employer of both the accused and the deceased. On the material day, she left the 2 at home, but when she came back, the deceased was not available. A report was made to the village elder. The next day, the body of the deceased was found in a well, not so far from the of PW1 residence. PW2, Lavin Ondego Ngoizi, was a son of PW1. He stated that he had left the accused and the deceased at home on the material day, at about 3.00 PM. When he came back, PW1 enquired about the whereabouts of the deceased. She never came back, and a report was made to the village elder. On 8th August 2021, her body was discovered in a water well near their home. PW3, Dr. Georgeroy Francis Oketch, was the medical officer who conducted post-mortem on the body of the deceased. He did not note any external injuries on the body. PW4, No. 236459 Inspector of Police Fredrick Okutta, was the Deputy Officer Commanding the Adungosi Police Station at the time. He received the report of the finding of the body of the deceased in a well. They retrieved the body, and took it to the mortuary. The accused confessed to them, that he had killed her, after she resisted his sexual advances. PW5, No. 233823 Chief Inspector of Police Jebason Okong'o, recorded the confession made by the accused. He stated that the accused was brought to him, on 9th August 2021, for that purpose. After complying



with the relevant rules, he took down his confession. Production of the confession was objected to, on grounds that the same was not recorded in compliance with the applicable rules. A trial within a trial was conducted. PW5 stated that he cautioned the accused as required by the law, he was not subjected to any form of inhuman treatment, he indicated that he had no Advocate or witness to call, and he had no medical condition. The accused made the statement in Kiswahili, and was recorded by PW5, after which both the accused and PW5 signed it. PW5 translated the statement into English. PW6, No. 76861 Police Constable Charles Ruto, stated that he took over investigations from PW4. He interrogated the accused, who informed him that he made sexual advances at the deceased, but she turned him down, and they quarrelled and fought, whereupon he hit her on the head, and she collapsed and died. He took her to her bedroom, and later disposed of her body in a well belonging to a neighbour. He stated that the confession was initially made at Adungosi Police Station, but was formally recorded at Amukura Police Station. Eventually the court ruled that the confession had been properly recorded, and the same was produced as evidence in court.

4. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 17th July 2023. The defence hearing happened on 12th October 2023, before me.
5. The accused was the sole defence witness. He stated that after lunch, he and PW2 and a friend of his left the home, to escort the friend who had visited PW2. They left the deceased at home. When they came back, they did not find her. They searched around for her, but did not find her. PW1 sent him to report the matter to the village elder, which he did. The body of the deceased was later found in a well, and was retrieved. He was arrested the following day. After his arrest, he was forced to sign a confession. The accused testified that he did not record the statement voluntarily, for he was assaulted by police officers at Adungosi Police Station, and forced to sign the same. He said that he was later moved to Amukura Police Station, where PW5 merely copied the confession recorded at Adungosi Police Station, and he was asked to sign the same. He said that the said statement was not read back to him. He said that he did not complain to the court that he had been forced to sign a statement. He denied being left at home alone with the deceased on the material day.
6. Both sides submitted in writing.
7. 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, it was with malice aforethought.
8. On whether the deceased died, I have the evidence of PW1 and PW2, and even the accused himself. They all testified that the deceased died, and that her body was retrieved from a well. PW3 was the medical officer, who conducted post-mortem on the body. He noted no external injuries, fractures or bruises on the body; but there was clotted blood on the ears, mouth and nose. He opined that drowning caused the death.
9. So, did the accused person kill the deceased? The accused can only be convicted of the offence charged, upon it being established that he caused the death of the deceased. None of the witnesses who testified, said that they saw him do anything to the deceased that would have caused her death. The post-mortem concludes that the deceased died of drowning. None of the witnesses who testified said that they saw the accused person cause the drowning of the deceased, by placing her into the well. The evidence that links the accused to the death is the confession that was recorded from him by PW5. The accused contested that confession at the trial, and a trial within a trial was conducted, but the confession was admitted into evidence thereafter. Even after that, he continued to contest it, even in his sworn defence statement.



10. In the ruling on the trial within a trial, on the voluntariness and admissibility of the statement, which Karanjah J delivered on 24th May 2022, the court said, in conclusion:

“(4) In sum, the prosecution case in this trial within a trial was proved beyond reasonable doubt. The confession statement (P. MFI 2) was voluntary and admissible in evidence. It may therefore be formally tendered in evidence.”

