



REPUBLIC OF KENYA



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**Republic v Kubai (Criminal Case 28 of 2016)
[2022] KEHC 14983 (KLR) (Crim) (30 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 14983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 28 OF 2016**

JM BWONWONG'A, J

MARCH 30, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

SUSAN KNIGHT KUBAI ACCUSED

JUDGMENT

1. The accused, Susan Knight Kubai is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya, in respect of Hellen Wanja Gichuki, the deceased.
2. The particulars of the offence are that on the 29th March 2016 at Greenwood Estate in Kasarani Sub-County in Nairobi, jointly with another not before the court murdered Hellen Wanja Gichuki.
On 11th April 2016, she pleaded not guilty to the charge.
3. The prosecution called twelve witnesses who gave evidence in support of their case; eleven of whom testified before Hon. Mr. Justice Wakiaga. I took over the trial pursuant to section 200 as read with section 201 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya; after the accused informed the court that her trial should continue from where it had reached.
4. Joseph Maina Murugu (PW 1) testified that on March 29, 2016 after travelling from upcountry, he went to Paul Mugo's house who was his employer in Greenwood Estate in Kasarani. In the house, he found the accused in the company of an unknown male, who was wearing a cap and was in the kitchen. That the accused was cleaning the floor which had blood-like substance.
5. PW 1 testified that he briefly interacted with the accused and excused himself to get a cup of tea at a nearby kiosk and the accused followed him. That after the tea, he managed to get away from the accused



and ran back to the house. PW 1 testified that he tried to call his employer who was unreachable. He was apprehensive that the blood that was being cleaned was of his employer. It was his testimony that he called Peter, Paul Mugo's brother-in-law, who arrived at the premises. PW 1 and Peter then proceeded to the backyard where they found the body of the deceased which was covered with blood. PW 1 also testified that he also called Waweru who escorted them to Kasarani Police station, where he reported the incident. It was his testimony that the deceased was Paul Mugo's second wife. He identified the accused as his employer's third wife.

6. On cross-examination by counsel for the accused, PW1 testified that he had been staying at Mugo's house as a caretaker and had the keys to the premises. Furthermore, at the time the incident in issue occurred, his employer had travelled abroad. PW1 admitted that he was not present when the deceased died and did not know who killed her. He was adamant that when he excused himself to get a cup of tea, he was terrified and afraid for his life. He further testified that his employer had intimated that he fought with the accused severally. During his testimony, he identified the photographs of the body of the deceased which were marked as MFI a – MF I j.
7. Geoffrey Murithi Kabugi (PW2), testified that on the material day he received a call from his wife who informed him that an incident had occurred at her brother's (Paul Mugo) home. Upon arrival, PW 2 met PW1 with whom they entered the house and noticed bloodstains on the floor which appeared to have been recently cleaned. Furthermore, one seat had what appeared to be bloodstains while on the stairs there were shoes of a male person. PW 1 and PW 2 went to the backyard of the house, where they found the body of the deceased. PW 2 testified that he accompanied PW1 and Waweru to Kasarani Police Station where he recorded his statement. During his testimony, he identified the accused whom he knew. PW 2 also identified the photographs of the deceased marked as MF1 a – MF 1j.
8. On cross-examination, PW 2 testified that he did not know where the accused was living with his brother-in-law Mugo. He indicated that he also knew PW 1 as Paul Mugo's caretaker. He further testified that he was present when the accused was arrested at Saika Estate.
9. In his sworn testimony Derrick Kiprono (PW 3) testified that he is attached to CID headquarters. He testified that he received a call from Chief Inspector Muchemi on March 28, 2016 at around 4.30 hours directing him to process a report that had occurred in Kasarani area. That he proceeded to process the photographs which showed the residence, gate, close up of the sofa set with blood sputter, close up view of the living room, the side view, exits, and photographs of the deceased, and thereafter issued a certificate to that effect. The photographs and certificate were produced as PEX No 1A to P and their certificate was also produced as PEX No 2
10. In cross-examination by counsel for the accused, PW 3 conceded that although there were blood trails and stain marks along the floor which looked washed, he had no photographs showing the blood trail. Furthermore, that he only picked items that had stains on them. He indicated that he relied on his observations to make a judgment on what photographs to produce.
11. In his sworn testimony Paul Mugo Kabutu (PW 4), testified that on 29th March 2016 at around 5.00 pm while on his way to Spain, he received a call from his boss, who informed him of the incident that had occurred in his residence in Nairobi. PW 4 immediately started his journey back to Nairobi. He testified that he arrived in Nairobi on 30th March 2016 and was informed that his girlfriend Hellen Wanja Gachiri had been murdered and the main suspect was Susan Knight, who was also his girlfriend. PW 4 testified that he went to City Mortuary to identify the body of the deceased. He added that the deceased had injuries on the chin, a bite on the chin, and bruises on the forehead. PW 4 further testified that the accused was aware that the deceased had returned from Qatar, where she regularly travelled for business and that she had moved in with him in his residence in Kasarani. It was his evidence that



