



**Republic v Murefu (Criminal Case E025 of 2022)
[2024] KEHC 10719 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E025 OF 2022**

**REA OUGO, J
AUGUST 9, 2024
(MURDER)**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALEX CHEMAO MUREFU ACCUSED

JUDGMENT

1. On the 29th of August 2022 Alex Chema Murefu hereinafter referred to as the accused person was arraigned in court and charged with the offense of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that; ‘ on the night of 30th June 2022 and the 1st day of July 2022 at Sango Trading Centre in Kimaeti Sub-county within Bungoma County, the accused person murdered Brigid Nasambu Wafula.
2. The accused person denied the offence and the prosecution called seven (7) witnesses to prove their case. Pw1 was Wekesa Luckson Natembeya. Pw2 was Benjamin Barasa Wekesa, Pw1’s father. Pw3 was Rose Nanjala Wafula. Pw4 was Joseph Butali Nati. Pw5 was Makokha Ngila Edward. Pw6 was No. 42672 Sgt Harrison Mugomo. Pw7 was Doctor Elly Kiplimo Kosgei.
3. The accused gave a sworn statement when put on his defense. He did not call any witnesses.

Prosecution Case

4. Pw1 testified that on 4.7.2022 he was with his brother Nixon in the shamba. They had cows that were grazing as they did their shamba work. Whilst there his brother went to move the cows to graze in another place when he came across a body. He did not see the body. They went home and reported to their mother. Pw2 recalled that on 4.7.2022 he went with his sons Dickson and Luckson to his shamba. He left them there. Later Luckson told him that they had found the body of a dead woman near the



- shamba. He went to the place and found the body near the edge of the river. He reported the matter to the area chief and then to the police who later picked up the said body. He did not know the person they found nor the accused person.
5. Pw3 recalled that the deceased Brigid was her daughter. On 30.6.2022 the deceased left her home with Hellen Nanjala. She did not see her daughter again. On the 6th of July 2022, she was told that a body had been found near the river. She sent her boys to check on the body at the mortuary and they found Brigid's body. She does not know the accused person.
 6. Pw4 testified that the accused is his brother. On 30.6.2022 the accused entered a bar where he was. The accused was with the deceased. (He recognized the deceased after being shown her photo). The accused sat with the girl at a different table. The accused bought them drinks. They were at the bar until 10 pm. The club where they were had disco lights. They left the accused and the lady in the bar. Later he was arrested. On being taken through his written statement by the prosecutor)he admitted that his wife had given the accused and the deceased a room to sleep in and that they found the deceased's body the next morning. The accused had run away by then. He did not see any injuries on the deceased. He urged his wife that they report to the police but she told him that they would be arrested. So, they decided to dispose off the body. They took the body and placed it near the river. His wife left him he does not know her whereabouts. Later he was arrested after 2 weeks.
 7. Pw5 testified that on 17.8.2022 while on duty at around 2.00 p.m. he received a call from the village elder Chrispinus Wanyonyi. Chrispinus told him he was with a lady with her mother-in-law. The lady was residing at Sango trading center Sawai village is her husband's home. He went to the scene. He found Maureen Chepkemoi and her husband Joseph Mati. They were quarreling over beans. The lady was complaining about her husband. The public told him that in the process of quarrelling the lady had hinted something that attracted their attention. She said she had hidden something about the family, that they had killed someone, and requested her to hide the information about the incident. This is what attracted the public and there was a discussion over it. He requested the lady to repeat what she said. He recorded her statement and requested the police to come and assist in the arrest. The lady and Joseph were arrested by the police and he was later called to record my statement. Maureen and Joseph are a couple. The incident happened when he was not in the office but he knew of it. They were referring to the murder of Brigid Nasambu. He didn't know the accused person before. He knew the deceased. She is from the neighboring village.
 8. Pw6 an officer attached to the DCI Bumula Kimaeti sub county recalled that, on 4.7.2022 at around 11.00 a.m. he was in the office when the DCI Bumula C.IP Evans Mwanga informed him that there was a case of murder which was reported at Sango Trading Centre within Kimaeti sub-county. He proceeded to the scene with PC Fredrick using Vehicle KCX 407 H. On arrival, they found the OCPD Kimaeti and Deputy OCS Mienga police station, Sgt Korir in charge of the police post, and other officers who had accompanied the team. They found the body of a female adult aged about 40 years around the river bank. The body had no injuries but her private parts had been interfered. The pant was on but there was inference. They removed the body to Bungoma mortuary. The body then was unknown and no one could identify the deceased. He booked her as an unknown female adult pending identification by the relatives. He recorded a statement from the witnesses. They also did the post-mortem after her relatives came to the office. Her mother and brothers accompanied them to the mortuary and they positively identified her as Brigid Nasambu Wafula from Malakisi village but not in Kimaeti sub-county or Sango. During the post-mortem, they removed a swab from her private parts which they took to the government chemist on 17.8.2022. He was in court when he got a call from the sub-chief Kisawai, who told him that he had received information that there were 2 suspects Joseph Mati and Maureen Kipchemoi. The 2 had a family dispute and the cause of the dispute was



