



**Republic v Kairu (Criminal Case E006 of 2022)
[2024] KEHC 9730 (KLR) (25 July 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E006 OF 2022**

**HM NYAGA, J
JULY 25, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH KARIUKI KAIRU ACCUSED

JUDGMENT

1. The accused person Joseph Kariuki Kairu was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on 20th January, 2022 at Ikerero area in Nakuru North Sub County within Nakuru County he murdered Benson Rubia Mukatia.
2. The accused denied the charge. The prosecution called 13 witnesses in support of its case. Their evidence is summarised as follows.
3. PW1 was Salvin Cheruto Katukoi, a Senior Government Analyst. She stated that she holds a Bachelor in Bio chemistry from Kenyatta University. She testified that on 17th February, 2022, she received an Exhibit Memo from CPL Cyrus Nyakebondo and also the following:
 - a. Finger Nails of the deceased marked as 'A'
 - b. A clear polythene paper in a brown envelop marked as 'B'
 - c. 2 Nylon strings blue and yellow in an envelope marked 'C'
 - d. Wood Chippings in a brown envelop marked 'D'
 - e. A piece of wood in an envelope marked 'E'
 - f. A torn Blue canvas sheet marked 'F'



4. She testified that she found that items 'B' 'D', 'E' and 'F' were heavily stained with human blood while item 'C' had slight human blood stains. She analysed the said items and found out that the DNA profile generated from the blood stains on polythene paper, wood chipping, piece of wood, canvas sheet and the 2 nylon strings all matched the DNA profile generated from the fingernails sample of the deceased. She produced the said DNA report as P. Exhibit 6.
5. On cross examination, she confirmed she had not stated how the storage was done. She said it is important that the items be kept separate to avoid contamination and agreed that this did not happen and that the items were not well stored. She confirmed she did not receive any samples collected from the accused.
6. PW2 was Judith Sakwa Mukeya, the deceased's mother. She testified that on 19th January, 2022 at 10.00 am, he received a call from his daughter in law, Grace, saying that the deceased had not returned home. She tried calling the deceased but he was unavailable. Later, she saw a text message purporting to have come from the deceased, saying that he was going to Nairobi to work and he would not be coming back. Later, the caretaker, one, Ruth called and informed her that the deceased had been found dead. The following day in the morning he travelled to Provincial General Hospital Morgue and viewed the deceased's body.
7. On cross examination, he stated that he was not aware whether the deceased had any issues with his wife. He said initially when she got married to the deceased, her family resisted but they later relented.
8. PW3 was Dr. Titus Ngulungu a pathologist from Nakuru County Teaching and Referral Hospital. He said he conducted an autopsy on the deceased's body at Nakuru Annex Funeral Home on 25th January, 2022. Externally, he noted that the body had signs of blood loss, lack of oxygen and injuries on the head. That the injuries looked like puncture wounds of various sizes ranging from 70mm to 20mm. He added that the injuries were deep into the skull and brain matter was visible from the wounds. There was an imprint on the lower lip/chin region running towards the ears. He opined the same was caused by gagging of the mouth. He said there were no defense injuries noted. Internally, he found the lungs had collapsed, haematoma of the region between the scalp and skull, fractured skull, 7 puncture wounds which entered into the brain causing lacerations and cerebral haemorrhage. He formed an opinion that the cause of death was severe head injuries caused by punctures using a semi- sharp object in keeping with homicide. He produced Post Mortem Report as P. Exhibit 7.
9. On cross examination, he said he had not indicated that the deceased was strangled. He explained that cyanosis is blue colouration on a body, due to lack of oxygen. He stated that pulmonary arrest can lead to cyanosis. It was his further testimony that there was evidence of gagging of mouth with a material. He was categorical that the injuries were not consistent with mob justice as the same were focused on the head.
10. PW4 was Daniel Mwaniki, an assistant chief from Chania Sub-Location, Bahati Location in Nakuru North Sub County. It was his testimony that on 20th October, 2022 at 8.30 a.m. he received a call from villager, one Peter Irungu Njoroge, saying that while he was heading to work in the morning he saw a motor cyclist drop a huge luggage, then rode off. The said Peter directed him to the scene and upon arrival, he found a crowd. He saw a canvas bag with two pieces of timber tied to it. He alerted his senior, Emmaculate, the Deputy O.C.S Bahati Police Station and the officer In Charge, Karunga Police Post. Police officers arrived at the scene and they opened the canvas bag. Inside it, he saw a body of a male African. He did not know the deceased and no one in the crowd recognized him. The body had fresh blood stains. The police officers photographed the scene and took away the body. He also stated that Peter, who was present, showed them where the motorcyclist had dropped the luggage.



