



**Republic v Abuti (Criminal Case 52 of 2015)  
[2024] KEHC 714 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 52 OF 2015  
PJO OTIENO, J  
JANUARY 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SHADRACK MUKOYA ABUTI ..... ACCUSED**

**JUDGMENT**

1. Shadrack Mukoya Abuti ('henceforth, the accused person') was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 5<sup>th</sup> day of August, 2015 at Bulanda village, Bulanda Sub-location in Butere district within Kakamega County, the accused person murdered Velma Atieno.
2. The accused person pleaded not guilty to the charge and to prove its case, the prosecution called a total of eight witnesses whose evidence is summarised as below.
3. PW1, Rogers Abuti Wakhongo, the grandfather to the deceased and father to the accused person, testified that on 4/8/2015 he was working as a boda boda rider carrying children to school and that during one of his trips, he met with the deceased who informed him she was going to his home. When he returned, the deceased was not at home and so he called her mother who informed him that she had sent her to collect her mobile phone from one Makokha. Makokha informed them that he had discharged the deceased and so they began a search of the deceased in vain. The next morning on his way to work he was informed by a village elder that the deceased had been found buried at a sugar plantation. He went there and confirmed the body to be that of the deceased. The police came, collected the body and took it to the mortuary. Later that day members of the public came to his house, and surrounded the house to his son who lives in Mombasa, while armed with crude weapons and wanting to lynch the accused person, who was reportedly inside the house, on allegations that he had killed the deceased. The witness decided to go and report the matter to the police but on his way back met the police who had arrested the accused.



4. On being cross examined, the witness told the court that he did not know what caused the death of the accused and that he did not see the accused kill the deceased.
5. PW2, Danis Dickson Rafimbi, a resident of Bulanda village testified, on affirmation, that on 6/8/2015 he was attending a funeral when police approached him with a jembe asking him if it belonged to him which he refuted. They again arrested him and questioned him on the jembe saying that he lent it to the accused person which he then used to kill the deceased, claims which he again refuted. That evidence attracted to cross examination by the defense.
6. PW3 testified that on 5/8/2015 at about 6:30AM he was asleep when he heard screams and rushed to his sugar plantation where he found a crowd and the mother to the deceased digging up while crying and later exhumed the body of the deceased. He attracted no cross-examination.
7. PW4 was Ann Shikuku Makokha, a resident of Imanga, who testified that on 4/8/2015 she received a phone from the deceased to charge for her mother which phone she collected at about 4:30 PM. At 7:30 PM the deceased's mother came looking for her ask. The next morning, she went to check with the mother to the deceased whether she had been found. She joined a search party the party entered a sugar plantation, they saw a freshly dug ground with deceased's clothes nearby. The ground was dug out and the body of the deceased recovered therein. Even her, the defense counsel chose not to cross-examine her.
8. PW5, Fridah Amukole Odera, the assistant chief of Bulanda sub-location testified that on 5/8/2015 he was informed by a village elder and the grandfather to the deceased that the deceased went missing the previous day and her body had been recovered at a sugar plantation. He called the police who came and collected the body. On 6/8/2015 he received information from the deceased's grandfather that people were suspecting that his son had committed the murder of the deceased and the public wanted to burn him. The police intervened and arrested the accused who was in the house of his brother. On being cross examined, he told the court that he did not see the accused commit the offense and that he also did not hear any member of the crowd that was baying for the accused's blood say to have seen the accused assault the deceased.
9. PW6, Munoka Ometi Gauline, a medical officer formerly attached to Butere County Hospita,l testified that on 10/8/2015 he conducted an autopsy on the body of the deceased who had bruises on the occipital region of the head with a broken hyoid bone on the base of the neck. The labia minora was lacerated with haematoma formation He concluded that the deceased's cause of death was strangulation due to a broken hyoid bone.
10. PW7, No. 78364 CPI Francis Kaptein testified that on 5/5/2015, he received a call to attend to a murder that had occurred in Imanga. In the company of other officers, they headed to a sugar plantation in the area and found the body of an 8-year-old girl next to a shallow grave. They then took the body of the deceased to St. Mary's mortuary. The following morning the accused person was arrested by members of the public. They went and picked him to the station where they interrogated him. He noticed that the accused person was giving a confession and since he did not have the legal authority to take a confession and he thus asked his colleague DCIO CI Songok to record the confession.
11. PW8, No. 232119, SSP Paul Songok, formerly attached to DCIO Butere, testified that on 14/8/2015 he was requested by the investigating officer to record a confession from the accused person. The accused person indicated to him that he had not been coerced into making the confession and he requested that his in law, Evelyne Kerubo, Id No 28040730, be present during the confession. He then cautioned the accused person in both Swahili and English on the effect of a confession. After recording



