



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Wanjiku (Criminal Case 39 of 2017)  
[2022] KEHC 3321 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL CASE 39 OF 2017**

**F GIKONYO, J  
JUNE 30, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ISAACK KAGIRI WANJIKU ..... ACCUSED**

**JUDGMENT**

1. The accused herein is charged with the offence of murder contrary to Section 203 as read Section 204 of the *Penal Code*. It is alleged that on November 8, 2017 at Oloikirkirai Trading Centre in Narok North Sub- County within Narok County he murdered one Evaline Rehak.
2. The prosecution called nine (9) witnesses in support of its case. The defence called only the accused.

**Prosecution's Submissions.**

3. The prosecution filed written submissions which are considered in the judgment. They also relied on the following authorities
  - i. *Ramanlal Trambaklal Bhatt V R* [1957] EA 332.
  - ii. *Sawe V Rep* [2003] KLR 364.
  - iii. *Venezio Nzivo V Rep*
  - iv. Section 107 (1) *Evidence Act*. Cap 80
  - v. Section 203 and 2006 of the Penal Code.
  - vi. *Republic V Mohammed Dadi Kokanee And 7 Others* [2004] eKLR.



- vii. [Republic V Susan Kabindi](#) 2010 eLKR Which Quoted the Case of Daniel Muthee V R CA No. 218 Of 2005(UR)

### **Defence submissions.**

4. The defence also filed written submissions which are also considered in the judgment. The defence relied on the following authorities.
- i. [Mercy Kajuju & 4 Others V Republic](#) [2009 eKLR
  - ii. [William Kiprotich Cheruiyot V Republic](#) [2021 eKLR
  - iii. [Republic V Patrick Ong'au Okioma](#)[2021] eKLR
  - iv. [Anthony Ndegwa Ngari Vs Republic](#) [2014] eKLR
  - v. [Nzuki Vs Republic](#) [1993] KLR 171.

### **Analysis and Determination**

5. As is my duty, I will be careful to evaluate the evidence adduced with judicious alertness in order not to miss the grace and power of the testimony of witnesses, and similarly, apply the relevant law to the facts emerging from the evidence. The evidence is already recorded and is part of the record. But what exactly should the prosecution prove to secure a conviction on a murder charge?

### **Elements of murder charge**

6. The accused is facing a charge of murder under Section 203 of the Penal Code which defines the offence as follows: -
203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
7. Accordingly, to sustain a conviction on a charge of murder, the prosecution is under a duty to prove beyond doubt the following: -
- a. The fact of the death of the deceased
  - b. The cause of such death
  - c. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and
  - d. That the said unlawful act or omission was committed with malice aforethought.

### **Of fact and cause of death of deceased**

8. These two elements could be handled together because of their close connection.
9. The prosecution submitted that the deceased died as a result of asphyxia due to ligature strangulation as indicated in the post mortem.
10. On 4/6/2018 the prosecution produced the post mortem report as P Exh 4 with the consent of the defence. The consideration here was to dispense with the attendance of family members who identified the body, for they lived in Austria in Surabe. In the post mortem report, Planer Dieder is listed as a person who identified the body of the deceased- Evaline Rehak before post mortem was conducted.



11. In the postmortem report (P Exh 4), Dr. Oduor Johansen who performed examination on the body of the deceased observed several injuries on the deceased physical body being stellate laceration with surrounding bruise on the forehead, multiple bruise on the left side of the face, curvilinear bruises on the cheek, contusion on the cheek area, contusion (ligature) around the neck, scars (mastectomy) of the breasts and bruise on left shoulder.
12. As a result of the examination of the body of the deceased, Dr. Oduor Johansen formed the opinion that the cause of death was as a result of asphyxia due to ligature strangulation.
13. Thus, the medical as well as other witness evidence proves that the deceased died, and the cause of death was as a result of asphyxia due to ligature strangulation. Therefore, the prosecution proved the fact and cause of death of the deceased Was the death due to an unlawful act or omission by the accused?
14. The prosecution submitted that they proved beyond reasonable doubt that the accused murdered the deceased on November 8, 2017 because investigations revealed he was the last person to be seen with the deceased, and the deceased was found dead in the house of the accused.
15. The defence submitted that there is no clear nexus between the accused and the unlawful act which caused the death of the deceased. according to the accused, it is not in issue that the accused was married and lived with his family in the subject room where the deceased body was found. To him, it was paramount to call upon the wife and / or children of the accused person to testify in this case. Therefore, the accused was of the firm view, that, the prosecution did not prove their case beyond reasonable doubt.
16. In my assessment, this case is based on circumstantial evidence. The guiding principle on circumstantial evidence as was stated in *Teper vs. R* [1952] 2 All ER. 447 and restated by the Court of Appeal at Kampala in *Simon Musoke Vs. R* [1958] EA 715, is that: -  
  
