



**Republic v Shikhubari (Criminal Case 36 of 2011)  
[2023] KEHC 2651 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 36 OF 2011  
WM MUSYOKA, J  
MARCH 24, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SILVESTER CHIKOLO SHIKHUBARI ..... ACCUSED**

**JUDGMENT**

1. Silvester Chikolo Shikhubari is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. Particulars of the offence allege that on the 18<sup>th</sup> – 19<sup>th</sup> day of May 2011, at around 20.00 Hours, at Ikumbura Village in Shiseso Sub-Location, Shisele Location, Kakamega South District within Western province, he murdered Rose Khamoye, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 4<sup>th</sup> July 2011. The hearing of the case for the prosecution commenced on 6<sup>th</sup> February 2012. 6 witnesses testified.
2. The first on the stand was Julius Echesa, who testified as PW1. He stated that on 19<sup>th</sup> May 2011, the Assistant-Chief of Shiseso Sub-Location came to his home at 4.00 PM, and informed him that his brother, the accused, had killed his wife, the deceased herein. He accompanied the Assistant Chief and the police to the home of the accused, which was nearby. They found the body of the deceased lying on the bed, with an injury on the shoulder. The body was removed to the mortuary by the police. PW1 found the accused in the police cells at Kakamega Police Station, where he had taken himself. He stated that the accused and the deceased had 6 children, who used to sleep with their grandparents in the same homestead. He stated that the deceased was buried at her parents' home. He said he did not know why the accused killed his wife.
3. Anne Chikolo testified as PW2. She was the daughter of the accused and the deceased. She told about how she got home from school on 18<sup>th</sup> May 2011, at 7.00 PM, and found the deceased, who instructed her to prepare the evening meal. The accused then arrived almost after that, and asked them whether they knew the owner of the home. He took a stick and waved it at them, whereupon she took a



small child, and they ran into a banana farm, and hid there till 10.00 PM, because they feared that he would beat them. She was with Prisca Netia, Michael Munyasa and Beverlyne Khakali. Thereafter, they decided to go to the home of a neighbour called Rose. She said that the accused was not drunk, but was very angry, and they wondered why. She said that the deceased also fled from the accused. The next morning they left for school, from the home of Rose, for they had their books and uniform. On the way to school, they met a woman called Grace, who was with another woman. She told them that their mother was dead, whereupon they decided to go home. At home, they found the Assistant Chief, and police officers from Malaika Police Station. The Assistant Chief informed them that their mother had died. At 8.00 AM, the body was removed for the mortuary. She said that she did not witness the death of the deceased as she and all the other children had run away. She explained that although the accused used to drink, on that day he was not drunk, and that he rarely used to differ with the deceased. She said that the deceased used to drink occasionally.

4. Robert Mugo, a police constable, number 39362, testified as PW3. He stated that on 19<sup>th</sup> May 2011, at 3.00 AM, the accused came to Malaika Police Station, and reported that he had differed with his wife, the deceased, and upon beating her, she died. He was booked, and placed in the cells, and PW3 and other police officers left for his home. When they got to the home, they found it locked. They met the area Assistant Chief, Pius Shibanda. They entered the house, and found the body of a woman covered with a blanket. They confirmed that she was dead. She had a stab wound injury at the left shoulder, which indicated that she had been stabbed from the back. They collected a number of items from the house, being a knife, a pair of grey track suit trousers, a torn white t-shirt, a multi-coloured woman's top and a pair of jeans trousers. They had blood stains. An exhibit memorandum was prepared by Police Corporal Kiprotich on 2<sup>nd</sup> August 2011, for the purpose of forwarding the items to the Government Chemist. The accused was subsequently charged with murder. He stated that it appeared as if there was a struggle in the house, for clothes had been thrown around the room.
5. Lawrence Kinyua Muthuri followed as PW4. He worked for the Government Chemist, as an analyst. He received items from Corporal Kiprotich, on 2<sup>nd</sup> August 2011, being a knife, a pair of blue jeans trousers, a pair of greyish track suit trousers, a multi-coloured sleeveless blouse, a torn white t-shirt, a blood sample from the accused and a blood sample from the deceased. He was asked to examine the knife and items of clothing, to determine presence of blood stains. After examining the items, he found human blood on the knife, the t-shirt, the blouse and the pair of track suit trousers. He did a deoxyribonucleic acid (DNA) profiling on the blood stains, using the samples provided. The results were that the blood stains on the knife, the pair of track suit trousers, the blouse and the t-shirt all matched, and were from an unknown woman; while the DNA profile generated from the blood stains on the pair of jeans matched the DNA generated from the accused. He prepared a report, which he dated 17<sup>th</sup> April 2013, which he signed. He said the knife only had 1 DNA profile, that of a female, none for the accused was found. He said that none of the stains on the items matched the blood sample of the deceased. He said that there was no mixed profile, of the blood of the accused and the deceased.
6. Dr. Dixon Mchana Mwaludindi testified as PW5. He was the pathologist who conducted post-mortem on the body of Rose Angitsa Mutsotso. The post-mortem form had been filled by Police Constable Owino Asin, and the body was identified by Boniface Shitaha and Jesica Indasi. It had minor bruises on the left cheek, and extensive bruising on the front upper collar bone. There were contusions on both shoulders. The entire back had several small injuries. There were 3 minor abrasions on the neck. The outer side of the left thigh had 3 bruises. There was a contusion below the chin. Internally, there was extensive bleeding under the skin on the chest; fractures of the 2<sup>nd</sup> and 3<sup>rd</sup> ribs; a huge clot just above the scalp; bleeding below the scalp; an unstable fracture of the neck; and bleeding into the muscles of the neck on the bone of the neck. He opined that the cause of death was the unstable neck fracture, secondary to blunt trauma. He took a blood sample for DNA testing. He said that the bruises were



