



**Republic v Njenga (Criminal Case 35 of 2019)  
[2024] KEHC 3708 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 35 OF 2019**

**AC MRIMA, J  
APRIL 5, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**STEPHEN NJENGA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Stephen Njenga, 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 28<sup>th</sup> November, 2019 at Kirita Farm within Trans Nzoia County, murdered Loice Mumbi (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned in Court to answer to the charge, he pleaded not guilty. He was tried. The hearing of this case was conducted by two Judges. The first five prosecution witnesses testified before Hon. Kimaru, J (as he then was). The rest testified before yours truly. After the close of the prosecution’s case, this Court found that a prima facie case had been established against the accused to place him on his defense.
3. The accused gave sworn testimony and called no witness.

**The trial:**

4. The prosecution called six witnesses to establish that the accused murdered the deceased. PW1 was Dr. Alex Wanyonyi Barasa who conducted the post mortem examination on the body of the deceased. PW2 was one Samuel Kairo Mugure, a grandson to the deceased. He lived with the deceased. One of the daughters to the deceased, Zipporah Ngendo Njenga, testified as PW3. PW4 was a neighbour to the deceased and also worshipped in the same Church with the deceased. He was Erastus Mwangi Kariuki. Likewise, one Joseph Kamithi Boro was a neighbour to the deceased and a fellow worshipper. He testified as PW5. No. 169458 Cpl. Tom Ogaro from the DCI Trans Nzoia East who was the subsequent



- investigating officer having taken over from the initial one who had retired from the police service testified as PW6.
5. The prosecution's case was that in the morning of 27<sup>th</sup> November, 2019 at around 7:30 am., PW2, who lived with the deceased, but slept in an adjacent house within the compound was woken up by a motorcycle which rode into the compound to collect milk. PW2 quickly went out of the house, but was astonished to see that the cows had not been milked and the main house where the deceased had slept was locked from outside.
  6. Curiously, PW2 went inside her grandmother's house. He peeped into the bedroom and saw the deceased lying on her bed while bleeding from her mouth. Shocked, PW2 rushed to inform one of his neighbours. That was PW4.
  7. PW2 did not know what had happened to the deceased. He confirmed not hearing any commotion the night before. He identified the accused as his Cousin.
  8. PW2 then called and informed PW3 of what he had witnessed. PW3 rushed home and confirmed as much; that indeed the deceased had died. PW4 and PW5, among other neighbours, also gathered. Eventually the Area Chief was informed and who in turn notified the police. The body was later removed and taken to the mortuary.
  9. Investigations were commenced by the police and several witnesses recorded statements. It was the evidence of PW6 that the initial investigator indicated in his statement that members of the public arrested the accused on suspicion of having killed her grandmother, the deceased. The accused was taken to the police where the two Chamber jackets and a mobile phone belonging to the deceased were recovered from the Accused. The items were produced as part of the exhibits.
  10. A Post Mortem examination of the body of the deceased was conducted on 29<sup>th</sup> November, 2019 by PW1 at the Mt. Elgon County Hospital mortuary.
  11. PW1 found cyanosed finger nails and conjunctiva injection on the body of the deceased. There was also a fractured cricoid cartilage that obstructed the upper airway. In the Cardio vascular system, PW1 found that there was de-oxygenated blood in the main vessels. The Spinal column had an injury on the C2 and there was a cervical spine injury as well.
  12. PW1 formed the opinion that the cause of death was asphyxia secondary to strangulation from assault. He filled in a Post Mortem Report which he produced in evidence.
  13. The accused were then led to Moi Teaching and Referral Hospital where he was mentally assessed and found fit to stand trial.
  14. On completion of the investigations, a recommendation that the accused be charged with the murder of the deceased was mooted. The accused was eventually arraigned before Court where he was accordingly charged.
  15. When the prosecution closed its case, the Court found that the accused had a case to answer. He gave a sworn testimony.
  16. The accused denied committing the offence. According to him, he was at his home which was about 2km away from where the deceased lived and was found dead. The accused contended that he never found his way to the home of the deceased the day or night the deceased died.
  17. After close of the defence case, parties were directed to file and exchange written submissions. The defence complied, but the State relied on the record.



