



**Republic v Lihavi & another (Criminal Case 37 of 2019)  
[2024] KEHC 3946 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3946 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 37 OF 2019  
SC CHIRCHIR, J  
APRIL 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**FAUSTINE LIHAVI ..... 1<sup>ST</sup> ACCUSED**

**ERICK MAYUBU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Faustine Lihavi (1<sup>st</sup> Accused) and ERIC Mayubu (2<sup>nd</sup> accused) were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the 9<sup>th</sup> day of June 2019 at Lunenere village in Shisejeri sub-location, Eregi Location of Kakamega South sub- County jointly murdered PETER ALUSIOLA. ( Deceased)
3. The accused persons denied the charges and the matter went to full trial.

**The Evidence.**

4. PW1, testified that on 10/6/2019, he was informed that his son who used to work as watchman was missing and attempts to trace him have not been successful.. He went to Shisejeri police station and made a report of a missing person. He later got a call from the police informing him that a body had been found at a river in Rugosi . The deceased used to live in a place called Nyaundu. He went to the scene and identified his body. The deceased hands had been tied. He did know the accused persons.
5. PW2 testified that he 1<sup>st</sup> accused was her grand-child while the 2<sup>nd</sup> accused was the husband to the 1<sup>st</sup> accused ,though they were estranged at the time. She testified that on the material date in the evening ,the 2<sup>nd</sup> Accused came to the 1<sup>st</sup> accused house and found the 1<sup>st</sup> Accused in bed with the



- deceased. The 2<sup>nd</sup> Accused took away the deceased and asked the first Accused to follow them. She identified the 2<sup>nd</sup> Accused as Kamontho.
6. PW3 was the deceased's mother and wife to PW1.. She recalled that on 10/6/19 she was at home. She had not seen the deceased the whole of that day. She later learnt that his body had been found in the river. She went to the scene , she noticed that the body was in bad shape and had injuries on his chest. She stated that the deceased used to work at Handshake club and butchery. She knew the 1<sup>st</sup> accused since they were friends with the deceased and that she had cautioned him against her since she was older than him. She further stated that though they were not residing with the deceased he visited quite often.
  7. She further told the court that she had not seen her son for close to one week prior to receiving the news of his demise. . She heard that he had been hit on the head with a panga. She could not tell if the deceased was drunk.
  8. PW4 was the pathologist, Dr. Dixon Mchana. He told the court that he did carry out post mortem examination on the deceased's body on 24/7/2019 at Kakamega Referral Hospital. He concluded that the deceased died from asphyxia secondary to drowning. He further stated that death occurred while the deceased was inside the water. The body had injuries on the head, chest back and legs. He however clarified that death was due to drowning , not the injuries. He produced the post- mortem report dated 24.6.2019. ( as P Exb. 1).
  9. PW5 testified that the deceased was his employee at the club, Handshake. She stated that on 10/6/2019, she left the deceased at work. It was past 6.00 pm. when the rest of the employees reported to work the next day at 8.00 a.m the deceased, who had the keys to the premises , and could not be traced. She and PW3, reported the disappearance to Eregi police station. She knew the 1<sup>st</sup> Accused as they belong to the same clan and she was aware that she was in a relationship with the deceased.
  10. She testified that she had never had any disagreement with the with the 1<sup>st</sup> accused , while she had never seen the 2<sup>nd</sup> accused person before.
  11. When re-examined by the prosecution, she stated that she last saw the deceased on Sunday night when she left him at work.
  12. PW7 was the chief inspector of police, Kakamega south headquarters. He stated that he was co-investigator in the case and that the initial investigation officer had since been transferred.
  13. He testified that on 9/6/2019, they received a report of a missing person, one Peter Alusiola and who was reported to have been working as a watchman at Eregi. Together with his colleague , they went to Eregi to investigate. Their investigation established that that the deceased and the 1<sup>st</sup> accused were lovers and that they had been drinking Chang'aa ( a local brew) together on that night. They also interviewed the 1<sup>st</sup> accused grandmother ( PW2) who informed them that the deceased and the deceased and both Accused persons went away together on the night in question.
  14. PW8 testified that on 11/6/2019, he was at Malinya DCIO office when the 2<sup>nd</sup> accused arrived at the police station in the company of his father and brother. He allegedly admitted tying and throwing the deceased in river Yala after finding him in bed with the 1<sup>st</sup> Accused.
  15. He stated that a report of missing person was made on 10/6/2019 at Eregi police post; that they booked the 1<sup>st</sup> and the 2<sup>nd</sup> accused as they searched for the body of the deceased; and on 15/6/2019, the body of the deceased was recovered at the place that the 2<sup>nd</sup> accused led them to. He stated that the 2<sup>nd</sup> came to the station and confessed the crime, and that the 2<sup>nd</sup> Accused is the one who took the officers to river Yala. He admitted that as a corporal at the time he was not qualified to take down a confession.



