



REPUBLIC OF KENYA



**Republic v Ngoka (Criminal Case E026 of 2021)
[2025] KEHC 1716 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE E026 OF 2021
SM GITHINJI, J
FEBRUARY 18, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

MUSTAFA BARAKA NGOKA RESPONDENT

JUDGMENT

1. Mustafa Baraka Ngoka is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal Code.
2. The particulars of this offence are that on the 10th night of September, 2024 at around 2000 hours at Mitsikitsini village, Kayatungo Location, Kaloleni Sub-County within Kilifi County, the accused jointly with another not before the court murdered Shaban Jefwa Katana.
3. The prosecution case is that Pw-1 in this care and the accused person comes from Mitsikitsini village in Kayafungo Location, within Kaloleni Sub-County.
4. The two apart from being neighbours had teenage love relationship for a period of two years. Later the accused ended the said relationship. The deceased who is also a neighbor to the two, got into a love relationship with Pw-1. The two used to meet in a particular place in the bush, near their houses for sex. A week prior to 10th of September, 2021 the accused met Pw-1 at the shopping centre and threatened her by saying “she’ll face it together with her idiot guy.”
5. On 10/9/2021 at about 8:00 pm Pw-1 was at home. She was with Pw-3 who is her relative. A she was used to, she borrowed a phone from Pw-3 to make a call. Using the said phone, a Nokia phone number 0738813667, she called her boyfriend, the deceased. She wanted to meet him at the usual place for sex. The deceased was reluctant but was persuaded to. The deceased who was with his elder brother at the time, left home at 8:30 pm telling his brother (pw-2) that he was going to guard animals. He left with his phone.



6. Pw-1 met the deceased at about 9:00pm at the usual place. He had a phone and D-light torch. They walked deeper into the forest for sex. Ahead, he was held from front by the accused person. He held him by the waist and ordered him by saying “Come here!” The D-light torch beam was directed on him and Pw-1 was able to recognize him. She as well knew his voice and recognized it. He was in a blue shirt with open buttons and a hat. She sensed danger and rushed back home, leaving the two at the scene. At home she took a phone and called the deceased but he did not pick the phone. She called several times till 10:00 pm. The phone was ringing but not answered. At 10:00 pm she slept. She woke up at 5.00 pm and called his phone again. It rung but was not answered.
7. When the deceased left home, he had locked the door to the room where he was spending the night with Pw-2 from outside. At 3:00am their mother noted the door was locked from outside. She asked Pw-2 who had done that and Pw-2 told her it was the deceased as he went to guard animals. Pw-2 called the deceased but his phone was not answered. He slept.
8. At about 5:00 am the following morning, villagers noted a body of a young man who had been killed in the lower side at an open field. The body had several cut wounds and could not immediately be identified. Pw -1 and Pw -2 were told of it. They went to the scene. The Police soon thereafter arrived. The scene was at the place where Pw-1 had met with the deceased and where the deceased confronted him. A close look at the body revealed it was the deceased in this case. The Police took the body.
9. The postmortem was conducted on the body on 16/9/2021 by Pw-5. Her report and evidence reveals that the head; scalp had left sided subgaleal hematoma, linear skull fracture involving occipital bone, temporal bone and parietal bone with displaced fragments.
10. Nervous system suffered extensive cuts, laceration and contusion injuries of the brain; cerebellum brainstem, occipital temporal and parietal lobes.
11. The spinal column had complete vertebra C2 and C1 fractures with displacement.
12. Spinal cord had complete cord transection at C2 level.
13. She concluded that the cause of death was due to penetrating head and neck injuries due to sharp force trauma. Several specimens were got for further examination but their findings is not of any relevance to the case.
14. Pw-6 investigated the case and on 17/9/2021 the accused was arrested and later on charged with the offence carried in the charge sheet.
15. Accused’s defence is that he hails from Mitsikitsini village and is a student in form one at Minjo Secondary School. Pw-1 was his girlfriend but they parted on 18/8/2018. When they parted her relatives attacked him among them one Amani Kahindi.
16. On the alleged day of the offence he was in school. He left school at 6:00pm and went home. He watched television with his father till 10:00pm. He then went to his room and slept. The following day he went to school and when he left school in the evening he heard about death of the deceased. He had been killed but he does not know by who.
17. I have weighed the charge, evidence and submissions by the defence counsel. The offence of murder is defined under Section 203 of the [Penal Code](#) (Cap 63, laws of Kenya) as

