



REPUBLIC OF KENYA



**Republic v Onzere (Criminal Case 16 of 2021)
[2025] KEHC 9143 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 16 OF 2021**

JN KAMAU, J

JUNE 23, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

HESBON MUTONGI ONZERE ACCUSED

JUDGMENT

1. The Accused person herein was 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 were that:-

“On the 31st day of August 2018 at unknown time at Chavakali Township in Sabatia Sub-county within Vihiga County jointly with another not before court murdered one Florence Mueni Kiswili”
2. The Prosecution’s case was heard on diverse dates between 2nd February 2019 and 11th April 2024 when it closed its case. On 24th June 2024, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. The defence case was heard on 28th October 2024.
3. This matter was partly heard by Njagi and Musyoka JJ. Njagi J took the evidence of Agnetah Kalewa Kitali [hereinafter referred to as “PW 1”] and Maclard Amugune [hereinafter referred to as “PW 2”] while Musyoka J took the evidence of Dr Masika Collins Were [hereinafter referred to as “PW 3”] and that of Veronica Musindi Mzee [hereinafter referred to as “PW 4”].
4. This court became seized of this matter on 8th March 2023 on which day the Accused person and the State indicated that they wished to proceed with the matter from where it had reached. This court then took the evidence of Sharon Madiga Vikini [hereinafter referred to as “PW 5”], Farex Muyera [hereinafter referred to as “PW 6”], Sharon Khavochi Lijodi [hereinafter referred to as “PW 7”], No



86488 PC Joshua Mwanja [hereinafter referred to as “PW 8”], No 80056 Sergeant James Makoba [hereinafter referred to as “PW 9”] and the Accused person.

5. The Prosecution’s Written Submissions were dated 18th November 2024 and filed on 8th January 2025 while those of the Accused person were dated 4th December 2024 and filed on 17th December 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

6. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Florence Mueni Kiswili” [hereinafter referred to as the “deceased”] died?
 - b. If so, was her death caused by an unlawful action[s] and/or omissions?
 - c. If so, who caused the unlawful action[s] and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

8. Both the Accused person and the Prosecution submitted that there was no dispute as to whether the deceased died.
9. As both the Prosecution and Defence witnesses alluded to her death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

II. Proof Of Cause Of The Deceased’s Death

10. The cause of the deceased’s death was a pertinent issue. The Accused person did not submit on the question of proof of the deceased’s death. On its part, the Prosecution submitted that the deceased’s death was proved by the autopsy report produced by PW 4 [sic] as exhibit in court.
11. PW 3 tendered a Post-mortem Report dated 6th September 2018 in respect of the deceased herein as an exhibit in this matter on an autopsy conducted by his colleague Dr Ali who resigned. He testified that after conducting the post mortem examination, Dr Ali formed an opinion that the cause of the deceased’s death was asphyxia secondary to cervical spine injury.
12. It was therefore clear from his evidence that the deceased’s death was not as a result of natural causes. It was therefore crucial to establish how the deceased sustained the injuries that caused her death.

III. Identification Of Perpetrator Of Deceased’s Death

13. The Accused person denied having murdered the deceased. He submitted that the deceased was found dead on 31st August 2018 in a dark corridor between buildings in Chavakali while drunk. He asserted that it emerged from the evidence on record that the deceased had prior to her death been in an alcohol drinking spree visiting various bars within Chavakali Market. He added that it had also emerged from the evidence of PW 2, PW 3, PW 5, PW 7 and PW 8 that Chavakali Market was very active at night and had many bars and many people frequent them during night hours.



