



**Republic v Azizi alias Abdi (Criminal Case 3 of 2014)  
[2023] KEHC 19605 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19605 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 3 OF 2014**

**HK CHEMITEI, J**

**JULY 5, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**HENRY MUSAMBI AZIZI ALIAS ABDI ..... ACCUSED**

**JUDGMENT**

1. The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on the 1<sup>st</sup> day of January 2014 at Paul Machanga Estate in Nakuru county murdered George Milimu Inziani.
2. The accused denied the charge and the prosecution called a total of 9 witnesses to establish its case. At the conclusion of the prosecution case the accused was placed on his defence and he gave sworn evidence and did not call any witness.
3. Before looking on the merits or otherwise of the matter it is necessary to summarise the evidence as presented during trial.
4. PW1 Protus Libwaga Imbwaga testified that the deceased was his brother and he received a report from his sister Petrolinah concerning the death of the deceased. He travelled to Nakuru where he saw the deceased body and witnessed the autopsy exercise.
5. PW2 Felix Mulimu Machuka testified that he was a neighbour to the accused and the deceased was his father. He said that and on the material day he was making a door when he was told that the deceased had been beaten badly. He went to the scene and he saw him wounded on the head. He assisted to take the deceased to the hospital but he was pronounced dead on arrival. He said that the incident occurred at the house of the accused mother.



6. When cross examined he said that although he did not witness the incident he saw a bloodstained hockey stick in the house.
7. PW3 Harrington Lubembe Imbaya the assistant chief Khayega sub location testified that he got information about the whereabouts of the accused person and he went with police officers and arrested him with two others at some house where they recovered bloodstained clothes as well. They took the suspects with the recovered items and presented them to the police.
8. He said that the items recovered were jeans and shoes which he recognised to be those of the deceased.
9. When cross examined he said that he had seen the accused wore those clothes. He said further that the house belonged to one Makamu although he was not there.
10. PW4 Jane Khadiala Milimo the wife to the deceased testified that she knew the accused. She said that she was informed by her son concerning the incident and she came and saw the deceased at the mortuary and that he had injuries on the head and arms.
11. PW5 Alfred Mihanje Imwaka a retired police officer testified that the deceased was his younger brother and he did witness the post mortem exercise.
12. PW6 Mathew Lunalo testified that he knew both the accused and the deceased. He said that on the material day at around 5.30pm he met a child called Felix who was screaming and saying that the deceased had been injured. He rushed to the scene and found him lying unconscious and bleeding profusely. He called for an ambulance and took him to the hospital PGH but the doctors were on strike. They took him to a private hospital but he was pronounced dead.
13. PW7 Sgt. Daniel Makori testified that on January 4, 2014 together with pw3 arrested the accused and other two persons and recovered a bag containing pair of shoes and a bloodstained jean. They handed them over to the OCPD. He said that the three were not known to him but pw3.
14. PW8 Dr. Daniel Wainaina from Nakuru county referral hospital performed post mortem exercise on the deceased body and concluded that the cause of death was head injury with multiple skull fracture following brutal blunt trauma. He produced the post mortem report.
15. PW9 CPL Elphas Marete carried out the investigations and preferred charges against the accused. He said that he did witness the post-mortem exercise by Dr. Wainaina.
16. He went on to testify that on January 5, 2014 he received a call from deceased brother concerning the arrest of the accused, his brother and the mother. They proceeded to Shinyalu police station the following day and brought the three together with the exhibits which he later produced on behalf of the government analyst.
17. When cross examined he said that he did not have the inventory of the recovered items.
18. In his sworn defence the accused denied the charge and testified that the deceased was his village mate and that on January 1, 2014 he was in Western Kenya and he did not find the means to get back to Nakuru.
19. He said the on January 3, 2014 her brother and mother went o Khayega and thereafter the police came and arrested them. He said that none of the prosecution witnesses had testified that they saw him at the scene. He denied that the deceased were friends with her mother.
20. At the close of the case the parties were directed to file written submissions which they complied.



21. The learned state counsel submitted that this matter was hinged on circumstantial evidence as there was no eye witness. The accused was later traced to western Kenya where the deceased bloodstained clothes and shoes were recovered and the accused arrested in the company of her mother and the brother. He relied on the case of *Abamad Mohamed & another v Republic* [2018] eKLR among others.
22. He submitted that malice aforethought had been established against the accused and this court ought to convict him pursuant to Section 203 of the *Penal code*.
23. The learned counsel for the accused submitted in his defence and argued that the ingredients of the offence of manslaughter were not proved. (This court is unable to tell from the record when the matter was reduced to manslaughter).
24. He submitted that the exhibits produced especially the shirt and the trouser were not properly handled and they cannot be relied on.
25. He submitted that there was no eye witness to the incident save for the accused mother who was not in any event called.
26. He further argued that the defence of alibi raised by the accused was not proved as he was not within the vicinity of the scene at that particular time. He went on to state that failure by the prosecution to call the crucial witness in this case the accused mother was very material.

#### **Analysis and determination.**

27. As clearly stated by the learned state counsel there was no eye witness to the incident and therefore this case basically has to be established through circumstantial evidence. The court in *Abanga alias Onyango v Republic* Criminal Appeal No 32 of 1990(UR) stated as hereunder the tests that must be satisfied under this ground, namely;
  - “ 1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;
  2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
  3. The circumstances taken circumstantively, 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.”
28. It is evident that the accused was not at the scene or at least no eye witness was called to ascertain whether he was present. The only eye witness whom the prosecution failed to call and for whatever reason they failed was the accused mother. Perhaps she would have shed more light on what transpired.
29. At the same time, it is true that the deceased was assaulted at the home of the accused mother who later was arrested with the accused at Khayega in western Kenya two or three days after the incident. The big question is what was she doing with the accused yet she was expected to assist the police in the investigations as the incident which has not been denied happened in her house in Nakuru.?
30. More importantly what were they doing with the deceased bloodstained clothes and shoes inside the house they were arrested in.? Even more fundamental was the fact that the deceased clothes when subjected to DNA analysis which was produced clearly showed that the blood stains were that of the deceased.



31. This leads me to an irresistible conclusion that after committing the offence the accused and her mother ran away to western Kenya with the deceased clothes possibly so that they could not be recovered. In fact, PW2 testified that at the time he saw the body he had only the shirt and no trouser.
32. Circumstantially therefore it was for the accused to explain his alibi which he only did in the defence and not during trial. He was found with the clothes of the deceased who had been recently murdered and this is clearly an inference of guilt. Cumulatively the evidence was not broken since after the deceased was killed the suspect disappeared and was shortly thereafter found with his clothes which were bloodstained.
33. There was uncontested evidence that the deceased bled profusely and that he was half naked and the incident took place in the home of the accused or for that matter his mother's home. So even though there was no direct evidence circumstantially this court finds that the state had proved murder charges against the accused.
34. The strong motive in my view was that the accused may have disapprove the relationship between his mother and the deceased. Although no murder weapon was produced the deceased died a heinous death.
35. Consequently, and based on the above evidence this court is satisfied that the offence of murder has been established against the accused and I so convict him under the provisions of Section 204 as read with Section 215 and 322 of the *Criminal Procedure Code*.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 5TH DAY OF JULY 2023.**

**H K CHEMITEI**

**JUDGE**