11. PW5 was Peter Irungu Njoroge. It was his testimony that on 20th January, 2022 at around 8 a.m. from a distance, he saw a motorcyclist hurriedly drop a luggage at the road bend and rode off from the scene. He moved towards the luggage and when he got near it, he saw it was a canvas bag tied with ropes. He got suspicious of the luggage and called the area chief and apprised him of the same. He waited for the chief who arrived after few minutes. A huge crowd gathered and when the police arrived they opened the luggage. He saw a body of a Male African, which was bleeding. He said the canvas was dark in colour and he positively identified it before court. He confirmed he did not see the Motor cyclist properly.
12. PW6 was Tabitha Muthoni, an aunt to the Accused. She said in November 2021, the accused went to live with her father. That in December, 2021 her father was found murdered in his homestead. That the accused was left to guard the compound. On 22nd January,2022 she received a call from the police officer saying that they wanted to gain access to the accused's house. She went there on 23rd January,2022 in the morning and she found the accused's house locked. The accused was absent. The police officers opened the door and they entered the house. Inside the house, she saw blood stains on the couch and oil poured all over the floor. She said 2 speakers of the woofer and a canvas used to dry cereals were missing. She added that on 24th January,2022 upon instructions by the D.C.I, she visited their office and they showed her 2 speakers and canvas material that she identified as belonging to her parents. She identified the canvas and two speakers before court.
13. During cross examination, she said she stayed far from her father's homestead and after his demise she only visited there once. She said she found the accused there. It was her testimony that she did not see the police dusting for fingerprints. It was her further testimony that the police officer had the house key.
14. PW7 was Mbugua Njoroge. He testified that on 20th January,2022 at 7.00 am while at his shop he saw motorcyclist riding a red motor cycle, make Boxer. It had a canvas on it which was dark in colour and supported by some pieces of timber which were about 2 by 2 inches. He stated that the pieces of timber resembled the ones he was shown in court. He did not see the rider clearly.
15. PW8 was Humprey Asirikwo. He testified that on 19th January,2022 at around 9.00 am he met with the accused. The accused wanted to sell to him a woofer. They discussed the price and later the deceased passed by his place and asked him to lend him Ksh.780/= . He did not have the money and so the deceased left. On the same day the accused called him using the deceased's phone enquiring if he had found the money to buy the woofer. He told him to call later and in the evening when the accused called, he confirmed he had the money. The accused went to his place with the woofer, make GLD and 2 speakers. He paid the accused Kshs.1200/= and he left. Thereafter he went home with the woofer. On 20th January, 2022 while at work, the deceased's wife went and asked him if he had seen the deceased. He told her no but he had sent him some cash that morning, and after doing so, he couldn't reach him on phone. He said he later learnt that the deceased's body had been found around the area. He went to the morgue and viewed it. It was his further testimony that later, he called the accused and his phone was picked by someone who described himself as a doctor, who informed him that the accused had been involved in an accident at Salgaa and had been taken to Nakuru for treatment. He visited the accused at the hospital. He said he realised the motor cycle that was involved in an accident belonged to the deceased and he alerted the police about the discovery.
16. On cross examination, he stated that he had seen the deceased with the accused before he went to ask him for money. He also stated that he was the one who identified the accused at the hospital. He explained that he had known the deceased's wife for over 10 years, but he had no relationship with her. He denied the accused's advocate's assertion that he went to the accused's house and stole the woofers in order to fix him.



