



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Chimanga & 2 others (Criminal Case 23 of 2016)
[2023] KEHC 25726 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 23 OF 2016
A. ONG'INJO, J
NOVEMBER 24, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MBOVU MUGANDI CHIMANGA ALIAS HAMISI SHOO 1ST ACCUSED

MWALEWA CHOMBO MUGELE 2ND ACCUSED

KOLO KUMBE MWACHUPA ALIAS KOLO MKALA 3RD ACCUSED

JUDGMENT

Introduction

1. The accused persons Mbovu Mugandi Chimanga Alias Hamisi Shoo, Mwalewa Chombo Mugele And Kolo Kumbe Mwachupa alias Kolo Mkala face a charge of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*.
2. Particulars of the offence are that Mbovu Mugandi Chimanga Alias Hamisi Shoo, Mwalewa Chombo Mugele And Kolo Kumbe Mwachupa alias Kolo Mkala on 4th March 2016 at around 2.00 pm at Miatsani village in Ndavaya Location within Kwale County jointly with others before court murdered Ruwa Buguta.
3. The prosecution called 5 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Mjeni Ruwa testified that on 3.3.2016 at around 8.00 am, she was at home with her parents and younger mother. That her father received a phone call and her mother asked who it was and that her father said that he had sent someone to look for a cow which had been found. PW1 said that her



- father decided to go but she told him that she had bursary forms which required to be taken to the chief. That PW1's younger mother asked who had called her father and she said it was Hamisi Shoo who was officially known as Mbovu Mugandi. That Hamisi persistently called PW1's father and PW1 accompanied her father up to the chief's office where he left her and proceeded to meet Hamisi. PW1 said that her father had carried her on a motorbike and when she was done with the chief's office he went back home.
5. PW1 informed court that in the evening, at 6.00 pm, her younger mother told her to call and find out where her father was. That she used her mother's phone to call but she could not reach him and they thought he was in a place without network. That the following day at 11.30 am, PW1 was in the house when she heard a motorbike and when she got out, she found Dudu Buguta and Dudu Mwaruwa who were her father's brothers. That the two reported that PW1's father had died in Miatsani and the body taken to Kinango Hospital Mortuary. That they met and proceeded to Kinango where they confirmed the death. PW1 said that her father's neck and hands were tied with a rope. PW1 identified her father's motorbike and the rope that tied him in the photographs in court as well as her father's mobile phone which was in court. PW1 identified Mbovu Mugandi and her uncle Mwalewa Chombo, the accused persons in court.
 6. PW2, Umazi Chombo the wife of the deceased said that on 4.3.2016, they woke up and the deceased took cattle to the field. That when he got back, he started digging a pit latrine while PW2 was in the house doing chores. PW2 said that he heard her husband receiving phone calls. That when he got into the house, the phone continued ringing and when PW2 asked who it was, the deceased told her it was Hamisi Shoo. That after eating, the deceased left in the company of Mjeni who was taking bursary forms to the chief's office.
 7. PW2 said that by 6.00 pm, the deceased had not returned home and that they tried calling him severally but he could not be reached on phone. PW2 testified that the next day at noon, his brother-in-law went and informed her that her husband had been killed. That together with her other brothers-in-law, they went to Kinango Hospital Mortuary where they saw the body of the deceased and that her husband's hands were tied at the back and to the neck. That they proceeded to Kinango Police Station where they recorded their statements.
 8. PW3, Benjamin Chimbonya Berago, the area chief testified that on 5.3.2016 at 8.00 am, he was at home when he got a report that someone had been found dead in the bush in Maphungo 'B' village. That he proceeded to the scene of the murder which is on the boundary between Matuga and Kinango and found the relatives had made a call to Kwale Police Station and that the police officers went to the scene by 1.00 pm. That the deceased had a red mobile phone – ITEL in his jacket, he had a manilla rope on his neck and there was a red motorbike make Haojin Reg 796 Q which was placed beside the body, and that the deceased had serious injuries on the head. That the body was collected and taken to Kinango Hospital Mortuary.
 9. PW3 said that on 6.3.2016, Hamisi Shoo went to his home in the morning and reported that he received a phone call from the police in Kinango that requiring him to attend. That Hamisi wanted PW3 to accompany him to the station. That Hamisi confirmed that he knew Buguta had died and upon further interrogation, Hamisi mentioned that Mwalewa Chombo Mgele and Kolo Kumbe Mkala as the ones who had jointly murdered the deceased. PW3 stated that Mwalewa Chombo was the immediate neighbour of Mbovu Mganda alias Hamisi Shoo while Kolo Kumbe lived in Kakindu village not very far from Mbovu and Mwalewa's homes.
 10. PW3 testified that Hamisi Shoo did not explain in PW3's presence the reason for killing the deceased. That when Mwalewa Chombo learnt that Hamisi had been detained, he went underground and on



