



**Republic v Marckenzi (Criminal Case 11 of 2017)
[2023] KEHC 19789 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 11 OF 2017
LM NJUGUNA, J
JULY 3, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

FRANCIS MUSYOKI MARCKENZI ACCUSED

JUDGMENT

1. The accused person herein was charged with two counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence being that on June 17, 2017 at Gitaraka village in Karaba Location of Mbeere South Sub County within Embu County murdered Rose Koki and Cynthia Kanini. Upon arraignment in court, he pleaded not guilty to both counts and a plea of not guilty was entered.
2. The case proceeded for trial and wherein the prosecution called eight witnesses in support of its case; after which the prosecution closed its case.
3. PW1, Charles Mukora Makenzi stated that he knew the deceased persons; Rose Koki as the wife to the accused and Cynthia Kanini Musyoka who was their daughter. He stated PW2, the son of the accused herein told him that his mother and his sister had been missing but upon asking the accused, he told him that they had gone to their maternal grandmother's place at Ithanga. He sent PW2 to Ithanga to check if they were there but he found out that they were not. That Catherine Nunu (daughter to the accused) told him that she saw her father (the accused) digging a trench on their shamba a few days before the two deceased went missing. He reported the matter to the police who later exhumed the bodies and thereafter took photos of the scene of crime. On June 28, 2017 he identified the bodies of the deceased persons to the doctor who conducted the postmortem.
4. PW2, Haron Makenzi Musyoki, a resident of Kitalaka stated that the accused is his father while Rose and Cynthia were his mother and sister respectively. That on June 17, 2017 his father had sent him



to spend the night with other children at the neighbor's house and upon coming back the following morning, he didn't find his mother and sister, Cynthia Kanini. That upon enquiring from the accused, he told him that they had gone for a function at the maternal grandmother's home at Ithanga. His sister Catherine Nunu told him (PW 2) that he had seen his father digging a trench, which information he shared with his grandfather. That his uncles Joseph and Gabriel came to ask his father about the whereabouts of his mother and sister, but he told them they had gone to Ithanga for a function. He stated that the morning he came home after spending the night at the neighbor's home, he saw his father with scratches on the face and upon asking him what had caused the scratches, he said he fell when he was chasing a donkey from the neighbor's shamba. Later, his uncles went again to their home and asked his sister to show them where the accused was digging a trench; they found it covered with soil and stones, and there were flies. They went and reported the matter to the police who went and exhumed the bodies of his mother and sister. It was his testimony that his parents used to quarrel but never used to fight. However, on cross examination, the witness told the court that his mother had once ran away to their grandmother's home.

5. PW3, Joseph Muthini Makenzi, a brother to the accused person stated that he knew the deceased persons in this case who were the wife and daughter to the accused person respectively. On 18.06.2017 he was called by his mother Milka Nunu who told him that she had been informed by PW2 that his mother and sister, Cynthia Kanini had gone missing from 17.06.2017. That in the company of his other two brothers, they went to the accused's house who informed them that both deceased had gone for a function at Ithanga. He further told the court that the accused's daughter Catherine Nunu took them to a place where her father had dug a trench. That together with his brothers Charles and Gabriel, they reported the matter to the police. On June 28, 2017 he identified the bodies to the doctor who conducted the postmortem. He further told the court that the accused and the deceased had a troubled marriage but the accused never exhibited signs of mental illness. On cross exam, he informed the court that he once reported the accused to the police for attempting to strangle his wife, the deceased herein.
6. PW4, Sgt Mutua Kithuka stated that on June 19, 2017 Charles Mukola Makenzi, (PW1) reported that his brother's wife and daughter had gone missing from the June 17, 2017. On visiting the scene, with PC Ezekiel Koskei, they found a heap of soil that looked like a grave and there were flies hovering over the heap and when they looked through the stones, they discovered a human hand. He secured the scene and waited for the DCIO Kiritiri who took over the investigations. On June 25, 2017 the accused person was arrested by the members of the public and taken to the police post where he rearrested him and thereafter escorted him to Kiritiri Police Station.
7. PW5, Catherine Nunu Musyoka testified that Rose Koki and Cynthia Kanini were her mother and sister respectively. It was her evidence that on June 16, 2017 at about 3.00p.m. his father asked her brother Haron to go to a neighbor's house and take care of his children. That her mother was not at home but she came back home later in the night at 9.00 p.m., That during the day, he saw her father digging a trench in the shamba and when she went near the said area, the accused chased her away. It was her evidence that they slept in the same house with her mother, accused and her siblings but upon waking up the following morning, she didn't see her mother and sister Cynthia and upon asking the accused, he told her that they had gone to Ithanga village for a function, but they did not come back as she expected. She stated that her father had blood on the face and his hands. She went to the shamba where her father had dug the trench and found it covered with soil and stones. She further told the court that her parents used to quarrel because her father used to say that the late Cynthia was not her daughter. It was her evidence that she didn't see her father kill the deceased persons herein but suspected him because he had blood on his body and further, because of the trench he had previously dug.