that Maureen and Joseph had removed the body from the house and the wife said that the accused had spent the night with the deceased. That when Maureen went to the house she found the lady was no more. She called her husband to resolve the problem. The accused by then was at large. The 2 were in a confusion. They disposed off the body between 12.00 a.m. to 1.00 a.m. at the river bank. After interrogating the 2 suspects the 2 admitted they had removed the body to the river. They were told the accused Alex Murefu was the last person to be with the accused. He got information that the accused was at Cheptais. Through intelligence, he asked the police to visit his home. They got the accused and he was arrested and placed in police custody. This was on the 22.8.2022. He went with PC Okido with other officers. They picked the accused person from Bumula police station. They took him for mental assessment and blood samples were taken from the accused person. He prepared an exhibit memo form marked all the exhibits and forwarded the same to the government analyst in Kisumu on 15.11.2022. He produced Exhibit Memo as PEXT No. 1. The post-mortem was done on 9.7.2022. He attended the post-mortem. Pw7 Doctor Elly Kiplimo Kosgei a doctor at Bungoma Referral Hospital testified that he did the post-mortem on the deceased on 9.7.2022. On the general observation of the body, it was of a female of African origin about 42 years old. Her nutrition was good and she had a feminine physique with a height of 5.5 feet. The post-mortem changes at that time of death were as follows; She had formed rigor mortis bilaterally. On external appearance, she had leg bruises right hip bruise and right forearm bruise and discharge within the vaginal intraorgans. On the internal appearance the lungs were waterlogged i.e. the lungs were full of water. The lungs were swollen she had interstitial fluid most likely from suffocation. As a result of his examination, he formed the opinion that the cause of death was asphyxia from forceful drowning in water. He produced the post-mortem report as Pext NO. 1. During cross-examination Pw7 told the court that the cause of death was asphyxia from forceful drowning in water. That before the drowning the deceased was alive.

Defence Case

9. The accused elected to give a sworn statement. This is his defence; he is Alex Chema Murefu and is 45 years old. He stays at Cheptais Mt. Elgon. He does not know why he is in court. On 30.6.2022 and 1.7.2022 he was at my home at Mt. Elgon. He was at my shamba. He was making the fence of his shamba in Mt. Elgon Cheptais. He was arrested in August 2022. He was at my home when he was arrested. He knows Joseph made (PW4) He is his stepbrother. He has a different father and he has a different but one mother. Culturally if one is born out of wedlock you stay with your father. His mother got married in Kiswayi Bungoma. That is where Joseph was born. He was last in Kiswayi on December 15th 2021. He had gone to see my mother at the place she got married. One cannot sleep where she is married culturally. Cheptais is where my father is and where he was born. Joseph wanted him to give him a shamba and they didn't agree on that. He isn't of their family. The dispute was over the shamba. They had disagreed because of the shamba. When he was cross-examined he told the court that he did not know the deceased. He was not with the deceased on the material night. The dispute he had with Pw4 his step brother is over a shamba. He was alone at home. He had nothing to show that he was not at the place where the deceased was on the material night.

Submissions

10. The defense filed written submissions. The prosecution chose to rely on the evidence on record. This is the defense submission in brief; it is the burden of the prosecution to prove their case beyond reasonable. There is no dispute that the deceased died, however, the cause of death was asphyxia due to forceful drowning in water” which means the deceased died by drowning. That PW-7, the pathologist testified on oath that before being forcefully drowned, the deceased was still alive. He also stated that for the drowning to take place and for one to die of asphyxia as the deceased, one needs to be submerged in a large water body e.g. a river, lake, or swimming pool. On whether it is the accused who caused



the death of the deceased it was submitted that the prosecution did not produce any direct evidence linking the accused to the offence. All the witnesses who testified for the prosecution testified that they did not know the accused, did not witness the accused doing the act, and that they were seeing the accused for the first time at the dock during the hearing of this case. There was evidence that Morine Chepkemoi who brought up the issue of how the deceased was a very crucial witness in this case. Morine did not testify and as such one can not verify the veracity of her assertions. As such this Honourable court has been left to deal with assumptions and suspicions. These suspicions however strong they are cannot sustain a conviction as stated in the case of Republic-vs James Mwiraria [2015] eKLR where this court stated that:- “Suspicion, however strong, cannot sustain a conviction. I find that the charge of murder was not proved to the required standard i.e. beyond any doubt. There are lots of doubts in the prosecution evidence and those doubts must be resolved in favour of the accused” .

11. It was further submitted that the evidence against the accused was circumstantial. Counsel argued this court to note the principles to guide it on circumstantial evidence as follows; the principles upon which circumstantial evidence must be considered as laid out in the case of R. v. Kipkering Arap Koske & another, 16 EACA 135 as quoted with approval by this court in the case of Republic v Bwanadi Omar Bwanadi & another [2022]eKLR where this court restated the principles as follows: “ 29. The principles upon which circumstantial evidence must be considered were clearly laid out by the predecessor court of appeal in the case of R. v. Kipkering Arap Koske & Another, 16 EACA 135 as follows:- (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 possibility the crime was committed by the accused and none else’ 30. The same principles were restated in Sawe V Republic Criminal Appeal Case No. 2 of 2002, where the Court of Appeal stated 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 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 submitted that the burden never shifts to the party accused.