- he lived with the deceased in the residence in Kasarani. Furthermore, PW 4 testified that the accused was also his girlfriend from 2009 and had her home in Komarock Phase III opposite Saika Estate. He also testified that the two women knew each other very well and their relationship was good. PW4 identified the accused in Court.
12. On cross-examination, PW 4 testified that the accused occasionally visited him in Kasarani but she did not have a key to the premises. Further, that he had started staying with the deceased as a girlfriend in 2010. PW 4 admitted that he had employed PW1 as a caretaker at his residence and had access to the property.
 13. Susan Wangari Kibutu (PW 5) testified that she is the wife of PW 2 and that on 29th March 2016 she received a call from his brother Peter about some suspicious activity that had taken place at PW 4's house. She then called her husband who was on night shift to go and investigate. Later on, she learned that the deceased who was PW 4's wife had been killed. She testified that she knew the deceased in person and had closely interacted with her. Furthermore, she did not know the accused but only knew the deceased and Lilian as the wives of PW 4.
 14. Joseph Waweru Kabuchu (PW 6) testified that he is the brother of Paul Mugo (PW 4). He recalled that on 28th March 2016 he met the deceased at around 3 pm in the premises, which he had rented to her along Kenyatta road. That later in the night he received a call through his wife's phone from Muriithi (PW 2) informing him of an incident at PW 4's house. That thereafter they went to report the matter at Kasarani Police Station. He testified that they subsequently proceeded to PW 4's house in the company of three police officers.
 15. PW 6 added that at the premises, the deceased's body was lying in the backyard and had visible bruises on the chin and an open wound on the forehead. He testified that there was also blood on the floor and bloodstains on the couch. That the next morning he recorded his statement with the police. Furthermore, since he did not know the accused, his nephew known as Arnold assisted the police to identify her. It was his testimony that he knew the deceased as the wife of PW 4.
 16. Peter Chomba Kabutha (PW 7) recalled that on 29th March 2016 at around 6 pm he had met the deceased at her business premises on Kenyatta Road and had been introduced to her as PW 4's girlfriend. That on the material day, he gave her a 'lift' and left her at Bypass as she was heading to Kasarani. He testified that later in the night he received a call from PW 1 who informed him of the events that had taken place on the same day. That he contacted PW 5 as he tried to get someone with more information on the matter. He testified that on the following day he was called by the police to record a statement and later on visited the scene of crime.
 17. In cross-examination by counsel for the accused, PW 7 testified that he knew the deceased as Paul Mugo's girlfriend. Furthermore, PW 7 testified that PW 5 was living alone. He conceded that he had received all the information from the incident from PW 1. He added the deceased had indicated that she was going to PW 4's house.
 18. No 234606 Chief Inspector Munywoki Gumbo (PW 8) testified that in 2016 he was attached to Kasarani Police Station as the deputy OCS. That on 31st March 2016 between 4.15 pm and 5 pm he held an identification parade at request of Ambrose Gichane, the investigating officer. That the suspect in the parade was Susan Kubai, the accused herein and the witness called to identify her was PW 1. That during the identification parade, the witness identified the suspect by an actual touch on her shoulder. He testified that he followed the procedure for holding identification parades. He also testified that there was only one witness.