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



18. To prove the offence of murder, the prosecution must establish the following elements beyond reasonable doubt:
 1. There must be proof that the victim died or is dead.
 2. The said death must have been occasioned by unlawful act or omission of the accused.
 3. Malice aforethought (mens Rea); - It must be established that the accused had the intentions to kill or cause grievous harm to the deceased.
19. The evidence of Pw-1, Pw-2 Pw-5 and Pw-6 leaves no doubt that one Shaban Jefira Katana is dead. The evidence of Pw-5 a consultant pathologist at Kilifi County Hospital reveals beyond doubt that he met his death out of penetrating head and neck injuries due to sharp force trauma. There's no dispute that he was murdered and the question is; by who?
20. The evidence that points to the accused herein as the culprit is that of Pw-1. She revealed that she had a love relationship with the accused for a period of 2 years before he ended it. The reason why he did so is not known or disclosed. She got into a new love relationship with the deceased in this case. A week prior to the night the deceased was murdered, the accused had met her at the shopping centre and threatened her, saying she and her idiot guy will face it. Pw-1 also claims that the night the deceased met his death, she had called him to meet her at their usual place in the bush for sex. They met at around 3:00pm and the accused confronted the deceased as the two walked deeper into the forest to have sex. She saw him using a D-light lamp which the deceased had, and of which light beam was directed on him. She also recognized his voice as he spoke when he grabbed the deceased along the waist and ordered him saying "come here" At that point she escaped and run back home. She tried calling the deceased several times and the calls went unanswered till he was found dead the following morning.
21. Two issues arise out of the foregoing evidence.
 1. Whether the accused was properly recognized at the scene of murder.
 2. If properly recognized whether the circumstantial evidence points exclusively to the accused's guilt.
22. On the first issue, Pw-1 is a neighbor to the accused. They had a love relationship for a period of two years. She therefore knew the accused very well, both physically and by voice. When she saw and heard him it was at night. She used a D-light lamp of which light was directed on him to see and recognize him. It's not in doubt that the D-light lamp was present as it was recovered at the scene. The accused also spoke and she recognized his voice. Pw-1 and accused were not strangers. They were close and had known each other for more than a period of two years. A week before the alleged offence the accused had spoken to the witness when they met. He is a person she could not have made mistake on. The available light was enough given the circumstances to favour positive recognition. She even described how he was dressed, a fact which shows she saw him clearly. The voice recognition buttresses the fact that it was him. In *Wamunga Vs Republic* (1989) KLR 424, the court of Appeal held that recognition evidence is more reliable than identification of a stranger because the witness is identifying someone they already know. In this regard, I do find that the accused was properly recognized at the scene of murder.
23. The second issue is whether he's the one who murdered the deceased. Pw-1 did not witness the accused murder the deceased and the available evidence to this aspect is therefore circumstantial. It was at night around 9:00pm, in the bush. The body of the deceased was discovered at that very scene later at 5:00 am with multiple cuts which led to his death.



24. The accused in his defense does not place himself at the scene. He says he was at home watching Television with his father, who was not called as a defense witness. This court finds the evidence placing him at the scene reliable and dependable to the said extent.
25. The legal principles governing circumstantial evidence are that: -
 1. The evidence must point exclusively to the accused's guilt. The circumstantial evidence should be strong enough that it excludes any other reasonable hypothesis except the accused's guilt. If there is another explanation that could account for the facts, the accused must be given the benefit of the doubt.
 2. The inculpatory facts must be incompatible with accused's innocence. The evidence must be inconsistent with any reasonable theory of innocence. If the accused's exculpatory explanation can reasonably fit the evidence, then circumstantial evidence is not sufficient to convict.
 3. The chain of evidence must be complete. The evidence must form an unbroken chain of events leading to the conclusion that the accused committed the offence. If there is a missing link in the chain, the prosecution's case weakens.
26. In Republic -Vs- Kipkering Arap Koske and Another (1949) 16 EACA 135, the court established that circumstantial evidence must exclude any reasonable hypothesis of innocence.
27. In Sawe -Vs- Republic (2003) e KLR, the court of appeal held that suspicion, however strong, is not sufficient to convict based on circumstantial evidence; and
28. In Abanga Alias Onyango -Vs- Republic, Appeal No. 32 of 1990 the court expressed that circumstantial evidence must form a complete and unbroken chain leading to only one conclusion, of guilt.
29. The accused was the last person seen with the deceased alive. It was at a secluded place at night. He was there for no good as he confronted him holding him by the waist and ordering him to get closer. He had one-week prior threatened to attack him and the lover (Pw-1). The deceased was later found dead at the very said scene. The accused offers no reasonable explanation as to what happened to the deceased after Pw-1 fled. He had the motive to kill or cause him grievous bodily harm out of jealousy of taking over Pw-1 in a love relationship. It shows though he had parted from Pw-1, he had not let go. All these facts when weighed together points irresistibly and firmly to the guilt of the accused person.
30. I therefore find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the penal code, and is hereby convicted of it.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF FEBRUARY, 2025.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr. Mwangi for the State

Accused virtually in prison

Mr. Mwangi: -We can have another date for mitigation. We can also have meanwhile a social inquiry report.

Court; - Matter adjourned. Probation officer to avail a social inquiry report which should contain victims' impact assessment report. Advocate be notified to attend for mitigation. Mention on 5/3/2025.



18/2/2025