14. He further contended that it was the evidence of PW 7 that on the material day, the deceased visited Florida Bar where she took alcohol in the company of her boyfriend and that when the deceased's boyfriend cleared his bill, he left and within five [5] minutes the deceased also left the said bar. He argued that he was not her purported boyfriend and neither was he said to have been in Florida Bar that night nor left the said bar with her.
15. He was categorical that the Prosecution had not informed this court of her movement from the time she left Florida Bar until the time she met her death. He added that the said PW 7 mentioned one Achieng, an employee at Florida Bar, who heard that the deceased had died and left for Kisumu after becoming uneasy. He blamed the Prosecution for not recording the statement of the said Achieng and/or availing her as a witness in this case.
16. He further argued that PW 2's allegation that he bought the phone from him at Kshs 200/= could not stand the test of credibility as in normal circumstances, a phone could not cost Kshs 200/=. He denied having being in possession of the phone that was produced in court and denied ever having sold it to PW 2. He was emphatic that PW 1 and PW 2 were the people who were linked to the said phone.
17. It was his contention that the Prosecution had totally failed to establish its case to warrant his conviction owing to several reasons among them being failure to do proper investigations leading to contradictions and/or discrepancies on the part of its witnesses, non-availability of crucial witnesses, failure to prove that he indeed harmed the deceased and failure to prove malice aforethought on his part. He thus urged this court to acquit him under Section 215 of the *Criminal Procedure Code*.
18. On its part, the Prosecution submitted that its witnesses had linked him to the murder of the deceased which was proven on circumstantial evidence. It pointed out that it was a fact that nobody saw the Accused person kill the deceased but that the circumstances it relied on were incapable of any other explanation other than the guilt on his part.
19. It was emphatic that he was responsible for the death of the deceased and that there were no other existing circumstances weakening the chain of circumstances relied upon by the Prosecution. It added that he gave no tangible defence and therefore did not dislodge the Prosecution's case hence was guilty as charged and should be convicted and sentenced accordingly.
20. The Accused person testified that on the material date of 31st August 2018, he was at Nairobi where he was working at Gymkhana Sports Club. He stated that he was arrested on 15th October 2018 at Vihiga Referral Hospital where he had been admitted after being attacked by people. He denied having killed the deceased. He also denied having sold a phone to PW 2. He said that he had been using his mother's phone but which got lost while he was charging it at a funeral.
21. Notably, PW 1 testified that on the material night of 31st August 2018, she was going back home after work on a motor cycle that was being ridden by one Ras. When she alighted at the corridor leading to her house, she stepped on something and upon checking using the light from the torch of a guard who was near the place, she realised it was the body of the deceased. She called Ras and they proceeded to Mudete Police Station where she reported the matter. The police went and took the deceased's body to the mortuary.
22. PW 2's evidence was that he bought the phone from the Accused person. He stated that the Accused person had told him that the phone was Kshs 700/= but they agreed that he buys it at Kshs 500/=. He said that he had sent him Kshs 200/= and later gave him pork of Kshs 30/= and Kshs 70/=. He informed the court that he gave the said phone to his wife who used it for about three [3] weeks before being arrested for being in possession of the said phone.



23. He pointed out that he was also arrested and taken to Mudete Police Station where he told the police that the phone was sold to him by the Accused person. He added that he identified the Accused person who was at Mbale Hospital, having been beaten by member of the public and that he admitted having sold the phone to him. He identified the phone as Samsung with a burnt and broken front.
24. His evidence was corroborated by that of PW 7, his wife who was arrested for having been in possession of the phone that was found to have belonged to the deceased.
25. PW 4 was the Accused person's mother. She testified that the Accused person had taken her phone but that when she was called by police to identify the phone at the Police Station, she noted that it was not hers. She said that her phone was black and bigger than the one at the Police Station.
26. PW 5 owned Florida Bar, Chavakali together with her husband. She testified that on the material night of 30th August 2018, she was at the Bar when the deceased came to visit her friend Achieng who was one of her workers. She stated that the deceased left and after fifteen [15] minutes, she came back with her boyfriend whom she identified as the Accused person herein. She said that they drunk and paid for the drinks and that the Accused person paid in cash and the deceased paid via mpesa.
27. She further testified that after his drink, the Accused person left immediately and that the deceased also left after five [5] minutes. She pointed out that they left and went to the same direction but later that night on 31st August 2018, a guard called Ken came and told them that the deceased had been killed. She told Achieng who stated that she was not aware that she had been killed but that she had come from a date. She said that she told Achieng to go and confirm if it was true and Achieng went and came back to confirm that indeed her friend, the deceased had been killed. She pointed out that Achieng was uneasy the whole night and that they had suspected that she was the one that killed the deceased but it was later found that she was not the one. Her evidence was corroborated by that of PW 6.
28. PW 8 was the investigating officer in this case. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 9. He testified that he established that the deceased was at Florida Bar in Chavakali on the night of 30th August 2018 and 31st August 2018. He stated that he got the deceased's phone number from PW 1 which was 0719xxxx8. He added that they also got the number from the deceased's relatives and sent it to Safaricom to assist in the investigations to find out who was using the phone. He established that when the deceased was paying for her bill at the bar, she used her phone but when she was found dead, she did not have her phone.
29. He stated that he established that the deceased was using Samsung Galaxy 53 IMEI No 35321xxxxx3345. He pointed out that he sought information from Safaricom on 26th September 2018 by sending the IMEI Number to check who was using the phone. He testified that Safaricom responded that 0790xxxx78 was registered in the name of PW 7 of Identification No 28xxxx03 and was using the IMEI No from 21st September 2018.
30. He further stated that he embarked on tracing PW 7 and on 16th October 2018, he found her at home and recovered the phone Samsung Galaxy 53 IMEI No 35321xxxxx3345. When he interrogated her, she indicated that she got the phone from her husband PW 2. He produced the said phone as an exhibit in court.
31. He further said that he also arrested PW 2 who said that he had bought the phone from the Accused person. He stated that he established that the Accused person was at Vihiga District Hospital where he had been beaten by a mob having been attacked after another theft. He pointed out that he was rescued by police who took him to the hospital.



