



**Republic v Mwambao (Criminal Case 42 of 2018)
[2022] KEHC 15371 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 15371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 42 OF 2018
A. ONG'INJO, J
OCTOBER 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER MWAVITA MWAMBAO ACCUSED

JUDGMENT

1. Accused person was arraigned in Court for the offence of murder contrary to section 203 as read with section 2014 of the [Penal Code](#) Cap 63 of the Laws of Kenya.
2. The particulars of the offence are that on July 8, 2018 at Makata village, Ziani Location of Kilifi South Sub county , within Kilifi murdered Beatrice Furaha John.
3. The prosecution called six (6 witnesses).

Summary Of Prosecutions Case

4. PW1 was Bernad Ngowa Mwaringa, son to Deceased. He called her on July 2, 2018 to assist him in getting bursary forms for his younger sibling Nellima Rehema. She picked up the forms on July 3, 2018 and took the forms to MCA Kilifi for processing and sent a message that she would go to collect bus fare . On July 3, 2018 he sent her Ksh 250 via Mpesa. They did not meet on July 4, 2018. On July 8, 2018 he received a message from the Deceased mobile phone asking how him and his colleague were. She said she was on her way upcountry. She said that Nellie should go to her father to get school fees and that her father was Peter and Kilunga was not her father. He did not understand the message. Shortly he received a message from his Uncle Price John Tanguri. He inquired if he had received a message from Deceased and asked him to read it again. He inquired when his mother had travelled upcountry. He decided to go back to Kilifi and got there between 3.00 PM and 4.00 PM. He called Deceased cell phone but it did not go through . He picked his sister Nellie and the Uncle and they went to Makata village where the mother used to live with Martha, Rose, Nellie and Stephen who are his siblings. He further



- said that his siblings used to live with their Father, Kilunga but they were divorced with the Deceased. Deceased used to live with the Accused. They had lived together for two years. Accused person told them that the mother had left home on August 2, 2018. They went back to Kilifi.
5. The following day they went back to Makata village to see the village chairman. They asked the chairman to assist them locate Deceased. The village elder told them that Deceased had been seen on July 6, 2018 within Makata Village. They were told by the village elder that the Accused person had allegedly raped and killed his sister in law. They reported the matter to Kilifi police station about the disappearance under OB 24 of 10/07/2018 at 1022 hours. On July 10, 2018 he called the Accused and asked him why he hadn't reported to the police on the disappearance. He asked him to go with him to Kilifi police station and the OCS told them to report the matter to Kijijiwa. Accused went back home. Prince and himself made a report to Kijijiwa police station under OB No 2 of 14/7/2018. CID officers asked for mobile phone contacts of Deceased and Accused person.
 6. On July 20, 2018, Uncle Prince told him that a body had been found at River Mbogolo and they started to make a journey to the place but OCS Kijijiwa told them to wait for the body at Mavueni stage. When the body arrived he was unable to identify it as the face was decomposed. They went to Kilifi District hospital where his aunt Riziki identified Deceased from her hair style and her dressing for 'chama.' They buried the mother in Kilifi town.
 7. He further testified that police from Makata called them to accompany him and Uncle Price accompany them to deceased place where the DCI collected belongings of the deceased, namely; ash grey hand bag, leso and bursary forms which she had collected in Kilifi. By that time Accused had been arrested they had already returned to Makata. He testified that he knew Accused, and that they lived with Deceased but he did not know how they used to relate. He further testified that the texts allegedly sent by the mother on July 8, 2018 were unlike her text messages as they were not spaced and he was suspicious of the said messages. Deceased mobile phone was never found.
 8. In cross examination he testified that the day he called Deceased to collect bursary forms she was already in Kilifi town but he was not. He said that the village elder had told him that he had seen deceased walking from the stage to her house on July 6, 2018. When they went to see Accused he came out of his house greeted them and went in and came out a second time. PW1 introduced himself and told him that he had not seen Deceased. He testified that the ash grey handbag is what Deceased had in Kilifi town and leso recovered was familiar to him as the Deceased used to wear it when she would visit them in Kilifi and did not recall if forms recovered in Deceased handbag had been filled.
 9. PW2 was Collins Jefua, a medical Doctor at Kiifi County Referral general and worked with Dr Noor Mohammed who carried out the postmortem. He testified that the postmortem was done on July 26, 2018 on the body of Beatrice Furaha. She had worn a black blouse, pink leso and white skirt. She was an apparent of age 47 years, normal nutrition and physique and 5 ft 1 inch. There was swelling in the subcutaneous tissues. There was no head injury or cervical fracture and body was tied with green net on both hands, legs were tied with an orange cloth and had a skeletonized face. No internal examination of the body was done due to decomposition. Doctor concluded that the cause of death was asphyxia secondary to drowning.
 10. On cross examination PW2 testified that the examining Doctor had said that the body was unsuitable for an internal examination. He concluded that cause of death was asphyxia which in the present case was due to drowning.
 11. PW3 was Price John Tanguri, brother to Deceased. He testified that he did not know the Accused prior to July 8, 2018. That he received a text message from Deceased phone number of xxxx indicating that she was going up country and her daughter should go to her father Peter to get school fees and that



