



**Republic v AMJ (Criminal Appeal 158 of 2017)  
[2022] KEHC 13033 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13033 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL 158 OF 2017  
GMA DULU, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**AMJ ..... ACCUSED**

**JUDGMENT**

1. The accused person herein stands charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the night of 3<sup>rd</sup> and 4<sup>th</sup> February 2017 at [Particulars Withheld] Village, Kitiango Location in Mukaa Sub-County within Makueni County murdered HWJ.
2. He has denied the charge and the prosecution has called nine (9) witnesses in support of their case. Pw1 is DJM a form three student from [Particulars Withheld] Village whose evidence is that on 3/2/2017 he was at home asleep with his uncle SW when at 11:00pm AM the accused, who was also an uncle called him and S and both came out of the house. They found the accused with two youngmen Kioko Kaunda and Mwongela Kilua.
3. According to this witness the three were already sitting on a form and the accused asked him and S to sit on the form. While there, the accused asked Mwongela Kilua if he had had sexual relationship with the deceased HWJ. When Mwongela denied the accused asked Kioko Kaunda the same question, and Mwongela then ran away. It was also his testimony that HWJ was also present with them at that time.
4. It is his evidence that Kioko then ran away and the accused followed him but did not catch up with him, warned him not to come back, then came back and ordered that the witness to cook for him, after S had also ran away. He said that he had a chargeable torch and could thus see around and that S later came back and assisted in the cooking and both then took the food to the accused who was in the house and went to sleep.



5. It was his further evidence that he did not see H again, and though he and S narrated the disappearance to the accused the next night when he was drunk, he merely told them to check on her at her home of origin. They then looked for the deceased H but did not see her. On 8/2/2017 while at school, he heard people shouting that H had been found, later on going home, found that she had been found about 100 metres from the home. At the scene he saw Dominic, and also the accused who had been arrested and beaten. The police came, took away the decomposing body which was carried by the accused to the police vehicle.
6. In cross examination, he agreed that the accused made a report on the disappearance of Hannah to the police.
7. Pw2 SWJ testified that he was a student at [particulars withheld] secondary school and that on 3/2/2017 at 11pm while at home, with DM and HM, AM arrived. AM who was his brother called them outside, where they saw him with Mwangela and H.
8. According to this witness, AM (accused) asked them to explain why Mwangela had talked insulting words that he used to have sex with H, his mother. When they said that nothing of the sort was happening, the accused gave them food to cook for him, and in the meantime, Mwangela and Kioko ran away. According to this witness Pw1 and himself cooked the food but in the process heard H crying behind the kitchen.
9. When they took food to the accused, they never saw H, and did not see her the next day. After looking for her for a week, they found her dead body.
10. Pw3 was Kioko Kaunda who on the fateful evening took alcohol with AM the accused, and Mwangela. According to this witness, as they walked home, the accused produced a machete near the river, and sharpened it. The accused then told the witness that they should go to confirm something at home. On arrival, they went to the house where S (brother of the accused) and Dennis his nephew slept.
11. According to this witness, the accused ordered the brother and nephew to come out of the house, while the accused went to call his mother. In the process, Mwangela who was with them ran away. It was his evidence that the accused forced the door of his mother's house open by kicking it, and then pulled her outside and even hit her with a machete three times and though the mother (the deceased) squatted, he kicked her legs.
12. It was also his evidence that Mwendo (accused) asked the mother to explain what was happening between her, the witness and Mwangela, and when she said that there was nothing between them, he said that he would kill her.
13. Further, according to this witness, when the accused insisted on scolding his mother, she said that she only asked for tobacco from them, and the accused then strangled her until she urinated. The witness then told the accused to stop what he was doing, but he raised his machete and told him to leave their home, and the witness went home leaving Pw1 and Pw2 behind.
14. Next morning, at 8am, he passed by that home and asked Pw1 and Pw2 where H was, but they said that they had not seen her. It was his evidence that he had grown up in that home.
15. The witness also testified that he saw the accused on 5/2/2017 passing near the witness's home, and later on 8/2/2017 he received information that the body of the deceased had been found, but did not go to the river to see the body.
16. Pw4 was Dominic Nzesi Mbova of Kyandue, a Nyumba Kumi elder whose evidence was that on 8/2/2017 at 11am he was proceeding to his farm with two dogs when the dogs ran towards the river and