...in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.
17. In light thereof, has the prosecution proved beyond any reasonable doubt that the death of the deceased was as a result of an unlawful act or omission by the accused person?
18. Although it is not most attractive style, in a case as this, it is appropriate to give the accounts as narrated by the witnesses.
19. PW1 -Joseph Muchemi Kagiri testified that he was informed by PW2 on 8/11/2017 that the accused; who is PW1's brother and the deceased were nowhere to be found and their phones were not going through. PW1 told PW2 to report the matter at Olokirikiria AP post. On 9/11/2017 PW1 was called by PW5 who informed him that the police were at the accused's residence. He went there and together with the officers; PW4 and PW5, gained entry to the house of the accused. At the sitting room they found a cloth bag belonging to the deceased. The bag was identified by PW2. They went to the bedroom belonging to the accused where they found blood stains. In the next bedroom belonging to the children of the accused they found the body of the deceased under the bed. The bag was produced as P Exh 1.
20. PW1 confirmed that he had seen the accused person with the deceased many times but he did not know the relationship between the accused and the deceased. it was his testimony that he has never quarreled with the accused.



21. PW2- Agnes Nyagwira Githinji testified that on 4/11/2017 she was at her house when she was called by the deceased. She peeped through the door and saw the deceased together with the accused. She went out and found the deceased closing the door of her house from the inside while accused was outside her house. She then went inside her house and later went to the house of the deceased where the deceased told her that accused had gained entry to her house and ransacked it looking for money, and that he was dangerous. On 5/11/2017 she stated that deceased called her to her house and told her that she opted to change the padlocks to her house since she was afraid that the accused could gain entry. She was then given a spare key. On 7/11/2017 she saw the deceased and greeted her; the deceased was in the company of the accused. Later that evening she saw the deceased again in company of the accused person within their trading center. From thereon she did not see the deceased again. She decided to call her but the phone was not going through. She then went to report the matter at AP camp. She was escorted by police officers and upon reaching the house of the deceased she opened. They searched inside but the deceased was not there. They recovered her passport. From there they proceeded to Kagiri's house and they called his neighbours together with his brother, PW1. The officers gained entry into the accused's house. Upon entering the house, they found a blue bag on top of the table. Upon search the officers retrieved the body of the deceased and took it to the mortuary.
22. PW3- Zacharia Koikai testified that he bought a parcel of land on behalf of his three friends; Isaac Kagiri, Moses Yiapa and Samuel Olochike. Isaac Kagiri was a witness in the said agreement. The four had agreed that after buying land they were to sub divide among themselves equally. Each was to get a quarter an acre. The accused herein built on his share a mud house and resided in it.
23. The testimony of PW4-Tobiko Sadera and PW5- Francis Yenko was similar to PW2's testimony. The witnesses were, however, cross-examined.
24. PW6, PW7 and PW8 are police officers who arrested, investigated and photographed and documented the scene of crime.
25. PW7- Samuel Liu visited the scene with PW8. They accompanied PW2 to the house of the deceased. PW2 opened the door of the deceased's house. PW2 identified a Nokia phone (P Exh 7) which was on the table as one belonging to the deceased. They then proceeded to the accused's house. The accused's house was locked. They called PW1 who is the accused's brother to witness their entry into the house. They forced entry into the house, and therein, they found the following items; a bag, a doll, pink-coloured pair of socks, pink-coloured sweater, cream coloured net curtain, cream-coloured stockings, and breast top, packet of biscuits which were produced as P Exh 1,8,9,10,11,12, 13 and 14 respectively.
26. PW7 confirmed that, in the sitting room, there was blood covered with soil. They found the buried body (half way under the bed as one could see part of the body- from arms upwards). PW8 took photos 1-47. They then took the body to Narok Referral mortuary. The accused confessed and took them to where he had thrown some items. On November 13, 2017, they broke the toilet and inside they found the camera and its container, black purse, Maasai bolted rungu which were produced as (P Exh 15(a), 15(b), 16 and 17 respectively. On their way the accused showed them where he threw his Nokia phone produced as P Exh 18. He produced the deceased passport as P Exh 19. He also produced as sale agreement (P Exh 3) between Sammy Pariuat Leparako and 4 others dated 14/7/2014 executed before advocate Ombati Daniel. He prepared an inventory of the items recovered. He produced the inventory as P Exh 20.
27. PW8- SGT Paul Kiilu from the scenes of crime corroborated the testimony of PW7. He produced photos 1-47.
28. PW9- C.I. Some took the impugned confession of the accused.