probably caused by blunt objects, and there were injuries that were caused by sharp objects. He said that the neck fracture could not have been caused by a fall.

7. Chief Inspector of Police Cyrus Njagi, service number xxxx, testified as PW6. He was in charge of the Malaika Police Patrol Base, on 19<sup>th</sup> May 2011, when he was woken up at 3.00 AM, by an officer called Dominic Barasa, a police constable. He was informed that someone had come to the base, with a report of a killing. He woke up, and when he went to the base, he found the accused. He interrogated him. He said that when he got to his home at 10.00 PM, he found his wife sleeping in the house with a man he did not know, and when he began to fight the man, the wife tried to separate them, and the accused hit her by mistake, and she died. He woke up a number of officers so that they could proceed to the scene. He instructed Corporal Kiprotich to contact the area Assistant Chief, to escort them to the home, to confirm the report. The team met the Assistant Chief on the road, and he took them to the home. They found the outer door closed, and it had blood stains. They opened the door, and found the body of the deceased lying on the bed, covered with a blanket. There were blood stains on the floor. A panga and a blood stained t-shirt were also at the scene. He asked the Assistant Chief to call a brother of the accused, who came to the scene, and stated that the deceased and the accused had a dispute at about 11. 00 PM. He heard him shouting, saying that he did not know who had bought liquor for the deceased, and who had brought her home on a motorcycle. He called for scenes of crime personnel. They came and took photographs. The deceased had an injury on the right shoulder. Outside the house, they found a blouse, which was blood stained. They took the exhibits, and removed the body to the mortuary. He passed by the Malaika Patrol Base, called out for the accused, and noted that he was wearing a pair of bloodstained trousers. He asked his brother to bring him clothes to change. When the change of clothes was brought, it turned out that the accused was wearing 2 pairs of trousers, a jean on the outside and a track suit on the inside. The brother of the accused also brought a knife, which had bloodstains, and was said to have been found inside the accused person's box. He said that the deceased appeared to have been stabbed. The panga at the scene did not have bloodstains, but the knife had them, and was subjected to DNA testing. He said that the body of the deceased did not have clothes. He said that he saw a stab wound on the body.
8. The prosecution case closed on 14<sup>th</sup> November 2018. The defence asked for typed proceedings to enable them prepare and file written submissions. On 12<sup>th</sup> October 2020, Mr. Munyendo, for the defence, indicated that he was not going to file written submissions, and asked the court to make a ruling on the matter of whether or not there was a case to answer. That ruling was made on 18<sup>th</sup> December 2020. I ruled, that the accused person had a case to answer, and I put him on his defence.
9. The defence hearing happened on 1<sup>st</sup> July 2021. The testified that he left for home after duty, on 18<sup>th</sup> May 2011, at 6.30 PM. He got home at night, and found his wife sleeping. He called out her name. No one answered. When he entered the house, he found her body cold. He then went to report at the police station. The police said they would investigate, and they then took him to Kakamega Police Station. He said that he was not aggressive. He did not find the children at home. There was no one at home. He asserted that he did not kill his wife, Rose Khamoya. He said that he did not understand why the children blamed him for the death of their mother, yet he had not disagreed with them.
10. At the close of the oral hearings, the accused, through his Advocate, Mr. Munyendo, indicated that he would file written submissions, and asked for typed proceedings. The proceedings were typed, but on 6<sup>th</sup> June 2022, he, through Ms. Muthami, indicated that he would not be filing written submissions, and asked for a date for judgment.
11. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of it, the role of the accused person in the causation, and the fact that the death is caused by the accused with malice aforethought.



