



**Republic v Dunda (Criminal Case E016 of 2022)  
[2024] KEHC 2791 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E016 OF 2022**

**A. ONG'INJO, J  
MARCH 14, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DENA MENZA DUNDA ALIAS AMOS ALIAS SAFARI ..... ACCUSED**

**JUDGMENT**

1. The accused Dena Menza Dunda alias Amos alias Safari 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 Dena Menza Dunda alias Amos alias Safari on 10<sup>th</sup> day of June 2022 at Shanzu Pangoni Area in Kisauni Sub-County within Mombasa County murdered Millicent Zawadi.
3. The prosecution called 10 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

**Prosecution Case**

4. PW1 testified that when the accused called him on June 10, 2022 and told him the deceased had committed suicide, he did not see a sign of committing suicide. He said that he found the body of the deceased lying on the floor beside the bed in the one room house and the body was covered with a cloth. PW1 said that he saw a piece of kikoi tied to timber in the roof above the bed. He said there was nothing on the deceased neck to show she had committed suicide. PW1 said the matter was reported to the police and the body was removed to Coast General Hospital Mortuary. PW1 testified that the accused and the deceased has supper together and it is thereafter that he was called and told that the deceased had committed suicide.
5. PW1, the uncle to the deceased, Daniel Tabu Katana said that the accused person called him at night and told him that the deceased had committed suicide. That he rushed to the scene and found the body



- of the deceased lying down on the floor next to the bed and it was covered with a cloth. He said that he did not see any sign of committing suicide. He said there was nothing on the neck to show that the deceased had hanged herself. He said that he saw a kikoi tied to timber in the roof above the bed. PW1 said that previously the accused and the deceased had differed and they went home and the parents resolved their issues and on return he showed him that their problems had been resolved. PW1 said that on two occasions on 22nd and on 24th June 2022, the postmortem had been scheduled but the accused failed to turn up and that when postmortem was done, the doctor told them that the deceased had been strangled.
6. PW2, Peter Kariuki who had given accommodation to the accused testified that on 10th June 2022 at 1.17 am, he received a phone call from the accused who told him that the wife had died. When he asked him how she had died and she was not sick, the accused said she had hung herself. PW2 asked how that was possible. That in the company of one Charles who had also received a phone call from the accused, they found the body was on the floor and he was shocked. PW2 said that there was a cloth which was tied on timber of the roof of the mabati house and none was on the deceased's neck. That a piece of cloth similar to the one tied on timber on the roof was next to the deceased's head. PW2 said that the accused and deceased used to differ and he sat them down and spoke to them.
  7. When the accused person reported to the Village elder, Florence Mwaka Mramba, PW3, that his wife had committed suicide, PW3 asked him where he was when the wife committed suicide. The accused person told the Village Elder that he was asleep. PW3 instructed the accused not to touch the body as it was a police case but the accused said that he had cut the cloth that the deceased had hung herself with as he wanted to save her. The Village Elder went to the scene, she found the deceased's body laying on the floor with the head facing the door while the head was towards the wall. That she noticed blood on the legs of the deceased and the accused told her that the deceased was having her monthly periods and blood might have flowed. That PW3 however saw that the deceased had a cut on one of the toes and it was bleeding and she also had a swelling on the right side of the neck. PW3 was also able to see a piece of leso that was tied next to the bed.
  8. The Village Elder said that in April 2022, the deceased called her and told her that the accused had beaten her and she advised her to leave so that she is not harmed. That the following morning, the deceased told her that they had spoken and agreed. However, within the same week, the accused person chased away the deceased and snatched the child away from her. He took the deceased's suitcase to her uncle's place.
  9. PW5, Dr. Gabriel Mngola, produced a postmortem report prepared by Dr. Chinene on 24th June 2022 in which it was found that the cause of death was asphyxia secondary to neck compression.
  10. PW6, Cpl Henry Kanyi, proceeded to the scene in the company of PC Karama where he found the body of the deceased lying next to their bed in a 10 square feet one roomed house built using iron sheets. That there was a piece of leso next to her body and another one tied to the roof truss. PW6 documented the scene and because of insufficient light he did not see injuries on the body of the deceased. He removed the body to the mortuary. That when he told the accuse to attend the postmortem with 2 relatives on 22nd June 2022, he failed to attend. That on 23rd June 2022, the accused surrendered himself to Bamburi Police Station and said he wanted to make a confession. The matter was referred to the OCS and the suspect placed in the cells. That vide Misc. Application No. E083 of 2022 at Shanzu Law Court, an order for detention of the accused was issued and the accused detained by the DCI for investigations.
  11. PW7, Edison Kazungu Charo, testified that the accused person called him at 11.00 pm and told him that his sister, the deceased herein had committed suicide. That he travelled to Mombasa the following



