



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Makokha (Criminal Case 42 of 2015)  
[2025] KEHC 1452 (KLR) (Crim) (14 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL CASE 42 OF 2015**

**GL NZIOKA, J  
JANUARY 14, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ISMAEL OPETU MAKOKHA ..... ACCUSED**

**JUDGMENT**

1. The accused was arraigned before the court charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the charge are that on the night of 2<sup>nd</sup> day of March 2015, at Drive in Estate Ruaraka within Nairobi, with others not before the court, he murdered Ezra Mutua Benson.
2. The charges were read to the accused and he pleaded not guilty thereto and the case proceeded to full hearing with the prosecution calling a total of ten (10) witnesses.
3. The prosecution case is that on the material date (PW1) Eunice Nyokabi Njenga visited the deceased, who was her boyfriend at his residence at All Soaps along Thika road and shortly thereafter she left for her residence escorted by the deceased. She testified that they continued chatting via text messages until the time he failed to respond to one of the texts.
4. That she was to return to the deceased's house for a sleep over and when she returned she found the door open which was unusual and when she got into the house she found the deceased lying in a pool of blood with the hand and legs tied with laptop cable. She also realized that some items including a television and laptop had been stolen.



5. That she inquired from the owner of the Kiosk near the deceased's house as to whether he had seen anyone going to the deceased's house but he said that he had not seen anyone whereupon she alerted the deceased's family of what had happened.
6. That the deceased brother arrived at the scene, untied the deceased and took him to Guru Nanak hospital but unfortunately he was pronounced dead on arrival. Consequently, the matter was reported to the police officers who commenced investigations and took the body to the mortuary.
7. As the investigation continued the police traced the deceased's cell phone number and established that, it was being used by (PW7) Cecilia Njuki Thuita. The investigator (PW7) Inspector Josephat Otieno told the court that he traced (PW3) Cecilia who informed the police officers that, she had gotten the phone from her friend Millicent who had got it from the accused who is a phone repairer.
8. As a result, (PW3) Cecilia and Millicent were arrested and led the police officers to the shop of the accused pointed him out and he arrested him. That upon arrest, the accused said that he got the phone from one "Segesh" but could not produce the said Segesh. He was then held to blame for the murder and after the investigation he was charged accordingly.
9. In the meantime the autopsy on the body of the deceased revealed that he died of gunshot wound as stated in the post-mortem report dated 4<sup>th</sup> March 2015, produced by (PW4) Dr. Dorothy Njeru.
10. At the close of the prosecution case the accused was placed on his defence. He testified that he has been in the business of repairing phones for the last fifteen (15) years. That, as regard the matter herein, he was brought a phone by a lady and a man to charge. That he charged it for five (5) minutes and was paid twenty shillings (Kshs 20) and the owners left.
11. That later police officers and two ladies went to his place of work and IP Otieno (PW7) asked him if he knew anything about the phone and he said that did not know anything about it but nevertheless he was arrested. He denied knowledge of the death of the deceased and said that he did not know where the deceased's death occurred and that has never been in possession of a firearm. He also denied telling the police officers that he got the phone from one Segesh.
12. At the conclusion of the entire case the parties filed their respective submissions. The prosecution in submissions dated; 13<sup>th</sup> July 2023 submitted that it has proved all the elements of the offence of murder as stated by the Court of Appeal in the case of; Anthony Ndegwa Ngari vs Republic [2014] eKLR being; proof that the death of the deceased occurred, that the accused committed an unlawful act which caused the death of the deceased and that he had malice aforethought.
13. That the cause of the death of the deceased was proved by the post-mortem report produced by (PW4) Dr Dorothy Njeru that indicated the cause of death being a single gunshot wound.
14. On whether the accused committed the unlawful act that caused the death of the deceased, the prosecution submitted that, Article 26 of *the Constitution* of Kenya gives instances where the right of life can be limited and as stated in the case of; Gusambizi Wensanga vs Republic [1948] 15 EACA that every homicide is presumed to be unlawful except for circumstances that make it excusable or where authorized by law.
15. The prosecution submitted that there was no evidence to suggest that the gunshot wound inflicted on the deceased's head was self-inflicted or justified, and that the evidence irresistibly points to an unlawful act.
16. On whether the accused had malice aforethought, the prosecution cited section 206 of the *Penal Code* that defines malice aforethought and relied on the case of; R vs Tubere S/O Ochen 1945 12 EACA



