



**Republic v Gube (Criminal Case 42 of 2016)
[2022] KEHC 12901 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 42 OF 2016**

**A. ONG'INJO, J
JULY 29, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

MWADZOMBO GUBE ACCUSED

JUDGMENT

1. The Accused person, Mwadzombo Gube is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya.
2. Particulars are that Mwadzombo Gube on the 17th day of November 2016 at about 11.00hrs at Mulungoni Village, Mazola Sub Location in Kinango within Kwale County murdered Kanga Chidongo.
3. The prosecutions case was supported by the evidence 7 witnesses. PW 1, PW 2, PW 3 & PW 4 testified before Hon. Ongeri J whereas PW 5, PW 6 & PW 7 testified before this court. The accused person also gave his defence before this court.
4. The 1st Prosecution witness Chidongo Nzile testified that on 17th November 2016 he was at home repairing his house when he saw the accused with his 5 children go to his home. That the accused called Mwakalu – PW 2 to the home of his inlaws. That PW 1 went to the home of Chidongo.
5. That accused was asked why he had brought the children and he said his mind was broken and he wanted the children to stay at the home of Chidongo. That he said he had left the wife in the forest and she had refused to come. PW 1 asked him to take them where the wife was and he agreed. PW 1 was accompanied by Chidongo & Mwakalu & Mukalu. That when they reached the accused persons house he passed and went to the shamba to a place in a thicket.



6. PW 1 said he saw blood on the accused persons T-shirt and he was afraid. That when they reached the forest the accused told them that there was the luggage. PW 1 said he saw the body of accused person's wife covered with a shirt and there was blood on the head, neck and waist. That when the accused told them the body of the wife was a luggage they held him and they said one of the children to get a rope so he could be tied.
7. PW 1 said the children followed them when accused was going to show them where the wife was. That Mwakalu – PW 2 called the village Chairman who in turn called the Chief after coming to the scene. Police were also called and after taking photographs collected the body and took it to the mortuary and also arrested the accused. PW 1 said the accused was his uncle's son and he knew him since childhood. He said that he had not heard that accused had differed with his wife.
8. In cross examination, PW 1 said from accused persons home to his inlaws home is about half an hours walk. He said when they got to the forest they saw the body of the deceased which the accused referred to as a luggage. He said he and Rodger accompanied police. He said Rodger was married to the sister of the deceased.
9. PW 1 said they didn't find a panga or axe at the scene and he didn't mention them in his statement. He said he had not disagreed with the accused, but he had given him little dowry after marrying his daughter many years. He said his daughter didn't go back home due to disagreements with the accused.
10. PW 2 Mwakalu Mumbo testified that on 17/11/2016 the accused called him to the inlaws home. That he went to accused persons inlaws with Zariah Muyo as he called him urgently. He said the accused was his uncles son. That they found the accused with his father-inlaw Chidongo. That accused told PW 2 he wanted him to go and see the work he had done. He said that he didn't see Selina and he recorded his statement with police. That Zairah called for Chairman.
11. PW 3 Zaridi Mwenjo Mwadzombo testified that on 17/11/2016 he was at home when PW 2 called him. He went to his home where they discussed about school committee. He said they had 2 shambas, one where they were staying and another big one where Selina was planting crops. PW 2 said he saw Selina in the shamba in the morning. He said he didn't see the accused person.
12. PW 3 said he was with Mwakalu. PW 2 when the accused called him. He said that when PW 2 called him he told Selina that PW 2 had called him. This was about 9.30a.m. and that he reached PW 2's home at about 10.30p.m. As it is a short distance. PW 3 said PW 4 is nearer his home. That the accused told him that he had brought the children so he could look after them. That the accused asked where PW 2 was.
13. He said PW 2 was younger than him. That accused called Mwakalu through phone. That when Mwakalu arrived PW 3 told him to ask accused where he had left his daughter and why he said he wanted him to raise the children. That the accused then told PW 2 that they should go and see the work he had done.
14. That accused led them past his house to a forest where they saw Kenga dying dead and she had been cut on the head and was lying facing upwards and she was wearing a skirt and a shirt placed on her. That he held the accused person & Pw 2 brought a rope and the people who followed them brought a rope which was used to tie him on the legs and hands and the village elder and the police were called.
15. PW 4 Roger Chaka testified that on 17/11/2016 at 5.00pm he took the body of the deceased to Hospital Mortuary. He said the body was in the forest. He did identify body for postmortem. He said Zardi called Rama and informed him that the deceased had killed his wife. He said he went to scenes and arrived at 2.00pm before Police and Chief arrived.