11. The said statement was subsequently formally tendered in evidence, and marked as an exhibit. Once a trial within a trial was conducted on the confession, and it was ruled that it was properly recorded and signed, and once the confession was formally produced and marked as a prosecution exhibit, the chapter on its validity and admissibility was formally closed. It could not be re-litigated. I, as trial Judge, cannot re-open the issue, so as to ascertain once more, whether the same was recorded voluntarily and whether it was admissible. That issue was closed, and can only be re-opened on appeal. I am bound by the decision of Karanjah J of 24th July 2022.

12. So, what is the substance of that confession? The same was produced as P. Exhibit No. 2. It is in Kiswahili. No English translation was provided. The pertinent part reads:

“... Nilimwonya dhidi ya kuendelea kunirushia mawe na akaendelea ndiyo nilikabiliana naye kwa kumpiga ngumi moja akanguka chini hadi akazirai na kufa. Nilijaribu kungoja lakini akuamuka. Nilianza kuwaza kwa tukio hilo na kwa sababu nilikuwa nyumbani peke yangu niliamua kuchukua mwili wa marehemu na kubeba na kutumbukiza ndani ya kisima kilicho hapo karibu tu na nyumabi kwa jirani nanikarudi nyumbani kupumzika...”

13. It translates, in English, that he hit the deceased with his fist, she fainted, fell down and died. Whereupon, he took her body, and dumped it in a well, near the home of a neighbour, after which he went home to rest.

14. The post-mortem report noted no injuries, which could be consistent with what the confession states, that the deceased was hit with bare hands. A fist. A blow from a fist may not leave any physical injuries on the body. There was clotted blood on the orifices on the head, being the mouth, nose and ears, consistent with a blow on the head, although the confession does not state which part of the body was hit. The conclusion that the deceased died of drowning suggests that the deceased was probably not dead when her body was dumped into the well. The evidence on the autopsy was not handled well. The doctor should have been questioned on his findings and conclusion. What did the absence of external injuries suggest? What did the clotted blood, on the orifices on the head, mean? What would the difference between “clotted blood” and “dried blood”? What did the conclusion, that the deceased died by drowning, suggest? Did she get into the water alive, or was she placed there in a state of unconsciousness, or was she dead already? Ideally, it should not be left to the court to draw conclusions on what the medical experts put in their reports, or on what those medical reports say in ordinary everyday language. Medical experts are brought to court to explain to the court, in non-medical or non-technical terms, that is in a language understandable by lay persons, what their findings are, and what the basis for their conclusions are. It does not help much when medical experts come to court to just read their findings and their conclusions, without attempting to explain or expound the substance of those findings and conclusions to the court. Medical experts are not brought to court to merely produce documents, the court can read the documents for itself. The purpose of their attendance is to give their expert opinion. In this case, PW3 was presented as a witness for the sole purpose of producing the post-mortem report. All he told the court was that he conducted an autopsy, formed the opinion that the deceased died by drowning, and then produced the post-mortem report. He did not explain