- he heard their barking sounds fighting with other dogs. He also sensed foul smell. When he checked around, he noticed a piece of red cloth and, on approaching, he saw a rotting human body with both hands eaten, stomach swollen, and lower body parts covered in sand.
17. He then called his wife PM on phone and asked her to call neighbours, and she came with three people. On arrival, the people screamed and the accused appeared with a machete, and when he was informed about the body, he checked and said it was the body of his mother.
  18. It was his evidence that, he and others then beat up the accused as they had previously heard the accused's mother crying at night, but when they enquired, he told them that the mother had gone to her sister's home. It was his evidence that even on 7/2/2017, he asked the accused where his mother was and he said that she had gone to her sister's home. He also testified that the accused had said that a man of God had told him that his mother had been mysteriously taken to go and cook for his father.
  19. It was his further evidence that when the crowd wanted to burn the accused, but he calmed them down until the police arrived and took him and the body, after the accused was tied with a rope. It was his testimony that the lower parts of the deceased's body was not clothed, and that the accused took Kshs.40/= and a bungle from the deceased's body and put it in his pocket.
  20. In cross examination, he admitted that he had not talked about the accused taking Kshs.40/= and a bungle in his witness statement. He denied knowledge of a pending case involving the accused at Kilungu court, but said the accused had a case a Makadara. He denied discussing a court case with the accused, and offering to pay the accused Kshs.50,0000/= to the accused to forgo testifying in court.
  21. Pw5 was Mwongela Kilowa who testified that on the day in question, at 11pm, he left the club with Kioko Kaunda, and A (accused). On reaching Kyandui river, AMJ removed a machete from his trousers and sharpened it. On reaching home, the accused woke up his mother (Hannah) who hesitated to come out and the accused threatened to pick her from where she was.
  22. The accused then woke up boys who were sleeping in a separate house, and then forcefully forced his mother's house open by kicking the door open, and entered therein with his machete. According to this witness, lighting was from stars. It was his evidence that he ran away to his home a twenty minutes' walk distance, and that after 10 minutes he heard AM shouting on phone that he had killed his mother. According to this witness the accused (Alex) was talking on phone to his father. It was his further evidence that when A entered the mother's house there was an audible bang and the mother screamed. He stated also that on many previous occasions the accused used to beat up his mother.
  23. In cross-examination, he stated that they had taken Silvercane and Napoleon spirits from 9pm that day. He admitted that he never reported the incident to anyone.
  24. Pw6 was JM the father of the accused and husband of the deceased. His evidence was that on 3/2/2017 at 1:00am, he received a phone call from AM who phoned to say that he would kill his mother, as Mwongela Mulwa (Pw5) usually slept with her.
  25. It was his evidence that he asked the accused whether his mother was alive, and the accused said "yes". He said he phoned the accused using the phone of one Muendo and warned accused not to cause trouble at home and also to be careful about his mother (deceased).
  26. According to the witness, when phoned his daughter DS about the issue, she said that she had heard of the dispute between the accused and the mother and that she had already warned him against his actions.
  27. It was this witness's further evidence, that on 8/2/2017 he received a phone call from the accused informing him that the mother's body had been found buried in a hole. When he came home, he found