18. Learned Counsel for the accused, Mr. Bikundo, argued that the prosecution had failed to discharge its burden of proof to the required standard to establish that the accused murdered the deceased. Several decisions were referred to in disproving the circumstantial evidence on record. He urged this Court to acquit the accused.

**Analysis:**

19. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

- (a) the death of the deceased and its cause;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

20. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

**The death of the deceased:**

21. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).

22. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the lifeless body of the deceased. The body was later collected by the police, taken to the mortuary and an autopsy carried out.

23. The second way in which the death of the deceased was proved was through the evidence of PW1 who conducted a post mortem examination on the body of the deceased and prepared a Post Mortem Report.

24. PW1 concluded that the deceased's cause of death was asphyxia secondary to strangulation from assault.

25. This Court, therefore, finds and hold that the death of the deceased and its cause were proved to the required standard.

**Whether the accused committed the unlawful act which caused the death of the deceased:**

26. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found in the morning, long dead.

27. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitly and firmly established;
- (ii) The 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.
28. The foregone principles were set out in the locus classicus case of *R -vs- Kipkering arap Koske & Another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic* (2013) eKLR, *Musii Tulo vs. Republic* (2014) eKLR among many others.
29. The Court of Appeal in *Musii Tulo* (supra) in expounding the above principles expressed itself as follows:-
4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R* (1958) EA 715 citing with approval *Teper v. R* (1952) AL 480 thus: -
- It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
30. Further, the Court of Appeal in *Sawe- Vs- Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -
- ... 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 on. 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 is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....
31. Returning to the case at hand, from the evidence of PW6 and PW3, the State attempted to come up with a theory that it was the Accused who killed the deceased. The assumption was premised on the allegation that when the accused was arrested, the deceased's clothes and a mobile phone were recovered from him.
32. With such a position, there is need to interrogate the manner in which the Accused was arrested and the exhibits recovered.
33. Apart from the testimony of PW6 (who went through the statement of the initial investigator), there was no direct evidence on how the accused was arrested and the alleged recoveries made. None of those who were involved in the arrest of the accused testified. Further, the recovery of the deceased's clothes and mobile phone was not documented. No inventory was prepared and produced in evidence.
34. There was also the issue of proof of ownership of the clothes and the mobile phone. Witnesses admitted that the clothes were common in the market and that there was nothing to prove that they were the ones which the deceased had. On the mobile phone, apart from the Affidavit sworn by PW3 that she bought the phone for the deceased, there was nothing to connect the phone with the deceased. Even the phone number was not given. There were no records from any of the subscribers confirming that indeed the deceased was the registered user of the mobile phone.
35. The record, therefore, fails to assert the position that the accused was arrested with the deceased's items. As such, the prosecution's theory remains hollow.



36. This Court is not, therefore, persuaded that the prevailing circumstances in this matter taken cumulatively 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.
37. This is a case where the evidence adduced against the accused boils down to the suspicion that the accused killed the deceased. However, as was held by the Court of Appeal in *Sawe –vs- Rep* [2003] KLR 364: -
- Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.
38. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -
- ... suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.
39. A similar view was expressed by the Tanzania Court of Appeal in *R vs. Ally* (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -
- Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.
40. Therefore, whereas there may be some suspicion that the accused may have been involved in the death of the accused, that suspicion alone, however strong, cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.
41. The prosecution, therefore, failed to prove that any of the accused was responsible for the death of the deceased in any way whatsoever.

**Disposition:**

42. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused is found not guilty of the murder of the deceased.
43. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the *Criminal Procedure Code*. He is hereby set at liberty unless otherwise lawfully held.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of:**

Mr. Bikundo, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