- whether he dissected the body, and if he did, what his findings were. He did not explain why he formed the opinion that the cause of death was by drowning. He did not explain why the blood of the deceased clotted on or came out through the nostrils, ears and mouth.
15. Of course, I do not blame PW3. His credentials were not recorded, and I suppose that they were not given. He signed the post-mortem form as a medical officer. I suppose he was not a qualified pathologist. It could be that he had no experience with giving evidence in court. A pathologist would have been more eloquent with giving information of what he exactly did, what his findings and conclusions were, and what the basis for those conclusions was. Indeed, a pathologist would not even require prompting from the prosecutor or the Advocate for the side calling him. A medical officer is a general practitioner, who would have no expertise in pathology of this kind, and perhaps not so much experience with giving evidence on such forensics. The duty was on the prosecution to guide PW3 properly, in examination-in-chief, so that he could give the court material that would be of assistance in determination of the matters in controversy. In this case, he was apparently left to his own devices, where he just placed a post-mortem report before the court, and left it to the court to interpret it itself. The Advocate for the defence did not have much of a role in all this. Indeed, he did not even have to cross-examine PW3. PW3 was a witness for the Republic. It was the duty of the Advocate calling him to do the necessary legwork. He failed to do so, and failed PW3 and the court, and undermined the prosecution case. The court could not do the work for the prosecution, by questioning PW3 on these materials, as trials are adversarial, the court should be a neutral umpire, and it should not be seen to be intervening, in instances of this kind, in a manner that may raise questions of partiality or even bias.
 16. Anyhow. There is a confession in this case. The accused person confessed that he was the one who killed the deceased. She rebuffed his sexual advances. He did not take kindly to that rejection, and a quarrel ensued, which escalated to a fight, where the deceased was felled by a blow from a fist thrown by the accused. She fainted, or fell unconscious, and died, or so the accused thought, and he dumped her body in a well, where she probably met her death, by drowning.
 17. The confession is clear on the actus reus, but was there malice aforethought? The elements of malice aforethought are set out in section 206 of the Penal Code. There is the direct intention to kill; the intention to cause grievous harm; the intent to commit a felony; and knowledge that the act may cause death or grievous harm, but there is indifference as to whether that result is caused, among others. In the instant case, it would appear that the accused had no intention of killing the deceased. After he knocked her out, he waited to see if she would regain consciousness. When she failed to come to, he concluded that she had died, and decided to dispose of her body, to avoid detection. By striking the deceased with a fist, the accused intended to commit a felony, for assault, likely to cause grievous harm or maim, is a felony, and if death results, it could amount to murder, for there would be malice aforethought, by dint of section 206 of the *Penal Code*. It could also be the case that he intended no harm, but there definitely was an intention to commit an unlawful and dangerous act, making it a borderline case between murder and manslaughter.
 18. It is not clear, from the medical evidence, whether the deceased died from being struck with the fist, or from drowning, upon being placed in that well when she had not yet died. Being struck with a fist would not necessarily, or in most cases, be fatal. It is not a choice weapon for anyone intending to kill another. The accused had, no doubt, no intention to kill, nor to cause grievous harm to the deceased. He must have panicked after the deceased failed to regain consciousness, hence the irrational decision to conceal the body by dumping it in a well. The conclusion by the medical expert, that the deceased died of drowning, would mean that the deceased was not dead when her body was dumped in the well, so she died of drowning, and not the blow from the fist. The dumping of the body was not intended to cause death by drowning, for the accused thought, according to his confession, the deceased was



already dead, and his intention was to dispose of the body. Whether the deceased was still unconscious, and not dead, are suppositions that I am making, given that the medical evidence was tendered in a manner that was not useful. There was no explanation for the blood on the nostrils, mouth and ears; as to what could have caused it to come out of those orifices, the probable time when it came out, whether blood could come out of those orifices while a person was still alive, whether drowning could cause blood to ooze out of such orifices, and whether a blow by a fist could have caused the oozing out of the blood through those openings.

19. I am of the persuasion that there is inadequate proof of malice aforethought. I am more inclined to find that the accused caused the death of the deceased through an intent to do an act which was dangerous or which endangered life, rather than an intention to kill or cause grievous harm. See *Waweru vs. Republic* [1982] KLR 391 (Law, Miller & Potter, JJA). It was not, in my view, a case of murder, but of manslaughter. The accused did an unlawful and dangerous act, which caused the death of the deceased. In *Director of Public Prosecutions vs. Newbury and another* (1976) 2 All ER 365 (Lords Diplock, Simon of Glaisdale, Kilbrandon, Salmon & Edmund-Davies), it was stated that it is manslaughter where death results from an unlawful act directed against the person, involving a considerable risk of injury, but which no reasonable man would foresee as likely to cause death or grievous harm. The accused did not foresee that striking the deceased with his fist was likely to cause her death or grievous harm, and when she fell, he thought she had merely lost consciousness, and anticipated that she would come to.
20. Consequently, I shall invoke section 179 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and find the accused herein, Samwel Ombima Buruk, guilty of the manslaughter of Betty Akelo, contrary to section 202 of the *Penal Code*, as read with section 205 thereof, and I, accordingly, convict him, under section 322 of the Criminal Procedure Code. For the purpose of sentencing, the Busia County Director of Probation and Aftercare Services shall compile a pre-sentence report, and file it herein. I note that the accused hails from Vihiga County, so, I shall direct that the pre-sentence report be filed within 30 days. The accused person has a right to make a statement in mitigation before sentence, a chance shall be availed for that purpose, once the pre-sentence report is placed on record. He shall be sentenced thereafter. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27TH DAY OF NOVEMBER 2023.

WM MUSYOKA

JUDGE

