



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Meri (Criminal Case 26 of 2015)
[2020] KEHC 9222 (KLR) (12 March 2020) (Judgment)**

Neutral citation: [2020] KEHC 9222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 26 OF 2015
DO CHEPKWONY, J
MARCH 12, 2020**

BETWEEN

REPUBLIC ACCUSED

AND

MWAGA MERI ALIAS KATUI MERE LUGWE ACCUSED

JUDGMENT

1. The accused person, Mwaga Meri alias Katui Mere Lugwe is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#), Cap 63 of the Laws of Kenya.

The particulars of the offence are that:-

“On the 10th day of September, 2012 at Mitunguni Village, Silaloni Sub-location within Kwale County, the accused person murdered Agnes Kanzala”.

2. The accused person was arraigned in court on June 23, 2015 where he was informed of the charge against him but was not required to say anything until he was examined by a Psychiatrist to confirm his mental capacity and the Deputy Registrar assigns him counsel.
3. On September 30, 2015, the charge and information was read and explained to the accused person and he pleaded ‘Not Guilty.’
4. The trial commenced on July 21, 2016 with the prosecution being led by the State Counsel M/S Ocholla, for the prosecution and Mr Mwakireti counsel for the accused person. The prosecution called a total of eight (8) witnesses and the accused person when placed on defence, opted to five sworn statement defence and called one witness.
5. Briefly, the evidence by the prosecution’s witnesses was that on September 10, 2013, PW3 was on her way to her home with PW4 when they met one Mose, a charcoal burner. That PW3 stopped and stated



- chatting with Mose which caused her child, PW4 Mwakipha Samson to be impatient and he decided to leave her behind and go home.
6. PW3 told court that after her chat with Mose, she continued with her journey to her home and on the way met the accused person, Meri, who pounced and attacked her with the kicks and blows, while threatening to kill her. That he strangled her until she lost her consciousness.
 7. On the other hand, PW4 told court that after he left his mother chatting with Mose, the charcoal burner and went home when he found the deceased had made porridge and he drank it. They then decided to go and look for their mother, PW3 who was taking long to get home. He told court that on the way, they met the accused person who was armed with a panga and he started chasing them. They ran into different directions and the accused ran towards the direction his sister, the deceased had ran. PW4 managed to get to their home where he narrated to PW2 and PW3 what had happened and they went out to look for the deceased who they found dead. He said that she had injuries on the neck and left finger.
 8. PW2, William Muang'a Vura, upon finding the deceased lying dead in the bush with cuts on the neck and left fingers, proceeded to report the matter to the police station at Silaloni.
 9. PW5 - PC Job Ouma investigated the matter after receiving the report and issued PW3 with a P3 form.
 10. PW6 CI Henry Wesonga arrested the accused person on June, 2015, in Mitunguri area.
 11. PW7, a Clinical Officer examined PW3 who had alleged to have been assaulted. He filled the P3 form in which she confirmed that PW3 had sustained injuries he classified as harm. She produced the P3 form as Exhibit P1.
 12. PW8, Dr Nafisa produced a post mortem report which confirmed the injuries the deceased had sustained and the cause of her death.
 13. As his sworn evidence in defence, the accused person Mwaga Meri alias Katui Meri denied killing the deceased person and stated that on the alleged date, he had travelled to Kazarui to buy cows and goats. He said that he was with one Chete Nzunga, DW2 and returned home at 2.00pm where he learnt of the deceased's death. He claimed that there had been bad blood between him and PW3, the deceased's mother, whereby he had taken her son to court for stealing and he was found guilty and convicted of the said offence. He said that he was shocked to learn of the deceased's death. He called one witness, DW2 Chete Nzunga who said that he was with the accused person throughout the 10th of September, 2013 and they returned home at 2.00pm.
 14. The parties were directed to file and serve written submissions in respect of their various position in this matter. The prosecution filed and served their submissions dated November 21, 2019 on even date while the accused (defence) filed theirs on November 19, 2019.
 15. After hearing all the evidence by the prosecution's witnesses and defence, the issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt.
 16. The accused person is charged with the offence of Murder contrary to Section 203 of the [Penal Code](#), which states that:-

“ Any person of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”.



