



**Moronge v Republic (Criminal Case 017 of 2015)  
[2023] KEHC 27500 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27500 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE 017 OF 2015  
RPV WENDOH, J  
MAY 18, 2023**

**BETWEEN**

**JOSHUA CHACHA MORONGE ..... ACCUSED**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The accused Joshua Chacha Moronge faces a charge of murder contrary to Section 203 as read with Section 205 of the Penal Code.
2. The particulars of the charge are that on 15/3/2015, the accused murdered Esther Ghati.
3. The prosecution called a total of six (6) witnesses who testified in support of their case.
4. The accused was granted bond and he absconded on 22/3/2016. A warrant of arrest was issued and the surety was summoned but in the end, he did not produce the accused. By a ruling dated 28/6/2019, J. Mrima directed that the case proceeds in the absence of the accused in accordance with Article 50(2) (f) of *the Constitution*.
5. PW1 Marwa Vincent Martin is a cousin to the accused. He testified that in January, 2015 the deceased who had secured a teaching job at Nyamaheraka Secondary School approached him and requested for a place to stay and he gave the accused his house at Isebania. PW1 allowed him to stay in his house as care taker. PW1 had moved to Kehancha; that in February, 2015 PW1 passed by the house without notifying the accused and found him with a young slim, light skinned girl who he introduced as his girlfriend. PW1 cautioned accused not to bring ladies to his house. He locked the master bedroom and left accused to use the other bed room, the sitting room, bathroom and kitchen; that the accused introduced the girl as a student taking a nursing course in Mwanza Tanzania and was on her way home; that on 9/3/2015, he went to Sirare and got late and went to spent the night in his house and left early and found accused was alone. On 14/3/2015, he was supposed to go for a flash disk from the house



but when he called accused, accused told him that he was still at Ulanda girls where he had allegedly gone for a science congress. PW1 did not go to the house that day because he did not have the key. He learnt from another teacher that the congress had ended and so the accused was lying to him that he was at the congress. On Monday morning, a lady called to inform him that the body of a lady whose throat had been slit was dumped near his plot. When PW1 called accused, he informed him that he was busy at school. On 16<sup>th</sup> he was called again and informed that the dead girl was accused's girlfriend. The accused still claimed to be in school and he told him to go to the house. PW1 later received a call and was informed that the murder of the girl had taken place in his house. He was summoned by DCI to report to Isebania. He was shown exhibits recovered from the scene and he identified a mattress cover, a bed sheet, which were stained with blood which he had given to Accused (Joshua) to use.