- the accused already arrested and saw the swollen body of his wife (deceased). He thereafter went to the mortuary, later buried the deceased and went back to Nzao where he used to live. He learnt later that the accused had a case at Kilungu court. It was his evidence also that the accused told him that he would kill his mother because of what he regarding Pw5 utterances about his mother.
28. In cross examination, he insisted that the accused called him on phone on 3/2/2017 at 1:00am. He said that S told him that the mother was fine. He said that regarding the case at Kilungu Court, the accused and deceased were State witnesses.
  29. Pw7 is Stephen W. Muindi, whose evidence was that on 6/2/2017 the accused told him that his mother had been missing for three (3) days. When he asked him whether he had made a missing person's report, the accused's answer was in the negative and he thus instructed him to make a report before 4pm.
  30. According to this witness, on the next day, while at home, he heard screams. On going to the scene, he was informed that the body of the mother of the accused had been found. He assisted in arresting and tying the accused with ropes, and the police came and re-arrested him.
  31. In cross-examination, he stated that the body of the deceased was first seen by Dominic Nzesi. He agreed that the accused did not go into hiding.
  32. At this point, the case was taken over by another Judge. Pw8 Dr. Makau Alex testified, on the post mortem report filled by Dr. Emmanuel Loiposha at Kilungu hospital on 11/2/2017. He produced the post mortem report, with findings that 80% skin was lost due to decomposition, body had missing hands from upper shoulder both hands, visible strangulation marks around the neck, body examined after six days, putrefaction had started and foul smell noted. The cause of death was strangulation causing asphyxia, and severe multiple body injuries. The post mortem report was produced as an exhibit.
  33. Pw9 was I.P Rama Mwachuno of Salama Police station, previously of Kilome police station, whose evidence was that on 8/2/2017 while at Kilome police station, he received a phone call at 9am from a village elder Dominic Nzesi informing him that as he walked with his dogs, they ran into the bush and on following the dogs, he found a female human body near a bridge, in a rotting stage.
  34. On receipt of the report, the witness then proceeded to the scene, saw the body and saw the accused already tied with ropes, by the public. He took the body to the mortuary and recorded witness statements and charged the accused herein with the offence, because of information from witnesses that the accused had a lot of disagreements with the deceased, his mother.
  35. In cross examination, he said that he was aware of criminal case No. 105 of 2016 at Kilungu Law Courts, in which the accused and the deceased were witnesses. He agreed that no report had been made to the police regarding the sour relationship between the accused and the deceased. He stated that the deceased's body only had inner wear. He confirmed that he found a jericin of oil at the scene initially meant to be need for burning the accused. That is the prosecution evidence.
  36. When put on his defence, the accused tendered sworn defence testimony and did not call any additional witness. It was his defence that on 02/02/2017, his mother (deceased) and himself attended court proceedings at Kilungu Court in which the accused were Bernard M. Nzomo and Salim Mwau, which was a robbery case. The hearing was adjourned, and on his way home, he passed by Kiunde market at 4:30 pm and met Dominic Nzesi Mbova sitting with Peter Marueti Katoo.
  37. According to him, Dominic asked why he wanted to imprison Bernard and Salim, and offered him Kshs.50,000/= from Bernard to persuade him and his mother not to testify in the case, which he declined. He stated that the next day 03/02/2017 at 8pm, he was from the same market carrying food



- when he was followed by Mwongela Kitua and Kioko Kaunda who carried Napoleon alcohol and soda, and informed him that they had been given the same by Dominic Nzesi to take to his mother.
38. They walked together home, and he entered the house and gave Cyrus John and Denis John the bag of food for them to cook. He then came out of the house and when Kioko and Mwongela gave his mother the alcohol that night, he quarreled his mother for accepting the alcohol.
  39. In the process, Mwongela insulted his mother and when he asked him why, he ran away. He then entered his house and phoned his father informing him that Mwongela had insulted his mother. The father however told him to give the phone to his mother for him to talk to her. He ate his food and went to sleep, but before he slept he heard Dominic Nzesi call his mother and allege that he heard people shouting and he had called the police.
  40. Next morning, he went into his mother's house to find out why Dominic Nzesi had called the police but he did not find his mother. Then he asked Denis where his mother was and he said that they heard her leave with Dominic. He then called his sister and his brothers on phone, but they said they had not seen the mother. He looked for Dominic but did not see him. He kept on looking for his mother and asking for her on 4<sup>th</sup>, 5<sup>th</sup> and on 6<sup>th</sup> he made a report to the police at Kilome. On 7<sup>th</sup> he met Dominic who asked him if he had seen his mother. On 8<sup>th</sup> at 11:00 am he received a phone call from PM, a cousin who told him that Dominic Mbova had seen something and that he should go back home.
  41. When he returned home, he met Dominic Mbova, Bernard Nzomo and Dorcas Nzomo in their farm, and they called him where he was shown his mother's coat and he thus called his father on phone. According to him, when he mentioned Dominic's name to his father, Dominic hit him with a stick and he fell down. Other people also beat him with a stick and tied him with a rope.
  42. Thereafter, the police arrived, took the body and arrested him and later charged him at Kilungu court. According to him his mother was killed due to the robbery case wherein he had refused to be bribed. He denied being involved in his mother's death.
  43. In cross examination, he stated that Jacob who was robbed was a close neighbour. He agreed that Mwongela and Kioko were young neighbours in their early 20s. He said that Dominic was taking advantage of his mother because she used to take alcohol. He said that if the alcohol was brought during the day there would be no insults. He said that he suspected Dominic to be the killer of his mother because he showed people where the body was buried.
  44. After the close of the prosecution and defence evidence, B.M Mutuku for the defence filed written submissions which I have perused and considered. The Assistant Director of Public Prosecutions relied on the evidence on record.
  45. This being a murder case the prosecution is required to prove all the elements of the offence beyond any reasonable doubt. The first element is whether the deceased died. The second element is whether the accused person caused the death of the deceased. The third and last element, is whether the death was caused with malice aforethought.
  46. Did the deceased die? In my view the prosecution proved beyond any reasonable doubt that the deceased died. All the evidence on record, including that of the accused, is that the deceased was missing from home from 03/02/2017. The body was found on 08/02/2017 partly decomposed, and partly buried in sand in the family farm not far away from the homestead. Postmortem examination of the body was done and the cause of death was established as strangulation and other physical injuries suffered.



