



**Muriuki v Republic (Criminal Case 14 of 2014)
[2022] KEHC 15892 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 14 OF 2014
RM MWONGO, J
NOVEMBER 30, 2022**

BETWEEN

SHEM NGARI MURIUKI ACCUSED

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The accused was charged with murder contrary to Section 203 as read with Section 204 of the Kenyan *Penal Code*. the particulars were that on 27th October 2013 in Kiamwangi Village Gachigi Location Kirinyaga East with others not before Court he kidnapped Francis Mburu Gakumba and murdered the said Francis Mburu Gakumba.

Brief Background

2. PW1 Peris Wangiri Mburu, the deceased's wife testified that on 20/10/2013, she left her husband at home at about 7.00pm. when she came back, he was nowhere to be seen. PW2, Joseph Wambugu and PW3 Douglas Kariuki both testified that they had met the deceased at church earlier that day and that was the last time they saw him.
3. PW4 Julius Njuki Gakumbi a brother to the deceased testified that the deceased's son had told him the deceased had not come back home the previous day. The family reported to the sub-chief who advised them to report to the police, who in turn advised that the family to look for the missing person.
4. The report was made at Kimunye Patrol base by PW 1, Pheris Wangari Mburu, the deceased's wife, on 29th October 2013. She reported that the deceased had left home on 27th October 2013 at 6.30 pm heading to a neighbour's house and never returned home.
5. On 8th November 2013, PW4 received a call from telephone No 0739-657-232 and he talked to a male person who told him that his brother was safe. The caller also informed him that his brother had a deal



- with three people including one Rose Njoka the owner of Cell Phone No 0739- 657-232 and that if he didn't help, he could be in trouble.
6. The caller demanded Kshs 180,000/- to release the brother: Shs 30,000/- was for the hire of the car that the caller used to take the deceased and Shs 150,000/- was for the group. He was told that the boss of the group was Rose Njoki. PW4 told the caller that he needed to talk with his brother to know whether he was alive. He was told that could be done later.
 7. In the afternoon at around 2.00pm a call came through and he was told that Rose had given a condition that he pay 75,000/- to speak to his brother. PW4 told them that he needed to consult the family. He requested the caller to spare his brother until the following day. The next day PW4 reported to the CID Kerugoya concerning the call. In cross-examination, PW4 confirmed that he did not recognize the caller by voice, that he would not know if it was the accused, though he thought the voice sounded like someone from Gichugu.
 8. PW4 testified that on 16/11/2013, he was called by the Assistant Chief and told that suspect had been arrested and that he should go to Kimunye Police station. He went there and told them about the call. He had his phone (Number 0725 048639) in his pocket and he was instructed to call the extorter's number. He called 0739657232, the phone of the arrested suspect rang. the police took the phone from the suspect and kept it.
 9. Later the body of his brother was found at a farm known as Mang'uas. this was around two months after he had disappeared.
 10. PW5, Josephat Mbui Gakumbi, who was the deceased's younger brother, testified that on 10/11/2013 he received a call from telephone number 0739-657-232. The caller, a male voice, asked for Kshs 170,000/- to release the deceased. He told the caller he would meet the family and come back to him on the following day, a Monday. On 12/11/2013, a Tuesday, the caller again asked for the money, and PW5 asked him for his Mpesa number.
 11. In cross examination, PW5 stated that the caller's voice was constant. He confirmed that the family reported the disappearance at Kimunye police station on 28/10/2013 and the ransom issue at Kerugoya CID on 11/11/2013.
 12. PW6 PC Martin Mwalavu testified that he and Cpl Ezra Serem and PC Isac Naibei went to a place called Gatugura in Gichugu to effect the arrest of one Shem Ngari Muriuki. They arrested the suspect and in his home recovered another phone with double Sim Card IMEI No 860-698-005-919-230. They also recovered another phone IMEI No 352-588-047-981- 420 without a Sim Card.
 13. The 1st Sim Card was registered under the names Shem Ngari and the 2nd Sim Card was registered under the name Rose Gachoki.
 14. They preferred charges of threatening to kill before Gichugu Law Courts where the complainant was one Evans Kaboi. That in the Kidnap Case, he was charged at the Gichugu Law Courts by which time the body of the deceased Francis Mburu Gakumbi had not been found. That he was able to establish that Rose Gachoki the owner of the 2nd Sim Card testified in Wanguru Court informing the Court that she had lost her National Identification Card.
 15. In cross-examination, he did not establish any relation between the accused and Rose Gachoki. She did not know how the Sim card was registered in her name.
 16. PW7, Dr. Ndirangu Karomo, is a pathologist working at Kerugoya County and Referral Hospital. He testified that the cause of death of the deceased was unascertainable due to massive putrefaction