17. PW9 was Grace Wanjiku Kariuki, the wife of the deceased. She testified that the deceased had bought a motor cycle registration No. KMFH 268 A, make Bajaj, black and red in colour and used it to operate a boda boda business.
18. The witness said on 19th January, 2022 the deceased went to work and did not come back. That at 22:50 pm she received a strange message from the deceased's phone number 0702302029 stating "Enda kwenu and Hutaniona tena. Nimeomoka". She said she had not argued with the deceased and when she got the message she showed a neighbour who advised her to wait for him to come home. On 20th January, 2022 she learnt from Wambui that the deceased's body had been found at Karunga. She went to the morgue and saw the body and confirmed that it was that of her husband. It had injuries on the head and neck. Later she gave the police the documentation for the subject Motor Cycle.
19. In cross examination, she stated that she was not aware of any grudge that the deceased had with anyone and the deceased never told her he had financial issues.
20. PW10 was No. 235224 Chief Inspector Simon Wahome, attached to D.C.I. Rift Region as the in charge of crime scene investigations.
21. He said on 2nd January, 2022 he was requested by the D.C.I Officer of Nakuru North Sub-County to assist in documentation of a murder scene along Bahati-Maili Saba Road. Upon reaching the scene, he saw a luggage wrapped in a bluish canvas material. They unwrapped it and found the body of a male person. The body had several cuts on the head. He took photographs of the scene.
22. He added that they also visited a house at Iherere village where he also photographed the scene. They also collected 4 items at the scene namely; piece of timber with chicken droppings, piece of chair with suspected blood; scrapping from wooden chair with suspected blood and a piece of nylon paper with suspected blood. He said he submitted all the said items to the government analyst and prepared the requisite certificate. He produced the said items and Certificate as Exhibit 17. He also produced a certificate dated 23.11.2022 relating to 3 photographs of a motor cycle as Exhibit 18.
23. On cross examination, he stated that the strings that were under the canvas were not before court. He said the canvas is blue and not black. He said it was not possible to process the scene for finger prints due to the nature of the surface.
24. PW11 was No. 247755 P.C John Ndegwa Ndungu attached to Salгаа police station as a driver. He stated that on 20th January, 2022 the station received a report of an accident that had occurred along Nakuru- Eldoret Road involving a lorry and a Motor Cycle. They visited the scene of the accident and found that the rider had been taken to the hospital by a good Samaritan. He took the motor cycle and took it to the police station. He said he never met the injured rider.
25. PW12 was Hellen Njambi Waweru. She stated that she lived near the place where the accused used to reside. She said that on 20th January 2022, while taking her child to school she saw a motor cycle parked near their homestead. It had a canvas tied to its carrier. There was no one near it. She identified the canvas before court.
26. In cross examination, she said the accused used to live with "guka" in the compound where she saw the motor cycle she said there were two houses there. She said the motor cycle was parked near the fence and she did not see anyone near it.
27. PW13 was No. 75479 Cpl Cyrus Nakebondo, attached to DCI Nakuru North. He stated that as part of an investing team, he visited the scene at Maili Saba Bahati Forest/Karunga area. Upon reaching there, they found the Deputy O.C.S from Bahati Police Station, other police officers and the area chief.



- He saw a canvas material, and a piece of timber suspected to have been used to support the canvas hold the body. The body was that of a male African and it had multiple injuries. He collected it and took it to the mortuary.
28. The witness added that on 21st January,2022, the Deputy O.C.S from Bahati alerted him that the murder suspect was admitted at P.G.H. Nakuru after being involved in an accident along Nakuru-Eldoret Road Highway while riding a Motor Cycle Registration Number KMFH 286 A. He went to the hospital and found the suspect admitted at Ward No. 10. He arranged to have him placed under police guard. On 22nd January 2022 he visited Salgaa Police Station and found out that the accident had been reported vide OB No. 14 of 20/1/2022. The subject Motorcycle was there. He went back to the hospital and recovered keys of the accused's house from him. On 23rd January,2022 in company of his colleagues they went to the accused's house at Maili Kumi area. He called the accused's aunt who showed them the accused's house. They opened the door and entered the house. Inside it, he discovered the house was disturbed, and there was oil poured on the floor and blood stains on the chair. The scene of crime was processed and he took part of a blood stained chair. He also collected some chippings, polythene paper and piece of timber and he prepared an exhibit Memo Form which he produced as Exhibit 1.
 29. He said during investigation he recovered 2 speakers and a woofer from PW8 which he produced as Exhibit 9. He confirmed Tabitha identified the canvas material, the said speaker and woofer as her late father's property. Later, the deceased's family availed the Motor Cycle document which showed the same was purchased on loan. He produced the relevant documents as Exhibits 17 and 18. He produced all other documents as exhibit No.19.
 30. In cross examination, he stated that they did not screen the Motor cycle for blood. He confirmed he had not produced the OB extract from Salgaa Police Station. He said the driver of the Motor Vehicle did not record a statement. He confirmed he did not collect any sketch maps of the accident and no eye witness of the accident testified. He confirmed there were discrepancies in regards to colour description of the canvas. e.g. Peter described it as black faded polythene bag, while PW7 stated that it was a black gunny bag, that PW12 stated that it was a black gunny bag while he stated that it was a blackish gunny bag. He testified that the actual colour was faded dark blue. He confirmed that they did not obtain either the call logs or the Mpesa transaction of the deceased's mobile phone data nor a mobile phone triangulation procedure. He said he did not find the accused with a phone or any personal property save for his keys. He said the accused did not sign any inventory in respect to the keys. He disputed framing the accused.
 31. On further cross examination, he said the OB did not bear the accused's name and the discharge summary did not bear the hospital stamp. He was of the view that the deceased was not killed at the scene but he had been transported there. He said the theft of the woofer and canvas were not reported and that the woofer was not tested for the deceased's blood. He clarified that no fingerprinting was done in the Accused's house due to the surface inside. He also conceded that they never found the murder weapon.
 32. By a ruling dated 29th February,2024 accused person was found to have a case to answer and accordingly put on his defence. The accused elected not to adduce any evidence. He did not file any submissions either. The prosecution did not submit as well.