- 12.3.2016, Mwalewa was arrested in the bush near his home. That Kolo flee and went to stay at the 2nd wife's home in Pongwe Kidimu in Lunga Lunga. That in May 2016, PW3 received a call from the chief of Pongwe informing them that Kolo had been arrested and he was taken to Kinango Police Station. That PW3 went and recorded a further statement and in August 2020, PW3 learnt that Kolo had been killed in Mwamose in Lunga Lunga
11. PW4, No. 84227 PC Rashid Wesonga testified that on 5.3.2016, at about 2.00 pm, he was at Kinango Police Station as an investigations officer when Chief Inspector Richard Masila called and informed him that the assistant chief Benjamin Bendago of Kifyonza sub-location called and informed him that there was a body recovered in his village in a thicket. That in the company of colleagues, PW4 left in a police vehicle and proceeded to the scene and on arrival found police officers from Kwale Police Station. That at the scene, they found motorcycle registration number 796 Q make Haojin red in colour. That they also recovered a mobile phone in the deceased person's pocket – make ITEL. That there were injuries on the head and there was a rope on the neck. That they took photographs and later moved the body to the mortuary and the motorcycle to Kinango Police Station.
 12. PW4 said that the body was identified as that of Ruwa Buguta, postmortem was conducted and the body released for burial. PW4 said that investigations commenced led by CIP Masila. That they recorded statements of the chief and members of the family. That they learnt the deceased was a livestock trader and on 4.3.2016, his friend Mbovu Mgandi alias Shoo called him that they go and plan how to go to the livestock market. That he was accompanied by his daughter whom he left at the chief's office in Banga to fill bursary forms. That the deceased proceeded to meet his friends and that was the last time he was seen alive.
 13. PW4 said that the assistant chief and members of the public arrested the 1st accused and took him to the police station. That the 1st accused was interrogated and that CIP Chemuolo recorded his statement under inquiry which led to the arrest of the 2nd accused who also admitted to having been involved. That the 2nd accused's statement was recorded by CIP Mwakio and from the statements of the 2 suspects, it was established that there was a 3rd suspect, Kolo Kumbo. That an investigations file was opened and forwarded to the ODPP who recommended that they be charged. PW4 produced the deceased's phone as Ex P3, he produced the rope found tied on the deceased's neck as Ex P2 and the photographs taken at the scene as Ex P1.
 14. PW5, Dr. Kitsao Mjimba Kalume produced the postmortem report prepared by Dr. Fankupi who was away for further studies though he was conversant with the doctor's signature and handwriting. That the postmortem was in respect to the body of Ruwa Buguta conducted at Kinango Sub-County mortuary on 6.3.2015. That on general observations, the body had swelling on the face, lips, abdomen, and scrotum. That there was blistering on the chest and patchy blistering on all of the right arm, peeling of the skin on the shoulder region and there were small whitish maggots on the neck. That purge fluids, blood bubbles foaming in the mouth and nose. That notably there was a rope around the neck, hyoid bone not palpable due to swelling around the neck, fecal matter was evident, tongue cut with ligature mark on the neck seen, and depression on the right frontal part of the head.
 15. PW5 said that on internal examination, the relatives declined to have the incision for internal organs examination due to traditional taboo and Mwamleo Buguta a young brother of the deceased as well as Umazi Ruwa the wife of the deceased signed to confirm that they did not want the body to be opened. The doctor was of the opinion that death was caused by asphyxia/strangulation due to hanging by a rope. That the postmortem was signed by Dr. Fankupi and PW5 produced it as Ex P4