or decay. In cross-examination, he could not tell how the body was identified. He was not sure of the identity of the deceased.

17. PW 8 – Phillis Wanjira Kanini was a friend and neighbor of the deceased person. On 27th October, 2013 at about 10.00am the deceased called and promised to give her important information. He did not call the next day. Later, she learnt that he had died and she attended the funeral.
18. In cross-examination, she denied that he had received bonus payment for tea and wanted them to spend together.
19. The prosecution case terminated at that point as the prosecution failed to comply with court orders to avail their remaining witnesses, in particular the Investigating Officer, on several occasions.
20. Parties were directed to file submissions on whether there was a case to answer. they complied.
21. The prosecution is duty bound to prove that indeed the accused person herein had the intention to cause the death of the deceased or to do grievous harm and had knowledge that by his action death would probably be caused.

Prosecution Submissions

22. The prosecution submitted that the deceased was well and sound on 27th October, 2013 when he went missing shortly after 6pm. The family could not trace him after days of searching in every known place.
23. On 8th November 2013 PW4 was called through Cell Phone No 0739-657-232 with a male person inquiring about the whereabouts of his brother. The caller placed some hefty demand to be met before the brother could be released. On 10th November 2013, PW5 received a call from the same number 0739-657-232 informing him that Kshs 170,000/- was required which prompted him to ask for a number to be used to send Mpesa on the 12th November 2013 only to receive a text message that before they bury their brother, another one will be picked.
24. In the meantime, the police were investigating the matter, and on 16th November 2013, PW4 was summoned to the Police station and found a suspect held on a Police Motor Vehicle. He was told to call the number that had been asking for ransom for his brother to be released. he called and there and then, a phone held by the accused rang. The Police recovered it from his pockets.
25. According to the prosecution, PW 4 was clear that the accused person was in fact the person who had engaged him in conversations about the deceased brother.
26. The deceased died as the direct consequence of the unlawful act by the accused and the mention of his boss being Rose Gachoki could not hold water as the said person testified disowning the accused knowledge only saying she had lost her National Identification Card.

Accused's Submissions

27. The accused submitted that the only evidence on record is that the deceased just disappeared into thin air. No evidence was ever adduced to connect such disappearance with the Accused person.
28. PW4, the deceased's brother, gave evidence that sought to connect the accused to an extortion ring. He claimed that when he went to Kimunye Police Station on 16th November 2013 after he learnt that a suspect had been arrested, he was requested to call the number through which an extortionist had been calling him (0739657232). When he allegedly called the number, it allegedly rang from the accused person's phone in his pocket.



29. The defence urged that this evidence should be disregarded because at the time, the accused person was in police custody and no evidence has been adduced that his phone which had already been confiscated was on and it had the line.
30. In all murder charges it must be proved that the alleged victim actually died. The postmortem conducted on the remains discovered in the bush on 28th day of February 2013 was inconclusive on whom they belonged to or what caused the death.
31. The defence urged this Court to find that the prosecution has not established a prima facie case against the Accused person to warrant his being placed on his defence.