- 63 where the court stated that in discerning malice aforethought it considers the nature of weapon used, the manner it was used, part of body targeted, nature of injuries inflicted, and the conduct of the accused before, during and after the incident.
17. The prosecution submitted that in the present case, the accused shot the deceased in the head an act meant to and did cause the death of the deceased proving that the accused had mens rea.
  18. The prosecution further submitted that, there were no witnesses to the murder and it is relying on circumstantial evidence which was defined by Osiemo J in the case of; Mohamed & 3 others vs Republic [2005] 1KLR 722 as evidence that proves a fact indirectly by proving other events and/or circumstances of a conclusive nature that provide reasonable inference of the happening of the fact.
  19. The prosecution further argued that it was relying on the doctrine of recent possession whose elements were laid out by the Court of Appeal in the case of, Eric Otieno Arum vs R [2006] eKLR being that; the property was found with the accused, the property is positively identified as the property of the complainant and was stolen recently from the complainant.
  20. That the Court of Appeal in the afore case further stated that, the proof of time depends on the easiness with which the stolen property can be moved from one person to the other while possession will be proved through any evidence of a search of the suspect and recovery of the allegedly stolen property.
  21. The prosecution submitted that it had proved the elements of the doctrine on recent possession as the mobile phone data produced as P exh. 11 and 13 showed that on 2<sup>nd</sup> March 2015 the deceased was in possession of his phone as he was texting with PW1 Eunice Nyokabi Njegna before he was murdered. That on 3<sup>rd</sup> March 2015 Millicent Anyango inserted her SIM Card in the deceased mobile phone, and on 5<sup>th</sup> March 2015 PW3 Cecilia Njoki Thuita inserted her SIM Card in the deceased mobile phone.
  22. Further, using the data of the deceased mobile phone, PW7 No. 86200 IP Josphat Otieno Oiwira and PW8 No. 64192 CIP Lucy Waithira were able to trace PW3 Cecilia Njoki Thuita and Millicent Anyango. That Millicent Anyango informed them that she had purchased the deceased's mobile phone from the accused and led them to the accused's mobile repair shop.
  23. Furthermore, the accused informed PW7 and PW8 that a person by the name 'Segesh' had taken the phone to him and offered him a commission if he sold the phone. However, the accused refused to disclose the whereabouts of Segesh.
  24. It was argued that despite the accused denying being in possession of the phone and selling it Millicent Anyango, he did not give any evidence to rebut the chronology of events put forward by the prosecution or the forensic evidence to dispute the chain of recent possession.
  25. That the prosecution having proved the doctrine of recent possession, the circumstances taken cumulatively created a nexus so complete that precisely pointed to the inference that the accused was the one that committed the offence. The prosecution urged that it had discharged its burden of proof beyond reasonable doubt and invited the court to find the accused guilty of the charge and convict him under section 203 of the *Penal Code*.
  26. However, the accused in submissions 15<sup>th</sup> November 2023 cited section 203 of the *Penal Code* and set out the ingredients of the offence on murder as being: the death and cause of death of the deceased; that the accused caused the death through an unlawful act on omission; and that the accused had malice aforethought as defined under section 206 of the Penal code.
  27. The accused also cited section 107 of the *Evidence Act* (Cap 80) Laws of Kenya and the case(s) of; Woolmington v DPP AC 155, Miller v Minister of Pensions {1942} 2 ALL ER, Rex v Isnaili Epuku S/0



- Achieni (1934) EACA, and R v Gachanja (2001) KLR 428 for the proposition that the prosecution had the duty to prove all the ingredients of the offence either by way of direct or circumstantial evidence beyond reasonable doubt.
28. However, the defence conceded to the occurrence of death of the deceased but denied playing any role in the offence. He argued that, the trial was based on a mere suspicion and hearsay from Millicent Onyango who was never called as a witness.
  29. On whether he was properly identified, the accused person cited the case(s) of; Abdalla bin Wendo & Another v R 20 EACA 168, Anjononi & others v R (1980) KLR 54 and Mbelle v R (1984) KLR 626 where the court stated that identification must be achieved with reasonable certainty to connect an accused person with the crime.
  30. The defence argued that in the present case, none of the ten (10) prosecution witnesses who testified linked him to the murder of the deceased. That PW7 IP Josephat Otieno the arresting officer and PW8 C.I. Lucy Waithera the Investigating officer both stated that he was identified by Millicent Onyango who was never called to testify.
  31. That, the prosecution reliance on a third party who never testified to identify the accused weakened the prosecution's case as it introduced a layer of hearsay and uncertainty, which undermined the credibility and reliability of the evidence presented.
  32. On whether there was malice aforethought, the accused quoted the statutory definition thereof as outlined under section 206 of the *Penal Code* and submitted that it can only be established where an accused person is directly linked to an actus rea of a specified murder.
  33. However, in the present case Millicent Onyango being the key witness was never called to testify and neither was there any evidence that the prosecution had summoned her to testify raising doubt as to her existence.
  34. Further, the credibility of the phone produced as prosecution exhibit (1) was in question as it was produced under police file No.CR 127/192/20 yet the deceased's death was recorded under police file No. CR 127/18/15 raising question as to whether the exhibit and the phone were actually related or were distinct.
  35. The defence relied on the case of, Feisal Mohammed Ali vs Republic (2018) eKLR where the court quashed and set aside the conviction and acquitted the appellant due to mere suspicion on the credibility of the evidence tabled.
  36. On whether the accused caused the death of the deceased, it was argued that there was no eye witness to the alleged offence and therefore the prosecution's case was entirely based on circumstantial evidence.
  37. The accused relied on the case(s) of, Sawe vs Rep [2003] KLR 364, Abang'a alias Onyango vs Republic C. Appeal No. 32 of 1990 and Republic vs Kipkering Arap Koske & Another [1949] 16 EACA 135 where the courts discussed the circumstances under which circumstantial evidence may be relied on to convict an accused person.
  38. On whether the accused was in recent possession of the deceased's mobile phone, the defence relied on the case of; Kinyatti v R [1984] eKLR where the Court of Appeal stated that, the control of an object in possession of an accused is not necessary nor a requirement for the definition of being in possession as set out in section 4 of the *Penal Code*.
  39. The defence further relied on the case of Eric Otieno Arum v Republic [2006] eKLR where the Court of Appeal stated that for possession to be positively proved, it must be shown that the property was