32. He added that he interrogated the Accused person at the hospital and he confirmed that he was the one that sold the phone to PW 2 having bought from his mother. When his mother was interrogated, she said that he had stolen the phone from her but when she was shown the phone, she noted that it was not hers.
33. It was his further evidence that he also received call data from Safaricom which proved that it was the deceased who was using the phone. His evidence was corroborated by that of PW 9 who produced the data call records in respect of phone number 0719xxxx8 as exhibit in this case.
34. This court noted his defense of alibi in which he completely denied killing the deceased. He pointed out that on the material day of 31st August 2018, he was in Nairobi where he worked. In ascertaining whether the Accused person's defence of alibi had value, this court had due regard to the definition of "alibi" in the *Black's Law Dictionary*, 10th Edition. It was defined as:-
- "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
35. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR.
36. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 [Laws of Kenya] that provides that:-
- "If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."
37. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Accused person's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. Additionally, he did not rebut PW 2's evidence that he was the one that sold the phone belonging to the deceased to him. His defense was only a mere denial.
38. PW 2 was categorical that it was the Accused person who sold the phone to him. PW 7 corroborated his evidence that PW 2 told her that he got the phone from the Accused person. The phone was recovered and a data record produced to confirm that indeed it was the deceased who was using the said phone before her death.
39. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that although there was no eye witness in this particular case, evidence established that the Accused person was linked to the Samsung Galaxy 53 IMEI No 35321xxxxx3345 which belonged to the deceased.
40. Consequently, it was this court's finding that the Accused person's defence did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 9.
41. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the evidence of the Accused person to have been watertight enough to have weakened the inference of guilt on his part. His assertions that the Prosecution relied on circumstantial evidence which was



not cogent was rendered moot as the circumstances relied on by the Prosecution were incapable of any explanation other than the guilt on his part.

42. This court was thus persuaded to find and hold that he was responsible for the death of the deceased. This could not have been a case of mistaken identity.

IV. Malice Aforethought

43. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing her death.
44. He submitted that the Prosecution failed to demonstrate and establish the principles stated in *Nzuki v Republic* [1993] KLR 171 without highlighting the holding he relied on therein.
45. On its part, the Prosecution relied on the case of *Nzuki v Republic* [1993] KLR 171 where it was held that malice aforethought was where there was intention to cause harm, intention to cause grievous bodily harm, where the accused knew that there was a risk that death or grievous harm would ensue from his acts and committed the acts without lawful excuse with an intention to commit a felony.
46. It submitted that the Accused person assaulted and caused grievous harm on the deceased. It pointed out that he was determined to injure her as the post-mortem showed that she had cervical spine injuries. It was its contention that his actions were propelled by malice aforethought.
47. This court had due regard to the case of *Morris Aluoch v Republic* [1997] eKLR which cited the case of *Rex v Tubere s/o Ochen* [1945] 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
48. The seriousness of the injuries the deceased sustained was confirmed by PW 3. He observed that the neck was hyper-tensed and overstretched, there was bleeding through the mouth and nose, bruises on several region and distortion of the spine at the nervous system.
49. The extensive injuries all over the deceased's body were evident that she suffered greatly before she died. They could not be said to have been bereft of malice aforethought on the part of the Accused person.
50. Having analysed the evidence that was adduced by both the Prosecution and the Accused person and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the Accused person herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the *Penal Code* as having been:-
- a. Proof of the deceased's death;
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.

Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 [Laws of Kenya] under Section 215 of the *Criminal Procedure Code* Cap 75 [Laws of Kenya].



52. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF JUNE 2025.

J. KAMAU

JUDGE

