



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Salim (Criminal Case 9 of 2019)
[2024] KEHC 1549 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 9 OF 2019
A. ONG'INJO, J
FEBRUARY 15, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MUNIR MURAD SALIM ACCUSED

JUDGMENT

Introduction

1. The accused Munir Murad Salim faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that Munir Murad Salim on the 4th day of January 2019 at Barisheba Area, Kisauni Sub-County within Mombasa County murdered S. A. a female aged 8 years.
3. The prosecution called 15 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Feruzi Abdulrazak Hamed, the mother to PW3, testified that she learnt about the relationship between the accused and PW3 in April 2018 when the accused went to her and asked her to speak to PW3 as they had disagreed. That when she refused and told the accused that PW3 was an adult and she could not force her to stay with him, the accused person started sending her insulting text messages to the effect that she was a big prostitute and PW3 would dire consequences. PW1 went and reported this to the accused person's mother and forwarded the messages to the accused person's brother called Salim Murad. PW1 reported the matter to Nyali Police Station in April 2018 and it is subsequent to it that the accused wrote a letter to her employer TV Raia in Nyali saying that PW1 was a prostitute doing illegal business and procuring men for her daughter to engage in prostitution. Because of the



- threats, she advised PW3 to change her cell phone number and she did but the accused got to know about the new number and continued issuing threats through text messages. She said that the accused also issued threats to her son known as Saidi. That the accused person was arrested and issued with a police bond of Kshs. 20,000/- to attend court in Criminal Case No. 1824 of 2018 but he did not turn up and a warrant was issued.
5. PW1 went further to say that on 4.1.2019, the accused person set their house on fire Barsheba at 2.30 am and it was members of the public who broke the door in order to escape and while they were outside they realized that the deceased herein was not with them and it was the brother-in-law who tried to go back but she was burnt by a part of a burning ceiling that fell on him and as a result the deceased was burnt to death. PW1 said that when they had come out of the house PW3 received a phone call and she heard her say “you have done what you have done but none is more mighty than god” PW1 asked who was the caller and PW3 said it was Munir, the accused person herein. That PW1 also told her that the accused also called her 30 minutes before the fire broke out and bragged that if she slept well that night then he was not a man.
 6. PW1 testified further that on 11.1.2019, the accused started calling PW3 again. That PW3 woke up and found missed calls from a private number and when that private number called again, she urged PW3 to receive it again and they audio recorded the threats that were made by the accused. That they went and reported to the OCPD Dog Section and while there, the accused person called and said that he had tested the blood of PW1’s family and the missed target was PW1’s mother, the tractor.
 7. That in April 2019 after she had moved to another house close to the road, she noticed that there was a white car that was being parked outside close to her house and she got scared. That one day, she saw that the car was being driven by the accused person and she went to Nyali Police Station and reported, and gave the police the registration number of the car. PW1 said that she knew the voice of the accused and after the burning of the house, the accused kept calling PW3 using a private number and they recorded the conversations.
 8. PW1 in cross examination said the fire was not caused by electricity. She said that PW3 received a call from the accused before the fire broke out and again she received a call through a private number after the fire.
 9. PW2, Sharifa Ali Mohamed, a friend to PW3, testified that on 4.1.2019, the accused person called her using a private number and told her that she had been seen with Nuru taking her to the police station. That the accused asked why she was engaging in matters that did not concern her. PW2 said that Nuru was a friend and she could not leave without helping her. The accused warned PW2 that she should not blame him for whatever would happen to her and Nuru. That he even asked if she had seen what he had done to Nuru’s place which he had burnt. That PW2 went to the police station on 5.1.2019 and made the report. PW2 even met the accused person’s mother at the police station and she reported to her that the accused person had threatened her and that she had gone to report. That the accused person’s mother told PW2 that it was okay for her to report for her own safety.
 10. PW3, Nuru Twalib Awadh, testified that she was staying in a rental house with her mother PW1 together with the deceased herein. She testified that she started cohabiting with the accused herein from 2016 but the accused would beat her over petty issues. She said that one time, the accused asked her to get someone from whom he could hire a car and she did. That when the accused person declined to receive phone calls from the owner of the car, he called her to find out where his car was. That the accused person told her that he had given the car to someone who was to return it. That the following day, the owner of the car called and informed her that he found his car at Naivas and that it had been