19. Rahab Wanjiku Mwangi (PW 9) testified that she recalled that she had been a friend of the deceased since childhood. She testified that in the course of their friendship, the deceased shared her personal experiences. That in 2014 the deceased had informed her about threats on her life by a lady called Susan due to her relationship with PW 4. She acknowledged that she did not know whether the deceased took further steps to report the matter to the police. She testified that she only learnt of her death on Facebook and did not know the accused.
20. No 67573 Sgt Joram Ndungu (PW 10) testified that on 29th March 2016 he received a report of murder from PW 1. He then visited the scene of the crime in the company of other officers. That at the time, the owner of the house was not there. PW 10 testified that at the scene, he found the dead body of a female adult with bruises on the face, was lying on her back, and appeared dragged from the house to the enclosed place outside the house. He also testified that he was also accompanied by PW 6 and PW 2. That a crime scene expert was called and who took photographs and preserved the scene before the body of the deceased was taken to the mortuary. He testified that he was the first officer to arrive at the scene.
21. Dr. Peter Ndegwa (PW 11) produced the post mortem report dated 22nd June 2016 as PEX No 4. He indicated that on 1st April 2016 he performed an autopsy on the body of Hellen Wanja Gichuhi. The deceased had bloodied clothes, her eyes were sore and she had bruises on the right frontal scalp and the right elbow. She also had teeth-like marks on her cheeks. Internally, she had bruises in the right scalp and front skull. There were also bruises in the right of the elbow and arm. According to him the cause of death was determined to be head injuries due to blunt force trauma.
22. No 448385 Ambrose Gichane (PW 12), testified that upon receiving a report from PW1 he traced the telephone of the suspect. PW 12 and PW 1, went to the scene and found bloodstains on the chairs. The accused was eventually arrested at her home in Komarock area. That Mr. Maina (PW1) identified the accused at a police identification parade that was conducted at Kasarani police station. He further testified that the accused was taken for mental assessment and later charged with the offence of murder. He produced the request letter for call data to Safaricom as PEXH 5 and the mental assessment report as PEXH 6.
23. It was his evidence that during his investigations he learnt that the deceased and PW 4 were living as husband and wife. He also testified that the accused was also a girlfriend to PW 4, the owner of the house where the deceased's body was found. He further testified that he decided to charge the accused based on the evidence of the witnesses.
24. In cross-examination by counsel for the accused, PW 12 testified that on the material day, PW 4 had traveled to Spain and was never treated as a suspect during the investigations. Further, he could not establish the identity of the person who assisted the accused in cleaning the house. He admitted that the stained seats were not taken to the Government Chemist Analysts department for further investigation. Further, that PW1 recorded a statement under inquiry that placed the accused at the scene of crime, and also identified her.

The prosecution then closed its case.

The submissions of the accused at the close of the prosecution case.
25. Counsel for the accused did not make submissions on a no case to answer.

The submissions of the prosecution at the close of its case

Counsel for prosecutions did not file any submissions.



26. Vide a ruling dated 15th December 2021 this court found the accused person had a case to answer and placed her on her defence.

She decided to give unsworn testimony and did not call any witness.

The case for defence

The accused made an unsworn statement and called no witnesses.

27. In her unsworn defence, the accused testified that she is aged 45 years and is a mother of three children. She also testified that she used to sell in a hotel. It was her testimony that on 29/03/2015 at 8.30 pm, an aged man went to her house in Komarock, as she was watching TV. The gate bell rang. She went there and found an aged man. The aged man introduced himself as a taxi driver. The taxi driver told her that he had been sent by her husband Paul Mugo (PW 4). She then returned to her house. She took a phone, her shoes and sweater. She rang her husband and his phone was not going through. She went out of her house and went to get a taxi. She then entered the taxi which was white in colour. The taxi driver was with another taxi driver. She did not know that the taxi drivers were good people. This was not the first time that her husband had sent a taxi to pick her up. They arrived at the gate to the house of PW 4 at Greenwood estate. She was surprised that the guards at the gate allowed them through the gate without asking them for their details. This taxi driver told her that he was a close friend of PW 4. That the taxi driver took her to PW 4's house.
28. Furthermore, the accused testified that upon arrival at the house of PW 4, the taxi driver opened the main gate and left it open. The taxi driver opened the door to the main house he then put on the electricity.
29. The accused continued to testify that she then saw blood on the floor. She was shocked and speedily left that house. The taxi driver showed her a gun and told her to shut up. Next to the taxi driver was a bucket and a piece of cloth used for cleaning the floor. The taxi driver told her to use the rug and clean the blood-stained floor. As she was cleaning the taxi driver was talking to somebody with his phone.
30. As she was cleaning the floor, Mzee Maina, the house boy of PW 4 arrived and sat down without asking her either where PW 4 was or why she was cleaning the floor. Mzee Maina (PW 1) asked for tea. She told him to go and make tea for himself. Instead of doing so, PW 1 went to an hotel to drink tea. The accused testified that: "I thought it was good for him to go for tea, because he would alert the guards as to what was going on in Mugo's house."
31. Thereafter the taxi driver ordered her and Mzee Maina to leave the house. They then passed through the gate and the guards did not ask them anything. From there they went to a hotel. They left the hotel and they did not see Mzee Maina. The same taxi driver that took her to the house of PW 4 arrived and took them. The taxi driver who sat next to her told her not to tell anyone what had gone on at the house of PW 4. This taxi driver told her if she told people what she had seen in the house of PW 4, her life and that of her children would be in danger. That is when she realized she was being returned to Komarock where she was living. The taxi driver told her to remember what he had told her.
32. Upon arrival in her house she tried to ring PW 4, but his phone was not going through. She then rang her mother in Uganda and told her what had transpired. She continued to testify that later her brother, Linus Kubai rang and told her he was going to report on duty; thereafter he was to return and have the matter reported to the police.
33. In the morning her house help called her and told her that she had visitors. She went to the sitting room, where she found CID police, the brother of PW 4, Joseph Waweru (PW 6) and Geoffrey Muriithi. The