morning and found the body of his sister had been taken to the mortuary. That on 22nd June 2022 when they went to the mortuary for postmortem, the accused did not turn up and that they went back home to Malindi. That on 24th June 2022 when they went back to the mortuary for postmortem, the doctor told them that the deceased had been strangled. PW7 said that one week prior to this incident, the accused and the deceased had differed and he and his uncle talked to them and the deceased said that he was giving the accused the last chance. He said that the deceased told them the accused had the habit of beating and strangling her. PW7 also said that one time he had given the deceased money to go home as a result of the domestic squabbles with the accused but she refused.

12. PW8, Inspector Florence Mapenzi Dzombo of Bamburi Police Station testified that on 23rd June 2022, she was on duty when PW9, PC Malachi Omolo who was at the Report Office informed her that there was a reportee who wanted to confess that he had killed his wife. That when the reportee was taken to her, he gave his name as Dena Menza, a Giriama male from Mwembeni within Bamburi. That when she asked him what his complaint was, he said that he wanted to confess having strangled his wife to death. PW8 inquired from Cpl Kanyi if there was any case that had been reported and Cpl Kanyi informed her that the accused had reported suicide and that he is the one who responded to the scene and that the matter had been reported to the DCI. Inspector Dzombo together with Cpl Kanyi proceeded to the office of the OCS where he repeated what he had told PW8. The OCS instructed that the accused should be placed in the cells and the matter referred to the DCI. PW8 said that he heard what the accused person had said and not what Cpl Kanyi and PC Malachi told him.
13. PW9, PC Malachi, was at the report office on 23rd June 2022 at around 1800 hrs when the accused went to surrender after killing his wife. He said that he escalated his matter to Inspector Dzombo, PW8. He said that prior to the accused person surrendering himself, he was not aware of the death of the deceased.
14. PW10, PC Noah Sangut investigated the matter and preferred the charges against the accused person. PW10 said that the room where the deceased was said to have committed suicide was very small and if it is true that the deceased hanged herself on the roof truss, the mosquito net could not have remained intact if she fell from the truss. She said that the truss was directly above the bed and the accused could not have failed to hear his wife. He said that the Village Elder was also suspicious of the accused person's allegations as he saw blood stains and an injury on the deceased person's toe. The investigating officer testified that the facts presented by the accused and what he found at the scene were not compatible with suicide. He said that he got information from the Village Elder that the accused was violent and the Village Elder intervened from time to time in their domestic quarrels. He ruled out the possibility of the deceased hanging herself above the bed where the accused person was sleeping.