16. He said the body was covered with a shirt. He said he saw the accused had been tied with a rope. He said he didn't see accused person with injuries. He said he didn't know if there were issues in accused person's family. He said the shirt that covered the body had blood stains and police took it away. PW 4 said that from the scene to where people lived was about 100metres. He said he didn't see any weapons at the scene. He said the accused had cut himself on the left hand. He said he didn't see any injuries on the left leg. He said they didn't beat the accused. He said h and Mwakalu arrested the accused and tied him.
17. PW 5 Dr. Ahmed Mukuche Juma Hassan carried out postmortem on the body of the deceased and he found cut on the right side of the head, a cut at the back of the head which was fractured and a cut on the buttocks. There was also a fractural cervical spine. The doctor formed the opinion that cause of death was fracture of cervical spine.
18. PW 6 CPL George Karoga was attached to Kinango Police Station by the time of the incident herein on 17/11/2016. He said that on the material day he got a call from the OCS who wanted him to him the OCS to Malungoni Village where Area Chief had made a report of murder. That he accompanied the OCS Masira and Sergent Yator to the scene and found a crowd had gathered at near a thicket about 7.00am from the home of Mzee Mwadzombe.
19. PW 6 took names of witnesses at scene and later recorded their statements. He said he found the suspect at the scene tied on the hands and legs. That he was wearing a vest and they learnt that it is his shirt that was used to cover the body of the deceased. PW 6 re-arrested the accused and had cuffed him. The body was collected and together with the accused it was taken to Kinango Hospital Mortuary. That before the police went to the mortuary they passed by the accused person's house and recovered blood stained panga and an Exhibits – PW & 4. PW 6 arranged for postmortem and relatives of the deceased identified the body. The Investigating Officer said that it is accused who produced axe or panga from his house when he went to take a shirt and jacket.
20. PW 7 P.C. Muiruri Musabi of scenes of crime produced photographs taken at the scene EX P6. At the close of prosecution case the accused was placed on his defence. The accused person in his sworn statement testified that he had 5 brothers and 3 sisters and that his brothers were not married. He said that he was staying in the same homestead with his siblings in Kinango. He testified that he didn't kill his wife.
21. He testified that on 17/11/2016 his wife went to the farm but didn't return as she usually did to breastfeed youngest child. That when the child started crying he went to look for the deceased but didn't find her. That he started searching and found she had been killed away from the farm. That he made phone call to the village elder and his father-in-law and reported his wife had been killed.
22. That together with his father-in-law they made phone calls to Saidi. PW 3 and Mwakalu. PW 2 who on arrival at the scene tied him with a rope. He said that Saidi was his uncle's son and was older than him and they were not in good terms as Saidi was not married and was given a smaller piece of land than himself and was not happy. The accused said that they started beating him demanding to know who killed the deceased and started burning his left hand leg. The accused said he had never differed with the wife since they got married. The accused said he had never differed with the wife since they got married.
23. That on 17/11/2016 at 5.00pm police arrived at the scene and took him together with the body of his wife to Kinango. Accused said he didn't heard police to his house and he didn't see police take photographs at the scene. He said the exhibits produced in court as weapons used to kill his wife were not his. The accused said that Saidi harasses his children at every opportunity. He said that he was