- the person she was living with was not her father. When he got the message he called PW1 and asked him if he was privy to such information from the Deceased. They went with PW1 to Makata and found Accused who told him that Deceased had left but he would contact them when she returned.
12. They went to Kilifi and he asked PW1 to inquire if Deceased had gone to a church function. He inquired from the pastor who told him that they had not seen the Deceased. On 10.0.2018 they made a report at Kilifi police station of a missing person. They went with PW1 to Kilifi and after two days they went back to Makata to report to the village elders. The village elders told them that they had seen the Deceased staying with the Accused. They went and reported to CID Kilifi.
 13. The OCS Kijipwa called later and told PW1 that a body had been found at River Mbogolo. They went to Kilifi District hospital to identify the body but it was decomposed as it had been in water for over a week. They made funeral arrangements.
 14. In cross examination, he said he was unable to identify his sister's body as they were not close enough and body was decomposed. He knew her physically but didn't know any special mark that could help identify her. He also didn't know how long Accused had lived with Deceased and had not known Accused prior to the incident. He received message from the sister and did not have evidence that the number was registered under the Deceased's name. On July 13, 2018 Accused accompanied them to Kilifi police station.
 15. PW4 was No 23570 CIP Victoria Kalundu Mutuku OCS Kijipwa police station Kilifi South sub county. On July 19, 2018 at 6pm he received a call from Assistant Chief Omar Ngala of Takaungu location who informed him that there was a body of an unknown person discovered in River Mbogolo. Due to lack of transportation they were unable to go. On July 20, 2018, on arrival in Kaole Village Ngombeni sub location Ziani location they found a body that didn't have clothes on the lower part and was floating in the river. They removed the body from the river. The body, face, mouth, eye and neck were tied with three lessoss. There was a mosquito net on the chest in sky blue color and body had magots on the right shoulder towards the back of the neck. Body was decomposed and bones in upper limbs were visible. There were no injuries on the lower part of the body. Photographs of the body were taken at the scene. On July 23, 2018 the suspect came to Kijipwa but the matter had been taken over by CID Mtwapa and he was taken to Mtwapa for investigations. The suspect was the Accused person.
 16. On cross examination he testified that the photographs were taken by the Investigation officer Mr Kiptoo. He further testified that he arrested Accused when he came to the station and identified himself as the husband to the Deceased. He arrested him on the basis of the intelligence he had gotten. Accused had not been told to report to the station. PW1 had informed them that Accused was connected to the murder and he said this when he went to identify the body.
 17. PW5 was Chief inspector No 235210 CIP Kilen Kulitha. He was in charge; scene of crime in Mombasa County.
 18. On October 5, 2018 at 0940 hours he received a sealed packet and a CD under cover letter CR 312/122/2018 purporting to have been signed by PC Kiptoo of DCI Mtwapa requesting that he process the CD and prepare them for photographic prints. He processed the CDS and prepared the photographic prints and produced the certificate marked October 7, 2018
 19. On cross examination he testified that he did not visit the scene and did not know who took the photographs and didn't know the lense that was used to take the photographs and only saw the body of deceased in photographs and could not tell the cause of death from the photographs.
 20. PW6 No 123975 IP Tito Kipto DCIO. On July 20, 2018 he got a report from OCS Kijipwa CIP Victoria Mutuku that there was a body of a woman found in River Mbogolo. The body had been