16. The Accused persons were put on their defence at the close of the prosecution's case.
17. DW1, testified on oath and stated that on 9/6/2019 at 9 p.m, she was at home with the deceased, when the 2<sup>nd</sup> accused came and took the deceased by force. They left, and she did not know where they went. On 11/6/2019, she was summoned to Eregi police station and that when she got there, she was arrested.
18. on cross examination, she confirmed that the deceased was at her place and that the 2<sup>nd</sup> accused came to her house with the PW2. She denied that she was drunk or that she accompanied the deceased and 2<sup>nd</sup> Accused that night. She further told the court that when she saw the deceased's body the hands were tied.
19. During re-examination, she stated that she did not live with the 2<sup>nd</sup> accused and she denied having assisted the 2<sup>nd</sup> Accused to kill the deceased. She admitted that the deceased was her lover; had no reason to kill him and that the 2<sup>nd</sup> Accused knew that the deceased was her lover. She also admitted that she was sleeping with the deceased in the kitchen that night. She got to know that the deceased was missing on 11. 6. 2019.
20. DW2 testified that the 1<sup>st</sup> accused was his wife and that they had 2 children together although they had separated for about 6 months.
21. He testified that on 7/6/2019 he was at home working when he was informed by two of his friends that the 2<sup>nd</sup> accused wanted to discuss something with him. On 9/6/2019, he went to meet her. They met at a neighbours house and chatted until 5 pm when the 2<sup>nd</sup> Accused went to her home and never came back .He further testified that when he was living, he met with PW2 and on inquiry about the 1<sup>st</sup> Accused pw1 informed hm was informed that she was in the kitchen. They both went there and found the 1<sup>st</sup> accused with the deceased
22. He testified that he took the deceased to question him why he was having an affair with his wife and that the deceased reacted with shock , ran off , tripped and fell into the river. He denied that they were quarrelling or fighting with the deceased. He stated that he did not know who tied the deceased's hands since there no one else at the scene. The following day, he went to the hospital since he was unwell and when he came back he found the 1<sup>st</sup> accused looking for him, and they both went to the police station. He denied tying the deceased's hands or pushing him into the river.
23. During cross- examination by the court, he said that they reached the river bridge at 12.30 am; that he was shocked when the deceased fell on the water, and hence did not do anything; that thought the deceased would climb out as the water volume was high. He admitted that he left the 1<sup>st</sup> accused house with the deceased.
24. The defence closed its case.

#### **Accused person's submissions.**

25. It is the defence submissions that none of the prosecution witnesses witnessed the killing of the deceased, and that the prosecution's case was therefore purely circumstantial; It is further submitted that the accused persons were arrested, charged and prosecuted merely on suspicion, yet suspicion, however strong cannot provide a basis to infer guilt. In this regard they have relied on the case of Republic vs. Philip Osingo (2015).
26. They finally submit that the prosecution failed to prove malice a forethought as required under section 206 (a) and (d) of the penal code.



27. The prosecution did not file any submissions.

### **Determination**

28. Section 203 of the penal code defines the offence of murder as follows: “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.
29. Thus to sustain the charge of murder, the prosecution must prove: the death of the deceased, the cause of that death, and that the death was due to an unlawful act or omission, and finally, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
30. On the fact of the death of the deceased and its cause, the pathologist ( PW4) produced a post- mortem which showed that the deceased died of asphyxia secondary to drowning. The body was identified duly identified. The death of the deceased and its cause was therefore proved.
31. The next question is whether the two accused persons charged caused the death of the deceased. None of the prosecution witnesses witnessed the killing. The prosecution’s case, as correctly pointed out by the defence, was purely circumstantial.
32. The nature of circumstantial evidence was expounded in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, where the court of appeal had this to say : “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’” ( Emphasis added)
33. For such evidence to sustain a conviction however, it must satisfy certain criteria. The criteria was set out in the case of *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) where the court set out the following principles: “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.”
34. The decision in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal provides further clarity. The court held:
- “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon



any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.” ( Emphasis added”)