- the confession, he read it out to the accused person who confirmed the contents of the confession. He stated that recording the confession took an hour. He produced the confession in which the accused person admitted to digging a hole and asking the deceased to get in after which he covered the deceased with soil up to the neck. He said that he killed the deceased because her mother had called him a 'jambazi' and her father had threatened to kill him because of a Kshs. 2,000 debt. He sought to and produced the confession statement as PExh2 with the concurrence of the defense counsel.
12. On cross examination he stated that at the time of recording the confession, he was a chief inspector of police and that the same was recorded on the 8<sup>th</sup> day after the accused was arrested. He denied suggestions that the accused had been tortured and coerced to confess. He reiterated that he did not know Evelyn Kerubo who was introduced to him by the accused.
  13. After the prosecution closed its case and the accused placed on his defence, he elected to give sworn testimony without calling any additional witness. He told the court that on the material day, having just sat class eight and waiting to join secondary school, he was home with his two parents when the father left to take his grandchildren to school and later take the accused to join form one. He later went to Bulanda secondary school and registered for form one and on coming back home at about 5pm, was informed by the matter that the deceased, who was his niece, had gone missing. The family member, including the accused went looking for the deceased in nearby homes without success, retired for the night till the next day when the body was found in a sugarcane plantation. He did not go where the body was retrieved from but when the mother to the deceased came back home, she pointed the accused to the crowd but the village elder restrained people from beating him. He was later arrested and taken to the police station where he was forced to record an implicating statement dictated by PW2. He said it was PWE2 who said he had killed the deceased and that Evelyn Kerubo was not present as he recorded the confession. He alleged having been beaten before recording the statement and that he was never cautioned on the effect of the confession. He added that he had been framed by his father because he had refused to enrol for form one and that on the material day he never met the deceased. He denied knowledge of the killer of the deceased and urged that he be acquitted for lack of evidence.
  14. On being cross examined, he told the court that he sat class 8 in 2015 and left school. He added that class 8 examinations are sat in December every year and that after exams he had gone to visit a sister and not the brother. He then denied any grudge with the father and that on the material day he was with the deceased in the mother's house taking tea. He added that since arrest he had not made any complaint about being beaten and that he did not intend to call any of the persons he alleged to have been with as witnesses.
  15. On being reexamined, the accused told the court that he had in fact sat class 8 in 2014 and joined form 1 in 2015. He denied any difference with the father to the deceased, that he ever tried poisoning him and that on the material day he met the deceased in the mother's house at 7 am and never met her again in the course of the day. He denied having killed the deceased and urged that the case to be dismissed.
  16. Parties have offered written submissions to court which the court has perused and found very useful. For that, the court is grateful to the parties. In the submission, the prosecution stresses and lays lots of premium on the confession and contends that the case is proved beyond reasonable doubt thus deserving a conviction being entered. On the other hand, the defence takes the view that the only evidence available is circumstantial and thus it does not meet the threshold to deserve and found a conviction.
  17. From the evidence and submissions on record, and being a murder case, the issues for determination remain whether the deceased died out of unlawful acts by the accused and if in so acting the accused was propelled by malice aforethought.



