



REPUBLIC OF KENYA



**Republic v Muse (Criminal Case E007 of 2021)
[2025] KEHC 2892 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E007 OF 2021**

**JN ONYIEGO, J
MARCH 11, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOHAMUD ALI MUSE ACCUSED

JUDGMENT

1. The accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars are that on the 10th October 2021 at Ifo Refugee Camp within Dadaab Sub-County of Garissa County he murdered Fatuma Hassan Abdi.
2. Having denied the charge, the matter proceeded to full trial with the prosecution calling a total of nine witnesses in support of its case. On his defence, accused gave sworn testimony.
3. PW1, Abshiro Idow Hassan, a businesswoman at Ifo refugee camp recalled that on 10.10.2021, Fatuma Hassan, her aunt took her goats to the bush to graze. Upon reaching evening, the goats returned home without the said aunt. After searching for her, they managed to find her under a tree lying down unconscious.
4. It was her testimony that upon observing her carefully, they saw blood in the mouth, ears and nostrils, forehead, soil in the eyes and at the same time, she had marks on the neck while bleeding from her private parts. It was her case that they called police officers and thereafter transferred the body to the nearby road. That the police arrived on the following day and upon removing her clothes, they noticed that she had been strangled using a rope. They thus took the body to Ifo refugee camp. Upon being shown the phone recovered from the house of the deceased, she identified the same as that belonging to her aunt the deceased herein.
5. PW2, Adar Abdullahi stated that on the material day at around 6.00 p.m., she was at home when she noticed that Fatuma's goats had returned home without her. That the same prompted people to go



- out to search for her and upon returning home at midnight, they revealed that they had found Fatuma dead. She testified that prior to her death, the deceased had borrowed her alien ID No. xxxxxx to register her sim card as she did not have an alien ID card. On her cross examination, she admitted that she did not witness the accused person kill the deceased.
6. PW3, a driver by the name of Abdullahi Abdi Hassan stated that, on 10.10.2021, he went to the bush to graze his goats but unlike Fatuma's goats, his were not further into the bush. That at 6.00 p.m., Fatuma's goats went back home scattered while Fatuma was nowhere to be seen. In company of Abshiro, PW1 and other people, they split into two groups with the view of searching for Fatuma.
 7. He told the court that, one group reported finding Fatuma dead and therefore, he left to go see for himself. Upon arrival, he saw Fatuma's naked body with blood on her face, mouth and nose. He further stated that he felt confused but still managed to call the police who upon joining them visited the scene where the deceased was found. That they took the body of the deceased to the hospital for postmortem and later had the same released to them for burial.
 8. PW4, Dr. Hassan Abdulahim, a medical officer working with Red cross testified that on 11.10.2021, he conducted post mortem on the body of the deceased at Ifo Hospital within Dadaab. It was his testimony that on the external appearance, the body had a rope tied around the neck. That there were bruises with severe bleeding noted from the nose and mouth. The deceased had tears and bruises on her vaginal wall with the abdomen grossly extended. According to him, the cause of death was cardiac arrest due to strangulation and lack of oxygen.
 9. PW5, No. 11026 PC Allan Onyango attached to Ifo police station in Dadaab Sub-county testified that on the material day, Ronald Bosulu told him to accompany him to a murder scene around Dadaab Liboi Road. At the scene, they found the deceased who was bleeding from the mouth while her neck was tied with a string. Around the scene, they found a syringe and a red slipper which was identified as belonging to the deceased. After that, they carried the body of the deceased to the hospital.
 10. PW6, Farhiya Magonow Ragow recalled that on 14.10.2021 at 1.00 p.m., she received a call from an unknown number through her cell phone number 0792xxxxxx. That the caller introduced himself as Mohamud. She stated that she knew Mohamud Hawesi, a relative to her husband. She further stated that upon calling her cell phone, the said caller dropped the call but later on, the police approached her and demanded to know the owner of the cell phone line that had previously called her. She told them that it was Mohamud Hawesi.
 11. According to her, the police were referring to the cell phone number 0724xxxxxx. That her husband Abdullahi Sudi Maalim, wanted to talk to one Mohamud. On cross examination, she stated that her number is registered with Safaricom.
 12. PW7, Abdullahi Sudi Maalim, a food vendor recalled that on 15.10.2021, his wife received a call from Mohamud Hawesi, the accused herein. That later, he received information that his wife and two other ladies had been taken to Hagadera and later to Ifo police station. Later, the police called him as they wanted to know the person who had called his wife using the cell phone number 0792xxxxxx. He stated that the police rang him using Mohamud Hawesi's cell phone as they wanted him to take them to Mohamud's house. He complied with the said order and led them to Ifo camp Bloc C3 where Mohamud Hawesi was arrested. On cross examination, he stated that he did not know Mohamud's phone number off head.
 13. PW8, No. 75664 Sgt. Leonard Busura, the investigating officer testified that on 10.10.2021, while at the station, the OCS informed him of a report of murder which had happened at slaughter area and therefore, he asked him to accompany him to the scene. That together with PC Onyango, PC Omollo



and Cpl. Eunice, they headed to the scene of crime where they found the body of the deceased lying along Liboi-Dadaab road.

