



**Republic v Musera (Criminal Case 48 of 2018)
[2023] KEHC 20359 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 48 OF 2018
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAKINA INGESHA MUSERA ACCUSED

JUDGMENT

1. 7 witnesses testified in this matter. None of them testified to have had witnessed the assault on the deceased. PW1, Miriam Elakosa Atubwa, was spouse to the deceased. She was informed that he had been killed, and rushed home, and saw the dead body. PW2, Joab Osmorn Kidaha Misango, was a brother of the deceased. He identified the body for post-mortem purposes. PW3, Martin Chahango Asena, had sold an Infinix mobile phone set to the deceased. PW4, Kissya Jackson Kidusu, a nephew of the deceased, was among the persons who first saw the body of the deceased lying in his house.
2. PW5, Dr. Masika Collins Were, conducted post-mortem on the body of the deceased. He noted cut wounds on the neck, head and left shoulder. He opined that cause of death was due to excessive haemorrhage due to injury to the neck, that is C1-C2 subluxation, which interrupted connection between the head and the nervous system. PW6, No. 61065 Corporal Daniel Chepwony, was the investigating officer. PW7, No. 95469 Police Constable Daniel Karanu Njeri, was the arresting officer, who testified that they found the accused with the Infinix mobile phone handset that the deceased had bought from PW3.
3. I put the accused on her defence. She denied killing the deceased, but conceded that she was found with the Infinix mobile phone handset, belonging to the deceased, and explained that the deceased had gifted it to her.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, it was with malice aforethought.



5. On whether the deceased died, I have the evidence of PW1 and PW4. They saw the body of the deceased lying dead in his house. PW2 identified the body for post mortem purposes. PW5 conducted autopsy on the body of the deceased, and produced the post-mortem report. The cause of death was said to be due to haemorrhage on account of the subluxation of the C1-C2. None of the witnesses directly linked the cause of death to the accused.
6. The only connection drawn between the accused and the death was the fact that the accused was found in possession of a mobile telephone set belonging to the deceased. The accused is linked to the death on that account alone. The death happened in May 2018, and she was arrested in July 2018. She explained that the deceased was her friend, and had gifted the phone to her. None of the witnesses placed the accused and the deceased together within the period when it is said that the accused killed her, that is between May 23, 2018 and May 25, 2018. None of them saw the accused at or near his house at that time. Being found in possession of the mobile telephone of the deceased 2 months thereafter is rather remote, in the absence of any other evidence. No evidence was led as to when the deceased was last seen with the said telephone mobile set, for if there was evidence that he had possession of it up to the time he was suspected to have been killed, then the accused would have had some explaining to do. In any case, the doctrine of recent possession is more relevant to the offence of stealing and other offences related to theft. The offence facing the accused is not in the same genus with stealing or theft.
7. The explanation given by the accused to exonerate her, is not altogether credible. I find it incredible that the deceased could give his only phone to her as a present, and leave himself without one. I also find it incredible that he would be so generous with a woman, who claims she was not his girlfriend or sexual partner, but he kept plying her with small amounts of money, including giving her his only phone. However, burden of proof lay with the prosecution, to establish that the accused killed the deceased, or was party to his killing. I am not persuaded that the prosecution established its case against the accused person in that respect. The case against the accused is built on suspicion, founded on her being in possession of a phone belonging to the deceased. That would be a case of circumstantial evidence. However, the circumstances of the possession do not, in my view, point inexorably, to the culpability of the accused in the murder of the deceased.
8. The remaining issue for determination is whether the accused acted with malice aforethought. As I have found above that there is no evidence that the accused caused the death of the deceased, the issue as to whether she had malice aforethought should not arise.
9. In view of everything stated above, I do hereby, find the accused herein, Sakina Ingesha Musera, not guilty of the offence of the murder of George Misango, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I acquit her accordingly, under section 322 of the Criminal Procedure Code, Cap. 75, Laws of Kenya. If she is still in remand custody, she shall be set free, unless she is otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
21ST DAY OF JULY 2023**

WM MUSYOKA

JUDGE