taken to Kilifi Hospital and had been identified as that of Beatrice Furaha who had been missing for two weeks .In the course of investigation they learnt that deceased had gone to Kilifi from Makata to look for bursary for her daughter called Nelly Kilunga. On July 3, 2018 she asked for money from her son PW1 to use as fare back to Makata. On July 4, 2018 she left Kilifi to go back to Makata where she was cohabiting with the Accused person.On July 8, 2018 Bernard Ngea Mwaringa got a message from the Mothers from 07xxx saying, '*Mwaendeleaje wenzako,mimi sasa hii niko sayaninosayonisha kwenda bwana*'The message was not written without spacing.

21. They went to deceased place but Accused never told them the whereabouts of the Deceased. Accused was arrested and phone taken to cybercrime unit Nairobi. Investigations revealed that messages in his phone imulated the ones sent to PW1. Deceased lessso, handbag and clothes were found in Accused house and the handbag that she had in Kilifi was found in the house as well.Accused was arrested and taken to Mtwapa . He produced Accused mobile phone as exhibit MF1P1. It was an Airtell Fero phone IMEI- xxxx.
22. In cross examination, he testified that Deceased phone was never recovered. The Deceased is the one who said that Deceased did not return since she left for Kilifi.He further testified that he didn't recover the body and didn't go to the scene. It is the OCS Kijipwa who collected the body. It was recovered on August 20, 2018 and it was on August 8, 2018 that PW1 had recieved a phone message from him.From the photographs Deceased had been strangled and postmortem investigations confirmed that she died due to drowning.The body of the Deceased was decomposed but the Aunt identified her at Kilifi Hospital Mortuary and thre was no reason to conduct a biological examination as features were identified by the son and aunty respectively.
23. On April 1, 2022, the Court gave a ruling that the Accused had a case to answer. Defence called one witness.

Summary Of Defence Case

24. DW1 was Accused person Peter Mwavita Mwambao from Makata, 52 years of age. He testified that they had been married with the Deceased for 5 years. Deceased was a business woman in Kilifi and he lived most of the time in Makata village. The Deceased had children from a previous marriage that he did not know about. They had three children. Deceased left on June 26, 2018 to go home to Kilifi on a 5 day Crusade in Kilifi town. It was not the first time she was going for a crusade and sometimes they would go together. On that occasion she went alone as he had crops to guard in the farm. Deceased left on a Monday and the following Monday July 2018 he called her on his phone and she said she was looking for bursary for her child and he never called her after that as they only used to communicate when it was necessary .His phone had gotten lost prior to Deceased leaving and to call her he needed to borrow a phone. Deceased phone also had problems.
25. On July 8, 2018 , three people came to Makata to see him; two young men and one woman came to see him . One identified himself as the deceased brother .They were looking for the deceased but he said she had gone for a curusade in Kilifi. He was in the farm. He told them to go home but they said they were in the area and they requested that when deceased came back they should communicate. They were back in Makata back at 5pm the next day . He went to church in Kilifi and the pastor told him that after the curusade that he had not seen the deceased. He went to Decased person's house in Kilifi and the children told him they had not seen her for days. He went to her parents but they said they had also hadnot seen her .He went to Kilifi police station to report the matter but he was told to go to Kijipwa police sation. He went back to deceased person's parents home and on the way he met Deceased person's son .He was among three peope looking for Deceased and he told them they go to Kijipiwa . He told him that he should go report thath his wife was missing.



