



**Republic v Mutiso (Criminal Case 42 of 2018)  
[2022] KEHC 15595 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15595 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 42 OF 2018  
HK CHEMITEI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JEFF MUSAU MUTISO ..... ACCUSED**

**JUDGMENT**

1. The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*. The particulars of the charge were that on the 11<sup>th</sup> day of August 2018 at Bondeni area in Nakuru East sub county within Nakuru county jointly with others not before court murdered Mariam Abdallah.
2. The accused denied the offence and the prosecution called 8 witnesses to established its case. At the end the accused was placed on his defence where he gave sworn evidence and did not call any witness.
3. Before looking at whether or not the prosecution established its case against the accused it shall be necessary to summarise the evidence as presented during trial.
4. Pw1 rose Apicha Ochieng testified that she was in her house on 11 August 2011 when she was called by one Miriam Wangui and told her of a body which had been found at a kiosk(kibanda). She called the Bondeni OCS and together with police officers they went to the scene and found the deceased lying there.
5. She said that the accused and others namely Musega and Shida used to stay there. She knew the deceased but she did not know her name.
6. When cross examined she said that there used to be other street boys who used to stay in that kibanda although on that day she had not seen the accused. That she knew that deceased whom at times she could call to wash her clothes.



7. Pw2 Mwanaisha Wanjiru Abdallah said that she lived at Bondeni and that the deceased was her sister. That she was staying with her and her two children. She told her that she had gotten a job in Nairobi courtesy of one Frida and she packed and went to Amina their other sister.
8. She went on to state that she did not see her again till when she was informed by her brother Abdallah about her death. She went to the scene and found her body lying on a mattress and the police took it to the mortuary.
9. When cross examined she said that she did not know about Frida but she heard from the deceased. She said that the accused was their step brother. She said that their relationship was good.
10. Pw3 Amina Abdallah Juma was the sister to the deceased. She said that she met her on August 10, 2018 taking her bag to her house but when she came back after work she did not meet her and she did not come back that evening. The following day she learned the incident from one Hawa and when she went to the scene she found that the deceased was Mariam. The police thereafter took the body to the mortuary after taking photographs.
11. She said that the accused who was her step brother was brought there but he denied that he had slept there the previous day.
12. On cross examination she said that she did not know that the accused used to live at the kibanda but she had seen it. She knew Farida but she did not know her telephone number. The deceased had the clothes she wore the previous day.
13. Pw4 Cpl Peter Waishiri from Bondeni police station was one of the officers tasked with the duty of carrying out the investigations. He went to the scene with other officers and found members of public gathered there. The body was on the floor covered with a blanket and upon uncovering her they saw a cloth tied on her neck. The scenes of crime officers were called to take photographs.
14. He went on to state that the villagers and relatives told them that the deceased were lovers with the accused. They went to his house and found him sleeping and upon interrogation he confirmed that the deceased was his girlfriend and that he was with her the previous night before he left for work. He was arrested and taken to the police station and the body taken to the mortuary.
15. On cross examination that the accused did not tell them that the deceased was his relative.
16. PW5 Dr. George Biketi carried out the post mortem and concluded that the cause of death was asphyxia due to upper air obstruction and spinal injury due to strangulation.
17. PW6 PC Wycliffe Omutu carried out the investigations after being tasked by the ocs Bondeni. He said that they visited the scene and found the deceased body lying inside the kiosk and she was half naked. There were sufurias as well as blankets at the scene. The body was taken to the mortuary after the scene of crime officers had taken the photos.
18. He was told by one Haji Ramadhan that the beddings belonged to the accused as they were friends. He then led the police to where the accused was and they arrested him. They went back with him to the scene and he confirmed to them that the beddings were his and the deceased was his girlfriend.
19. He was arrested and later samples were taken to the government chemist for analysis. These were the deceased panty, pubic hair, finger nails and vaginal swab. He identified the same in court. Later a post-mortem was done.



