



**Republic v Majengo (Criminal Case 11 of 2016)
[2022] KEHC 18133 (KLR) (28 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 18133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 11 OF 2016
DO CHEPKWONY, J
JANUARY 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

SIMON OMBAYO MAJENGO ACCUSED

JUDGMENT

1. This is a case of murder where Simon Ombayo Majengo, the accused herein is charged with the said offence contrary to section 203 as read with section 204 of the *Penal Code*, Cap 63 Laws of Kenya.
2. The particulars of the offence as per the information presented reads that:-

“The accused herein murdered Jane Apiyonn Omela alias Jennifer Kalekye Pamela (hereinafter to be referred to as the deceased) on the night of 14th and 15th day of December, 2015 at Kona Mbaya area in Likoni District, Mombasa County within Coast Region.
3. When the Accused person was presented to court to take plea, he denied causing the death of the deceased and a plea of “Not Guilty” was entered.
4. The prosecution called a total of six (6) witnesses to support their case against the accused person. In summary, the prosecution presented the following evidence.
5. PW1 was Patricia Atieno and her testimony was that she had known the deceased for about seven (7) years before the incident as at that time they were neighbouring one another although she owned a drinking joint. She also said that although she knew the accused person as a customer, she did not know him by name. On that fateful day, PW1 claims that the deceased came to the drinking joint asking for the deceased and she told him that the deceased had gone to fetch some water. He also claimed to be the deceased’s husband and opted to wait for her to return. Later, when the deceased returned, PW1 prepared for them some ugali, vegetables and tea. They stayed together until 6.00pm when both the



- accused and the deceased left after the accused had promised that he would collect some money from his sister and give it to the deceased.
6. According to PW1, both the deceased and the accused returned to the drinking joint and the accused bought beer worth Kshs.70/= to share with the deceased. Later, PW1 joined the boozing until 8.00pm when another lady came and joined the table. At that moment, PW1 went to sleep. She narrated that she could hear the three singing luyha songs. It was not until the following day that PW1 was awoken by one Maryam who was asking whether she knew the man who had been drinking with the deceased. She confirmed that she knew him and Maryam then said that she had checked on the deceased's house and a man answered, then came out running with a hanging shirt over the shoulder claiming that he was getting late for work. PW1 and Maryam then immediately proceeded to check on the deceased and found her lying dead and half naked with clothes pulled up and was naked on the bottom part with her pants turned on the side. The matter was then reported to the village elder and later to the police.
 7. PW1 added that three months after the incident the accused returned to her drinking joint and on seeing him, she alarmed the people around and he was arrested.
 8. On cross-examination, PW1 stated that the deceased had no fixed place of abode and she could either sleep at her house (PW1's) or at Maryam's house. She also admitted that the first time she had met the accused was on the date of the incident and after the accused had left with deceased to get some cash from an alleged sister, PW1 had not seen him again until 3months after the incident.
 9. PW2 was Maryam Salim Kitole and she testified that on 14th December, 2015, she was at home when the accused and the deceased came to her house and they appeared to be seducing each other. The deceased then told her that the accused was her friend and they had known each other for long. That the accused then requested PW2 to allow her a room to sleep with the man and she allowed them to use one of her two-roomed house. However, she warned that the house was in disrepair and could come down when rained on. PW2 did not spent the night in the same house as she left to sleep at her sister's house.
 10. According to PW2, the following morning at around 6.00am, she went to check on deceased and after several unanswered calls, the accused came out and informed her that the deceased was still asleep and should not be woken up unless she wakes up by her own. The accused then left and when she peeped into the room, she noticed that the deceased was covered in a white sheet and was not responding to her calls. PW2 then proceeded to PW1 and informed her of the same. PW1 then came and on observing the deceased, they noticed that she had died. Later the village elder and the police came and confirmed that the deceased was dead and took away the body. Later, the accused person was arrested some months after the incident.
 11. Upon being cross-examined, PW2 admitted that on the fateful day she was drinking changaa with both the deceased and the accused at PW1's place although she did not know the accused at that material time. However, she denied that the accused had borrowed any cash from her or even from PW1. It was her further testimony that PW1's husband was arrested in connection with the same offence but was released after the accused herein was arrested.
 12. PW3 was Alfred Nzau Mwambaka, an Assistant Chief at Kwale. He testified that on 15th December, 2015 he was called by a village chairman called Voja informing him that his sister who happens to be the deceased herein, had been murdered. He then proceeded to Kona Mbaya where his sister had been murdered but they found that the body had already been taken to Coast General Hospital. He added that it was later identified that she had been strangled to death.



