



REPUBLIC OF KENYA



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**Republic v Kamotho (Criminal Case 8 of 2018)
[2022] KEHC 16487 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 8 OF 2018
CM KARIUKI, J
DECEMBER 20, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL WAGURA KAMOTHO ACCUSED

JUDGMENT

1. The Accused was charged with offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 Laws of Kenya.
2. The particular being that on 6th-April 7, 2018 at, the Sipili area in Nyahururu Sub-County within Laikipia County murdered Ivonne Wambui Nyaguthii
3. He pleaded not guilty, and the matter went to a full hearing. At the close of the Prosecution case, the Accused was put on his Defence, where he tendered sworn evidence.

Prosecution Evidence

4. PWI was Beth Wambui Jennifer. She testified that the deceased was her granddaughter and that on April 6, 2018, after serving supper for her children and grandchildren, she realized that the deceased's food remained untouched and that is when she realized the deceased was not in the house, that she went to the home of Philomena who was playing with the deceased earlier in the day, but couldn't find her, she went to the home of Mary Muthoni, but she could not find her.
5. That when she failed to find her, she opted to report the matter to Sipili Police Station and also Sawanga Radio. At around 10 pm, she informed the mother of the deceased, her daughter, that the deceased was missing.



6. That the following day as she waited to hear any news of the missing child, she saw a group of people who had gathered around the unfinished building which was near their house, accompanied by Eunice Nyakanini, a village elder, rushed to the scene only to realize that the deceased was lying dead.
7. That on 9/4/2018, she heard the caretaker of the building, Eunice Nyakanini, calling people to go and remove the accused person's belongings from his house, that it was during that time that she saw the deceased's shoes and jacket, and pink underwear.
8. On cross-examination, she stated that the accused had been her neighbour for close to seven years and lived in wooden houses. That the accused's house was broken into on 7/4/2018, where the police officers conducted a search and only carried one grey pair of trousers.
9. On 9/4/2018, Eunice Nyakanini called the Police, and she took them to the accused house, whereupon a search was carried out, and several items belonging to the deceased were recovered the said Eunice Nyakanini who opened the door to the accused person's house.
10. On re-examination, she stated that the wooden door was broken on 7/4/2018 and had not been repaired, and the house remained unlocked for two (2) days, and anyone could access it.
11. PW2 was John Maina Jenniffer. He testified that he was a grandfather to the deceased and that he identified her at the mortuary.
12. PW3 was sergeant Peter Ndung'u, who testified that he received a report of a child who had been murdered and her body thrown into a trench with another officer, rushed to the scene, and found the deceased's body. Further, the area chief had already arrested the accused person; they led him to his house, where he opened the door for them, that they conducted a search and found grey trousers with blood stains, and they carried the same with them.
13. PW4 was Sergeant Jacob Musungu; he testified that he had received a report of a missing child on 7/4/2018 from the grandmother; he later received a report that the said child had been found murdered and dumped in a trench. They led the suspect to his house, and the door was broken; they searched and found grey trousers with blood stains.
14. On 9/4/2018, the caretaker of the plot, namely Eunice Nyakanini called them and led them to the house of the accused; they went to the accused person's house, the door was not locked, and a crowd of people had gathered there, and they conducted a search and found a pair of shoes, a jacket and pink underwear belonging to the deceased, they took photographs of the scene.
15. On cross-examination, he changed and stated that on 9/4/2018, when they went back to the scene, they found that the house had been locked by Eunice Nyakanini, who opened the door for them.
16. PW5 was Jenniffer Nyaguthiie, who testified that she was the mother to the deceased's person. On a material day, her mother called her at around 10 pm and was informed that she could not find the deceased person. Further, they searched for the deceased all over the place, including her friend's houses, and when they could not find her, they reported the matter to the police station. On the following day, she saw a group of people gathered near an unfinished house, and upon going there, she found that it was her daughter's body; she fell unconscious.
17. PW6 was MM, a child aged ten years old; she testified that on 6/4/2018, they were playing with the deceased, RM, and also MW; they were at P's place. After that, P went to her place and left the deceased with Sammy, sitting outside his house as he watched them play. That Sammy sent her "ngumus" and a cigarette, and she left the deceased sitting on his lap. On cross-examination, she testified that they used