20. When cross examined he said that members of the public had already tempered with the scene and that there were other people residing at the structure. That they did not interrogate Frida neither did they check the deceased phone to establish whether she spoke with the deceased.
21. He went on to state that none had seen the accused with the deceased on that particular day. He said that he took deceased undergarments to establish whether she had been raped. He said that the kibanda could not be locked and anybody could access it and was on a road.
22. PW7 Margaret Wahu Maina a government analyst produced her report which concluded that the semen stains on the deceased panty matched the DNA of the accused finger nails. She went ahead and produced the report as part of her evidence.
23. When cross examined by the defence counsel she said that the items submitted are usually stored safely and in a chronological order and that she was assigned the work three months ago. She said that the envelope had no seal. She said that the deceased pant had DNA semen stains of the accused.
24. She denied in re-examination that the items she referred to could be tempered with as they are registered and stored in separate containers.
25. Pw8 PC David Njogu basically was called to produce the exhibits namely panty of the deceased and the accused inner wear or boxer. On cross examination he said that he could not tell when the specimens were taken.
26. When placed on his defence the accused gave sworn evidence denying the charge. He said that he was within Flamingo estate on the material day and that the deceased was his step sister. He said that he went to her sister who gave him food and he felt sleepy and went to lie down under an avocado tree.
27. Some people who identified themselves as police officers came and arrested him and took him to where the body was. He denied that he stayed in that shade as it did not have walls or windows. He denied staying with Musega and Sila although he knew them.
28. He was later told to remove his inner wear by the police officer and the rest of the clothes given back. She denied having any relationship with the deceased as she was her sister. She had never differed with the deceased nor her step sisters.
29. When cross examined he said that he had a family though his wife had since left him. That the deceased was from the 2<sup>nd</sup> house and she was 35 years old but not married and had no children. He denied living in the shade and ever meeting the deceased and neither was he aware of her travel arrangements.
30. He said that his blood sample and the finger nails were taken after three days at the mortuary. He said that he was drunk on the 10<sup>th</sup> after taking changaa.
31. At the close of the defence case the court directed the parties to file their written submissions. As at the time of writing this judgement it was only the prosecution which had complied.
32. The learned state counsel submitted that they had proved their case against the accused beyond any shadow of doubt. That this was a case based on circumstantial evidence as there were no eye witness to the incident. The prosecution basically relied on the DNA analysis which found that the semen found on the deceased panty matched with the dna specimen collected from the accused fingernails.
33. The state relied on the case of *Abamad Abolfathi Mohammed & Another V. Republic* (2018) eKLR as well as Section 111(1) of the *Evidence Act*. He prayed that the court should therefore based on this hold the accused liable for the death of the deceased.



## Analysis And Determination.

34. The court has gone through the evidence as tendered by both the state and the accused person herein. What is not in dispute is the fact that the deceased and the accused were relatives' courtesy of one father. Secondly there were no eye witnesses to the incident and the last time the deceased was seen alive was the afternoon of August 11, 2018 as she told her sister that she was going to her house. The evidence as presented by the prosecution is basically circumstantial in nature.
35. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the court set out the grounds to be considered in support of circumstantial evidence. It stated as hereunder;
- “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.”
36. There was also evidence adduced which was to the effect that one Farida had secured a job for the deceased and she was going to send fare to her. The said Farida was not called to testify neither was her statement recorded.
37. It appears that the kiosk/shade or kibanda which her body was found was occupied by other persons who included the accused. The fact that there were household items like mattresses, blankets, sacks and utensils among others attest to this. There was however no evidence that the deceased was seen on that particular day in the said structure.
38. At the same time, although the accused said that he was at Flamingo estate taking changaa on that particular day there was no evidence to that effect.
39. The only evidence that points out culpability of the accused is the scientific one as presented by the analyst in my view. The exhibits that were submitted to the government chemist included the deceased pant, pubic hair, nail clippings, and vaginal swab.
40. On the other hand, what was submitted from the accused were his pant, nail clippings and pubic hair samples.
41. There was no dispute that these items were collected from the accused three days after the incident. He did not deny that the pant so collected was his.
42. The results as per exhibit p3 was that
- “The semen stains on the deceased pant (item A) generated a mixed DNA profile that marched the DNA profile generated from the finger nails (item C) marked “Miriam Abdallah (deceased) “and that generated from the finger nails (item2) marked “Jeff Musau Mutiso(suspect)”.



43. If that was the undisputed findings by the witness one wonders why was the accused semen stains found on the deceased panty. The accused attempted to skirt around this issue in his defence evidence but i doubt whether he ousted that scientific findings. It is now known that DNA is unique to each individual and the finding of semen in the decease clothes in my view is almost a conclusion that he had sexual intercourse with the deceased.
44. Semen is not a product that is available anywhere anytime from male human beings. There must be generally some sexual stimulation of the male organ and in particular though not always probably with a woman. There was no other evidence led by the accused to explain how his semen and spermatozoa was found on the deceased panty.
45. There was an attempt during cross examination by the defence to suggest that the samples were contaminated or poorly stored. This was counteracted by the witness who said that the samples were well kept and they were stored chronologically and usually the source would not be known.
46. At the same time the accused confirmed that the police took his inner wear from him, a fact which was not controverted. Although it was not clear how the deceased pant was obtained from her body and handed over to the police, one can conclude that the fact that the semen found therein belonged to the deceased was conclusive that he had sexual intercourse with the deceased that fateful time.
47. There is also the nagging issue of why there were no semen and spermatozoa found when the virginal swab was taken. This issue was not raised to the analyst but the fact that the same was found on the panty is sufficient prove of sexual activity.
48. This also leads in my view that there was a very likely possibility that the accused raped and or had unconsented sexual intercourse with the deceased and whatever the case strangled her thereafter.
49. The accused herein did not vehemently attack the findings of the analyst. In other words, the issue of the DNA analysis was not challenged and in the finding of this court it was the duty of the accused under section 111 (1) of the *Evidence Act* to prove otherwise. The motive for the killing of the deceased remain unknown taking into consideration that she was the accused step sister. There was no evidence of any differences with her or generally the two families.
50. I think the court has gone ahead to establish the accused guilt. The prosecution has proved its case beyond any shadow of doubt based on the scientific evidence.
51. The accused is therefore found guilty under the provision of section 204 of the *Criminal Procedure Code* as read with section 215 of the *Penal Code*.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23RD DAY OF NOVEMBER, 2022.**

**H. K. CHEMITEI.**

**JUDGE**