14. He told the court that members of the public informed them that they had removed the said body from the bush where the incident had allegedly occurred. According to him, the scene was interfered with but nonetheless, he stated the deceased was bleeding from the nose and mouth. In the same breadth, the body had a tight rope around the neck.
15. It was his testimony that the public led them to the bush where the body had been found and thereafter took the said body to Ifo hospital where Dr. Hassan carried out a postmortem examination. He thereafter started recording statements from witnesses. In the course of his investigation, he got information that the deceased's mobile phone had also been stolen. The said phone of Nokia make whose IMEI number was 35899109933283 had in it a safaricom line number 0724xxxxxx.
16. Upon coming to the above realization, he requested for the phone call data as the said phone had been registered under an Alien Registration No. 419041 by the name of Adar Abdi. He averred that he was able to trace Adar Abdi who informed him that in the year 2018, she gave the deceased her Alien Card No. with which she registered her line. He testified that he was able to ascertain from the called data that the deceased's number had called number 0793xxxxxx.
17. The data obtained from this number was registered in the name of Farhiya Ragow a resident of Hagadera refugee camp. With that revelation, he interrogated the said Farhiya who informed him that the deceased person's cell phone line had been used to call her cell phone number.
18. That the aim of the caller was to talk to her husband known as Abdulahi Sudi Maalim who later led them to the house of the accused within Ifo Refugee camp. They arrested the accused and from the said house, they recovered the deceased person's phone. He went further to state that the IMEI number matched the details which they had previously obtained. That PW1 who lived with the deceased identified the phone. They further recovered from the accused person a phone Samsung by make, black in colour with an IMEI No. 357847094558411. The said phone was registered in the name of Muse. According to him, the accused person stated that his cell phone number was 074xxxxxx in respect of which he also requested for call data.
19. In regards to the deceased's phone number 0724xxxxxx's call data which ran from 10.10.2021 to 16.10.2021, he established that the deceased's mobile phone was switched off on 10.10.2021, on the day she went missing. Two days later, the accused person used the deceased's sim card number and inserted it in his phone number Samsung and then call Farhiya (PW6). Additionally, the accused person used the said Sim card to call from 12.10.2021 up to 14.10.2021. In the same breadth, the accused person could not satisfactorily explain why he was not only in possession but also used the deceased person's phone and sim card. On cross examination, he stated that the distance between the homes of the accused and the deceased was about 1km and that they may have known each other.
20. PW9, Cpl. Ronald Emase from DCI Headquarters who is attached to Safaricom as a data analyst stated that part of his duties include receiving court orders and processing the same as directed by courts. In reference to this case, he stated that he received directions requesting for data call records for phone No. 0748xxxxxx. From their records, the number was registered in the name of Mohamed Muse holder of ID No. 875999. The second number being 0792xxxxxx was registered in the name of Farhiya Ragow holder of ID No. 761204 while phone No. was 0724xxxxxx was registered in the name of Adar Abdi holder of ID No. xxxxxx.
21. He further told the court that the investigating officer had desired to know whether the three numbers were at the same place on 10/102021. After going through the call data, the number for Mohamed



Muse No. 0748xxxxxx on that day was being served by the same booster known as Ifo South from the 10/10/21 until 14/10/2021. Phone number 0792xxxxxx held by Farahiya Ragow was on 10/10/21 neither served by Hagadera Block G nor by Ifo South. The last number held by Adar Abdi was on 10/10/21 being served by Ifo South all the way up to 16/10/21. He testified that Muse Mohamed and Adar Abdi numbers were being served by the same booster. Additionally, that Adar Abdi and Mohamed Muse shared the same handset S/No 358991099332830. Mohamud Muse used this handset on 13/10/21 and Adar Abdi used the same on 16/10/21. During this time Muse was being served by Ifo South booster and Adar was being served by Ifo Camp booster. According to him, this indicated that the users of the same handset were at Ifo as they used the same garget but different lines. That the handset was being used by cell phone No. 0748xxxxxx registered under Mohamed Muse. It was not easy to know the owner of the handset and neither did he go further to know who owned the said handset.