26. On July 10, 2018 he went to Kilifi police station to report the matter but a report had already been made. The OCS came and the son to deceased told him that he had seen his mother 5 days prior to July 10, 2018 and he gave the mother money to travel back Makata. The deceased would usually go home at any time but she didn't call him to tell him that she was going home as he did not have a phone. OCS told him to go to Kijipiwa to make a report. He went home and on July 16, 2018 he went to Kijipiwa and reported that his wife was missing. He also made a report of loss of his phone and solar maize and that his wife was missing. When he went back home and investigations were started he was told to take receipts for the items that were stolen. He went to Kijipiwa where he heard that a body had been recovered at River Mbogolo in Takaungu location but the body could not be identified as it was decomposed. He went to report to the village elder who knew his wife and he told him he had gone to see the body but could not identify it. He was instructed to go to the Chief Takaungu and to Kijipiwa. He took the receipts that police had requested. When OCS came in, he was asked why it had taken him so long to report the matter and that they had been looking for him. He went into her office and she told him that he had killed his wife and was placed in the cells. OCS asked if he had a panga at home, and he said he had 4 pangas, a knife and an axe. He was taken to Mtwapa where he was charged. He didn't record the statement at Mtwapa and was taken to Court.
27. On cross examination he testified that the last time he saw Deceased she was going for crusade. He was aware that the Deceased was looking for bursary for her child's school fees. He didn't communicate with Deceased as his phone was lost and Deceased person's phone was also spoilt. He reported at Kijipiwa police station vide OB NO20 that his phone had gotten lost. He had stayed with deceased for 5 years and deceased had told him that she had two children from a previous marriage but he had never seen them. He testified that no murder weapon was found in his house
28. On re-examination he said he never went with the police to his house and had never seen the purse with the deceased and he used to communicate to deceased through calls and he never sent any messages from Deceased phone. He said that Deceased person's children were staying in Kilifi and were of different fathers. He was also the one who advised deceased to apply for bursary.

Summary of Submissions

29. Submissions on behalf of the Accused person were filed on July 4, 2022.
30. It is submitted that death of Deceased was not proved to be linked to Accused person as no evidence was provided to link the drowning of Deceased to Accused person.
31. It was submitted that there was no evidence produced to conclude that there was bad blood between the Deceased and Accused person. Prosecution witnesses attested to the fact that they only came to learn about the Accused on July 8, 2018. PW1 testified that the Deceased and Accused had been living as husband and wife for two years and he was not aware how they related hence no motive was established. Accused was also involved in reporting the matter together with PW1 at Kilifi Police station and information to charge the Deceased was instigated by PW1.
32. It was submitted that the prosecution's case was circumstantial at best and no evidence was provided to link Accused Person to unlawful death of Deceased. The prosecution produced a handbag, lessor and dress marked as MF1-4 and MF1-5 respectively but the items were never produced as exhibits and therefore court cannot rely on them. Even if the Court were to put reliance on them the said items were not uncommon to be found in the house of deceased as the two were living as husband and wife.
33. It was submitted that it is uncertain if the body collected belonged to the deceased as the person who took the photographs was never called to produce them.



34. It was submitted that the body identified was not properly identified as the person who identified it, Aunt to PW1 never testified.
35. It was submitted that there was no print out of the alleged SMS that were sent from the mobile phone of the Deceased on July 8, 2018 to PW1 and PW3 neither was the phone data and message prints from Accused phone produced to compare the two. The prosecution also did not provide a location from where the alleged message were sent from neither did they find the phone set of the deceased.
36. It was also submitted that Accused reported the disappearance of Deceased under OB NO 20/16/7/2018 and was in fact arrested when he had gone to follow up the matter. Reliance was placed on the case of R V Daniel Musyoki Musaya & 2 others [2014]

Analysis and Determination

37. Having heard from both parties, and read submissions, it is my finding that the core issue for determination is; Whether the prosecution proved its case beyond reasonable doubt?
38. It is trite law that the prosecution to sustain a murder conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are:
 - a. That the deceased died.
 - b. That the death was caused unlawfully.
 - c. That there was malice aforethought; and
 - d. That the accused person directly or indirectly participated in the commission of the alleged offence.

