



**Republic v Kubai (Criminal Case 2 of 2019)
[2024] KEHC 11311 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 2 OF 2019
GL NZIOKA, J
SEPTEMBER 23, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH NJUGUNA KUBAI ACCUSED

JUDGMENT

1. On the 23rd day of January 2019, the accused was arraigned before the court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the charge are that, on the 7th day of January 2019, at Gatitu village at Kinangop Sub-County within Nyandarua County he murdered Jane Waithera Maina.
3. The charges were read to him and he pleaded not guilty. The case proceeded to full hearing. The prosecution case is that, on the material date, the 7th day of January 2019, the deceased Jane Waithera Maina was staying with her mother (PW1) Grace Njambi Maina at Njoya, Nyakio location at Gatitu.
4. That she left the house at 7.30pm to go and pick a basin (Kurai) from the accused's house but by 8.30pm she had not returned home as such her mother decided to inform her sons, (PW2) John Gago Maina and (PW3) Paul Macharia Maina to look for the deceased.
5. John Maina (PW2) testified that, they proceeded to the accused's house and upon arrival, they called him out and after 5-10 minutes the accused opened the door carrying a panga. That when asked whether he had seen the deceased, he answered that, he had not seen her that evening.
6. In the meantime, (PW3) Paul Macharia called out the deceased's phone and he could hear the phone ringing within the vicinity of the deceased's homestead. That he went near where the phone was ringing and found the deceased lying on the ground. She was dead.



7. PW's scream alerted the brother (PW2) John and other neighbours who had joined in the search and it was confirmed that, the deceased was dead. The police officers from Kwa Haraka Police Station were called and took the body was to the morgue for post mortem.
8. That post mortem examination was conducted by Dr. Ngulungu who formed the opinion that, the cause of death was asphyxia due to neck pressure keeping with manual strangulation throttling.
9. No. 230922 Inspector Alexander Njagi (PW4) the investigating officer testified that, he charged the accused following the post mortem results that the cause of death was strangulation and further the deceased's body lay too close to the accused's house. That he concluded that the accused wanted to move the body to another location.
10. At the close of the prosecution case, the accused was placed on his defence. He told the court that, on the 7th day of January 2019, he went home at 7.00pm. that he untied the cow and went to cook. That at 10.00pm people knocked on the door of his house, and John (PW2) told him that there was a lady who had gotten lost and they were looking for her. Further that, there were other people surrounding his compound.
11. That he hid himself and called the police officers and was advised to go back home as those people may have been passing by. That earlier he heard the people surrounding his house asking "who brought this body here" and as he was going back, he heard screams and ran back to the police station. He denied killing the deceased stating that, she was from the same village with the deceased and had no motive to kill her.
12. At the conclusion of the trial, the state relied on the evidence adduced while the defence tendered submission dated 25th January 2024. It is the defence submissions that, the prosecution has not proved the case beyond reasonable doubt. That, there was no eye witness to link the accused to the commission of the offence. Further no DNA report was produced to determine whether the accused killed the deceased or not.
13. Further, it is curious why the deceased's brothers went to look for her in less than six (6) hours of missing and targeted the accused's house. Furthermore the recovery of the deceased's body near the hedge surrounding the accused's house is not proof of the accused's commission of the offence.
14. Furthermore, the prosecution is relying on circumstantial evidence and no proof of the accused's involvement in the crime herein. The defence further relied on the provisions of section 206 of the Penal Code to submit that, there is no proof the accused had malice aforethought to warrant him kill the deceased.
15. That all the witnesses testified that, they had no quarrel with the accused, which is proof of lack of motive for the accused to have killed the deceased. The defence cited and relied on the case of Oumavs- Republic (1986) KLR 619 where the Court of Appeal stated that a court while evaluating the prosecution evidence must have in mind the accused's defence and satisfy itself that the prosecution evidence left no reasonable possibility the defence being true, and where there is doubt the benefit goes to the accused. The defence urged the court to give the accused the benefit of doubt and acquit him.
16. At the conclusion of the case and in considering the evidence on record I find that, the key question to address is whether the prosecution has proved the case beyond reasonable doubt.
17. In that regard, it is settled law that the burden of proof in criminal cases lies on the prosecution to prove the case beyond reasonable doubt. On the other part, the burden of proof for the defence is on