12. From the material before me there is prima facie proof that the deceased in fact died. PW1, PW3 and PW6 saw her dead body lying on a bed at the house she shared with the accused. PW2 was present when her body was removed to the mortuary. The pathologist, PW5, conducted a post-mortem on a body said to be that of one Rose Angitsa Mutsotso. The deceased, according to the charge is Rose Khamoye, and it was not indicated whether or not the 2 were the same person. None of the witnesses stated whether Rose Khamoye was also known as Rose Angitsa Mutsotso. PW1 and PW3 talked of seeing a stab wound injury to the back of left shoulder, but PW5 noted multiple injuries, including an unstable neck injury, which he opined was the cause of the death. Given that the names of the person identified in the charge sheet as the deceased, and that in the post-mortem report do not tally, I find myself in difficulty, with respect to deciding whether or not the body that PW5 examined was that of the deceased herein, and to conclude that the cause of death that PW5 stated was that in respect of the person whose name appears in the charge sheet. My difficulty is compounded by the fact that the persons who identified the body for post-mortem purposes, that is to say Bonface Shitaha and Jesca Indasi, did not testify. There is prima facie evidence that the deceased, Rose Khamoye died, but the cause of her death is unknown, since the cause of death, that PW5 testified on, related to the death of one Rose Angitsa Mutsotso, appearing as Rose A. Mutsotso in the post-mortem report placed on record, dated 25<sup>th</sup> May 2011.
13. So, who was responsible for the death of the deceased? According to the prosecution, the accused went home at about 7.00 PM, on 18<sup>th</sup> May 2011, very angry, caused a commotion, which caused members of his family to scatter into the night, that is his children and his wife, the deceased. That was according to PW2, his daughter. She said she was present when he chased them away. She and the other children ran in one direction, and it would appear that the deceased went in a different direction. PW2 ended up in a neighbour's house, where she slept till morning. She did not know what happened to the deceased after they left their home. If, indeed, the deceased fled, it is not clear from the evidence when she went back to the house.
14. PW2 was the only person who was at the scene, at least at the initial stages, for she was not present when the actual killing happened. The other witnesses were all government officials, except for PW1, and they all were involved in the happenings after the event, that is to say PW3, PW4, PW5 and PW6. According to the police witnesses, PW3 and PW6, the accused person took himself to the police after the killing, and reported that he had killed his wife after a dispute. PW6 said that the accused told him that he had found a man at his house sleeping with the deceased, and during his confrontation with that man, the deceased was fatally injured. He also said that he interviewed a brother of the deceased, who informed him that he heard the deceased and the accused disputing that night, with the accused asking her who had bought her liquor, and who had brought her home. PW1 said that he was a brother of the deceased, but he did not testify about that, and it is not clear whether he was the brother of the deceased that PW6 was talking about. Either way, whatever PW6 told the court was told to him by the said brother of the accused amounted to hearsay. What the accused informed the police would also amount to hearsay, and it would have perhaps helped if what was recorded in the occurrence book for that day was presented before the court. In his defence, the accused person did not support the version, that he reported to the police, that he had killed his wife in the course of a domestic fight, rather he said he found her dead, and that he was not responsible for her killing.
15. The forensic evidence does not help either. The items that were collected from the scene, and presented in evidence, did not yield positive results, when subjected to DNA testing and profiling, as they did not link the accused to the murder. The knife, the t-shirt, the blouse and the pair of track suit trousers were found stained with blood from an unknown female, that was to say the blood on them did not match the sample provided and alleged to be that of the deceased. The body of the deceased was naked,



when PW6 saw it on the bed. The items of clothing subjected to DNA were not removed from her body. PW3 and PW6 testified that they collected them from within the house or compound, and none of the witnesses, including PW2, connected them to the deceased or even the accused. Did they belong to the deceased? Were they even collected from the home, given that no inventory, of their recovery, was produced in court? Only 2 items were collected from the person of the accused, the jeans pair of trousers and the pair of track suit trousers. He had them when he went to report to the police, and was in police cells in them. None of them were found to have the blood of the deceased. One of them had the blood of an unknown female.