6. PW2 Faustine Kibwabu, is the brother of the deceased, Esther Ghati. He testified that the deceased was in a teacher's training college in Tanzania. He denied having known the accused but that on 16/3/2015, his elder brother informed him that he had received a call that Esther's body had been found near the Border Point Lodge. He proceeded to the place but found the body had been removed to Migori Hospital Mortuary. He went to the hospital, observed and identified the body as that of the sister. On 19/3/2015 he identified the body to the Doctor before postmortem was done. PW2 was shown a techno phone which he identified as that of his sister because she had had it for long and he had used it before.
7. Dr. Vitalis Owuor (PW3) of Migori Level 4 Hospital performed postmortem on the body of Esther Ghati on 19/3/2015. PW3 found that the deceased had sustained deep cut wounds on the neck running from the back of the left side ending at the sternal notch; the neck was held by the skin, cervical vertebra was severed; jugular arteries were all severed and spinal cord was severed at C 4. The Doctor formed the opinion that the cause of death was severed cervical cord secondary to assault.
8. PW4 Kipngetch Benard, a Government analyst produced a report (PEX3) that had been authored by Ann Nderitu a Government analyst who had received nine items which were submitted to the Government analyst including the deceased's blood item (i) and accused's blood item 9. Analyst was to determine the source of the blood on items 2 to 8 and found that the bedsheets and piece of mattress item 2 and 4 which were heavily stained with human blood, panga short trouser. The DNA profiles generated from blood items on the bedsheet, panga piece of mattress, shoe insole, were of female origin and the donor of item 8, (blood of mother of deceased) and owner of the blood stains on items 2 -7.
9. PW5 CPL William Kemboi was the scene of crime personnel in this case. He visited the scene at Isebania with other police officers. He took photographs of the scene A-H.
10. PW6 Ruth Anzala was the investigating officer in this case, She found the deceased's body at Migori Hospital Mortuary after it was found near Border Point, Isebania; that the deceased's relatives arrived at the mortuary and identified the body. She visited the plot where the body was found and met a tenant. PW6 recovered a grey mattress without a cover dumped in unfinished house near where the body was found; she looked in a pit latrine and saw a panga, bag and other items. Scenes of the crime personnel photographed the scene and the following items were retrieved from the latrine, deceased's clothes, panga, mattress cover (blue) curtain all blood stained. she forwarded them to Government analyst.
11. PW6 said the accused was traced through PW1, the owner of the house who had left the house under the care of Accused. The owner of the house directed them to Nyamaharaka Secondary School where the accused was teaching and he was arrested. PW6 recorded witness statements. PW6 said she found the deceased's phone, a techno in accused's house at the school in Nyamaharaka.
12. Mr. Oywer, Accused's counsel filed closing submissions, in which he urged that this being a murder case, the prosecution has to prove it beyond reasonable doubt as defined in Woolmington vs. DPP



(1935) AC 462. He also urged that the prosecution has a duty to prove that a charge of murder was committed and relied on the decisions of R vs. Hiller (2007) 233 A/ LR .63 and Shepherd vs. R (1991)LRC CRM 332 and Simon Musoke vs. R 1 EA 715 which dealt with situations where courts rely on circumstantial evidence to find a conviction. Counsel argued that whereas it is not disputed that Esther Ghati died, it was however not been established that it was thought the unlawful actions of the accused. He argued that none of the prosecution witnesses saw the accused commit the offence; that the exhibits produced do not have any nexus to this case. Counsel went further to submit that malice aforethought as defined under Section 206 of the Penal Code was not proved. He urged the court to acquit the accused of the charge.

13. I have now considered the evidence on record and the submissions of the counsel.
14. Although the accused was not present and did not give his defence, the burden always remains with the prosecution to prove its case beyond any reasonable doubt. The standard of proof of beyond reasonable doubt was expounded upon in the case of Woolmington vs. DPP supra page 462 where the court stated:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

15. This being a murder charge, the prosecution has to prove beyond any reasonable doubt the following:-
  1. The death of the deceased;
  2. That the death was caused by the unlawful act or omission of the accused;
  3. That the Accused had malice aforethought.

#### **Of deceased’s death:**

16. There is no doubt that the deceased Esther Ghati is deceased. PW2, the deceased’s brother identified the body to PW3 (the doctor) the doctor, who performed the post mortem. The investigating officer PW6 was also present at the post mortem. According to PW3, the doctor the deceased met her death from the injuries inflicted on her body. The cause of death being severed spinal cord secondary to assault. Photographs of the mutilated body of the deceased were produced in court as exhibits.

#### **Whether Accused caused the death:**

17. PW1 testified that the accused, who was his cousin requested to be allowed to reside in PW1’s house which he allowed him, in January, 2015. PW1 further said that in February 2015 a date he could not recall, he passed by the house and found accused in company of a young slim light skinned girl whom he introduced as his fiancé and that she was pursuing a nursing course in Mwanza and had just passed by to greet him. He also recalled being at the house on 9/3/2015 when he found the accused alone and accused claimed to be going for a science congress in Ulanda Girls; that on 14/3/2015 he wanted to pass by the house but accused claimed to be away and it is on 16/3/2015 is when he received a call about the



murder of a girl near his plot. PW1's testimony that the accused was using his house is not controverted in any way. Indeed, none of the prosecution witnesses saw the person who murdered the deceased. All there is, circumstantial evidence. The question is whether the evidence links accused to the offence.

18. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal had this to say on this point:

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.”

19. In the case of *Abang'a alias Onyango vs. Republic Criminal Appeal 32 of 1960*, the Court of Appeal identified three tests to be satisfied where a case rests entirely on circumstantial evidence. They are:-
- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly be established;
  - (ii) those circumstances should be of a definite tendency unerringly pointing towards the 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.

(see also *Sawe v Republic* (2003) e KLR and *GMI v R* Cr. App. No. 38 of 2011).

20. In this case, PW1 left his house for the accused and accused was there till 9/3/2023. Even as of 14/3/2023 when PW1 wanted to pass by the house, the accused claimed to have gone for a science congress and was away. There is no doubt that accused was using PW1's house at the time this offence was committed. PW1 identified the bed sheet and mattress cover which were recovered in a latrine and found stained with blood which he had left in the house with the accused. They were PW1's property. The said items were found stained with the deceased blood.
21. PW1's testimony of having given the house to occupy is not controverted. Further, there is no explanation as to how PW1's bed sheet and mattress cover came to be stained with the deceased's blood and found itself in the pit latrine.
22. PW1 told the court that he had been to the house in February, when he met accused with a lady whom he claimed to be his fiancée and a student in Mwanza. Though PW1 did not identify the deceased as the lady he met, I do not think that it is a mere coincidence. PW2 described the deceased as a student in Mwanza and the description of light skinned, slim lady fits exactly that of the deceased. It is possible that deceased is the person PW1 had seen.
23. PW6 testified that they recovered a techno phone in accused's house at Nyamaharaka Secondary School. PW2 identified it as the deceased's phone which he knew because he had used it before. The



court appreciates that phones look alike and it would have been prudent for the investigating officer to go further and establish whether it actually belonged to the deceased through the cyber crime office or confirm whether the deceased's line was being used in the phone.

24. Further to the above, the insole (PEX 8) that was found to have the deceased's blood was found in Accused's room. It confirms that Accused came into contact with the deceased for her blood to be found in the room in which he resided. To crown all this, the accused after arrest, and being charged has disappeared without a trace. This case has been heard in his absence. The accused's conduct speaks volumes and goes to buttress the evidence against him that he is the one who murdered the deceased, tried to conceal the evidence but some evidence was left at the scene. He is the one who murdered the deceased. His actions of absconding speaks louder than words. The circumstantial evidence forms such a chain that there is no doubt that it unerringly points to Accused as the one who caused the death.

### **Of malice afterthought:**

25. Section 206 of the Penal Code defines malice aforethought. It provides as follows:-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- (a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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”.

26. In the case of *Rex vs. Tubere s/o Ochen* (1945)12 EACA 63, the East African Court of Appeal observed:-

In determining existence or non existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and the part of the body injured.”

27. Again in *Hyam vs. DPP* (1974) A C the court held inter alia:-

Malice aforethought in the course of murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious bodily harm.”

28. In the instant case, a sharp object was used to sever the cervical cord. The neck was nearly severed off and was only held by the skin. There were many more injuries which go to show demonstrate that the accused was out to end the deceased's life. I am satisfied that the prosecution proved beyond any doubt all the ingredients of the offence of murder contrary to Section 203 of the Penal Code. I find the Accused guilty of murder as charged and convict him in absentia.

29. It is so ordered. Warrant of Arrest to remain in force.



**DELIVERED, DATED AND SIGNED AT MIGORI THIS 18<sup>TH</sup> DAY OF MAY, 2023.**

**R. WENDOH**

**JUDGE**

In presence of; -

Ms. Kosgei for the state

Appellant Absent

Ms. Emma/ Phelix –Court Assistant