Issue

32. The only issue is whether the accused has a case to answer.
33. Section 306 (1) of the *Criminal Procedure Code* requires that at the close of the state's case the court must make a determination whether on the evidence presented by the accused, a prima facie case has been made out which warrants the defence to be called upon to answer to the case made out.
34. In this case the accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution is bound to prove that:
 - a. The death of the victim occurred;
 - b. That the accused persons committed the unlawful act which caused the death of the victim; and
 - c. That the accused persons had Malice aforethought.

Death of the Deceased

35. There is no doubt that the death of the deceased occurred and there is evidence that a burial was attended. PW1, the deceased's wife testified that her husband (deceased) left home on 27th October 2013 and never returned. That it was only after two Months that the body of her husband was recovered near a stream. He had the clothes he had worn that the day he disappeared
36. PW7- Dr. Ndirangu Karomo. The pathologist testified that the cause of death was unascertainable due to massive putrefaction or decay. Upon cross-examination, he could not tell how the body was identified. He was not sure of the identity of the deceased.
37. PW6 - No 88586 PC Martin Mwalavu testified that he was assigned duties to investigate a case of kidnap and threatening to kill. No investigations were conducted that linked the accused to the death of the deceased.
38. The prosecution blamed the accused for kidnapping the deceased and causing his death. However, they were unable to show that the accused was involved. The alleged evidence that PW4 called a number that rang in the pocket of the accused was not tested. No exhibit was produced, no telephone data was availed; Nothing in fact was availed linking the accused even remotely to the alleged death. The mere fact that the accused person was in police custody does not prove that he had a phone which was used in connection with the deceased's death.
39. No evidence has been adduced that his phone which had already been confiscated was on and it had the line.



40. There is no witness who positively identified the accused person as having been involved with the deceased abduction and later murder.
41. There was no evidence that the 1st Sim Card was registered under the names Shem Ngari and the 2nd Sim Card was registered under the name Rose Gachoki; nor is there evidence of her connection with the accused. It is not known to whom the recovered phone with double Sim Card IMEI No 860-698-005-919-230 and phone IMEI No 352-588-047-981- 420 without a Sim Card belonged to, and how they are connected to the accused.
42. In dealing with electronic evidence, Mrima, J in *Godwin Musungu Kitui vs. Republic* [2019] eKLR cited his decision in High Court of Kenya at Bungoma Election Petition No. 4 of 2017 - *Levi Simiyu Makali vs. Koyi John Waluke & 2 Others* (2018) eKLR and held that:

“Where a party wishes to rely on electronic evidence under the foregoing provisions, the one who undertook the actual work of processing that electronic evidence must prepare a Certificate whose contents are provided for in Section 106B (4)”

Malice aforethought

43. The prosecution has relied on incomplete and inconclusive circumstantial evidence to link the accused with the murder of the deceased. There is no direct evidence linking him to the murder. The only link is the cellphone communication between the alleged kidnappers and the deceased’s brothers, which evidence is of little probative value without calling evidence as to whom the numbers belonged to.
44. Circumstantial evidence can be relied upon to support the conviction if it points clearly to the accused as the person who killed the deceased. In *Abanga alias Onyango vs. Republic*, Cr. App No. 32 of 1990 this Court had this to say:

“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.”

Disposition

45. From the foregoing, it is clear that the evidence adduced by the prosecution witnesses has not been able to link the accused with the murder. Further, PW 6, the investigating officer testified that he was assigned duties to investigate a case of kidnap and threatening to kill, and not a case of murder.
46. Consequently, it has not been demonstrated that there was an intention on the part of the accused to kill the deceased and hence malice aforethought has not been established.
47. The court therefore finds that the accused has no case to answer. Accordingly, the accused is acquitted, and shall be forthwith set at liberty, unless he is otherwise lawfully held.
48. Orders accordingly.



DELIVERED AT KERUGOYA ON THIS 30TH DAY OF NOVEMBER, 2022.

RICHARD MWONGO

JUDGE

In the presence of:

1. Accused in Person
2. Mr. Mamba for the state
3. Mr. Murage Court Assistant