16. As there is no direct link between the accused and the death of the deceased, culpability can perhaps only attach on account of circumstantial evidence. PW2 placed him at the scene, when he caused everyone to scatter, including the deceased. She said, in her testimony, “My mother had also ran away from the accused.” So, if the deceased had also run away, did she go back to the house? And if she did go back, at what stage, and who was at the home at that time? After the accused allegedly chased his family away, did he remain in the home, or did he leave? And if he did leave, did he go back? And if he did go back, at what stage? This ought to be taken together with the fact that the items recovered from the scene, and from the accused person, did not bear the blood of the deceased. The circumstantial evidence is, therefore, weak, and it does not inexorably link the accused to the death of the deceased.
17. The next consideration is whether he caused the death with malice aforethought. Did he have malice aforethought? Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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;
  - (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.”
18. Under section 206, malice aforethought is to be inferred where an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from custody of a person and in the process a death is caused.
19. One of the factors considered, to determine whether or not there was malice aforethought, is the nature of the injuries sustained by the deceased, that caused her death. In this case, there is a mystery as to cause of death, for the witness who testified on that, PW5, talked of injuries sustained by a person other than that named in the charge sheet. PW5 identified the person whose body he examined as Rose Angitsa Mutsotso, which rhymes with the name in the post-mortem report, Rose A. Mutsotso, but the deceased person, according to the charge sheet is Rose Khamoye. So, the cause of the death of Rose Khamoye is unknown. PW1, PW3 and PW6 talked of an injury to the left shoulder of the body they



found on the bed. None of them talked of the extent of that injury. None of them talked of blood on the bed or bedding, for PW3 and PW4 talked only of blood stains on the items that they recovered. PW4 described the stains on most of the items as being slight, and that only the blouse had heavy blood stains. However, the blood on those items was found to be not that of the deceased. It cannot, therefore, be gauged, from the testimonies of PW1, PW3 and PW6 that the injury they saw was life threatening. The court can only go by the medical evidence, which is unreliable, for the reasons given above. Consequently, there is no material upon which it can be inferred that the accused had malice aforethought, if indeed, he was the one who inflicted the injuries that were said to have caused the death or were noted on the body recovered by PW3 and PW6.

20. Overall, the evidence presented by the prosecution falls short of establishing beyond reasonable doubt that the accused caused the death of the deceased person. The case by the prosecution relied too heavily on evidence from the government officials, who only came into the picture after the death was reported. Only 1 witness testified on the events before the death. The prosecution should have called more witnesses on the happenings before the death was reported, to shed light on the circumstances or the context within which the death occurred. There were houses within the compound, occupied by relatives of the accused, those relatives should have been called. It was said, by PW6, that a brother of the accused was interviewed, and talked of hearing a loud quarrel between the deceased and the accused, on the material night. He was a vital witness who should have been called, to give more details of the circumstances, and more crucially to place the accused and the deceased together at that crucial time. That same person was said to have assisted with recovery of exhibits, for it was he who took the knife, placed on record as an exhibit, to the police. The omission to call him, left a gap, and created a doubt, that has to be resolved in favour of the accused person. PW1 described himself as a brother of the deceased. It did not come out clearly whether he was the same brother that PW6 talked about. If he was, then he did not testify on the issues that PW6 referred to him about, and it behoved the prosecution to have him testify on those issues. The evidence of PW5 also needed to be handled, by the prosecution, in a manner that would have sought to connect the deceased named in the charge sheet, with the person whose body he conducted the post-mortem on. As matters stand, the 2 appear to be different persons, yet there is a possibility that Rose Khamoye and Rose A. Mutsotso referred to the same person.
21. In view of everything stated above, I do find and hold that the accused herein is not guilty of the offence of murder, of Rose Khamoye, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I acquit him accordingly, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya. He shall be set free, unless he is otherwise lawfully held.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF MARCH 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Munyendo, Advocate for the accused person.