found with the suspect; it is the property of the complainant; it was stolen from the complainant, and it was recently stolen from the complainant.

40. That, it is only after the prosecution has established that an accused was found in possession will an accused bear the evidential burden to provide reasonable explanation for possession as stated by the Court of Appeal in the case of Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008 that it is only when an accused is found in possession of recently stolen property he is required to discharge the burden of how he came into possession of said property pursuant to section 111 of the [Evidence Act](#).
41. That in the present case, it was the evidence of PW6 Cpl Odhiambo, PW7 IP Otieno and PW8 CIP Waithera that PW3 Cecilia had actual possession of the deceased's phone. Further, PW3 stated that she was given the phone by Millicent Onyango and that she did not know the accused.
42. Further, prosecution exhibit(s) 11 extract of call data records for No. 0727766307 belonging to Millicent Onyango, 12 call data records for No. 0727766307 belonging to Cecilia Thuita and 13 certificate under section 6598) of the [Evidence Act](#) produced do not show a record or name of the accused neither did PW9 PC Martin Mwenda Njeru mention the accused's name in his report. Additionally, prosecution exhibit 11 has only two pages out of a 188-page report and is neither stamped, certified or paginated and was therefore inadmissible as its integrity and authenticity are in doubt.
43. The defence argued that no evidence was rendered before the court to show that he used or was in possession of the deceased's phone hence the doctrine of recent possession is not applicable. Further that, the prosecution's case was based on hearsay evidence as none of the witnesses who testified could identify him but instead referred to information shared to them by Millicent Onyango.
44. The defence cited the case of [Kinyatti vs Republic Cr. Appeal No. 60 of 1983](#) (CA) where the Court of Appeal described hearsay evidence as the assertion of another person other than the person testifying and is not original evidence. Further reliance was placed on the case of [Republic v John Ng'ang'a Njeri \[2018\] eKLR](#) where the High Court set out the instances where statements of witnesses who are not available can be admitted as evidence.
45. That the High Court stated that such statements are admissible where the witness is unavailable due to death, physical infirmity, mental illness or is outside the court's jurisdiction and that the statement has sufficient indicia of reliability and/or where such statement has been subject to cross-examination by an accused or was made under oath.
46. The defence submitted that the evidence produced by the prosecution did not fall within the afore exceptions as there is no evidence that the prosecution attempted to summon Millicent Onyango to appear as a witness nor was there any explanation given of her failure to come to court.
47. At the conclusion of the case and considering the evidence adduced in total alongside submissions tendered I find that, there is no direct evidence that the accused committed the offence of murder herein. The evidence of (PW1) Eunice Nyokabi is that she found the deceased in a pool of blood and tied on the floor. That his hands and legs were tied using a laptop and box cables. That she realized that some of his items had been stolen including laptop and phone.
48. That she went on to state that she inquired from the kiosk man nearby as to whether he had seen anyone enter the deceased's house and leave with items but he said he did not see anyone. The witness was categorical in her evidence in chief that she did not know who killed the deceased or what happened to him.