13. No.235765 I.P Yusuf Ibrahim testified as PW4 and informed the court that he was previously based at Likoni Police Station where he was serving as an Officer In-Charge of Crime before transferring to Changamwe where he is currently attached as the Deputy O.C.S. He told the court that he had conducted an identification parade for the accused person who was positively identified by three witnesses namely; Rose Akoth, Maryiam Salim and Patricia Atieno. That, upon interrogating the three witnesses, they all affirmed that the accused person was the last person to be seen with the deceased.
14. No. 233830 C.I.P Gesalia Kiribo testified as PW5 and told the court that he was formerly the O.C.S. at Inuka Police station where the present matter was reported. He testified that on 15th December, 2015, he received a call from PW2 informing him that there was a dead body in her house. That he proceeded to the scene and found the deceased lying on a small mattress while facing upwards. The deceased had bruises on both sides of her neck and there was nothing significant around her. He added that the house did not appear to have been broken into and when he asked PW2 of what had happened, he was informed that the deceased had been in the company of a male person the previous day and they had requested for a place to sleep and that is how they ended up in her house. On cross-examination, PW5 informed the court that he cannot tell what happened from the time of the incident to the time of the accused person's arrest.
15. N0. 55894 P.C Daniel testified as PW6. He was the investigating officer in this case and his testimony was only limited to production of post mortem report prepared and signed by Dr. S.M Otieno as exhibit 6. He informed the court that the report showed that the deceased had died as a result of strangulation.
16. In his defence, which he opted to give on oath, the accused person told the court that he works as a loader at Shimazi. He stated that as from 14th to 18th December, 2015, he was working day and night at Shimazi and he did not go to Likoni during that period. He also insisted that he did not know the deceased but admitted that he knew PW1 because he used drink changaa at her brewing joint. The accused then said that sometimes in February, 2016 PW1 and PW2 caused him to be arrested by members of the public.
17. When cross-examined, the accused person admitted that there had been no disagreement with PW1 and he did not know about PW3.

Analysis and Determination

18. This court has considered the evidence of the prosecution witnesses and the sworn defence by the accused person to determining whether the case against the accused person has been proven beyond reasonable doubt.
19. The accused herein is charged with the offence of murder contrary to section 203 as read with sections 204 and 206 of the [Penal Code](#).
20. Section 203 of the [Penal Code](#) defines murder as follows;
 203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
21. Section 204 on the other hand prescribes the sentence for the offence of murder which is death. Going by the provisions of Section 203 of the [Penal Code](#) (above), a trial court can only convict for the offence of murder if it is established beyond reasonable doubt that a person has died; that the death



was unlawful; that it was committed by another person as a result of his act or omission; and finally, the act or omission that resulted in the death was motivated by malice aforethought, express or implied. (See case of *Woolmington v DPP* [1935] AC 462).

22. Malice aforethought is the mental element in the offence of murder and it is express when it is proved that there was an intention to kill unlawfully (see case of *Beckford v R* [1988] AC 130). It is implied whenever it is proved that there was an unlawful intention to cause grievous bodily harm (See case of *DPP v Smith* [1961] AC 290). It is therefore apparent that intent is a common element in both forms of malice aforethought; whether implied or express. For malice aforethought to be established, the intent must first be established. More so, Section 206 of the [Penal Code](#) prescribes circumstances under which malice aforethought may be deemed to have been established. It reads as follows;

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one 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 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.
23. In addition to the foregoing, this court has stated for the umpteenth time that the onus and evidential burden in criminal cases lies with the prosecution to prove its case against the accused person beyond any reasonable doubt. In a case of Murder, the prosecution must prove that it was the accused who caused the death of the deceased by an unlawful act. It must equally prove that at the time the accused murdered the deceased, he had formed an intention to either cause death or grievous bodily harm to him or her.
24. Turning to the facts of the present case, it is a common ground that the deceased was killed. The cause of the death as evident from the post mortem report produced as Exhibit 6, was strangulation. This finding was buttressed by the testimony of PW6. There was no evidence to the contrary therefore,, to this extend the prosecution has proved the death of the deceased and the cause thereof to the required standard beyond any reasonable doubt.
25. The second is, was the death of the deceased caused by the Accused? In this case there was no eye witness who saw the accused inflict any injuries on the deceased. It is therefore clear from the evidence



presented by the prosecution that there is no direct evidence linking the accused to the murder and the case against him is purely based on circumstantial evidence.

26. In the case of *Sawe v Republic* [2003] eKLR, it was stated, among other things, that for a court to convict on circumstantial evidence, some ingredients must be established as below;

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

27. Therefore, with regard to this case, this court will consider the facts presented before it and weigh the same against two key questions, that is;

- a. Whether the facts of this case compatible with the innocence of the accused?
- b. Whether the facts are capable of explanation upon other reasonable hypothesis than the guilt of accused?

28. PW1 stated that she knew the accused person as her customer and admittedly, the accused person also testified that he knew PW1 having been a customer at her brewing joint on various occasions. However, PW1 did not know that the deceased and the accused person had an intimate affair and the first time she learned of this is when the accused introduced himself as the husband to the deceased. It is evidenced that on that material date, PW 1 spent quite some considerable time with the accused person from 10.00am who had come looking for the deceased until 6.00pm when the deceased finally showed up. In addition to that, PW1 cooked some food and shared the same with both the deceased and the accused. That, thereafter the accused and the deceased continued to enjoy themselves by drinking alcohol but at around 8.00pm, PW1 excused herself and retired to sleep.