- to play in that plot and that it was not the first time that Sammy put his hands under the deceased's Dress but did not do anything to her.
18. She further testified that there was a bar on the front side of the plot where Sammy used to live and also a lodging; the houses and the fence were wooden.
 19. PW7 was PN, a child aged ten (10) years. She gave unsworn evidence. She testified that, together with MM and the deceased, they were playing inside the plot where they resided, and also Sammy used to live there. Further, she saw the deceased sitting on Sammy's lap, so she left and went to her mother's work; when she came back, she only found Sammy sitting outside his house. The deceased was not there at the time.
 20. She further stated that there was no gate to their plot and a bar at the front side of the plot. Finally, she said that she did not see Sammy put his hands under the deceased's Dress.
 21. On cross-examination, she testified that on the material date, she was playing with M, Y, W, and S, who had come to play inside the plot they were residing in. That it was usual for Sammy to sit outside his house whenever he came from work, that all this time, her mother was in the house. She did not see Sammy put his hands inside the deceased's Dress.
 20. She further stated that they lived in the same plot as Eunice Nyakanini, who used to sell the bar in the plot. The people in the bar used the toilets in the plot near the houses and the gate.
 23. PW8 was Dr Karimi Joseph Kinyua, who carried out a post-mortem on the deceased's body. He produced the Post mortem report as Exhibit 1.

Defence

24. At the close of the Prosecution case, the Court ruled that the Accused person had a case to answer and put him on his Defence.
25. The Accused DWI testified that on April 6, 2018, he woke up as usual and went to his place of work in Sipili town and later came back, that many children were playing in the compound of the plot where he was residing, and he slept at around 10.30 pm.
26. That the following day he went to work as usual. At noon, the chief, accompanied by the deceased's relatives, found him and took him to the AP Post; they informed him that he had killed the deceased. He was handcuffed, brought to the police post, and then to his home. The police officers searched the whole house, and only found grey trousers which they carried with them, they were attacked by the mob together with the Police and he was later taken to the police station.
27. He testified that he was unaware of what happened to the deceased person, that nobody even informed him of the missing child on the day that he was allegedly seen with her and was just in his house. That there was an existing grudge between him and the caretaker of the plot Eunice Nyakanini and she could have instigated his arrest. That there was a bar in their plot, and the patrons used the same toilets as the tenants, and this could have exposed the deceased person to the drunkards.
28. He further testified that the items allegedly recovered from his house two (2) days after the arrest could have been planted there since the police officers searched the house in his presence. Furthermore, they only carried his trouser and had left the door to his house broken; therefore, anyone could have accessed his house during the two days he was in remand.
29. Further, he testified that the report from the government chemist did not connect him with the incident.



30. The parties were directed to put submissions, but only Defence filed the same.

Accused Person's Submissions

31. The Prosecution must adduce evidence to prove the three ingredients of murder under section 203 of the *Penal Code*. These ingredients are: the accused person carried out an unlawful act or omission; the execution of the unlawful act or omission caused injury to the deceased person causing the death of the deceased, and the accused person had formed the intention to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.
32. All the prosecution witnesses never saw the accused person kill the deceased. In fact, all witnesses had relied on the information of PW6 and PW7 minors who had allegedly been with the deceased playing, and the accused was sited outside his house the day she was murdered.
33. It is not in contention that the accused lived in the same plot as the PW7. Although the plot had other tenants and a bar on the front side of the plot, the patrons used the same toilets as the tenants.
34. The two (2) witnesses playing amongst other children only testified that they left the accused with the deceased in the evening. Still, they did not know anything else of what transpired after that; interestingly, when the deceased's family were looking for the deceased in the evening, they did not inform them that they had left her with the deceased. It seemed that this was an afterthought and was only meant to fix the accused person.
35. When the accused was arrested by the chief and taken to the police post station, he was accompanied to his house by the police officers who searched his house and only carried one(1) trouser belonging to the accused. Nothing relating to the deceased was recovered in the accused's house during the search.
36. In a desperate move to the accused person with the murder of the deceased herein, the caretaker of the building, namely Eunice Nyakanini, who did not testify but was mentioned by most of the witnesses, called the Police after two days and an alleged search was conducted again in the accused's house. As a result, some items belonging to the deceased were recovered.
37. It is interesting to note that when the accused was arrested, the door to his timber house was broken into by the members of the public, and the witnesses testified that the same remained open until the caretaker removed his belongings from the house.
38. Therefore, it is very clear from the foregoing that the items were planted in the accused person's house when the house was left unlocked, broken into, and unattended to, and that is why the items were never recovered the first time search was carried out in the presence of the accused.
39. Further, one is left to wonder what was the business of the said Eunice Nyakanini to go and ransack the accused's house in his absence and the absence of even a police officer.
40. The Prosecution must establish the elements laid down in *Joan Chebichii Sawe v Republic* [2003] eKLR for the Court to rely on circumstantial evidence solely.
41. In *Republic v Kelvin Mukuba Wambui* [2020] eKLR, in acquitting the accused person, this Honourable Court was guided by the Court of Appeal Case; *Joan Chebichii Sawe v Republic* [2003] eKLR.
42. *Abang'a alias Onyango v- Republic* CrA 32/1990 in *PON V Republic* [2019] eKLR.
43. The Prosecution's evidence failed to create reasonable doubt in this case.



44. The only evidence was by two minors, whose evidence was not corroborated, who testified that they were playing with the deceased person. At the same time, the accused sat outside his door as he watched the children play, and they then left the accused with the deceased person as they later went running other errands.
45. When the said children were interrogated on the whereabouts of the deceased person when she went missing, they did not say that they were playing with her and left her with the deceased person.
46. That the accused person was all along in his house on that night, but nobody inquired about the whereabouts of the deceased from him.
47. That there seemed a calculated move to fix the accused person with the offence as even the deceased's clothes that she was wearing on the fateful day were planted in the accused's house two (2) days after he had been arrested.
48. The fact that the door to the house was broken and remained unattended for two days, only for someone to call the Police and inform them that she had seen some of the deceased's items, raises many issues.
49. It emerged that the plot where the accused lived and the alleged 'star witness' Eunice Nyakanini lived had a bar on the front side where the said Eunice used to sell and that patrons to the bar used the same toilets with the tenants also creates doubts and probability that the drunkards would have committed the offence.
50. The Report from the Government Analyst at the Laboratory of the Government Chemist Department's Report, produced as P exhibit 5, exonerated the accused herein from the commission of the deceased.
51. The conclusion and the opinion of the Government Analyst were to the effect that: The DNA profile generated from the pair of trousers (item C) was of unknown female origin.
52. From the foregoing, the Prosecution was not able to prove its case beyond any reasonable doubt that it's the accused committed the offence.
53. In emphasizing this issue of DNA profiling, reliance was made on the cases of *Republic vs- Frederick Kipkirui Korir* and *Republic v Francis Njuguna Kamau & another* [2016] eKLR.
54. No evidence linked the accused person to the offence of murder in question.
55. Further from the holding in the case mentioned above that, the fact the accused had been seen with the deceased during the day does not necessarily mean that he murdered the deceased.
56. The Standard of proof emphasized in section 107 (1) of the *Evidence Act* that:

“Whoever desires any court to give judgment as to any legal, right or liability, dependent on the existence of facts, which one asserts must prove those facts exist.”
57. In *JOO vs Republic* [2015] eKLR, Mrima, J held that: This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person”.
58. A very important witness, namely Eunice Nyakanini, whom other witnesses adversely mentioned, was not called as a witness in this case.
59. This witness was a neighbour to the accused and the caretaker of the plot where they were living; she was operating a bar on the front side of the bar.



60. Further, the witness allegedly recovered some exhibits from the accused person's house two days after he was arrested; a search was conducted, and those things were not recovered during the initial search.
61. Further, the Investigation Officer in this matter did not testify. Therefore most of the exhibits were not produced as exhibits in Court, and thus the Court cannot rely on them during the determination.
62. These witnesses were supposed to come and fill in the gaps that the other secondary witnesses had left.
63. It is trite law that failure to call material witnesses by a party should draw the conclusion that if such evidence was called, then the same would be adverse to the party not reaching the same. The same conclusion should be drawn in this matter. No explanation was given as to whether there was any difficulty or expense that was being faced by the Prosecution to avail the said witnesses to Court. The Court will note that Eunice Nyakanini and the Investigating Officer failed to testify and shed more light on what happened to the deceased person. See the case of [*Republic-vs- Frederick Kipkirui Korir*](#)

Issues, Analysis, and Determination

64. After going through the proceeding and submissions on record, I find the sole issue for determination is whether the ingredients of murder have been proved beyond any reasonable doubt.
65. Section 203 defines the offence of murder. It requires proof of the following elements beyond any reasonable doubt to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
66. The first issue for consideration is proof of death. Article 26 (1) of the [*Constitution*](#) guarantees every person the right to life. In the instant case, there is no dispute about the occurrence of the deceased's death. All the prosecution witnesses confirmed this.
67. PW8 was Dr Karimi Joseph Kinyua carried out a post-mortem on the deceased's body, producing the Post mortem report as Exhibit 1. The defense did not contest that death occurred in respect of the deceased herein. Accordingly, it is my view that the Prosecution has satisfied this element beyond any reasonable doubt.
68. The other question is whether the accused unlawfully caused the deceased's death. None of the prosecution witnesses saw the subject kill the deceased. In essence, the prosecution case is based on circumstantial evidence.
69. In [*Abmad Abolfathi Mobammed and Another v Republic*](#) [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person, just as direct evidence. Way back in 1928, Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver, and Donovan* [1928] Cr App R 21: -

"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances that, by intensified examination, can prove a proposition with the accuracy of mathematics. So it is no derogation from evidence to say that it is circumstantial."



70. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The Court stated:

“Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr App No 32 of 1990*, this Court set out the conditions as follows:

“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 the guilt of the Subject; (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.”

71. All the prosecution witnesses never saw the accused person kill the deceased. In fact, all witnesses had relied on the information of PW6 and PW7 minors who had allegedly been with the deceased playing, and the accused was sited outside his house the day she was murdered.

72. It is not in contention that the accused lived in the same plot with the PW7; the plot had other tenants and a bar on the front side of the plot; the patrons used the same toilets as the tenants.

73. The two (2) witnesses who were playing amongst other children only testified to the effect that they left the accused with the deceased in the evening. Although still, they did not know anything else of what transpired thereafter, interestingly, when the deceased's family were looking for the deceased in the evening, they did not inform them that they had left her with the accused

74. When the accused was arrested by the chief and taken to the police post station, he was accompanied to his house by the police officers who searched his house and only carried one(l) trouser belonging to him. Nothing relating to the deceased was recovered in the accused's house during the search.

75. The caretaker of the building, namely Eunice Nyakanini, who did not testify but was mentioned by most of the witnesses, called the Police officers after two days, and alleged search was conducted again in the accused's house. As a result, some items belonging to the deceased were recovered.

76. It is interesting to note that when the accused was arrested, the door to his timber house was broken into by the members of the public, and the witnesses testified that the same remained open until the caretaker removed his belongings from the house.

77. From the foregoing, it may be inferred that it is probable items were planted in the accused person's house when the house was left unlocked, broken into, and unattended to, and that is why the items were never recovered the first time search was carried out in the presence of the accused.

78. Further, one is left to wonder what was the business of the said Eunice Nyakanini to go and ransack the accused's house in his absence and in the absence of even police officers.

79. The Prosecution must establish the elements laid down in the case of *R vs Kipkering Arap Koske & Another* 16 EACA 135, where it was, among other things, held that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”



It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case *Joan Chebichii Sawe v Republic* Crim App No 2 of 2002 had this say about suspicion in a criminal case:

"The suspicion may be strong, but this is a game with clear and settled rules of engagement. The Prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira vs. Republic* (Criminal Appeal No 17 of 1998 (unreported), suspicion, however strong, cannot provide a basis for inferring guilty which must be proved by evidence."

80. The Prosecution has to prove its case beyond a reasonable doubt. What is reasonable doubt? In the case of *Miller v Minister of Pensions* [1947], Denning J explained what reasonable doubt is. He stated:

"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable." the case is proved beyond a reasonable doubt. Still, nothing short of that will suffice."
81. The other evidence prosecution proffered to prove their case was by two minors whose evidence was not corroborated, who testified that they were playing with the deceased person. At the same time, the accused sat outside his door as he watched the children play, and they then left the accused with the deceased person as they later went running other errands.
82. When they were interrogated on the whereabouts of the deceased person when she went missing, the said children did not say that they were playing with her and left her with the deceased person.
83. That the accused person was all along in his house on that night, but nobody inquired about the whereabouts of the deceased from him.
84. The fact that the door to the house of the accused was broken and remained unattended for two days, only for someone to call the Police and inform them that she had seen some of the deceased's items, raises a lot of suspicions.
85. It emerged that the plot where the accused lived and the alleged 'star witness' Eunice Nyakanini lived had a bar on the front side where the said Eunice used to sell and that patrons to the bar used the same toilets with the tenants also creates doubts and probability that the drunkards would have committed the offence.
86. The Report from the Government Analyst at the Laboratory of the Government Chemist Department's Report, produced as P exhibit 5, exonerated the accused herein from the commission of the offence of murder
87. The conclusion and the opinion of the Government Analyst was to the effect that: The DNA profile generated from the blood stains on the Dress (item D) Matched the DNA profile generated from the Blood Sample (item B3) marked, "IWN (deceased), with a probability of a random match 1 in 1.3 x10. The Dress (item D) generated a mixed DNA profile of unknown male origin. The DNA profile generated from the pair of trousers (item C) is of unknown female origin.
88. From the foregoing, the Prosecution was not able to prove its case beyond any reasonable doubt that it's the accused committed the offence via DNA evidence produced.



89. In emphasizing this issue of DNA profiling, reliance was made on the case of *Republic vs- Frederick Kipkirui Korir*; the Court held that;

“The Government analyst report of Polycarp Lutta Okwengu (PW2), the Government analyst, has exonerated the accused from the commission of this offence. Furthermore, it has discredited the direct evidence of Robert Kippyegon Mutai (PW3).”

90. Further, in *Republic v Francis Njuguna Kamau & another* [2016] eKLR the Court held that; -

“The evidence of PW10 destroys the prosecution case. Although the recovered shirt was said to belong to the 2nd accused (though no proof was offered), the blood stains found on that shirt did not match the DNA profile of the blood sample of the 2nd accused. Instead, the blood stains on the shirt were of 'unknown male origin.’

There is, therefore, the very real possibility that this shirt did not belong to the 2nd accused. Thus, although the blood stains on the wood originated from the deceased herself, no link is shown to exist between the exhibits recovered and the blood stains on them to the two accused persons. Therefore, in that case, it is quite probable that it was a third unknown mate person who attacked and killed the deceased”.

91. Further, there was a holding in the case mentioned above that the fact the accused had been seen with the deceased during the day does not necessarily mean that he murdered the deceased. The Standard of proof emphasized in section 107 (1) of the *Evidence Act* that:

“Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist.”

92. In *JOO vs Republic* [2015] eKLR, Mrima, J held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty of the Prosecution to ensure adequate evidence is adduced against a suspect to uphold any conviction. The Standard of proof required in criminal cases is well settled, proof beyond any reasonable doubt; hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person”.

93. A very important witness, namely Eunice Nyakanini, who other witnesses adversely mentioned, was not called as a witness in this case.

94. This witness was a neighbour to the accused and the caretaker of the plot where they were living; she was operating a bar on the front side of the bar.

95. Further, the witness allegedly recovered some exhibits from the accused person's house two days after he was arrested; a search was conducted, and those things were not recovered during the initial search.

96. Further, the Investigation Officer in this matter did not testify. Therefore most of the exhibits were not produced in Court, and thus the Court cannot rely on them during the determination.

97. These witnesses were supposed to come and fill in the gaps that the other secondary witnesses had left.

98. It is trite law that failure to call material witnesses by a party should draw the conclusion that if such evidence was called, then the same would be adverse to the party not calling the same. The same



conclusion should be drawn in this matter. No explanation was given as to whether there was any difficulty or expense that was being faced by the Prosecution to avail the said witnesses to Court. The Court will note that Eunice Nyakanini and the Investigating Officer failed to testify and shed more light on what happened to the deceased person. See the case of Republic-vs- Frederick Kipkirui Korir supra.

99. In sum, the court finds that the prosecution has not proved its case beyond a reasonable doubt, and thus court makes the orders;
- i. The accused is given the benefit of the doubt, and thus murder charges are dismissed, and the accused shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 20TH DAY OF DECEMBER 2022.

CHARLES KARIUKI

JUDGE