17. From the definition, what is required to be proved by the prosecution for the offence of Murder are the following elements:-
 - a. that the death of the deceased occurred;
 - b. that the death was caused by the unlawful act of the accused person;
 - c. that the accused person in causing the death of the deceased, did so with malice aforethought.”
18. The burden of proving these elements always lie and remain with the prosecution and it never shifts to the accused person.
19. With regard to the issue of whether the deceased died, it was the evidence of PW2 - William Munala Vura, PW3 - Junwa Cimbale Mambo, PW4 – Mwakupha Samson and PW5 – No 924XXX, PC Job Ouma, that the deceased’s body was found lying in the bush with cut wounds on September 10, 2013. She was said to have been found dead. PW1 – Hussein Mutsololo Mumbo identified the deceased’s body to the doctor who performed the post mortem examination in the presence of PW5 – No 92XXXX PC Job Ouma. The post mortem report was prepared and signed by Dr Mngola, who performed the post mortem examination on September 23, 2013 and confirmed that the deceased had died as a result of haemorrhage and partial decapitation. PW8 – Dr Nafisa Seith produced the post mortem report on behalf of Dr Mngola as Exhibit P1. The accused person and his witness, DW2 also confirmed that they learnt that the deceased had died while the accused person said that he was shocked by the news.
20. It is therefore clear that the death of the deceased is an undisputed issue. And from the confirmed cut wounds on the deceased’s body by the evidence of PW3, PW4 and PW5 and the post mortem report, it is also clear that the deceased’s death was unlawfully caused.
21. The next issue for consideration is whether the accused person caused the unlawful death of the deceased.
22. According to the prosecution’s evidence, PW4 was walking with the deceased on the fateful day when they met the accused person who was carrying a panga and he asked them to stop but they ran in different directions. The accused person followed the deceased as PW4 ran into the bush from where he saw the accused person cut the deceased on the leg and hand. He also said that he saw the accused person walk past him after he had cut the deceased.
23. PW3, mother to the accused and PW4 stated that she was on her way home on the fateful day when she met the accused person, who pounced on and attacked her with kicks and blows while threatening to kill her. She told court that she sustained injuries for which she was examined and treated at Samburu Health Centre as confirmed by the P3 form which was produced by PW7 – Rose Mwaka, a Clinical Officer as Exhibit P1.
24. From the evidence of PW2 and PW6, the accused person disappeared from home until June 27, 2019 when he was arrested while attending a funeral at Mitungari Village. The accused denied having committed the said offence and his witness, DW2 told court that they were together at Kazamoyo where they were selling livestock until 2.00pm when they returned. In my analysis of the evidence that was presented before me, I find that although PW4 is the only eye witness to the incident of the accused person cutting the deceased to death, there are a set of facts or circumstances which point to no one else other than the accused person as the person responsible for the death of the deceased.



25. It is worth-noting that the incident where the deceased was killed happened around 10.00am which is broad daylight with sufficient light for anyone to see what was happening and the people around. The issue of mistaken identity would therefore not arise in such circumstances.
26. Furthermore, PW3 and PW 4 clearly identified the accused person as the person they met on the fateful day. Infact, PW3 told court in cross-examination that the accused person attacked and assaulted her on the day. She reported the matter and was issued with a P3 form which was filled by PW7 – Rose Mwake, a Clinical Officer on September 11, 2013 confirming that PW3 had gone to hospital for examination and treatment of injuries she alleged had been inflicted on her by a person known to her. The P3 form was produced as Exhibit P1.
27. PW4 – said that he was with his sister the deceased when they met the accused person who chased them and proceeded to pursue the deceased. He said that he saw the accused cut up the deceased. He was the last person to be said has been seen with the deceased before she was found dead. There is also uncontroverted evidence that the accused disappeared from home from the September 1, 2013 to June 27, 2015 when he was arrested while attending a funeral. This evidence was not challenged by the accused in either cross-examination or evidence in defence.
28. There is also a confirmation by both the accused and deceased’s family that there had been a long standing dispute between them.
29. With this kind of evidence, I do find that it all points to the accused person as the person who could have killed the deceased. He was the last person to be seen chasing her when she was alive and his conduct of disappearance after the incident is incompatible with his innocence. I have also considered his evidence and that of DW2 in his defence and find that it has not displaced the prosecution’s strong case.
30. As for whether in causing the deceased’s death, the accused person did so with malice aforethought, Section 206 of the [Penal Code](#) provides that:-
 - “Malice aforethought shall be deemed to be established by evidence proving anyone 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 an act 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 or any person who has committed or attempted to commit a felony.
31. It came out from the evidence of PW4 that he was with his sister, the deceased when they met the accused person who was armed with a panga and he chased them. He stated that the accused person pursued the deceased and he saw him cut her with the panga. PW2 confirmed he saw the deceased lying dead with cuts on her neck and left finger. PW8 produced a post mortem report which indicated that on post mortem examination the deceased was found having sustained deep cuts on the right side of



the neck with a fracture on the cervical vertebrae. It was also cited that the third and 2nd finger of the left hand are completely amputated.

32. From the type of weapon used to the nature of injuries and where they were inflicted on the deceased, it is clear that the accused person intended to cause grievous harm or death of the deceased.
33. In conclusion, I find that the prosecution has proved their case against the accused person beyond reasonable doubt who I find guilty of the offence of Murder and convict accordingly as charged.

**JUDGMENT DELIVERED IN OPEN COURT, DATED AND SIGNED AT MOMBASA THIS ...
12TH ... DAY OF ...MARCH... 2020.**

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Shabola counsel for the State

M/S Okumu counsel for the Accused

Accused - present

Court Assistant - Mwanaidi