CID searched her house. They asked her the clothes she wore the previous day and her phone. The CID took her and her brother, Linus Kubai to Muthaiga police station. Upon being asked what had transpired the previous day she told them what had happened. She told them she was in good terms with Mugo (PW 4).

34. The accused also told the CID that PW 4 had a relationship with the deceased in 2012 and 2013. She further testified she was pained and angry for the period she was in custody; since Mzee Maina did not show any signs of surprise when he saw her cleaning the blood. Mzee Maina did not tell the guards what he saw in that house.
35. The accused testified that she was a suspect at a police identification parade, where Mzee Maina identified her as a person he knew. She also told police she knew Mzee Maina.
36. The defence closed their case after failing to secure the attendance of their witness namely Elias Kubai. Counsel for the accused informed the court that they did not need the assistance of the court to secure his attendance.

The final submissions of counsel for the accused

37. Counsel for the accused filed written submission. He argued that the prosecution adduced circumstantial evidence in support of their case. He asserted that none of the prosecution witnesses saw or alleged to have seen the accused unlawfully assault the deceased. Counsel cited the case of Republic v Michael Muriuki Munyuri [2014] e-KLR which is in respect of circumstantial evidence.
38. He submitted that PW 1 did not see who assaulted the deceased and was not aware that PW 4 had travelled to Spain. He further submitted that PW1 did not inform the security at the gate what had transpired in the house. The accused's assumption that the taxi driver had been sent to pick her up by PW 4 was therefore legitimate.
39. Counsel also submitted that the prosecution did not adduce evidence to prove that the accused was guilty of a wrongful act or omission, which was the direct consequence of what caused the death of the deceased. It was the submission of counsel that the clothes of the accused did not have any bloodstains belonging to the deceased and she was not found in possession of the murder weapon. Additionally, the police did not recover anything that connected her to the offence. Counsel submitted that her only connection was that she was placed at the scene where the deceased's body was found for which she had a reasonable explanation.
40. In conclusion, counsel submitted that the prosecution had not proved mens rea and the actus reus in respect of the unlawful death of the deceased as provided for under section 206 of the Penal Code. That the accused offered a reasonable alternative hypothesis that supported her innocence which weakened the chain of circumstances relied on by the prosecution. Reliance was placed on the case of Musili Toro v Republic [2014] e-KLR in respect of circumstantial evidence.

Counsel urged the court to acquit the accused.

The submissions of counsel for the prosecution

41. The prosecution did not file their final written submissions as they did not have a right to do so; since the prosecution was not personally conducted by the Director of Public Prosecutions as set out in section 310 as read with section 161 of the Criminal Procedure Code (Cap 75) Laws of Kenya.



Issues for determination

42. I have considered all the entire evidence adduced by the prosecution and the defence and the submissions of the defence in the light of the applicable law. I find that the following are the issues for determination.
- 1 Whether it is the accused who caused the death of the deceased.
 - 2 Whether the evidence discloses murder or manslaughter.

Issue 1

43. I find that there is no dispute that the deceased died. The issue for determination is whether the accused is the one who unlawfully caused the death of the deceased.
44. There are two key ingredients in a charge of murder that are required to be proved. These are the actus reus and mens rea. The actus reus is the unlawful act that leads to the death of the deceased, while mens rea is the malice aforethought. These two elements must be established for the charge of murder to be proved to the required standard. The Court of Appeal in the case of Anthony Ndegwa Ngari-v- Republic (2014) e-KLR, stated that the three elements of the offence which must be proved in a charge of murder are: -
- (a) The death of the deceased.
 - (b) The accused committed the unlawful act which caused the death of the deceased.
 - (c) That the accused had malice aforethought.
45. The burden is on the prosecution to prove criminal liability which is established by the two ingredients namely actus reus and mens rea. In the case of Woolmington -v- DPP (1935) A.C 462 at 481 while addressing the issue of the legal burden of proof, stated that: -
- “Throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
46. I find that the evidence against the accused is circumstantial in nature. For a court to convict the accused on circumstantial evidence, the chain of evidence must irresistibly point to the accused as the perpetrator of the offence. See *Sawe v Republic* (2004) e-KLR. If there is any break in that chain of evidence, the accused must be acquitted.
47. I find as credible the evidence of Joseph Maina Murugu (PW 1). PW 1 was a care taker of Paul Mugo Kabutu (PW 4). PW 4 was a man friend to both the accused and the deceased. I further find as credible that on 29th March 2016 PW 1 while he was from upcountry, he went to the house of his employer at Greenwood Estate in Kasarani. PW 1 found the accused in a kitchen cleaning the floor which had blood like substance. The accused was with an unknown man, who wearing a cap. He tried to call PW 4 but was unreachable. He then called the brother in law of PW 4, because he thought that the blood that he saw was that of his employer (PW 4). PW 1 and Joseph Waweru Kabuchu (PW 6) proceeded to the backyard where they found the body of the deceased, which was covered with blood. They then went to Kasarani police station.