22. In conclusion, it was his view that the number for Mohamud Muse and Adar Abdi were at the same place and same time using the same handset. He prepared a certificate which he produced as Pex 9. On cross examination, he stated that he was not given any handset for analysis and examination and further, that a S/No. is the same as IMEI number. Additionally, that every cell phone number using safaricom is registered. He further stated that he was not aware whether the deceased had used somebody's ID No to register her phone but conceded to the fact that it is possible for one to steal somebody's ID and use it to register his phone.
23. DW1 in his defence averred that he comes from Dadaab. He conceded to being in possession of the phone in question but averred that he had bought the same at Kes. 500/- from someone else. According to him, he informed the police that he knew the person who sold him the phone together with a sim card and he had used the same for two days prior to the visit by the police. He stated that he had used the phone in calling his aunt. He further urged that the police did not take into account his side of the story as he denied killing the deceased. He averred that his mistake was that of buying a phone which he did not know that it was stolen. He further testified that the person who sold him the phone is known as Gobar.
24. Upon close of the defence case, parties were directed to file submissions. Prosecution filed its submissions dated 13-12-2024. Mr. Okemwa basically adopted prosecution evidence thereby urging that prosecution had proved its case beyond reasonable doubt. Learned counsel contended that prosecution's evidence is consistent and trustworthy. It is the prosecution's case that the element of death and the unlawful cause of it has fully been proved through the postmortem report and the manner in which it was executed.
25. As to the perpetrator, Counsel contended that at some point and indeed on the fateful day, the deceased's phone and that of the accused were at the same point according to the safaricom signal implying that the accused was at the scene of crime. Learned counsel opined that there is sufficient circumstantial evidence which places accused at the scene of the crime. That the accused did not give any reasonable explanation on how he came into possession of the stolen phone belonging to the deceased.
26. Counsel contended that the recovery of the deceased's phone from the accused's house is sufficient proof that the accused was involved in the killing of the deceased. The court was urged to uphold the doctrine of recent possession to find accused person culpable.
27. On malice aforethought, counsel urged that from the nature of the injuries sustained and the cause of death, it is obvious that the perpetrator intended to cause grievous harm which led to the death of the



deceased. To buttress that proposition, counsel relied on the case of *Roba Gama Wario vs Republic* (2015)e KLR and *Nzioka vs Republic* (2019)KLR 171.

28. The court was further urged to find that the strong circumstantial evidence based on possession and use of the deceased person's stolen phone after she had died is sufficient enough to convict. In that regard, the court was referred to the case of *Abanga Alias Onyango v Republic* appeal number 32 of 1992.
29. Despite Mr. Bosire counsel for the accused indicating that he had filed submissions, none was reflected in the system.

Analysis and determination.

30. I have considered the evidence as tendered by the prosecution witnesses and the defense proffered by the accused person. The key issue for determination is whether; the prosecution has proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
31. Accused is charged with murder under section 203 of the [Penal Code](#) which provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
32. It is trite law that for a court to convict an accused person on the offence of murder, the prosecution must establish beyond reasonable doubt the following elements; that death occurred; that death was occasioned through an unlawful act or commission committed by the accused and; that there was malice a forethought possessed by the accused leading to the commission of the offence of murder.
33. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR the Court of Appeal held that:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

 - (a) the death of the deceased and the cause of that death;
 - (b) that the accused committed the unlawful act which caused the death of the deceased and
 - (c) that the Accused had the malice aforethought.”
34. On whether there is proof of death and the cause of the said death, it is not in dispute that the deceased herein died. PW4, Dr. Hassan Abdulahim, conducted post mortem on the body of the deceased at Ifo Hospital. He further testified that on the external appearance, the body had a rope tied around the neck. It also had bruises with severe bleeding noted from the nose and mouth. The deceased had tears and bruises on her vaginal wall with the abdomen grossly extended. According to him, the cause of death was cardiac arrest due to strangulation and lack of oxygen. From this revelation, i have no doubt that the deceased subject of this case died.
35. On whether the death of the deceased was caused by an unlawful act or omission and whose unlawful act or omission it was, one must interrogate the nature of the injuries sustained. whether those injuries were caused by an unlawful act or omission and by who is the question to answer. I observe that there was no eye witness who saw the deceased being assaulted and neither can it be said that they were self-inflicted. They must have been inflicted by somebody. The act cannot be said to be lawful in any way as there was no evidence that the deceased committed suicide or that whoever assaulted and inflicted on her those multiple injuries was acting in absolute self-defense or defense of their property.