Analysis and Determination

33. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved; the death of the deceased; that Accused caused the death and that he was actuated by malice aforethought.
34. Section 203 and 204 of the Penal Code, under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused, by an unlawful act or omission, caused the death of the deceased through malice aforethought.
35. The said sections read as follows:
- “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
36. I will now proceed to analyse the evidence to find if the Prosecution has established the said ingredients.
37. The post-mortem form P. Exhibit 7 produced by Dr. Titus Ngulungu reveals that the deceased died of severe head injury attended by skull fracture and brain laceration due to multiple semi sharp, semi-blunt trauma to the head in keeping with homicide.
38. Thus there is no dispute as to the cause of death. Based on the evidence of the pathologist and other witnesses, it is clear that the deceased died out of an unlawful act, which multiple trauma.
39. From the evidence tendered before court it is clear that none of the prosecution witnesses actually saw or witnessed the accused kill the deceased. Thus, there was no direct evidence linking the accused to the death of the deceased. The prosecution case on this aspect therefore is hinged on circumstantial evidence.
40. In the case of Ahamad Abolfathi Mohammed and Another vs Republic [2018] eKLR, the Court had this to say on circumstantial evidence:
- “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.’”
41. In Abanga alias Onyango vs Republic CR. App NO. 32 of 1990(UR) the court held as follows:
- “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.”

42. In *Sawe vs Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:

“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.”

43. It is thus the duty of this court to establish if the circumstantial evidence adduced leads to the irresistible inference that it was the accused and not anyone else, who killed the deceased.
44. So what is the circumstantial evidence adduced against the accused? I will analyse the same.
45. PW5 testified that he saw a motorcyclist drop a luggage on the road and rode off speedily. The luggage was later found to be the deceased’s body. Pieces of timber were used to support the body. The police were able to retrieve other pieces of timber from the accused’s house. They found that they that were similar in size and they had chicken/bird droppings of similar nature, suggesting that they came from the same source.
46. PW6 confirmed the accused lived in her father’s homestead and that she directed police officer to his house. She confirmed that the canvas bag belonged to her father, and was in their home, where the accused was residing.
47. Several witnesses confirmed that when the house was opened by the police, there were blood stains on the couch and oil had been poured all over the floor. The investigators were of the view that the oil was used to mask blood in the house. The analysis of blood stains on items found in the accused’s house were conclusive that the blood was that of the deceased. This evidence points to the fact that the deceased was assaulted while in the accused’s house.
48. PW8 told court that on the material day the accused had called him using the deceased’s phone enquiring whether he had gotten the money. The deceased’s wife and mother confirmed that they received strange messages from the deceased’s number. This confirms that the accused was in possession of the deceased’s phone on the day he went missing.
49. PW11’s testimony was that an accident occurred along Nakuru-Eldoret Road involving a motor vehicle and a motor cycle. PW9 testimony was that the subject motor cycle was found to belong to the deceased. He said the motor cyclist had been rushed to the hospital by a good Samaritan. PW8 testified that when he called the accused, a person who described himself as a doctor answered the call and told him the accused had been involved in an accident and had been taken to hospital for treatment. He went to the hospital and identified the accused.
50. From the above evidence, it is not in doubt that the accused was the one who was riding the deceased’s motor cycle and he was involved in an accident with it.



51. Based on the foregoing, I am satisfied, that the circumstantial evidence relied upon by the prosecution is strong and it forms a complete chain pointing irresistibly to the accused as the person who killed the deceased.
52. Having found that the prosecution has proved actus reus, the next issue for determination is whether malice aforethought can be inferred.
53. The offence of murder is complete when, “malice aforethought” is established. Pursuant to section 206 of the Penal Code malice aforethought is established if the 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.”

The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal 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.....”

54. In *Morris Aluoch vs Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*, the Court of Appeal cited the case of *Rex Vs Tubere S/O Ochen (1945) 12 EACA 63* with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.



55. Based on the evidence of the pathologist, it is clear the deceased was bludgeoned several times and sustained severe injuries that led to his death. The accused's house as described was the place where the deceased met his cruel death.
56. The circumstantial evidence points to the accused as the one who committed the offence. After killing the deceased, the accused wrapped his body in a canvas and dropped it on the road and rode off He took the deceased's motor cycle and phone after killing him. He then tried to make it look like the deceased had gone away voluntarily, by sending messages to his wife and mother. These are clear signs that the accused had the motive of killing the deceased.
57. In the circumstances, I am persuaded beyond reasonable doubt that the prosecution proved the presence of malice aforethought on the part of the accused.
58. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the information of murder beyond reasonable doubt.
59. Consequently, I record and enter a finding of guilty against the accused as charged.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer/Miruya

State Counsel Nancy

Accused present