48. PW 6 in company of six police officers went to the scene of crime and found the body of the deceased lying at the backyard of the house of PW 4. The evidence of PW 6 is supported by that of Geoffrey Murithi Kabugi (PW2). PW 2 is the brother of PW 4.
49. Furthermore, I find as credible the evidence of Paul Mugo Kabutu (PW 4) that on 29th March 2016 at around 5.00 pm while on his way to Spain he received a call from his boss who informed him of the incident that had occurred in his residence in Nairobi. He immediately started his journey back to Nairobi. He admitted living with the deceased as his wife. He then went to the Nairobi city mortuary and saw the body of the deceased. He also testified that the body of the deceased had injuries on the chin, a bite on the chin and bruises on the forehead. PW 4 was living with the deceased in that house, where she was found dead.
50. I also find as credible the evidence of No 67573 Sgt. Joram Ndungu (PW 10), who visited the scene of crime. The evidence of PW 10 was that PW 1 told him that after taking tea in a make shift hotel, PW 1 heard the accused call for a tax. Upon arrival at the scene, PW 10 found the body of the deceased lying on the back and appeared dragged from the house to an enclosure outside the house.
51. Furthermore, I find as credible the evidence of Joseph Waweru Kabuchu (PW 6) that the deceased was the wife of PW 4. PW 4 went to the scene of crime and found the body of the deceased at the backyard behind the kitchen.
52. Furthermore, I found as credible the evidence of Dr Peter Ndegwa (PW 11) that he performed a postmortem on the body of the deceased. He concluded that the cause of death of the deceased was due to head injuries due to blunt force trauma. PW 11 produced his report as exhibit Pex No 4.
53. Additionally, I find as credible the evidence of Rahab Wanjiku Mwangi (PW 9) that the accused used to threaten the deceased on phone that unless he left PW 4 alone, she was going to face it.
54. I also find as credible the evidence of C.I. Munyoki Ngumbo (PW 8) that he conducted a police identification parade at the request of the investigating officer; in which the accused was identified by PW 1. I find that it was absolutely unnecessary to conduct the parade, since PW 1 knew the accused well before this incident.
55. I find that the chain of the circumstantial evidence irresistibly points to the accused as the perpetrator of the death of the deceased jointly with an unidentified male person.
56. Furthermore, the prosecution is not required to prove the motive. This is clear from section 9 (3) of the Penal Code which reads as follows:
- (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”
57. The motive for the murder appears to be that the accused was not happy that the deceased was living with PW 4 as her husband. This is clear from the threats the accused issued to the deceased through her phone call to her. She used a blunt object to cause the death of the deceased
- I find that it is the accused who caused the death of the deceased.

Issue 2

58. I find that the fatal injuries that the deceased inflicted upon the deceased were in the head. The head is a sensitive part of the body. I also find that the accused had issued threats to the deceased warning



her to leave Mugo (PW 4) alone otherwise she was to face consequences. In the circumstances, I find that the evidence discloses murder and not manslaughter. I therefore find that the accused formed the intention and caused the death of the deceased by using a blunt object.

59. I further find that the accused jointly committed this murder with an unknown male person and thereafter she called a taxi and escaped with her accomplice. The accomplice is in law a principal offender in terms of section 20 of the Penal Code.
60. I find further the evidence of the accused is incredible in view of the ample evidence produced by the prosecution.
61. In the premises, I find that the accused is guilty of murder and I hereby convict her of murder contrary to section 203 as read with section 204 of the Penal Code.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE THIS 30TH DAY OF MARCH 2022.

J M. BWONWONG'A

JUDGE

In the presence of: -

Mr. Kinyua: Court Assistant.

Ms Peris Maina for the Republic

Mr. Chege holding brief for Mr. Wakaba for the accused.

