



**Republic v Ismail (Criminal Case 5 of 2016) [2024] KEHC 6717 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6717 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA**

**CRIMINAL CASE 5 OF 2016**

**JN ONYIEGO, J**

**MAY 24, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NOOR AHMED ISMAIL ..... ACCUSED**

**JUDGMENT**

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 12.05.2016 at Kotulo Sub Location of Tarbaj Sub County within Wajir County, he murdered Genye Noor Ahmed.
2. The accused having pleaded not guilty to the charge, the case proceeded to full hearing with the prosecution calling a total of nine witnesses.
3. PW1, Dr. Oduor Johnson testified that he conducted postmortem on the body of the deceased herein. That apart from the body being partially decomposed, there was an incised wound from the neck of the deceased and further two stab wounds on the side of the chest. He proceeded to state that due to religious reasons, he did not open the body of the deceased in as much he formed the opinion that the cause of the death was as a result of multiple injuries due to a penetrating trauma. He produced the postmortem report as Pex 1.
4. PW2, Elizabeth Waithera Onyiengo government chemist testified that between 20<sup>th</sup> and 31<sup>st</sup> of May, 2016, she received a number of exhibits from C.I. Lumatete of DCI Tarbaj for purposes of analysis. Among the items received was: orange, maroon and black coloured dress in a khaki envelope marked as item 1; a knife in a sheath and in a khaki envelope marked as item 2; a T-shirt- green/black and white stripes in a khaki envelope marked as item 3; a kikoi – purple green and white in colour in a khaki envelope belonging to the accused herein marked as item 4; black boot marked as item 5; black boot in a khaki envelope marked as item 6; a finger nail in a khaki envelope marked as item 7 and a blood sample in a bottle indicated as that of the accused person item 8.



5. That it was desired to examine the items listed above and determine the presence and origin of any blood stains. Upon completion of the process, the following conclusions were arrived at: the dress (item 1) was moderately stained with blood of human origin; the knife (item 2) and the kikoi (item 4) were lightly stained with the blood of human blood.
6. That the DNA profiles generated from items 1,2,4 and 8 were tabulated as follows: the DNA profile generated from the blood stains on the knife (item 2) and the kikoi (item 4) matched the DNA profile generated from the blood stains on the dress (item 1) indicated as that of the deceased and that it was of an unknown female origin. The finger nail (item 7) did not generate a DNA profile. Mrs. Oyiengo thereafter produced the report as Pex 2.
7. PW3, William Kailu Munyoki, a government analyst testified that on 20.05.2016, they received the following items in brown khaki envelopes: a blood-stained dress marked 1, indicated as that of the deceased; one soiled gumboot marked 5 and one gum boot soiled and blood stained marked 6. It was required to ascertain whether the soil samples from the items listed above matched. From the analysis conducted, it was found that the soil samples from the items listed above were found to be from the same geographical area. The report was produced as Pex 3.
8. PW4, Khadija Abdi testified that on 12.05.2.2016, she was at the Safaricom booster looking for her camel when she came across a dead body. That the body was lying facing down and so she could not recognize the person. She thus ran home to inform others.
9. PW5, Isaack Sheikh Osman, an assistant chief Kotulo sub location testified that on 13.05.2016 at about 8.00 p.m., he received a call from Sgt. Abdi Aziz of Kotulo Police Station. The officer informed him that somebody had been found murdered and therefore, his help was to aid the investigations. He stated that together with one Hussein Ismail and Sgt Aziz accompanied him to the funeral of the deceased. Upon reaching there, they found a person who had been arrested by the elders and so they were directed to the home of the said arrested person where they found the accused herein.
10. He testified that they found the accused person asleep and upon waking him up, they asked where he had hidden the knife. In response, the said person stated that the said knife was in a sack in front of the bed. He identified the knife before the court as the one retrieved from the house of the accused person. They further got gumboots under his bed and the same had blood stains at the edge. When he was further asked of the clothes he wore the previous day, he pointed at a paper bag and therein were a kikoi and a t-shirt. The kikoi was green in colour and further, there were blood stains on the side of the t-shirt. They then arrested the accused person herein and took him to Kotulo Police station for further investigations.
11. PW6 Amin Demeel Ahmed testified that on the material day, he received a call from the son of Noor Abdi Ahmed informing him that Genye had been killed and so, he went to report the same to Kotulo Police station. After that, together with others, they went to the scene and started looking for foot prints near the body. They thus waited for the police to pick the body but later on, received a call informing them that a person who had such boots as the ones whose foot prints were found at the scene had been arrested. That the footsteps led to the house of one Gedi Bulle.
12. It was his evidence that as at that time, the accused herein was part of the team that was looking for the suspect. That upon further inquiry, Gedi was found not to be the person responsible for the offence. Meanwhile, the accused looked stressed and restless and later on asked to leave. As they were leaving the scene, they got a call from one Ujumbe, one of the accused person's wives who demanded to know why Gedi Bulle, her uncle had been arrested while the person responsible for the offence was the accused person herein.