Defence Case

16. 1st accused, Mbovu Mgandi Chimanga gave sworn evidence that the deceased was a fellow businessman and on 2.3.2016, he met the deceased at the market and that the deceased bought 2 cows from him. That Mzee Mbando called the 1st accused and told him that he was selling his animals and that the deceased said he would accompany him to Mzee Mbando's place. That the following day at 6.00 am, the 1st accused received a phone call from Kolo Kumbé Mwachupa who said that there was a cow at his mother's place and that he went and bought the cow. That on the way from Kolo Kumbé, the 1st accused called the deceased and asked if he was going but he said that he was taking his child to school and that he would go and see the cows at the 1st accused's home.
17. The 1st accused said that he called Mwalewa at about 8.00 am who arrived at 9.00 am and they took tea together. That they then proceeded to Mbando and arrived at 1.00 pm and bought cows but went back for the cows the following day. The 1st accused said that they also took Mzee Mbando to Mwanguta where they again bought 2 cows and Mzee Mbando returned home on a motorbike. That at 2.00 pm, they arrived at Mwabanda where they took 2 other animals and started driving the 4 animals back home. The 1st accused said that they left Mwabanda at 4.00 pm. That the 2nd accused went home at 8.00 pm and at 9.00 pm, he called and told him that Ruwa had died. The 1st accused said that he did not know the 2nd accused was Ruwa's brother-in-law. That the next day, they went to the 2nd accused's home and he told them that his parents and brothers had gone for burial.
18. The 1st accused informed court that he went to the assistant chief Benjamin Bendagu and reported that he was to go with the deceased to Mwabanda but the deceased said that he was taking his child to school. That on 2.5.2016, he received a phone call from the OCS who had confiscated his cows and that he told the OCS that he would go to the station the following day. That when he got to the station, the OCS told him that he had been called in relation to the deceased. That the OCS looked at the phone and said that on 3.3.2016, he spoke to 2 people and the 1st accused gave names of the people he had contacted.
19. 2nd accused, Mwalewa Chombo Mugele gave sworn evidence that the deceased was known to him and that on 3.3.2016, he was at home and at 8.00 am, Bofu Mgandi called him to his home and that they went to Mwabanda and bought 2 animals though he could not remember the old man who sold them the animals. That they left the animals at Mwabanda and the following day they went to Mwanguta in the company of the old man where they bought 2 cows. That the old man went ahead of them on a motorbike to Mwabanda where they took the two cows that had been bought previously and that they drove the 4 cows back to the 1st accused's home.
20. The 2nd accused informed court that when he arrived home, he did not find anyone and on inquiry, he was told that Ruwa, his brother-in-law had died. That it was the 2nd accused's brother, Chiti Chombo Mugele who informed him of the death and that he was told to take care of the home. He said that his father returned after one week and that the 2nd accused went to condole with his sister, the wife of the deceased, and returned home after 3 days.
21. The 2nd accused stated that on 12.5.2016, he received a phone call from the assistant chief's police officers who informed him that he was required at Fyonzo Primary School. He said that on arrival, he met the officer, Gini Mwanagiya, together with the assistant chief Zamu Bendago and 2 other people who were not known to him. That he was surrounded, arrested and taken to Kinango Police Station and later charged with the offence of murder. He said that he did not sign any statement and that on 3.3.2016, he did not see the deceased.