18. However, before that merit decision may be delved into, there is a preliminary issue regarding the propriety of the confession statement recorded by the accused. At trial and while Pw8 testified the question of the propriety of taking of the confession was never meaningfully brought to question till the accused took the witness stand. However, in his evidence, the fact that the statement was taken by a qualified officer and on the date alleged was not in contention. The contention was however that the accused was assaulted by persons who were not identified and on a date not disclosed. When asked if he had made any complaint about the assault, more than 7 years later, he answered in the negative. He equally did not adduce any independent evidence, even treatment notes to prove the alleged assault. The court takes the view that had he been tortured as alleged, and having been represented by an advocate all along, that grave fact would have been brought to the attention of the court. In coming to such conclusion, the court borrows the cords of the court of appeal in *Stenice Mkono Makayora v Republic* [1981] eKLR that:-

“We think that if the appellant was really beaten and forced to sign the statement he would, have lodged his complaint when given the opportunity, by the magistrate.”

19. More importantly, the confession statement was produced by concurrence of the defence and the court was never given a chance to test if any impropriety had gone into recording that confession. The court thus finds that the confession was properly taken in accordance with the law and is thus admissible having been produced with the concurrence of the defense.

20. On the merits, the fact of death of the deceased is not challenged even by the defense. When added to the evidence of PW1-6, there can be no doubt as to the death of the deceased.

21. That leaves the two issues; whether the injuries leading to death are attributable and connected to the accused and if in acting so, he was accentuated by malice aforethought.

22. While there is no eye witness to the assault upon the deceased by the accused, the oral evidence by PW8 and the confession statement made by the accused, admitted in evidence by the court and produced by PW8 as PExh2 is unequivocal and self explanatory on how and the motive why the accused killed the minor. In law, that a confessional statement has been admitted by the court is never a bar to the accused from leading evidence to prove that the same was untrue. It was therefore possible and equally necessary for the accused to call evidence on his defence to prove, for example, that the third party who is said to have been present at the request of the accused and who the accused asserted was not there, was indeed not there. That could have been achieved by calling the alleged in law, Everlin Kerubo, to attend court and give evidence on her presence or absence at the time of recording the confession. That he chose not to do by telling the court that he did not wish to call any other witness. In *Kanini Muli v Republic* [2014] eKLR, the Court of Appeal while discussing the subject held:

“Secondly it has for a long time been accepted that even after the trial court has ruled a confession is admissible, the accused is at liberty to call evidence to show that the confession was not voluntary”

23. The failure by the accused to disturb and displace the propriety of the confessional statement left a damning inculpatory evidence against him pointing with no doubt that he planned to kill and did kill the minor on account of what he perceived as wrongs committed against the accused by the parents of the minor. The court thus finds and holds that the death of the minor was occasioned by the unlawful conduct of the accused person.

24. On the last question of whether or not he was propelled by malice aforethought that goes to the state of mind which is only inferable from the conduct of the offender. From the evidence on record, in



particular the confession and autopsy report produced, that the accused convinced the unsuspecting girl to get into a hole he had dug then proceeded to bury her alive, is not only overly cruel and gross but could have been intended to occasion to her at least grievous harm. To compound the matter, the autopsy report records and gives the opinion that the deceased was not only strangulated but also had her hyoid bone fractured. To this court such injuries could only be committed by a person who had a definite premeditation to not only occasion grievous harm to the deceased but also terminate her life altogether. The court finds that in luring the deceased into the sugarcane plantation, digging up a hole and burying her therein after strangling her, the accused was accentuated by extreme malice aforethought.

25. In conclusion, the court finds that the prosecution has proved all the ingredients of the offense of murder against the accused, beyond reasonable doubt, and thus returns a verdict that the accused is guilty as charged. He is convicted for the offence of murder under section 203 as read with 204 of the [\*penal code\*](#).

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

**PATRICK J O OTIENO**

**JUDGE**

In the presence of:

Mr. Osango for the Accused

Ms. Chala for the Prosecution

Court Assistant: Polycap