8. PW6, Dr Phyllis Muhonja stated that she conducted post mortem on the bodies of Rose Koki and Cynthia and formed the opinion that the cause of death was asphyxiation and severe head injury and asphyxiation respectively. It was her evidence that she could not know the condition of the accused at the time of commission of the offence.
9. PW7, Dr Mucheru Wahome Wangombe testified that the accused was admitted on November 23, 2017 but was later discharged on January 4, 2018. He testified that the patient was diagnosed and treated for alcohol use disorder and depressive disorder and thereafter discharged on medication and that he was supposed to be followed up by the county psychiatrist thereafter.
10. PW8, Sgt Bernard Wachuri Wekesa, the investigating officer in this matter stated that Rose Koki and Cynthia Kanini were murdered on the night of June 17, 2017 and secretly buried within the compound of the accused person. He stated that Cpl Muriithi from scenes of crime took photographs and together with his colleagues Cherotich and Matolo, exhumed the bodies from the shallow grave and took them to the mortuary. He later attended the postmortem at Embu level 5 hospital and further recorded statements from the witnesses.
11. After the close of the prosecution's case, the accused was placed on his defence upon the court finding that the prosecution had established a prima facie case.
12. DW1, Francis Musyoki Marckenzie testified that Rose Koki was his wife but had nothing to say about the said death. It was his evidence that he could not remember the date and the year but remembered that he woke up at around 5.00 a.m. and went to Kitaraka in Karaba where he opened his business. That he later went to a place called P.I and only left at 6.00 p.m. to a bar where he consumed some alcohol until 9.30 p.m. He stated that while there, a scuffle ensued and he hired a bodaboda to take him to another bar known as Kiangegwa where he continued the drinking spree and could not tell what happened until morning because he was drunk. That he went home, found his daughter Catherine who asked him what had happened to him as he was bleeding on the face. That he told her he sustained the injuries after he fell when he was chasing a neighbour's donkey. That he went to the police station to find out why he was being looked for and thereafter was charged with the offence herein.
13. After the close of the defence case, directions, were given for both parties to file their submissions but none of the parties complied with the said directions.
14. I have considered the evidence presented before this court by both the prosecution and the defence.
15. In the instant case, the accused person is facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Murder is defined as "when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." The elements of murder and which the prosecution ought to prove are;
 - a) the death of the deceased occurred
 - b) the death was caused by unlawful acts;
 - c) that the accused committed the unlawful act which caused the death of the deceased; and
 - d) that the accused had malice aforethought.

[See *Republic v Isaac Mathenge; Republic v Mohamed Dadi Kokane & 7 others* [2014] eKLR].

16. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.



17. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused herein murdered the deceased persons (See Woolmington v DPP [1935] AC 462). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See Miller v Ministry of Pensions, [1947] 2All ER 372). The question therefore is whether the above ingredients were proved to the required standards. [Also see Moses Nato v Republic [2015] eKLR].
18. As to whether the death of the deceased persons occurred, it is not in doubt that the deceased persons herein died. PW6 testified that she conducted post mortem on the bodies of the deceased persons. As such, death was proven.
19. On whether the deaths were caused by unlawful acts, under Article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See Guzambizi Wesonga v Republic [1948] 15 EACA 63), the court held that:-
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- [See also Sharm Pal Singh [1962] EA 13 and Daniel Nzioka Mbuti & another v Republic (*supra*)].
20. From the evidence on record, I note that there is no direct evidence linking the accused person with the death of the deceased. The prosecution is relying on circumstantial evidence to prove the case against the accused persons. In this regard, the Court of Appeal stated:-
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango Vs R Cr. App. No 32 of 1990, this court set out the conditions as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly 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] eKLR and GMI v R Cr. App. No. 38 of 2011; Teper v R [1952] ALLER 480 and Musoke v R [1958] E.A 715].
21. Therefore, for this court to find the accused person guilty, the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt.
22. The accused mounted a defence from the onset to the effect that he was suffering from a mental illness.



23. Section 11 of the *Penal Code* (cap 63 Laws of Kenya) provides that: –
- “Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”
24. Further, from the provision of Section 11 the presumption of insanity is rebuttable. Where an accused person raises the defence of insanity, the burden of proving insanity rests with him on a balance of probability (See *Marri v Republic* [1985] KLR 710 and *Muswi s/o Musele v Republic* [1956] EAC 622).
25. Under Section 12 it is provided: -
- “A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person maybe criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effect above mentioned in reference to that Act or omission.”
26. It is thus clear that insanity is a defence if proved that at the time the accused committed the offence he was labouring under the disease of the mind. However, for the said defence to be available, it must be shown that the accused at the time of doing the act or making the omission was incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission as a result of the disease of the mind.
27. The Court of Appeal in the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR held that; -
- “if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the *Penal Code* he could not be held criminally responsible for the murder of the deceased.
- Both Section 12 aforesaid and the M/c Naughten Rules recognise that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. The test is strictly on the time when the offence was committed and no other.”
28. Of importance to note is the fact that the offence herein was allegedly committed on June 17, 2017. He was assessed on the 28th day of June, 2017 and was found mentally ill and therefore not mentally fit to stand trial. From the information above, would it therefore be safe to conclude that indeed the accused herein was at the time of the commission of the offence suffering from a mental illness?
29. In *Leonard Mwangemi Munyasia v Republic* (*supra*), the court observed that: -
- “We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”