13. PW7, No. 211350862 A.P. Silas Bowen stated that on 13.5.2016 at 1300 hours, while at Kotulo Police Post, a murder incident was reported via O.B. No.512/ 2016. Upon receiving the information, together with four officers and the assistant chief of Dakhakut village, they went to the accused person's home as they had received information linking him to the offence herein. On reaching the homestead of the accused, they found him sleeping. That they recovered a sword, T- shirt and male gumboots. Sergeant Ali and Assistant Chief Interrogated the accused person and thereafter, took him to Administration Police Post where they handed him together with the blood stained shirt and sword to Tarbaj Police Station.
14. PW8, Noor Abdi Ahmed stated that he was the father of the deceased, a 16-year-old girl. That the accused person was his relative and further, he used to teach his children at Duksi school but did not teach the deceased herein. That on 12.05.2016, while in town, he got information that his daughter had been killed. It was his evidence that the deceased had previously confided in a neighbour that the accused person was disturbing her and not to mention the fact that he had a disagreement with the accused person. That he removed his children from the accused person's school five days prior to the incident herein. He went further to state that he was at the scene when the accused person was arrested and from his house, a knife, clothes and shoes were recovered.
15. PW9, Number 219337 Chief Inspector Lumatete testified that he was the investigating officer in the matter. It was his case that on 14.05.2016, he took over the investigations from one, Police Constable Eric Omondi. He proceeded to state that notwithstanding the fact that the accused herein was a neighbor to PW8, he equally made sexual advances on the deceased severally in vain. That on the fateful day, the accused armed himself with a knife with intent to harm and he attacked and thereafter attempted to rape the deceased. That the deceased resisted, as she was strong thus prompting the accused person to stab her twice on right arm and chest making her weak. He thereafter pushed her on the ground and mercilessly cut her throat. That as he fled from the scene, the locals managed to trace him using foot prints of gum boots since it had rained and marks had collected on the side of the road.
16. It was his evidence that via a Misc. Application No. 12 of 2016, the prayer for exhumation was allowed thereby enabling PW1 to examine the deceased's body as enumerated in the post mortem form. After collecting evidence, it was clear the accused needed to be arraigned in court upon which he preferred the charges herein.
17. Mr. Mulati, the prosecution counsel made an application to recall PW9 in order to produce the dress(dera) as Pex 8. The said application was allowed thus PW9 clarified that the said dress belonged to the deceased for the reason that he personally forwarded the same to the government chemist.
18. The prosecution proceeded to close its case and the court ruled that a prima facie case had been established against the accused person thereby putting him on his defence.
19. DW1, Noor Ahmed Ismail testified that on 12.05.2016 between 6am and 12 pm, he was at home asleep. That other family members had gone to herd while others had gone to town. He stated that he is related to the deceased person as he knew she lived about 50-70 meters away from his home. He denied killing the deceased in as much as he had an issue with PW8. He denied that the exhibits were recovered from him and further, that he was amongst the search party who followed foot prints to Bulle Gedi's home. He further stated that upon being arrested, the Chief took all his clothes and the allegation that the DNA profile of blood in his clothes and that of the deceased matched is simply a propaganda. In the same breadth, he stated that the said knife belonged to him only that it was not stained with blood.
20. The defence closed its case upon which the court directed that parties file their submissions which directions parties complied with. The prosecution by submissions dated 01.11.2021 submitted that



the evidence tendered was sufficient to sustain a charge of murder and the elements of the said offence. Further, that there is circumstantial evidence which was never rebutted as the same placed the accused person at the scene of crime. That it did not just happen that the accused person's clothes had blood stains as the same was a clear hypothesis that he killed the deceased herein.

21. Mr. Mwalimu in his submissions dated 06.03.2024 submitted that the prosecution did not prove its case as is required. That the same was so for the reason that there are two glaring aspects that this court must interrogate from the testimony of PW2, PW5, PW6, PW7 and PW9. The same were to the effect whether the items allegedly recovered from the accused could link him to the offence herein and whether the items recovered were referred to the government analyst. That according to the prosecution, the police recovered a t-shirt, gumboots, a kikoi and a knife from the accused person's house all which had blood traces on them. However, PW2 in her testimony stated that upon examining the items, it was found that no trace of blood was found on the shirt and the gumboots but on the kikoi and the knife.
22. Learned counsel submitted that PW6 having used his own kikoi to wrap the deceased and the fact that the items examined by PW2, none of them matched the blood of the accused person herein, the only possibility is that the items produced in court had no link to the accused hence no connection to the case before the court. Reliance to that end was placed in the case of Republic v KNK [2016] eKLR where the court held that the government report exonerated the accused person for the reason that the DNA generated from the blood stains obtained from the red slippers did not match the DNA profile generated from the accused person. In the same breadth, PW5 who allegedly recovered the knife stated that the same smelt perfume and not blood showed a possibility that the said knife was not the very knife produced before the court.
23. It was urged that from the totality of the prosecution evidence coupled with the fact that there existed a grudge between the accused person and PW8, there was enough reason for the accused to be framed. It therefore followed that the circumstantial evidence relied upon by the prosecution did not satisfy the three tests as was enumerated in the case of Sawe v Republic [2003] eKLR. This court was therefore urged to acquit the accused person.
24. Mr. Kusow, counsel for the family in his submissions dated 01.03.2024 reiterated his submissions at the case to answer stage and further stated that a careful examination of the evidence herein points at the accused person as the perpetrator of the offence herein. That there is no room for co-existence of circumstances negating or weakening the inference that the accused was responsible for killing the deceased.
25. I have considered the evidence tendered before this court both by the prosecution and the defence and the rival written submissions together with that of the family. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The offence of murder is defined under section 203 of the Penal Code in the following terms; -