Analysis and Determination

22. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
23. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- ‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
24. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

25. Death of the deceased is not disputed that Ruwa Buguta died.

Death was caused by an unlawful act or omission

26. The deceased, Ruwa Buguta was found lying dead in the bush in Mafungo ‘B’ village on the boundary between Matuga and Kinango Sub-Counties. He had been strangled by a rope, the tongue was cut and there was a depression on the frontal part of the head. Dr. Fankupi was of the opinion that death was caused by asphyxia where blood vessels in the neck obstructed oxygen to the brain. The injuries were not self-inflicted and they were not accidental. It is not in doubt that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

27. There was no eye witness to the murder of the deceased Ruwa Buguta. According to PW1 and PW2, the deceased left home on 4.3.2016 to go to the livestock market after the 1st accused persistently called him on phone and he was never seen alive again. When his body was found in the bush near his in-law's home between Matuga and Kinango Sub-Counties, the police were informed about communication between the 1st accused and the deceased and the 1st accused was summoned by the police to go to the police station. The 1st accused requested PW3 to accompany him to the police station and on arrival he was interrogated about his whereabouts on 4.3.2016 and the last time they were with the deceased in the presence of PW3 and he disclosed that he was with Mwalewa Chombo Mgele and Kolo Kumba Mkala when they murdered the deceased.
28. PW3 said that the 1st accused and 2nd accused were immediate neighbours to each other and the 3rd accused, now deceased, was from Kakindu village which was not very far from the 1st and 2nd



accused persons' homes. The 2nd accused who is the brother-in-law of the deceased went underground immediately he learnt of the 1st accused arrest and on 12.3.2016 he was traced and arrested in the bush whereas the 3rd accused relocated to his 2nd wife's place in Pongwe Kidimu in Lunga Lunga. That the 3rd accused was arrested by the chief of Pongwe in May 2016 where he was taken to Kinango Police station and was jointly charged with the 1st accused.

29. The accused persons tried to remove themselves from the scene of crime saying that they had gone to buy livestock at Mwabanda on 3.3.2016 and to Mwangi the following day on 4.3.2016 but evidence of the daughter and the wife of the deceased was to the effect that the deceased left on 4.3.2016 when the 1st accused persistently called him on phone so that they could go to the livestock market. That is the last time the deceased was seen alive. PW3 the Assistant Chief confirmed having accompanied the 1st accused to the police station at the instance of the 1st accused and he was present when the 1st accused was being interrogated and he confirmed that he went with the deceased to the market on 4.3.2016 and together with his co-accused persons they committed the murder of the deceased.
30. The circumstances surrounding the murder of the deceased, the evidence of PW1, PW2 and PW3 makes this court believe that the accused persons were involved in the murder of the deceased and they are therefore found to have committed the unlawful act that caused the death of the deceased.

Malice aforethought

31. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances: -

- (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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

32. On the element of malice aforethought in respect to Section 206 of the [Penal Code](#), the court held as follows in the case of [Isaac Kimathi Kanuachobi - v- R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”



33. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

34. When the body of the deceased was recovered dead in a bush, a rope was found tied to his neck, his tongue was cut and he had depression on the right frontal part of his head. Dr. Fankupi in the postmortem report dated 6.3.2016 was of the opinion that death was caused by asphyxia/strangulation by a rope.

35. The nature of injuries inflicted on the body of the deceased and the manner in which the same was inflicted is evidence that the assailants’ main intention was to cut short the life of the deceased. The deceased was having his motorbike and other personal items but all of them were left at the scene. Malice aforethought was therefore proved by the prosecution.

36. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused persons are found guilty of the offence of murder and convicted accordingly pursuant to Section 322 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 24TH DAY OF NOVEMBER 2023

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Ms. Musyoki Advocate H/B for Mr. Otieno Advocate for the 1st Accused

Ms. Musyoki Advocate for the 2nd Accused

1st Accused person present in person

2nd Accused person present in person

3rd Accused person – No appearance - Deceased

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Mr. Ngiri: I pray for a date to confirm if accused persons have records

Ms. Musyoki: I pray for a date for mitigation after Victim Impact Statement

Order: Mention on 13.12.2023 for Records, Victim Impact Statement, Pre-sentence Report and Sentence.

HON. LADY JUSTICE A. ONG’INJO

JUDGE