36. There was no justification for the said act at all. Article 26 (1) of *the Constitution* of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* or other written law. [See *Gusambizi Wesanga vs Republic* [1948] 15 EACA 65]. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased.
37. On whether the prosecution has proved beyond reasonable doubt that it was the accused person and not any other person who committed the unlawful act which caused the death of the deceased, the court is bound to evaluate the evidence tendered. From the evidence presented before this Court, it is clear that none of the prosecution witnesses saw the accused person or any other person assault the deceased. To that extent, there is no direct evidence to connect the accused with the offence. The prosecution thus is relying on circumstantial evidence to prove its case.
38. The question therefore is whether there was sufficient circumstantial evidence linking the accused person with the unlawful killing of the deceased. The conditions for circumstantial evidence to sustain a conviction in any criminal trial were laid down in *Abanga alias Onyango v Republic* (supra) where the Court of Appeal held:
- “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.”
39. The prosecution is relying on the doctrine of recent possession as the accused person was found with the deceased’s phone and therefore expected to explain how the said phone came into his possession. [See Sections 111(1) and 119 of the *Evidence Act*]. It is worth noting that the deceased does not deny having been found in possession of the deceased’s phone.
40. It is well-established that the doctrine of recent possession allows the court to infer guilt when the accused is found in possession of recently stolen property under unexplained circumstances. [See the case of *Eric Otieno Arum vs Republic* [2006] eKLR].
41. In the case of *Republic vs Kowkyk* [1988] 2 SCR 59, by a majority, the Canadian Supreme Court held as follows:
- “Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must - draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the



doctrine will not apply.” [Also see the case of Isaac Ng’ang’a alias Peter Ng’ang’a Kahiga vs Republic, Cr App. No. 272 of 2005 (UR)].

42. In this case, the prosecution witnesses, especially the investigating officer stated that upon realizing that the deceased person’s phone had been stolen, he requested for the phone call data as the said phone had been registered under an Alien Registration No. 419041 by the name of Adar Abdi. That PW1 who lived with the deceased identified the phone recovered from the accused person which was Samsung by make, black in colour with an IMEI No. 357847094558411. Additionally, the accused person could not satisfactorily explain how he came about the phone and started using it despite the fact that the accused person and the deceased lived closer to one another in terms of proximity.
43. Additionally, PW9 stated that from his investigations, he established that on 10.10.2021, Adar Abdi and Mohamed Muse shared the same handset S/No 358991099332830. Mohamud Muse used this handset on 13/10/21 and Adar Abdi used the same on 16/10/21. During this time Muse was being served by Ifo South booster and Adar was being served by Ifo Camp booster. According to him, this indicated that the users of the same handset were at Ifo as they used the same garget but different lines. That the handset was being used by cell phone No. 0748xxxxxx registered under Mohamed Muse(accused).
44. There is no doubt that the deceased herein was killed on 10.10.2021. From the evidence of PW9, he established that on 10.10.2021, the number for Mohamed Muse (No. 0748xxxxxx) was on that day being served by the booster known as Ifo South from the 10/10/21 until 14/10/2021. Likewise, the number 0724xxxxxx held by the deceased was on 10/10/21 being served by Ifo South all the way up to 16/10/21. Of importance to note is the fact that PW8 from his investigations had established that previously, Adar Abdi had lent the deceased her alien identification card so that she could register her phone. The same was buttressed by the fact that the number captured by PW9 as being with the accused person at the time in question was 0724xxxxxx, which belonged to the deceased.
45. In as much as the accused person denied causing the death herein, he proceeded to aver that his mistake was that of buying the said phone which he was not aware that it had been stolen. That he bought the said phone from one Gobar. The accused did not adduce any supporting evidence to support the theory of purchase of phone.
46. The accused person did not dislodge the fact that on the fateful day, he was at the same locality with the deceased who thereafter was found dead. PW9 proceeded to state that in fact, the users of the same handset were at Ifo as they used the same garget but different lines. That the handset that was being used was cell phone No. 0748xxxxxx registered under Mohamed Muse. Having weighed the prosecution’s evidence vis a vis that of the accused person, I find that the chain of events more so from the testimony of PW8 and PW9 conclusively lead to an adverse inference that it was the accused who killed the deceased.
47. Finally, on the question whether there was malice aforethought on the part of the accused person, the prosecution had a duty to prove malice aforethought on any of the circumstances stated under section 206 of the *Penal Code* which states that:

Malice aforethought shall be deemed to be established by evidence proving any one 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 a wish 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 of any person who has committed or attempted to commit a felony.

48. What can be deduced from the section above is that, malice aforethought can either be direct or indirect depending on the peculiarity and facts of each case. In the classic case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. See also [See the Court of Appeal in the case of Joseph Kimani Njau vs R (2014) eKLR].
49. PW4 who conducted post mortem on the body of the deceased formed the opinion that the deceased died as a result of cardiac arrest due to strangulation and lack of oxygen. From the foregoing, it is logical to conclude that the accused person must have intended to cause the deceased grievous harm or death.
50. Putting all factors together and circumstances under which the offence was committed, I have no doubt in my mind that the prosecution has proved the case of murder against the accused person beyond any reasonable doubt. Accordingly, I am inclined to find accused person guilty and I therefore convict him as charged.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE