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
26. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients. Those ingredients are as follows: -
  - a. the death of the deceased and the cause of death;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and



- c. that the accused had malice aforethought.
- [See Johnson Njue Peter v Republic [2015] eKLR].
27. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused herein murdered the deceased [ See Woolmington v DPP [1935] AC 462]. The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” [See Miller vs Ministry of Pensions, [1947] 2All ER 372]. The question therefore is whether the above ingredients were proven to the required standards.
28. As for the proof of the death of the deceased and the cause of the death, PW1, PW4, PW5, PW6, PW8 and PW9 all testified as to having seen the body of the deceased. PW1 further testified as to having conducted post-mortem on the said body and upon which he formed an opinion that the deceased died as a result of multiple injuries due to a penetrating trauma. He produced the postmortem report as Pex 1. As such, the death of the deceased was proved.
29. Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In Guzambizi Wesonga v Republic [1948] 15 EACA 63 the court held that; -
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- [See Daniel Nzioka Mbuthi & another v Republic [2021] eKLR].
30. The cause of the death of the deceased herein was not excusable or authorized by law thus the same was unlawful.
31. As to whether the accused person committed the unlawful act which caused the death of the deceased, from the evidence, I note that there is no direct evidence linking the accused person with the death of the deceased. The prosecution is relying on circumstantial evidence to prove the case against the accused person.
32. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of Abanga alias Onyango v Republic CR A NO.32 of 1990(UR) in the following terms:
- a) The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.
- b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.
- c) 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.”
- [See also Simon Musoke v R [1958] EA71]
- [Also See Sawe v Republic [2003] eKLR and GMI vs R Cr. App. No. 38 of 2011].
33. Therefore, for this court to find the accused person guilty, the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. The accused



person denied committing the offence herein in as much as he acknowledged that the knife together with the clothes recovered from his house belonged to him. PW1 testified as to having conducted post-mortem on the deceased upon which he formed the opinion that the deceased died as a result of multiple injuries due to a penetrating trauma. PW2, testified that on 20<sup>th</sup> and 31<sup>st</sup> day of May, 2016, at the laboratory of the government chemist's department Nairobi, the items already listed elsewhere in this judgment were received from No. 219337 CI Lumatete of DCI Tarbaj.

34. PW5 stated that upon visiting the house of the deceased, they recovered gumboots, kikoi, a blood-stained t-shirt and a knife. PW9, the investigation officer herein in his testimony identified the dress and further produced the same as Pex 8. In doing so, he stated that the deceased was in the same dress at the time of death. Additionally, he testified that he remembered the dress as it was given to him at the health facility and thereafter, he forwarded the same to the government chemist.
35. In view of the foregoing, the investigating officer's report was corroborated with that of PW2 that indeed, the said dress was worn by the deceased at the time of death. Further, in her finding, PW2 stated that the DNA profile generated from the blood stains on the knife (item 2) and the kikoi (item 4) matched the DNA profile generated from the blood stains on the dress (item 1) indicated as belonging to the deceased. Having in mind that the accused person in his testimony conceded that the knife and the clothes recovered belonged to him, it is my humble view therefore that the nexus can't be wished away. It is in my considered view that indeed the accused person was at the scene where the deceased was found. The above was further corroborated with the findings of PW1 who found that the cause of death of the deceased was as a result of multiple injuries due to a penetrating trauma.
36. In the foregoing, it is my view that the defence was expected to give an explanation on the deceased's blood stains in his knife and the kikoi. [ See section 111(1) and 119 of the [Evidence Act](#)].
37. These sections stipulate as follows:

Sect. 111. (1) -When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Sec. "119- The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."
38. In the circumstances of this case, it is my holding that the accused person's defence failed to offer any explanation as to how the deceased might have met her death. His defense, in my mind was not only hollow but also amounted to a mere denial.
39. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person herein who unlawfully caused the deceased's death.
40. Finally, on the question of whether there was malice aforethought on the part of the accused, the Court of Appeal in the case of *Nzuki vs Republic*(1993) KLR 171 held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;



- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed...”

- 41. In the instant case, PW1 who conducted the post mortem on the body of the deceased formed opinion that the deceased died as a result of multiple injuries due to a penetrating trauma. From this piece of evidence, it cannot be denied that the accused person must have intended to cause the deceased grievous harm or death hence proof of malice a forethought.
- 42. In the end, I find that the prosecution has proved the case of murder against the accused person and I therefore find him guilty as charged and convict him accordingly.

**Dated, signed and delivered in open court this 24th day of May 2024**

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**J.N. ONYIEGO**

**JUDGE**