- used to commit a crime. She informed the mother of the accused and the accused was not happy about it.
11. PW3 said that she left pretending that she was going to the accused person's cousin's wedding but she did not go as the accused had beaten her. She went to her mother's place and refused to go back. That is when the accused started threatening to kill her. She said the accused could send voice messages to her WhatsApp threatening to kill her and her entire family and she sent those messages to the accused person's family and his brother in Dubai.
 12. PW3 further testified that on 4.1.2019, she was in her mother's house in Barsheba when she woke up and saw a missed call from a private number. She said that the private number say that "ukilala salama leo mimi si mwanaume". She said that she identified the voice of the person talking as that of the accused. She said that by then she had divorced and she was staying with her mother, brother, father, uncle, the deceased, her cousin and her three months old child. That within 10 minutes of that call, a motorbike passed by and she heard glass on the window breaking and there was a lot of light outside. She then heard a neighbor shout that "Moto! Moto! Moto!" That she then woke up her uncle, her brother and her cousin who were sleeping in the sitting room and went downstairs where the door of the posho mill was broken and they got outside.
 13. PW3 went further to say that when they got out, she again received a call from a private number and she heard the accused person laughing and said that he wanted her entire family to die. That he continued to call incessantly and she refused to pick. Instead she went to the accused person's mother and told her that the accused had burnt their house. That while at the accused person's mother, the accused called again and PW3 put the call on speaker and when he heard the mother talk, he disconnected the call. PW3 said that after the burial of the deceased, the accused continued to call using a private number and said that his happiness was to see her suffer. She said that such threats were issued to her even in the hearing of the OCPD Nyali Police Station when they went to make a report of the threats.
 14. PW4, Edwin Okoth Ogola, testified that he used his identity card to register an Airtel line 0789850013 for PW3, Nuru, in December 2018 as her identity card was lost. He said that Nuru returned the SIM Card after she got her ID card as he was using the SIM card.
 15. PW5, Murshid Abdalla Mohamed, responded to the alarm that there was a fire and he called a fire brigade who arrived after 30 minutes and put out the fire. He said that the occupants of the house that was on fire came out through the posho mill door and not the main door.
 16. PW6, Bilal Hussein Yusuf, said that on 4.1.2019 at around 3.00 to 3.30 am, he was woken up by an alarm from the mosque saying that there was a house on fire in Barsheba. He proceeded to the scene which was his brother-in-law's house and found the body of the deceased being removed from the scene by the police and the fire brigade. That he accompanied the body to the mortuary where he identified it for postmortem.
 17. PW7, Juma Mulindwa Yusuf, said he was woken up by a neighbor who told him that his second house was on fire. That he proceeded to the scene and found the upper floor of the house was in flames. That on inquiry whether everybody was safe, it was realized that a child might have remained in the house. That fire fighters searched the house and found a child had been burnt beyond recognition. That the next day at around 10.00 – 11.00 am, he passed by the scene and recovered bottles with brownish liquid near the water meter. He then reported to the police. PW7 knew the deceased and he also said that he did an assessment of the damage caused to his house at Kshs. 1.7 million.
 18. PW8, Daniel Hamisi, Liaison Officer at Safaricom, testified that on 11th January 2019, he received a request from DCI Kisauni requiring him to provide registered user details for incoming and outgoing



calls for Safaricom Tel. No. (particulars withheld) for the period between 1st January 2019 to 11th January 2019. He established the user details as those of Edwin Okoth Ogola of ID No. 29269088. He established that on 4th January 2019, at 0252 hours, there was an emergency call to 112 from (particulars withheld), the location was at Barsheba in Mombasa and the call lasted for 18 seconds. At 0256 hours, telephone number (particulars withheld) received a call from Airtel No. (particulars withheld) which lasted for 23 seconds. That the location of the caller was within Barsheba. That at 030446 hours and at 030510 hours, there were emergency call that lasted for 18 and 73 seconds respectively. PW8 produced the call data and a certificate to that effect as exhibits 4, 5 and 6. He said that there is no way that one can interfere with what has been extracted from the system as there is control use and one must key in the inscription key.