47. With the evidence on record, in my view, the prosecution proved beyond any reasonable doubt that the deceased died due to strangulation and other physical injuries.
48. Did the accused cause the death of the deceased? The evidence on record is circumstantial in nature as nobody saw the accused kill or fatally injure the deceased. For circumstantial evidence to sustain a case against an accused person, the unculpatory facts should irresistibly lead to the conclusion that the accused is guilty and should not lead to any other reasonable hypothesis than that the accused is guilty.
49. In the present case, the deceased was the mother of the accused. There is evidence that their relationship was not cordial due to the deceased's drinking habits, and suspicion by the accused that the deceased was having love affairs with other men in the absence of his father. On the night when the deceased disappeared, there is evidence, including that of the accused, that there was a heated quarrel between the two for the deceased receiving alcohol at night from two young men. The accused admitted that he phoned his father that night regarding the incident.
50. On his part, his father Pw6 JM, testified in court that the accused phoned him at 1:00am that night saying that he was contemplating killing his mother because of her drinking and immoral conduct. The accused stand is however, that it was most probably Dominic who killed her because he is the person who discovered the dead body.
51. It is noteworthy that, for more than 4 days of the disappearance of his mother, the accused never bothered to inform his father about it. He reported the incident to the police only after a neighbour Pw7 Stephen Muindi gave him a deadline to do so. Even after reporting to the police, he did not inform his father about the missing mother. In my view, the accused person's version is unbelievable.
52. In my view, from the evidence on record, the circumstantial evidence herein leads to no other reasonable conclusion that it is the accused and nobody else that killed the deceased. I thus find that the accused person is the killer of the deceased.
53. Was the killing done with malice aforethought? Malice aforethought is a concept that is defined under section 206 of the Penal Code. It is an intention to kill or do grievous bodily harm. Everyone is presumed to intend the natural consequences of his or her acts.
54. With the evidence of the strangulation and other injuries which had caused the deceased's death, and her being buried in sand, in my view, malice aforethought was proved. It is clear to me that whoever caused the injuries or did the strangulation intended to kill the deceased or do grievous bodily harm. The burial of the body in sand is another factor to show that the culprit wanted to hide the death and is part of a chain of events that proves the malice aforethought in the mind of the culprit.
55. I thus find that the prosecution proved beyond reasonable doubt that the death of the deceased herein was caused with malice aforethought.
56. Consequently, and for the above reasons, I find that the prosecution has proved the offence of murder contrary to section 203 as read with section 204 of the Penal Code against the accused person herein beyond reasonable doubt. I thus convict him of murder as charged.

**DELIVERED, SIGNED & DATED THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022, IN OPEN COURT AT MAKUENI.**

.....

**George Dulu**

**Judge**