### **Defence Case**

15. The accused, Dena Menza Dunda, said that on 9<sup>th</sup> June 2022 in the evening, he made a phone call to his wife Zawadi. That on the material day when he went home for lunch, there was no food and he returned to work. That around 4.00 pm, he made a phone call to his wife and instructed her to make a list of items that they did not have in the house so that she could go and buy them. That she told him that she would wait for him so that they could go shopping together but the accused told her the arrangement was not possible as there was a church service at 5.00 pm. That the deceased made the list and went shopping on a bodaboda. That at 5.00 pm when the deceased went to church, he found the pastor had travelled and that he returned home at 5.30 pm.
16. The accused said that they prepared supper, ate and that at 9.30 pm, the accused went to sleep whereas his wife, the deceased sat on a plastic chair as she was not feeling sleepy. That at about 1.00 am, he heard a cry like something had fallen and when he woke up, the lights were off and the net had been cut



- one side. That on getting out of bed, he hit the body that was hanging near the bed. He said that the deceased was still kicking and picked a panga and used it to cut the leso she had used to hang herself. He said that his wife has not died when the body fell from the roof.
17. The accused said that he raised alarm but nobody responded. That he made a phone call to Peter Kariuki, Joseph Charo, the deceased's brother – Dickson who did not pick the call, and the Village Elder. The accused said that he told them that his wife had committed suicide. That the Village Elder made a phone call to the Chief who in turn called the police. That the police went and found the piece of leso that the deceased had used to hang herself was still on the roof.
18. The accused said that the body was taken to the mortuary and his statement was recorded at the scene. The accused said that while they were in the process of making funeral arrangements on June 12, 2022, Cpl Kanyi called and informed him that he was required the following day at Bamburi Police Station to record his statement. That the accused was blamed for the deceased's death and threatened by the deceased's family. That when he went to the police to request for protection during postmortem, the police detained him. That when he was taken to Shanzu Law Courts, he learnt that he had been charged with murder.
19. DW2, Rajab Chengo Menza, said that the accused was his elder brother and that on the night of 9<sup>th</sup>/10<sup>th</sup> June 2022, he was in Mariakani when at 1.00 am he received a phone call that informed him of the death of the deceased. That the following day in the evening, he went to his brother's place and that he accompanied his brother to go and view the body at the mortuary before proceeding home to make funeral arrangements. That however, the two families differed and postmortem was therefore not done as relatives of the deceased wanted to dictate where and when burial was to take place.
20. DW2 said that relatives of the deceased alleged that the accused killed the deceased and that the accused went to Bamburi Police Station to report that he needed help as it was alleged he had killed the deceased. DW2 said that together with his late brother Lewa, they helped the accused to make funeral arrangements. That when the accused went to the police station, he was detained on allegations of being a murder suspect.

### Accused Person's Submissions

21. In the submissions, the defence advocate said that the prosecution was relying on circumstantial evidence as there was no eye witness who witnessed how the deceased met her death. They relied on the holding in *Kirui v Republic* 2023 Court of Appeal 17 (KLR) which quoted the case of *Abanga alias Onyango v Republic* which set down three tests to be satisfied where a case rests entirely on circumstantial evidence namely:
- “... the circumstances from which an inference of guilt is sought to be drawn, must
  - (i) 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.”
22. The defence submitted that the prosecution had not established circumstances in which they would have inferred the guilt of the accused person herein and they did not give a reason as to why the accused would want his wife dead.