19. PW9, Dr. Zainab Baga, examined the body of the deceased and was of the opinion that the cause of death was 100% burns including inhalation burns.
20. PW10, Joseph Gitonga Mugao, the Government Analyst found that petrol was detected in item marked C – burnt debris in Khaki envelope which was found in the sitting room. He also found that the liquids in items marked D, E, F, and G were petrol.
21. PW11, Wycliffe Ojwang', Court Administrator Shanzu Law Court, produced copies of proceedings in Criminal Case No. 1824 of 2018 and 638 of 2019 in which the accused person herein had been charged with the offence of offensive conduct against Feruz Abdulrazak Hamed and Abdulrazak Salim respectively and the charge in Criminal Case No. 1824 of 2018 was withdrawn under Section 87 (a) of the Criminal Procedure Code whereas in Criminal Case No. 638 of 2019, the accused was fined Kshs. 5,000 of spend 6 months in prison.
22. PW12, No. 113660, PC Mungai Wakaba from Digital Forensic Lab, DCI Headquarters, testified that he is a Digital Examiner and Analyst. He received Exhibit Memo Form under Lab No. CCU-1070-2019 from Nyali Police Station Exp8 (a) which was used to forward 5 phones namely: -
 1. Infinix Hot 3 IMEI 356602074282065 – Exp8(b)
 2. USB Flash Disk make HP 16 GB - Exp8(c)
 3. Huawei Phone –Y541U03 – Exp8(d)
 4. ITEL IT 2160 phone IMEI 352081107271382 - Exp8(h)
23. The instructions were that PW12 extracts audio messages from the Infinix phone between 4.1.2019 to 19.4.2019. He was also required to extract call logs, SMS and WhatsApp conversations from the Infinix phone from different subscriber numbers including (particulars withheld), (particulars withheld), (particulars withheld), (particulars withheld) and +255(particulars withheld). That he was also supposed to extract images and audio from the flash disk. PW12 said he was able to generate a report after an analysis dated 30th November 2020.
24. Some of the messages extracted from the Exhibits were the one dated 11.1.2019 from mobile number (particulars withheld) in which the owner of the phone wrote “Nipe namba ya mamako niwape kazi huku udanguro pesa naskia hamna mwalala na polisi.” PW12 extracted several text messages for the period of 4.1.2019 to 19.4.2019. PW12 extracted call logs, Mpesa transactions and audio recordings from accused person’s telephone number (particulars withheld) to PW3’s phone number (particulars withheld).
25. PW13, Vincent Mabu, Liaison Officer for Airtel, testified that he was able to get the subscriber details of mobile number (particulars withheld) between the period of 1st January 2019 to 30th April 2019 was



registered under the name of Munir Murad of ID No. 29655143. He produced a report ExP12 (a) and a certificate under Section 65 and 106 (a) and (b) of the *Evidence Act*.