12. It was further submitted that the prosecution case is also that the accused was the last one to be seen with the deceased. On this, it was submitted the prosecution had not proved that the accused was the last seen with the deceased. Reliance was made on the Court of Appeal decision in the case of Republic -vs- Makokha (Criminal Case E001 of 2020) [2022]KEHC 13216(KLR) where the court held that: For the prosecution to successfully rely on the doctrine of last seen it must prove: (i) That the accused was seen by witnesses in the company of the deceased. (ii) That the deceased was found dead. (iii) That there was no possibility of the deceased to have left the company of the accused. It was further submitted that though Pw4 stated that the accused was the last one to be seen with the deceased there was no evidence adduced to corroborate this evidence, Pw4’s wife was not called and further, the evidence of the doctor was that the deceased died from asphyxia due to forceful drowning in water which occurred later that day. That it was PW-7’s expert testimony that the deceased was alive before being drowned. Lastly, it was submitted that there was no malice aforethought proved on the part of the accused and that the case was preferred against the accused on mere suspicion. The accused urged this court to acquit him of the charge of murder.



Analysis and Determination

13. In any criminal the prosecution must prove their case beyond reasonable doubt. Murder is defined by section 203 of the Penal Code as; “any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” The prosecution has the onus of proving that; a death has occurred, the death was caused by an unlawful act or omission of the accused person before the court, and that the accused person caused that death with malice aforethought.
14. On the issue of death, there is evidence that the cause of death of the deceased was asphyxia from forceful drowning in water. Doctor Elly did the post-mortem on the deceased. Pw2 and Pw3 saw the body of the deceased.
15. On whether the accused caused the unlawful death of the deceased. The prosecution case is that the accused was seen with the deceased on 30.6.2022 at a bar drinking and that later the wife of Pw4 gave them a room to sleep. The next day Pw4 and his wife found the deceased in the house and took her body to the river and they feared reporting the matter to the police in case they were arrested. None of the witnesses saw the accused cause the death of the deceased. As correctly submitted the evidence adduced against the accused is circumstantial evidence. Am guided by the principles in the case cited by the defence on what to consider when evaluating circumstantial evidence. The fact must be such that they point to the accused person as the only one who could have caused the death of the accused. The only evidence that links the accused person to the alleged murder is the evidence of Pw4. Pw4 told the court that his wife let out a room to the accused and the deceased and that the next morning they found the body of the deceased in the room. She had no injuries. By then the accused was not in the room. They decided not to report the matter to the police. His wife decided that they take the body and dispose of it. They took the body and placed it near the river bank and the next day the body was found. They were arrested but later released. During cross-examination, he told the court that he could not tell if the deceased was dead or alive when they found her. He recalled that the accused and the deceased had been drinking the previous night. The cause of death as per the evidence of doctor Elly Kosgei was asphyxia from forceful drowning in water. The doctor testified that there was evidence that she had leg bruises on the right hip and right forearm and a discharge within her vaginal inteorgans and on the internal appearance the lungs were waterlogged and swollen and that she had interperal fluid most likely from suffocation. During cross-examination, he told the court that the deceased was alive before the drowning. It was the evidence of Pw4, they took the deceased’s body to the river. The accused was not with them, he had left as per his evidence. Pw4 took the deceased to the river and they caused the drowning of the deceased. The cause of death was asphyxia from forceful drowning. The prosecution has failed to show that the accused was responsible for the death of the deceased.
16. Even if the accused was last seen with the accused. He remains a suspect. The Court in the case of Republic vs James Mwiraria [2015] held that “Suspicion however strong cannot sustain a conviction.”. The accused cannot be held to be the one responsible for the death of the deceased. He could have been with the deceased the previous night, but the evidence adduced indicates she was still alive when she was taken to the river bank. Further, samples were taken from the deceased’s body, but, the result from the government analyst was not tendered in court to prove that indeed the accused had been with the deceased the night before Pw4 and his wife found her in the room. The accused denied being with the deceased on the said night. His alibi was not investigated. Sufficient evidence of corroboration is lacking on the part of the prosecution.
17. It could be that the Investigating Officer in this matter left the real perpetrators to go free. Maybe an inquest should have been conducted to find out what happened. Had the investigating officer taken



time to properly investigate this matter they could preferred charges against Pw4 and his wife. I need not make a finding on malice aforethought.

18. In conclusion I find that the prosecution has failed to prove their case beyond reasonable doubt. The accused person Alex Chemaio is acquitted of the charge of murder as charged. He is free to go unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA ON THIS 9TH DAY OF AUGUST 2024.

R. E.OUGO

JUDGE

In the presence of;

Alex Chemaio/ Accused person - present

Mr. Webo -For the Accused

Miss Matere - For the State

Wilkister - C/A