23. It is submitted further that on the fateful day the accused was in good terms with his late wife and there is no reason whatsoever that would have provoked and/or pushed him to kill his beloved wife.
24. As to whether circumstances established were of a definite tendency and unerringly pointing towards guilt of the accused, it was submitted that no witness testified that the differences between the accused and his late wife ever escalated to the point that it became violent and physical. That the domestic issues and disagreements between the accused and his late wife never escalated to a point where either party was forced to contemplate killing the other. That the accused and his wife's disagreement were reconcilable and normal as put by the prosecution witnesses who knew the couple.
25. It was further submitted that no witness testified that the accused threatened or had a tendency of threatening his late wife. That none of the prosecution witnesses testified as to how frequently the accused and his wife had domestic wrangles and disagreements. That this clearly showed the couple lived well and the misunderstanding between them were not frequent and they were just the misunderstanding that any other couple would have had.
26. The defence counsel submitted that the second element of circumstantial evidence had not been satisfied by the prosecution.
27. On the 3<sup>rd</sup> element whether 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, the defence counsel submitted that it is evident that the accused person and his late wife never had frequent disagreements and that all the few disagreements were solved amicably by their relatives or their pastor. It was submitted that the prosecution had failed to satisfy the 3<sup>rd</sup> test and that the prosecution had failed to satisfy the 3<sup>rd</sup> element on circumstantial evidence and as such the accused was not proved to have committed any unlawful act that caused the death of the deceased.
28. On the issue of confession, it was submitted that the testimony of PW8, Inspector Florence Mapenzi Dzombo was not admissible as it did not comply with provisions of Section 25 (a) of the *Evidence Act*. It was submitted that when the accused person went to Bamburi on 23<sup>rd</sup> June 2022, he was seeking refuge when he started receiving threats on his life from the family of his late wife.
29. On the ingredient of malice aforethought, it is submitted that the prosecution failed to prove and adduce evidence that the accused had intention to cause harm or death to his late wife. That the accused and his late wife were in good terms when the deceased met her death.
30. The court was therefore urged to acquit the accused person of the charges of murder as the wife took her own life.

### **Analysis and Determination**

31. In consideration of the evidence of 10 prosecution witnesses and in consideration of the defence witnesses' sworn statements, 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.
32. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused person was 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.'



33. 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**

34. There is no dispute as to the death of the deceased Millicent Zawadi.

#### **Death was caused by an unlawful act or omission\*\***

35. The evidence of the doctor was that the deceased died as a result of asphyxia secondary to neck compression. This could have been as a result of hanging or even strangling but the circumstances of this case coupled with other injuries on the body of the deceased point to a 3<sup>rd</sup> party having inflicted injuries that led to the death of the deceased. This court therefore finds that the death of the deceased was not as a result of self-inflicted injuries or an accident.

#### **Participation of the accused in the commission of the alleged offence**

36. From the evidence of PW1, PW2, PW3, PW4, and PW7 coupled with the evidence of PW6, PW8 and PW9, this court finds that the circumstances of this case point to the culpability of the accused person in the death of the deceased. Whereas the accused person claimed that he was woken up by a cry like something had fallen at 1.00 am and that he found his wife's body hanging from the truss of the roof, he had earlier at 11.00 pm called PW7 and told him that his sister had committed suicide. That difference in time between 11.00 pm when the accused called PW7 to report that his sister had committed suicide and 1.00 am when he called PW1, PW2, PW3 and PW4 who stay within the vicinity of his residence is not explained and does not make sense. The only conclusion that one makes was that he was trying to conceal the death or exonerate himself after strangling the deceased.
37. The conduct of the accused person in allegedly finding that his wife was hanging from the truss of the roof and cutting off the leso that was allegedly used was not compatible with the person who finds their loved one has committed suicide. The first response would be for one to raise alarm before thinking of cutting off the material used for committing suicide.
38. When the accused person reported to the Village Elder that his wife had committed suicide, PW3 in turn reported to the Chief and the police who removed the body to Coast General Hospital Mortuary on the belief that it was a case of suicide. PW9, PC Malachi Omolo however testified that on 23<sup>rd</sup> June 2022 at 1800 hours, the accused person went to the police station to surrender himself after killing his wife. PW9 did not know the accused and did not know that a report had been made that his wife committed suicide. PW9 escalated the matter to Inspector Dzombo, PW8, and the accused person made the same report that he wanted to confess having strangled his wife to death at 2100 hours. When PW8 inquired from Cpl Kanyi if there was any case that had been reported, Cpl Kanyi told her that the accused had reported suicide. Cpl Kanyi and inspector Dzombo accompanied the accused to the office



of the OCS Chief Inspector Ezekiel Rotich and the accused told the OCS exactly what he had told PW8. The accused person was booked in the cells and the matter referred to the DCI for investigations.