30. In the case herein, the actions of the accused person prior and after the death of the deceased persons are what calls for close scrutiny. I say so for the reason that it was widely known that the accused and his wife had a difficult marriage; it was also alleged that Cynthia was not the biological child of the accused person herein and that he was in the habit of mistreating the deceased for reasons inter alia that the said Cynthia was not his child.
31. In the same breadth, PW2 narrated on how upon finding that their mother and sister were missing, he asked the accused person who told him that they had gone to Ithanga for a function. That he noticed that the accused herein had scratches on his face and upon being asked, he stated that he sustained the same from a fall while he was chasing a neighbour's donkey. He further stated that the same day, the accused person fled from home. PW5 also narrated how on June 16, 2017, the accused told PW2 to go to a neighbour's home and look after the neighbour's children and that the deceased was not at home in as much as she returned at 9.00 p.m. That the accused prior to that had dug a trench in the shamba and when she went near to where he was digging, he chased her away. His explanation for digging the trench was to prevent soil erosion. That after a while, she realized that her mother and Cynthia were missing and upon enquiring, the accused told her that the duo had gone to Ithanga. That the accused person was not happy when she asked him what the trench that he was digging the previous day was for. That was the trench where the bodies of the deceased persons were recovered from.
32. PW8 testified that the accused person hated the deceased together with Cynthia as he was alleging that Cynthia was not his biological child. That he hated his late wife to an extent that he could not eat food prepared by her; and that after the incident had been reported, he visited the scene and found that the accused person had fled away. PW7 stated that the accused was treated for alcohol use disorder and depressive disorder; additionally, that alcohol disorder is a condition that is treatable if one stops drinking alcohol. That the accused presented with the history of alcohol and not history of depression. It was his statement that the mental status of a patient can change from time to time.
33. From the evidence on record, the prosecution witnesses stated that indeed the accused and the deceased had a difficult marriage characterised with violence. That PW2 and PW5 after having failed to see their mother and Cynthia, enquired from the accused of their whereabouts. In his defence the accused gave a detailed account of his version. He narrated how he woke up at around 5.00 a.m and went to Kitaraka in Karaba where he opened his business. That he later went to a place called P.I and thereafter to a bar where he consumed some alcohol until 9.30 p.m. It was his case that while there, a scuffle ensued and so he hired a bodaboda to take him to another bar known as Kiangewa where he continued the drinking spree. That from Kiangewa to his place, the distance is far enough but due to the fact that he was drunk, he did not know what happened thereafter till morning. He stated that the witnesses gave false testimony and he denied ever committing the offence herein.
34. On a deeper interrogation of the evidence before this court, the same brings about a different scenario in that there were calculated actions both before and after the incident. The accused person's conduct before digging a trench, of sending PW2 away and then preferring to tell his children and relatives that his wife together with Cynthia had gone to Ithanga and thereafter fleeing home was in my view a demonstration of awareness of his own actions and what he had done. He had dug a trench where he buried the bodies of the two deceased. The consequences of this demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the incident thus the same forming necessary intent of the perpetration of the offence herein. Even if the accused person was found to be incapable of taking plea, PW7 stated that the accused was treated for alcohol use disorder and depressive disorder; additionally, that alcohol disorder is a condition that is treatable if one stops drinking alcohol. That the accused presented with the history of alcohol and not history of depression. It was his statement that the mental status of a patient can change from time to time. In reference to the



above, at the time of the alleged perpetration of the offence herein, and the evidence taken as a whole clearly shows well orchestrated plan by the accused person to eliminate the two deceased.

35. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person herein who unlawfully caused the deceased's death.
36. Finally, on the question of whether there was malice aforethought on the part of the accused, the Court of Appeal in the case of *Joseph Kimani Njau v* [2014] eKLR held as follows:

“ Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

37. In the instant case, PW6 who conducted the post mortem on the body of the deceased formed the opinion that the deceased persons died as a result of asphyxiation and severe head injury and asphyxiation respectively. This shows that when the accused person inflicted the injuries to the deceased persons his intention was to kill them.
38. In the end, I find that the prosecution has proved the case of murder against the accused person and I therefore find him guilty as charged and convict him accordingly.
39. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