26. PW14, No. 95203, Benard Kinyua King'ori at Nyali Police Station investigated the murder herein. He testified that CPL Amin Said Amin was instructed by the OCS Nyali Inspector Joseph Kipkemboi to attend to a fire incident scene in Barsheba within Kisauni. On arrival, they found a fire brigade from Mombasa County working to put off a fire and they put it off at 4.00 am and they found that a child had been consumed by the fire. They recovered the body of a child by the name Sham Ali, a female aged 8 years. That PW3, Nuru Twalib, approached them and informed them that she had information that would assist with investigation. That he asked her to go to the police station and record a statement. That he learnt that the accused had made a phone a call to PW3 before and after the fire. He revisited the scene and witnessed the postmortem of the body of the deceased on the same day, and recorded statement of other witnesses on subsequent days.
27. PW14 recovered exhibits from the scene which were taken for analysis and it was established that the liquid in the bottles recovered in the scene marked c was petroleum. He formed the opinion that the cause of the fire was an arson attack using petrol bomb. PW14 also sent PW3's mobile phone number (particulars withheld) for forensic analysis and it was established that the subscriber number (particulars withheld) is the one who made the call on the night the house was set on fire. It was also established that the subscriber of number (particulars withheld) was Munir Murad, the accused person herein. The accused person was arrested and 3 identity cards, several SIM card plates, mobile phones and SIM cards recovered from him which were also subjected to analysis. The investigating officer said the accused actualized his threats by setting the house on fire and thereafter continued to threaten PW3 and her family.

Defence Case

28. The accused person in his sworn statement said that on 4.1.2019, he was in Nairobi attending to his business. He said that he was a land broker in South Coast and used to source for spices and dried and fresh fish and take to Nakuru, Naivasha and Nairobi for sale. That prior to his arrest, he visited a friend in North Coast before he went back to Shimoni. He said that he did not communicate with the complainant on the material day of the offence or later and did not receive any calls from her. In cross examination, he said that on 4.1.2019 he was with his friend. He said that he had separated from his wife Nuru and that he did not threaten her or threaten her mother. He also said that he did not write a letter to the company that employed Nuru's mother claiming that she was a prostitute.
29. The accused person's witness Abdulrahman Suleiman Said testified that he worked in Nakuru and that on 4.1.2019, he was in Kitisuru in Nairobi with the accused person and that they had visited their aunt known as Zahra.

Accused Person's Submissions

30. Counsel to the accused person submitted that the accused person was suspected of having committed the offence because he had a misunderstanding with PW3 but there was no evidence beyond reasonable doubt that the accused committed the offence. It was also argued that the fire which caused the death of the minor was not caused by any accelerant and it could have an electric fault. That the accused was not placed at the scene of the crime and thecal data from his Airtel mobile phone 0784177754 was not produced to show his location on the fateful night.
31. It was also argued that the evidence of PW12 and PW13 that there were no call data between the accused person's line 0784177754 and (particulars withheld) was sufficient proof to warrant the discharge of the accused person.



32. The accused person's advocate also submitted that the prosecution failed to prove the element of malice aforethought. That none of the evidence adduced by the prosecution hints to the culpability of the accused, either mens rea or actus reus. The court was urged to discharge the accused person.

Analysis and Determination

33. In consideration of the evidence of 15 prosecution witnesses and in consideration of the defence sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

34. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’

35. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

Death of the deceased

36. There is no dispute as to the death of the deceased S. A. female aged 8 years.

Death was caused by an unlawful act or omission

37. The deceased died as a result of 100% burns including inhalation burns according to Dr. Zainab Baga, PW9, who produced the postmortem report as ExP2. The deceased was sleeping when the house was set on fire and when the rest of the family members were scampering for safety, she was forgotten in the house but when PW1 and PW3 realised that she was not outside, attempts were made to go and rescue her, the brother of PW1 suffered burns from a falling ceiling board and he retreated. The burning of the house was not accidental, it was an act of an arsonist and therefore, an unlawful act that led to the death of the deceased child.

Participation of the accused in the commission of the alleged offence

38. The accused and PW3, Nuru Twalib, started cohabiting as husband and wife in 2016 and when in 2018 they differed and PW3 moved back to her parent's house, the accused was unhappy about it and he started issuing threats to PW3 and PW1 who informed his mother and family members that worsened the situation even more.
39. The accused person said that he was in Nairobi on the material night of the incident herein and called DW2 who was alleged to be his cousin to corroborate his defence of alibi but this defence was not raised with the investigating officer or the prosecution witnesses in their cross examination.