- taken to hospital on 22/11/2016 after he came from Kwale Court and he was arraigned in court on 29/11/2016.
24. He said he didn't know how to read and write and that he was beaten at Kinango Police Station. He said he was not informed he had a right to legal representation when he was at the police station. He said his statement was never produced in court and the police officer who recorded his statement didn't testify.
 25. In cross examination the accused said he was alone when he found his wife had been killed. He said he called the village elder but could not remember his number. He said he had no difference with his father-in-law. He said Saidi is son to his father's elder brother and that they were not in good terms. He said he didn't know if Saidi and the deceased were in good terms. He said he went to the farm at 10.00am to look for his wife and found she had died.
 26. He said that the child he took to the farm to breast feed was 9 months old Hube. Accused said he was burnt on left thumb and left leg. He said his treatment notes were taken by the police. He said he arrived at his father-in laws home at 10.30am. He said that he was accompanied by all his 5 children when he went to his father-in-laws place. He said his wife was killed 2.00am away from his home.
 27. The accused said that he was told by police to record a statement and say he killed his wife but that was not the truth. He said had didn't complain in court that police tortured him. He said that Matari was his younger brother whereas Saidi was his cousin. He said Matari had no bad blood with the deceased. At the close of defence case defence counsel sought for 21 days to file written submissions and judgment was deferred to 7/7/2022.
 28. On 7/7/2022 submissions had not been filed neither have they been filed upto the time of writing this judgment. This court will therefore rely on the prosecution and accused persons evidence on record to determine the charge herein.
 29. From the charge of murder to be proved the prosecution has to prove beyond all reasonable doubt the fact of death; cause of death; that the cause of death was as a result of an in lawful act and/or omission and that the unlawful act was actuated with malice aforethought and finally that the perpetrator was properly identified. The accused person has denied having killed his wife. He did however go to his father-inlaws home about half an hours walk away in company of his 5 children and after he called PW 2 & PW 4 he told that he had brought the children so they could be taken care of by PW 1, PW 2 & PW 3. When PW 1 asked where his daughter was he said he had left her in the forest and that she had refused to come with him.
 30. The accused then told PW 2 and PW 3 to accompany him so they could go and seen the work he had done. PW 1 said he saw blood on accused
 31. person's shirt and he became afraid. The accused then led PW 1, PW 2 & PW 3 back to his home but instead passed the home and continued to the edge of a forest bordering his farm where he showed them what he referred to as a luggage and it was the body of the wife the deceased herein.
 32. PW 1, PW 2 & PW 3 saw that the body was covered on the upper part using accused person's shirt and there was blood on the head, neck and waist. The prosecution was therefore able to prove fact of death & PW 5 Dr. Ahmed Mukuche Juma Hassan said cause of death was fracture of cervical spine. He did observe a cut on the head of the deceased on the right and at the back. There was also a cut on the buttock and fracture of the spine.
 33. The injuries observed by the doctor could not have been accidental. The person who inflicted them didn't intend that the victim would survive them. The assailant savagely attacked the deceased and



after killing she also abandoned her body in the forest. The assailant was a person possessed of malice aforethought.

34. The accused person did not tell his father-in-law or even PW 2 & PW 3 that his wife had been killed. He took the children to his inlaws to take care and he invited PW 2 and PW 3 to go and see the work he had done. When they arrived and he led them beyond his home into the forest bordering their land he showed the body of the deceased referring to it as a luggage.
35. The investigating officer testified that before they left the scene the accused person wanted to get a shirt and a jacket and when they took him to the house they recovered blood stained panga and axe. Although the accused denied having killed his wife and there is no eye witness to the killing the from the evidence adduced by PW 1, PW 2, PW 3, PW 4 and the investigating officer PW 6 leads to the irresistible conclusion that he is the one who killed the deceased and knowing the repercussion of such an act he took the precaution of taking his children to his father in-law to take care of them as he knew he would be detained.
36. The accused person wore a blood stained T-shirt seen by PW 1. The accused invited PW 2 & PW 3 to go and see the work he had done on arrival he pointed to him what he referred to as a luggage and it was the body of his work. That was very derogatory of him showing the father of the deceased the body of his daughter as a luggage was senseless and insensitive.
37. This court concludes that the accused person is the one who killed his wife and therefore finds him guilty as charged and convicted.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JULY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Ogwel – Court Assistant

Accused – Present in person

Mr. Lyoodi Advocate for Accused

No appearance for Mrs. Makuto Advocate

For State – Ms. Kambaga*

Hon. Lady Justice A. Ong'injo

Judge

29/07/2022

Ms. Kambagi

Accused may be treated as a 1st Offender.

Order

Mention – 15/09/2022 for Victim Impact Statement, Mitigation & Sentencing.

Hon. Lady Justice A. Ong'injo

Judge



29/07/2022