29. DW1-The accused gave unsworn testimony. In his defence he stated that he was with the deceased on 7/11/2017 at around 3.00 p.m. He went to his house together with her to talk about some issues. He went to buy an alcoholic drink- Kenya Cane (KC)- and ½ kg meat from the shops and when he came back, he found the deceased down and blood was all over her body. He tried to seek help and thereafter ended up at Kericho police station. He confirmed that the deceased died in his house and was retrieved therein. He was able to identify some of the items that were recovered from his house. The accused however denied killing the deceased.
30. The evidence show that, on the material day, i.e. on 7.11.2017, the deceased and the accused went together to the house of the accused. From thence, the deceased was never to be found alive again. On the following day, the lifeless body of the deceased was discovered partially buried under the bed in the house of the accused. What is the defence by the accused?
31. The accused confirmed he and the deceased went together to his house on the material day. Except, he seems to suggest that upon agreement, he went out to purchase a beer and meat for their dinner. He further told the court that after he had bought the items, he met his friends at the bar and started discussing business matters with them. He sat down with his friends to drink.
32. Again, he told the court that upon coming back home he found the door shut. He tried to call out the deceased but there was no response. He explained that he thought she was playing a hide and seek game. He said that, he pushed the door open and found potatoes which had been peeled half-way, and was startled. He thought the deceased was in the bathroom. It is when he started looking for her in the house that he discovered blood on the floor leading to the children's bedroom, and found her lying in a pool of blood. According to him, he started wailing, and did not know what to do. He started walking aimlessly and inquired where the police station was. But, suddenly, at least from his story- he realized he was at the police station, Kericho. This was after 2 days.
33. The court finds it curious that he had invited the deceased into his home when his wife was not at home- she had gone to visit her ailing mother. Again, I find his defence that he was confused to be untenable, that he travelled from Narok to Kericho which is quite a considerable distance, subconsciously. Notably, evidence show- and this he confirmed- that he went to Kericho police station two days after the incident. Nothing succinct supports his allegation of such profound and prolonged confusion- for two days he did not know what he was doing or where he was. This kind of confusion is only possible in a theatre movie or in fairy tales. His defence was merely an afterthought meant to explain what is clearly an escape from the law.
34. In rounding up this element, evidence herein show: (i) that he was the last person to be seen with the deceased when she was still alive (see the evidence by PW2); (ii) that, the deceased and the accused went to his house together- a fact the accused also confirmed before the court; (iii) that, on the same day, her lifeless body was discovered in the house of the accused partially buried under his bed; (iv) testimonies by PW6, PW7 & PW8 provide a direct nexus between the accused and the death of the deceased (*R vs. Ahmad Abolfathi Mohammed & Ano* [2019] eKLR); and, (v) Medical evidence shows that the deceased died of strangulation. Therefore, the defence of the accused was merely to exonerate himself rather than telling the truth.
35. The chain of events derived from the evidence adduced prove that; (i) the inculpatory facts are incompatible with the innocence of the accused; and (ii) the facts drawn from the evidence are capable of no other conclusion or explanation except the guilt of the accused (*Dorcas Jebet Ketter & Another vs. R* [2013] eKLR and *Kipkering Arap Koske vs. Republic* (1949) 16 EACA, 135); that, accordingly, this court finds that the deceased met her death as a result of an unlawful act on the part of the accused.



### **Was act done with malice aforethought?**

36. The prosecution submitted that they proved malice aforethought. The accused person knew very well that strangling the deceased on the neck would cause death. The several and/ or multiple injuries sustained by the deceased shows that the accused repeatedly assaulted the deceased. The accused injured the most delicate parts of the body that is head and neck regions. The choice of weapon- Masai bolted rungu was indicative that he wanted to murder the deceased. Therefore, the conclusion that the accused's acts were calculated.
37. Did the accused have the necessary malice aforethought?
38. Section 206 of the Penal Code defines malice aforethought as follows: -
- “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) .....
39. The act of strangling of the neck of the deceased and use of a maasai bolted rungu-the bolt is a metal with sharp tracks which and makes the rungu dangerous weapon- was a deliberate act to cause the death of or cause grievous bodily harm to the deceased. The deceased sustained several/ multiple injuries. The repeated assaulted was with the intention to cause grievous harm or death. The injured areas are the head and neck regions. The weapon likely to have been used by the assailant was dangerous- a maasai bolted rungu, P Exh 17. Photos of the scene and body of the deceased showing injuries sustained were produced by PW8- scenes of crime officer as P Exh. 2 (1-47)
40. The death was planned and executed stealthily by the accused. In addition, the manner the body was disposed of was intended to destroy or conceal evidence and defeat justice. Such act, I have already stated, is cruel, an avowed and demented design of greatest mischief; an outrageous “ambition” to do all possible hurt to fellow human. From the foregoing, I am satisfied that the prosecution discharged its burden and proved beyond reasonable doubt that the accused caused, with malice aforethought, caused the death of the deceased.

### **Conclusions and final verdict**

41. The circumstances of this case, taken cumulatively forms 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 no one else. The facts lead to an irresistible conclusion that the accused killed the deceased. Medical evidence shows that the deceased died of strangulation. The evidence proves beyond doubt that the accused murdered the deceased.



42. Consequently, I find the accused, Isaack Kagiri Wanjiku guilty of the murder of Evaline Rehak contrary to Section 203 as read with Section 204 of the Penal Code cap 63 Laws of Kenya and convict him accordingly. It is so ordered.

43. Right of appeal explained.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 30TH DAY OF JUNE, 2022**

**F. GIKONYO M.**

**JUDGE**

**IN THE PRESENCE OF:**

The Accused

Mr. Langat for the accused

Ms. Torosi for DPP

CA – Mr. Kasaso