39. The accused person in his defence has claimed that he went to the police station on 23<sup>rd</sup> June 2022 to seek refuge because he was receiving threats from the family of the deceased. PW1, the uncle of the deceased testified that the accused person called him at 1.00 am and told him that his niece had committed suicide. He went to the scene and said that he did not see any sign of suicide. The defence did not question this witness of the alleged threats. PW7, the brother of the deceased also testified and said how he and his uncle had talked to the accused and his sister over their differences and the deceased said she was giving the accused the last chance and they went back to staying together. PW7 said that his sister said the accused had the habit of beating and strangling her. PW7 was never asked about any threats issued towards the accused person that could have made him seek refuge at the police station.
40. According to PW7 and Cpl Kanyi, PW6, postmortem on the body of the deceased was scheduled for 22<sup>nd</sup> June 2022 but the accused person failed to turn up as agreed. He was supposed to attend together with 2 of his relatives to identify the body for postmortem. Before the next scheduled postmortem for 24<sup>th</sup> June 2022, the accused person surrendered himself to the police station on 23<sup>rd</sup> June 2022 and said he wanted to confess having strangled his wife. He did not report that he had received any threats from the family of the deceased. In any case, the first 2 officers that he came into contact with, PW9, PC Malachi and PW8, Inspector Dzombo were not known to him and they had no reason to say what he did not tell them.
41. Allegations that the accused person went to the police station to seek refuge are therefore an afterthought which has been raised too late in the day to be interrogated and verified. When the accused person PW9 and PW8 about strangling his wife, he was not yet under arrest. He was a reportee. The provisions of Section 25A of the *Evidence Act* had not crystallized and was therefore not yet applicable to him. The accused person's defence that he went to the police station because of threats and that PW8 was not qualified to take his confession cannot be regarded.
42. The accused person is therefore found to have committed the unlawful act that caused the death of the deceased.

### **Malice aforethought**

43. 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”.



44. 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 v 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.”

45. 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.”

46. The accused person committed the offence at 21.00 hours on 9<sup>th</sup> June 2022 but waited up to 11.00 pm to report to the brother of the deceased, PW7, and at 1.00 am on 10<sup>th</sup> June 2022 to report to PW1, PW2, PW3, and PW4. He must have been busy erasing evidence that would connect him to the offence.

47. PW7 testified that he and his uncle had resolved a dispute between the accused and the deceased barely one week prior to the commission of this offence and the deceased said that she was giving the accused a last chance. The deceased had complained that the accused had the habit of beating and strangling her. It would appear that all along the accused person had been planning on how to terminate the life of the deceased in the safety of the one roomed house.

48. The Village Elder, PW3, recounted instances when the accused person was cruel and violent to the deceased person and she had intervened in their domestic misunderstandings and quarrels from time to time. She said the deceased had reported one night that the accused was beating her and she advised her to find a way of leaving so that she does not suffer harm. On another occasion, the accused person snatched the deceased person’s one-year-old child and chased her away to her uncle’s place.

49. What the accused person was doing to the deceased cannot pass as normal domestic misunderstandings and quarrels. They were a violation of the deceased person’s rights and ended in the deprivation of the deceased person’s life contrary to Article 26 of the *Constitution* of Kenya, 2010. Evidence of express malice on the part of the accused person was proved beyond reasonable doubt by the prosecution witnesses.

50. In conclusion, this court finds that all the ingredients of the offence of murder have been proved by the prosecution beyond reasonable doubt. The accused person is found guilty and is convicted accordingly pursuant to Section 322(1) *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 14<sup>TH</sup> DAY OF MARCH 2024**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

In the presence of: -

Etropia- Court Assistant



Mr. Ngiri for the State

Mr. Idhiaka Advocate H/B for Mr. Kitonga Advocate for the Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ngiri: We do not have past records

Mr. Idhiaka Advocate: I seek another date for mitigation.

Order: Mention on June 13, 2024 for Mitigation, Victim Impact Statement and Sentence. Accused Person Remanded in Custody at Shimo La Tewa GK Prison.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