29. Further, the evidence on record shows that after the two relished the alcohol to their accommodation, the deceased approached PW2 seeking for some place where they could spent the night. In her testimony, PW2 confirmed that she allowed the deceased and the accused persons use one of her rooms. However, PW2 told court that when she returned she tried to call out the deceased but here was no response. Instead, it is the accused person who responded by opening the door and ran out with his shirt hanging on his shoulders while claiming that he was getting late for work but asked her not to wake up the deceased person unless she does so by herself. Later, the deceased was found lying half naked in the room, with her torn pants to the sides.

30. In an attempt to shake those facts, the accused testified; that he did not go to PW1’s brewing joint on that fateful date as he was on duty at Shimazi, where he was working as a loader and was not present at the scene on that particular date. He even denied knowing the deceased person. Much of what the deceased seems to put forth is the defence of alibi. In my view, where an accused person wishes to rely on the defence of alibi, he must raise it at the earliest opportunity available to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939, in the case of *R. v*



Sukha Singh S/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the a decision of the High Court in which it was stated:-

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

31. In the instant case, the accused person raised the defence late in the day during the defence hearing as it raises questions and leaves doubts on the possibility of the same being an afterthought. However, weighing the defence against the evidence of PW1 and PW2 the court is persuaded that that PW1 and PW2 were reliable and truthful witnesses and their evidence cannot be watered down by the defence adopted by the accused person for a number of reasons. Firstly, both PW1 and PW2 positively identified the accused person on an identification parade overseen by PW4 and the accused person did not raise issues of dissatisfaction with the manner in which the identification parade was conducted. It is thus safe to conclude that the accused person was well known to PW1 and PW2 by appearance. Secondly, the accused person admittedly testified that he would occasionally go to drink at PW1’s brewing joint hence buttressing PW1’s testimony that the accused person was known to her as a customer and could recognize him although she could tell what his name was. Therefore this court is sufficiently persuaded that the man who was last seen with the deceased by PW1 and to whom PW2 offered a room to spend with the deceased is the accused person herein. However, it is not denied that at the time they were offered the room by PW2, both the deceased and accused person were intoxicated. No one saw what transpired between the two overnight but it is beyond rebuttal that the following morning the deceased was found dead in the same room they had been offered by PW2 and she (the deceased) was half naked (bottom part) and her pants were twisted to the sides. PW2 also added that on the same morning, when she called out for the deceased, it is the accused person who responded as he came out of the room rushing while claiming that he was getting late for work. It is further evidenced that after the incident, the accused person disappeared and was at large only to show up three months later when he was arrested. It was even the evidence of PW2 that the accused had warned her not to wake up the deceased, which evidence was not rebutted.
32. The above circumstantial facts therefore irresistibly point at the accused person’s guilt as he was the last person to have been seen with the deceased while she was alive. In a persuasive Indian case of *Deepack Sauna v State of Delhi* which the court fully agrees with observed as follows:-

“In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt.”



33. Similarly, the court in the case of *R v ECK*[2018] eKLR cited with approval the case of *Moses Jua v the state* (2007) (PELR – CA/11 42/2006 where the court held as follows:-

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.” (Emphasis added)

34. In this case, the court having satisfied itself from the evidence offered that the accused person was the last person to be seen with the deceased and even spent the night with her to be found dead in the morning. The accused thereafter disappeared for three months and the explanation that he did not know the deceased was just a way of avoiding the truth. It is therefore my finding that the death of the deceased was caused by unlawful act on the part of the accused.

35. The final issue for consideration is whether in causing the deceased’s death, the accused person had the necessary malice aforethought. From the evidence of PW1 the accused person introduced himself as husband to the deceased and the deceased acknowledged that she knew the accused person. PW3 also testified that the deceased who was his sister was once married but was separated from her husband at the time. PW2’s testimony which is corroborated by that of PW4 is that the deceased’s body was clothed but naked on the lower part with the pants twisted sideways.

36. The court has taken into account the circumstances surrounding the deceased’s death and the manner in which she died and come to the conclusion that the accused may not have had the intention of committing the offence he is accused of. It is most probable than not that the accused person was motivated by a sexual desire and the strangulation was probably an effort to achieve that desire. It is also clear from the evidence presented by the prosecution’s witnesses that both the deceased and the accused person were tipsy and that could have also influenced the accused’s actions as prior to this incident, there is no evidence that there was bad blood between the deceased and the accused, hence no motive revealed. To the contrary, it would seem that they were in good terms prior to that fateful day. Consequently, this court is unable to conclusively find that the death of the deceased was caused by malice aforethought on the part of the accused hence the ingredients of murder have not been proved; the accused person is thus not guilty of the offence of murder.

37. Instead, it is the court’s finding that the circumstances of this case fit the definition of Manslaughter under section 202 of the *Penal Code*. It provides as follows:-

[202] Manslaughter

1. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
2. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm



38. The charge of Murder against the accused is hereby reduced to that of Manslaughter pursuant to the provisions of section 179 of the *Criminal Procedure Code*.
39. Accordingly, the accused person is acquitted of the charge of murder but convicted of the offence of Manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JANUARY 2022.

D.O CHEPKWONY

JUDGE