40. PW2 was at her house on the material night when the accused called and warned her against accompanying PW3 to the police station to report him and asked her if she had seen what he had done to Nuru's place which he had burnt. PW2 went to the police station on 5.1.2019 and made a report vide OB No. 39/5/1/2019. According to PW2, the accused had used a private number to call her and threatened her, telling her to stop accompanying PW3 to the police station. That at the police station she met the accused person's mother and reported to her that he had been threatening her.
41. The threats issued by the accused started before, during and after the arson incident and the accused person was charged in Criminal Case No. 1824 of 2018 which was withdrawn under Section 87 (a) of the Criminal Procedure Code and subsequently in Criminal Case No. 638 of 2019, in which he pleaded guilty and he was fined Kshs. 5,000 in default 6 months in prison.
42. Evidence that the accused person called PW3 before the arson telling her that "ukilala salama leo mimi si mwanaume" and later after the arson he called again laughing and said that he wanted her entire family to die is corroborated by the evidence of PW1 who heard PW3 respond to a call and say "you have done what you have done but none is more mighty than God".
43. Evidence of PW8 established that Airtel No. (particulars withheld) which was confirmed to have been registered in the name of the accused was the private number that called Safaricom Tel. No. (particulars withheld) which PW3 was using on the material night.
44. PW12, No. 113660, PC Mungai Wakaba from Digital Forensic Lab, DCI Headquarters, a Digital Examiner and Analyst extracted audio messages, call logs, SMS and WhatsApp conversations from the Infinix phone for the period between 4.1.2019 to 19.4.2019 from different subscriber numbers including (particulars withheld), (particulars withheld), (particulars withheld), (particulars withheld), and +255(particulars withheld) and established that on 11.1.2019, the accused person sent 1 WhatsApp messages and 3 SMS from (particulars withheld) to (particulars withheld) as follows: "Nipe number ya 4un i4 niwape kazi huku udanguro pesa naskia hamuna maskini mwalala na polisi hahahahaha"; "Hutaki jua jinsi utakavyo pumzika?"; and "Hahahahaha mbwaa Sun na mamake pia mbwaa!".
45. Although the accused person was not seen setting the house on fire, the circumstances before, during and after the commission of this offence are incapable of any other explanation upon any other reasonable hypothesis than that of the accused person's participation in the commission of the offence. The accused person menacingly threatened PW1 and PW3 together with all the other family members on account of his differences with PW3. He was charged for conducting himself in an offensive manner to his mother-in-law and he pleaded guilty and he was fined Kshs. 5,000/- in default to 6 months imprisonment.
46. This court therefore finds that the evidence adduced by the prosecution outweighs the accused person's defence of alibi and confirms that he committed the unlawful act that caused the death of the deceased.

Malice aforethought

47. Section 206 of the Penal Code defines malice aforethought as follows: -

"Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

48. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of Isaac Kimathi Kanuachobi -vs- R (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

49. The elements to prove malice aforethought were settled in the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990) where the Court held:

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

50. From the evidence adduced by the prosecution witnesses, it is clear that the accused person was out to kill all the family members of PW3 because she refused to go back to him. He said that expressly on phone and when it was only the deceased who died after the house was set on fire by petrol bomb, he told PW3 that he had missed his target which was PW1. He continued calling PW3 and told her that his happiness was to see her suffer. The accused person persistently threatened the complainant’s family with a clear intention of causing harm to them and was not deterred by the charge in Shanzu Criminal Case No. 1824 of 2018. Instead, he absconded and proceeded to fulfil his mission. This court finds that the offence was premeditated and that the accused was actuated by malice aforethought.

51. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322 (1) of the Criminal Procedure Code.

Dated, signed and delivered in Open Court/online through MS TEAMS, this 15th day of February 2024

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State



Ms. Saisi Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: There is a previous record.

Ms. Saisi: I pray for a date for mitigation.

Order: Mention on 20.3.2024 for Victim Impact Statement, records and mitigation and sentence. APIC.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