49. It's noteworthy that the deceased had earlier on escorted PW1 Eunice to the bus stage and returned home and indeed it is in the prosecution evidence that, the kiosk man with a kiosk opposite the gate to the deceased's house confirmed that the deceased returned from the bus stage alone and he did not see anyone leaving the gate carrying a T.V. screen.
50. Basically none of the other witness testified as to how the deceased met his death and the prosecution has conceded that none of its witnesses saw the accused kill the deceased and therefore the case can only fall on circumstantial evidence.
51. In that regard, I note from further evidence that, after the death of the deceased, the police officers commenced investigations that led to the recovery of his phone in possession of PW3 Cecilia Njuki Thuita. The witness testified that, she got the phone from a colleague and workmate Millicent Onyango who had purchased it from the accused who is a phone repairer. That, the only time she met the accused is when the police officers arrested her and Millicent. PW3 Cecilia further stated that she relied on Millicent to purchase the phone for her.
52. Pursuant to the afore evidence the prosecution is relying on the doctrine of recent possession to link the accused to the commission of the offence herein. It is the prosecution case that the murder occurred on 2<sup>nd</sup> March 2015 and the phone stolen. That on 3<sup>rd</sup> March 2015, the phone was bought from the accused person by Millicent who used it on the same day. That on 11<sup>th</sup> March 2015 the phone was recovered from PW3 Cecilia.
53. The prosecution thus argues that based on the chronology of events as from the time of the deceased was murdered to the recovery of the phone and arrest of the accused person it is indicative of a definite tendency which precisely point towards the guilt of accused.
54. Further the circumstances taken cumulatively create a nexus so complete that, there is no escape from inference that within all human probability the crime was committed by the accused and no one else.
55. However, the defence submitted that the doctrine of recent possession requires proof of physical possession and in this case, the deceased's phone was in physical possession of PW3 Cecilia and not the accused. That further there is no evidence linking the accused with possession of the stolen phone.
56. I have analysed the evidence herein in relation to the doctrine of recent possession and I find that the same has not been proved. The accused was not found in physical possession of the phone. The evidence to the effect that, he had the phone on 3<sup>rd</sup> March 2015 could only have been given by one Millicent who did not testify and in fact the phone was recovered much later on 11<sup>th</sup> March 2015. Furthermore, there is no forensic evidence that he ever used the phone.
57. Pursuant to the aforesaid it is evident that, in the absence of the evidence of Millicent Anyango who was a key witness in the matter herein and whose evidence would link the accused to the offence the prosecution case has been rendered a fatal blow as it relates to the charge of murder.
58. However, one cannot ignore the evidence of (PW7) Inspector Josephat Otieno Owira who arrested Millicent and PW3 Cecilia and recovered the phone. He testified that Millicent led him to the accused's shop and pointed him out as the person who sold the phone to him. The defence argues that, that evidence is hearsay as Millicent did not testify.
59. That may be so, however, PW8 Chief Inspector Lucy Waithera, the investigating officer corroborated the evidence of PW3 Cecilia that, Millicent confirmed she bought the phone for PW3 Cecilia from the accused the phone. That she recorded the accused's statement under inquiry and he stated that, he got it from one "Segeshe". Notably the statement under inquiry was not produced in evidence.



60. However, the accused acknowledged that he repairs phones and therefore gives credence to Millicent's allegation that she had taken her phone to the accused for repair when she learnt of the subject phone herein. The accused does not plead to bad blood between him and Millicent or PW3 Cecilia.
61. But even more so, the accused in his defence further acknowledged that he received a phone from a lady and a man to charge. That he charged it for them and they left. He does not state that the phone he dealt with is not the phone herein. He wishes to exonerate himself by arguing that, the phone herein was recorded under police file No. CR 127/192/20 yet the matter occurred in 2015 and recorded under police file No. CR 127/18/15. That the two files are distinct from one another and raise suspicion on the nature of evidence presented.
62. However, that discrepancy was dealt with when PW8, the investigating officer who stated that, the entry of CR 127/192/20 was an error. She explained that, it was a human error.
63. Based on the aforesaid it is the finding of this court that, the accused handled the stolen phone. He acknowledged that he did not know the people who gave him the phone to charge, did not record entry of service rendered (if any) or issued a receipt to them and therefore, the defence viewed in the light of evidence that he allegedly mentioned one Segeshe, it is evident that, he handled the stolen phone.
64. In my considered opinion he should have been charged with an alternative count of handling suspected stolen phone. However, although he was not charged with that offence section 179 of *Criminal Procedure Code* allows the court to convict an accused person of a lesser offence at the end of trial, where the evidence reveals commission of that offence.
65. Consequently I acquit the accused of the offence of murder but find him guilty of the charge of handling suspected stolen property and convict him accordingly.
66. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 14<sup>TH</sup> DAY OF JANUARY 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

Ms. Chepkonga H/B for Ms. Kigira for the State

Mr. Mwale for the accused

Mr. Komen: court assistant