- the preponderance of evidence. Thus the burden of proof never shifts to the accused to prove his or her innocence.
18. The afore settled principles of law are based on the doctrine of presumption of innocence, as stipulated under Article 50(2)(a) of *the Constitution* of Kenya 2010: -
- “(2) Every accused person has the right to a fair trial, which includes the right—
- (a) to be presumed innocent until the contrary is proved;”
19. In evaluating the evidence herein, it is notable that, the offence of murder which the accused is charged with is provided for under section 203 of the Penal Code which states: -
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
20. The ingredients of the offence are settled through various decision. The Court of Appeal in the case of; Joseph Githua Njuguna vs Republic (2016) eKLR stated as follows: -
- “Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are: (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See Milton Kabulit z& 4 others v Republic [2015] eKLR.”
21. Pursuant to the afore the elements of the offence are settled as:
- a. Proof of occurrence and/or cause of the death of the deceased
 - b. That the accused committed the act which caused the offence
 - c. That the accused had malice aforethought.
22. In the instant matter there is no dispute that, the deceased died on the 17th day of January 2019. That fact is supported by the evidence of the mother (PW1), brothers (PW2) and (PW3), and corroborated by the pathologist’s post mortem report produced by Dr. Ngulungu (PW5). Therefore the occurrence of the death is adequately proved.
23. In the same vein, the cause of the death is not in dispute. It is indicated in the afore said post mortem report that, the deceased died as a result asphyxia arising from manual strangulation. Thus cause of death is well established.
24. The key question is whether, the accused murdered the deceased. From the evidence of the deceased’s family members (PW1), (PW2) and (PW3) the deceased left home to go and pick basin from the accused’s house. There is no evidence as to whether she actually reached the accused’s house or not.
25. However, there is no dispute that, the deceased body was recovered near the accused’s house. The question that arises is whether the recovery of the body near the accused’s house is sufficient evidence that, he killed the deceased.
26. It suffices to note that no one saw the accused kill the deceased. Thus there is no direct evidence. The case is thus based purely on circumstantial evidence.



27. The law on circumstantial evidence is settled. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows: -

“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 mine)

28. In summation, the afore case law thus requires that, before any conviction is based on circumstantial evidence, that evidence must be adequate to prove the case on the required standard of beyond reasonable doubt.

29. Further circumstantial evidence requires interpretation or inference to reach reasonable conclusion. In that regard, the court will admit circumstantial evidence if it meets the following criteria

- a. The evidence is logically connected to the case.
- b. The evidence must prove or disapprove a fact relevant to the case.
- c. The evidence should be reliable, trustworthy with minimal chance of falsehood.
- d. Its potential to influence a decision should not outweigh the probative value.
- e. The evidence should not be hearsay

30. Pursuant to the afore, circumstantial evidence may include: -

- a. Physical evidence for example finger prints or DNA that connects the accused to the crime or scene of crime.
- b. Documentary evidence for example documents records, text messages that support inference of guilt.
- c. Behavioural evidence that includes accused’s action that points to guilt or involvement in the crime. The example thereof includes running away after the offence is committed or attempting to destroy evidence.

31. However, it is notable that circumstantial evidence is admissible if it is corroborative. That, it bolsters a case when combined with other evidence.

32. In the instant matter there is no evidence of DNA, fingerprints or document that can incriminate the accused. In the same vein, the accused is reported to have fled to the police station when his home was invaded. The investigating officer (PW4) No. 230922 IP Alexander Njagi and the arresting officer (PW6) No. 255043 PC Joseph Karanja corroborated the accused’s evidence to the effect that, he took himself to the police station.



33. Further, evidence reveals that, there was no bad blood between the deceased, her family members and the accused. Furthermore there is no evidence that, the accused had malice aforethought to kill the deceased. As of malice afore thought section 206 of the Penal Code states that : -

“Malice aforethought shall be deemed to be established by evidence proving 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; or
- 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.

34. The evidence herein evaluated holistically reveals that there is a possibility the deceased could have been killed before she reached the accused’s house as there is a possibility she reached the accused’s house and was killed by the deceased.

35. However, as aforesaid before a court can convict on circumstantial evidence and draw the inference that the accused committed the offence, it must be satisfied that, there are no other co-existing circumstances which could weaken or destroy the influence of guilty.

36. In *Rex vs. Kipkerring Arap Koske & 2 others* [1949] EACA 135 the Court of Appeal stated:

“In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

37. Consequently, based on the possibility someone else could have committed the offence the benefit of doubt accrues in favour of the accused. I therefore find and hold that a conviction herein would be unsafe. I am inclined to give the accused that benefit of doubt and I acquit him.

38. However, before I pen off, I made an observation that, while the investigating officer was testifying he made a statement to the effect that the accused and deceased had a love affair. He did not expound on the same and neither did the prosecution probe the allegation

39. If indeed that was the case, it was an opportunity to establish a motive and possibly link the accused to the offence. All in all the investigation herein was casual and left the case bare.

40. I accordingly acquit the accused under section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

DATED, DELIVERED AND SIGNED ON 23RD DAY OF SEPTEMBER, 2024



GRACE L. NZIOKA

JUDGE

In the presence of:-

Mr. Ndiema for the State

Ms Mueni H/B Mr. Waweru Nyambura for the accused

Mr. Komen – Court Assistant