35. What are the circumstances in this case?
36. It was the evidence of PW2 that on the material night, the two accused persons left the 1<sup>st</sup> Accused house’s with the deceased . Thus the accused persons were the last persons to be seen with the deceased, while alive. From the night they left with the accused persons , the deceased remained unseen. For instance he failed to report to work where he was expected to the following day , having been the one in custody of the keys for the premises where he worked. On the same day a report was made of a missing person at the police station. The deceased was never traced until his body was found in the river.
37. PW2 was the 1<sup>st</sup> Accused’s grandmother and son-in-law of the 2<sup>nd</sup> Accused. There was no suggestion of any feud between PW2 and any of the accused persons. There was no reason therefore for PW2 to give a false testimony against her own blood relative and grand- son-in-law. I have no reason to disbelieve her testimony. Thus there is no doubt that the accused persons were the ones last seen alive with the deceased.
38. The doctrine of “last seen alive” was considered in the Nigerian case of *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006 where the court explained it as follows:

“ Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”
39. The 1<sup>st</sup> Accused, told the court that the the 2<sup>nd</sup> Accused and the deceased left together. She denied accompanying them. However PW2’S testimony was that the both the accused persons and the deceased left together. PW2 was not put to task in cross- examination on whether indeed the 1<sup>st</sup> Accused remained behind or accompanied the deceased and the 2<sup>nd</sup> Accused. The 1<sup>st</sup> accused having been one of the last persons to be seen with the deceased has not made any attempt to explain how the deceased met his death. Her simplistic assertion that she never accompanied the deceased is not plausible. Further she has not given any explanation as to why her own grandmother would lie about her. In the absence of any satisfactory explanation , the only inference this court can draw is that , having been one of the last persons to be seen with the deceased alive, she was responsible for his death.
40. On the part of the 2<sup>nd</sup> Accused , he admitted that he was with the deceased that night. He told the court that he took the deceased to question him on why he was having an affair with his wife ; that out of shock the deceased thrived and fell into the water while trying to run away from him. He stated that he too was shocked and hence did nothing. He hoped that the deceased would climb out of the water. He however admitted that the water volume was high and thus raises the question as to how he expected the deceased to help himself out of the water if indeed the water volume was too much.
41. Further it was the evidence of PW7, the investigations officer, that although he was not present when the deceased’s body was retrieved from the river investigations show that the deceased ‘s hands were tied with a belt. The 1<sup>st</sup> Accused also admitted that the deceased hands were tied when the body was



retrieved. According to the pathologist, death was caused not by injuries which were evident on the body but by drowning.

42. It follows that the deceased must have been tied and thrown on to the river. The 2<sup>nd</sup> Accused told the court that he does not know who tied the deceased's hands, yet it was his testimony that there was no one else on the scene when the deceased thrived and fell.
43. In the *Stephen Haruna V. The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court had this to say about the accused explanation on "last seen scenarios":

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased." (Emphasis added)
44. The 2<sup>nd</sup> Accused's explanation is equally far from being satisfactory. In the absence of any satisfactory explanation the only inference is that he is the one who threw the deceased to the river.
45. Further other circumstances in this case point to the culpability of the accused persons. According to PW7, the Accused persons led the investigators to the river, where the deceased's body was indeed found and retrieved. The Accused persons could only lead the police because they knew where they had thrown the body.
46. Am satisfied that the circumstances of this case, taken cumulatively point to the two accused persons as the ones who caused the death of the deceased

### **Was there malice aforethought?**

47. The offence of murder is complete when, "malice aforethought" is established, if, pursuant to section 206 of the Penal Code evidence proves 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. In the case of Hyam v DPP {1974} A.C. the Court held interalia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.” ( Emphasis Added)

49. In 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.” ( Emphasis Added)

50. The Accused persons did not expect that the deceased was going to survive being thrown into river Yala, which according to the 2<sup>nd</sup> Accused, the water volume was high. The deceased’s hands were tied such that even if he was to attempt to save himself by swimming, he certainly could not. Tying the deceased’s legs was meant to stop him from making any attempts at saving himself. Their act of tying the deceased’s legs betray their intentions: – to ensure that the deceased’s chance of survival was nil.

51. On motive , it is trite law that motive is not an ingredient for the offence of murder. In John Mutuma vs Republic (2015) e KLR, the court of Appeal held: Our law does not require proof of motive , plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to proof of malice aforethought”

52. However, the 2<sup>nd</sup> accused’s the motive is evident. He found the deceased in bed with his estranged wife. In his defence, he admitted that he was angered because of this , and took the deceased to question him on his actions. It can be inferred he was angry with the deceased for having an a sexual relationship with his wife. The 1<sup>st</sup> accused’s motive is not evident , but as held in in Mutuma’a case ( supra), prove of motive is not mandatory.

53. In conclusion, am satisfied that the prosecution has proved its case beyond reasonable doubt. I find both accused persons guilty of murder pursuant to section 203 as read with section 204 of the penal code and I convict them accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

**S. CHIRCHIR**

**JUDGE.**

**In the presence of :**

Godwin- Court Assistant

1<sup>st</sup> Accused

2<sup>nd</sup> Accused.