Deceased Died.

39. As per evidence provided by PW1 he communicated with Deceased last on February 4, 2018 when she had come to Kilifi to fill bursary forms for his sibling Nellie. He received a confusing message from her on February 8, 2018. This prompted PW1 and PW3 to start looking for Deceased and they reported the matter to the police. About two weeks later an unknown body of a woman was found in River Mbogolo. The Aunt to PW1 was able to identify the body as that of the Deceased from the hairstyle.
40. From the foregoing it is clear that Deceased died and this element was proved by the prosecution to the required standard.

That the death was caused unlawfully

41. There was no eye witness to the murder of the Deceased but upon recovery of the body it was observed that the body had been tied up both at the hands and legs. The Deceased could not have possibly tied herself and thrown herself into the river. The only inference that could be made from the state of the body is that a person had tied the Deceased up and thrown her in the river with the purpose of killing her unlawfully.
42. From the foregoing I find that this element was proved beyond reasonable doubt.



That there was malice aforethought

43. The offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the Penal Code evidence proves 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.”

44. In *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, the Eastern Court of Appeal observed: “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

45. From evidence provided the body of the Deceased was in bad condition and had been tied at the hands and legs and the torso as well. From the condition of the body it was clear that the murderer had the intention to kill the deceased and even went to extent of throwing Deceased into the river which can only lead to the conclusion that the murderer wanted the Deceased to die from drowning. Consequently I find that this element was proved beyond reasonable doubt.

That the accused person directly or indirectly participated in the commission of the alleged offence.

46. It was the evidence of the Accused, that Deceased left for a crusade on June 26, 2018 for 5 days and they only communicated once on the Monday of July. It was however PW1’s evidence that he called the Deceased on July 2, 2018 to come pick up bursary forms for Nellie. When PW1 saw her she had an ashy grey handbag that he had gifted her a while back. On July 3, 2018 he sent her KSH 250 for her journey back to Makata. They last communicated on July 4, 2018 before he received a strange message from her on 8.07.2018. He asked the Pastor whether he had seen the Deceased and he said he had not. A village elder in Makata village however told him that Deceased had been seen in the village on July 6, 2018. The police however found the ashy grey handbag in the house of the Accused person. This discounted the Accused person’s defence that he last saw Deceased on the July 26, 2018. The inference that can be drawn is that the Deceased went to Makata village when she left Kilifi town on July 4, 2018. The Accused also demonstrated a casual attitude to the disappearance of Deceased and PW1 had to push him to go and report a missing persons report. The message written from the Deceased phone indicated that Accused was the father to Nellie and there was need for her to get school fees from him. This points to the fact that the sender of the message was well known to Deceased otherwise the name of the ex husband would not have been mentioned. PW1 was also told that the Deceased had been seen in the village on July 6, 2018.

47. The Court in *Abanga alias Onyango v Republic* CR App NO 32 of 1990(UR) held as follows to circumstantial evidence: “It is settled law that when a case rests entirely on circumstantial evidence,



such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form 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 none else.”

48. The surrounding circumstances herein it is the Accused person who carried out the murder. I find that this element was proved to the required standard.
49. In conclusion I find the Accused guilty of the charge of murder as provided under section 203 as read with section 204 of the [Penal code](#) and convict him accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH OF OCTOBER 2022

HON LADY JUSTICE A.ONG'INJO

JUDGE

In the presence of :-

Ogwel - Court Assiatant

Nguri for the state.

Court: Mention on 14.11.2022 for mention impact statement, pre-sentence reports and mitigation.

HON LADY JUSTICE A.ONG'INJO

JUDGE

28.10.22

