



**Republic v Wamalwa & another (Criminal Case 29 of 2019)
[2023] KEHC 21696 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 29 OF 2019
AC MRIMA, J
AUGUST 3, 2023**

BETWEEN

REPUBLIC STATE

AND

IBRAHIM GADDAFI WAMALWA 1ST ACCUSED

EVANS OMONDI OMIDO 2ND ACCUSED

JUDGMENT

Introduction:

1. The accused herein, Ibrahim Gaddafi Wamalwa and Evans Omondi Omido, were jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 11th October 2019 at Laini Moja village, Sirende Location in Kiminini Sub-County within Trans Nzoia County, the accused jointly murdered Silvia Nanjala Mundi (hereinafter referred to as ‘the deceased’).
2. When the accused were arraigned in court to answer to the charge, they pleaded not guilty to the offence. They were tried. The hearing of the prosecution’s case began before Hon. Kimaru, J (as he then was) where the first two witnesses testified. After the close of the prosecution’s case, this Court found that a *prima facie* case had been established against each of the accused to place them on their defenses.
3. The accused gave sworn defenses and none called any witness.

The trial:

4. The prosecution called four witnesses to establish that the accused jointly murdered the deceased. The prosecution’s case was that the accused, the deceased, one Joseph Walukana (did not testify) and a Village elder one Ruth Wekesa Wanyonyi (testified as PW2) were all neighbours at Maili Saba.



5. On the moonlight night of 11th October, 2019 at around 1:00 a.m., PW2 was in attendance of a funeral fundraiser to bury Joseph Walukana's son at his homestead. There was music (commonly referred to as 'Disco Matanga) and entertainment set up to encourage people to participate in raising funds.
6. As PW2 was waiting for the village Chairman, Wangereka, and Secretary, Barasa, to wind up on their duties, PW2 heard screams emanating from the deceased's house which was around 50 meters away from where she was. She was with one Anthony Juma (did not testify) who told her that it was the deceased screaming because she was drunk. The deceased used to sell the local alcoholic commonly known as chang'aa.
7. Shortly after the screams, PW2 met and greeted the accused near the deceased's house. Eventually PW2 retreated to her home to sleep.
8. The following day at 7:00 a.m., PW2 was awoken by news that the deceased had passed on. She arrived at the deceased's house where the deceased's body had been found. She found the police. She informed the Area Chief of the incident. Later, the first accused strangely called her inquiring if the police had left.
9. PW4 was No. 260048 PC Douglas Nyaora. He was the investigating officer who proceeded to the crime scene upon receiving the report on 11th October, 2019 at 9:00 a.m.
10. He found the body of the deceased lying naked. She had visible fingernail marks on her neck. The body was removed and taken to the mortuary paving way for investigations.
11. PW4 established that on 11th October, 2019 at 1:00 a.m., the deceased had sent his son Fadhili their stepmother to sleep. She was sleeping in one of the houses in the homestead. Fadhili came back and found the accused at the door of the deceased's house. They were asking for a match box to light a lamp as it was dark. He handed them the match box. He would return to their house to find the deceased on the floor. She was still alive. The deceased's daughter Miriam then left to look for the other children in the other house when she met the accused who offered to escort her home. The 1st accused then inquired as to the status of the deceased.
12. In the morning, the deceased was found naked again by Miriam. She was lifeless. PW2 informed him that children then moved to Uganda and rejoined their father after their house was demolished since it was erected alongside the railway line. PW4 formed the opinion that the accused were persons of interest.
13. Following the post mortem, PW4 concluded that the deceased had been murdered. PW4 additionally stated that PW2 informed her that the deceased was screaming from her house. She then bumped into them. It is for all these reasons that PW4 charged the accused with the present offence.
14. The body was identified by Titus Barasa and Wilson Masai Sikuku (none testified) during the post mortem which was conducted on 17th October, 2019. The autopsy was conducted by Dr. Patrick Musita at Kiminini Cottage Hospital mortuary. It was PW1, Dr. Denis Nanyingi, who produced the Post Mortem Form on behalf of the attending Doctor.
15. According to PW1, the deceased had defensive injuries on her hands, fingers and nails. Internally, the deceased suffered severe lung collapse on both bilateral sides. Her glottis was closed with a frothing trachea. She had no obvious semen in the external genitalia. She suffered a neck laceration mark on the anterior aspect. Her spinal cord suffered a fracture at the neck level. It was concluded that the deceased's cause of death was cervical spine fracture with asphyxiation due to strangulation. A high vaginal swab was taken for semen analysis.



16. On 22nd October, 2019, the swab was submitted to the Government Chemist's Department at Kisumu. PW3, one Polycarp Lutta Kweyu, on 25th October, 2019 obtained buccal swabs from the accused. He undertook the analysis and concluded that the DNA profile generated from the high vaginal swab tested positive for the presence of seminal fluid that did not match the DNA profiles generated from any of the accused.
17. PW3 prepared his report which was produced in evidence together with the Exhibit Memo.
18. After close of the prosecution's case, the Court found that the accused had a case to answer. They were placed on their defenses. Both gave sworn defenses.
19. The 1st accused denied the offence. His evidence was that on 11th October, 2019, he worked and came home at 6:00p.m. He had supper and took a bath. He later left for the funeral fundraising at 8:00 p.m. He found several people. There was Disco Matanga.
20. After making his contribution, the 1st accused retreated to an establishment that brew chang'aa at 1:00 a.m. It did not belong to the deceased. He met the 2nd accused whom he knew quite well and they drank together. Thereafter, PW2 emerged inquiring if they were going for the fundraiser. They informed that they would return later.
21. He would later return home. The 1st accused produced the PW4's statement in denying the allegations tendered by both PW2 and PW4 as cardinal that were stated in Court did not appear in the statement. He denied ever having a dispute with the deceased.
22. The 2nd accused testified that on that fateful day, he was at work and would later return home. He rested and later left for a funeral fundraiser at his friend's house. His friend was called Joseph. He arrived at the home at 10:00 p.m. He found several people. He handed over his contribution. There was Disco Matanga in the event.
23. The 2nd accused then left at 1:00 a.m. to take chang'aa in a nearby establishment where he met the 1st accused. They were then approached by PW2 asking why they were not at the fundraiser to which they responded that they would return later. They kept their word and returned later.
24. The 2nd accused denied committing the offence and denied the allegations as testified by the prosecution's witnesses.
25. After close of the defence cases, parties were directed to file and exchange written submissions. However, as at the time of writing this judgment, this Court was only in receipt of the accused's joint written submissions dated 5th February, 2023.
26. Learned Counsel for the accused, Mr. Bikundo, argued that the prosecution had failed to discharge its burden of proof to the required standard to establish that the accused murdered the deceased. He urged this Court to acquit the accused.

Analysis:

27. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

- (a) the death of the deceased occurred;



- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

28. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

- 29. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
- 30. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there PW2 who vouched that she saw the lifeless body of the deceased. The body was later collected by the police, taken to the mortuary and an autopsy carried out.
- 31. The second way in which the death of the deceased was proved was through the evidence of PW1 who produced a Post Mortem Report on the autopsy conducted by his colleague on the body of the deceased. The Post Mortem Report was produced in evidence.
- 32. PW1 observed a litany of injuries both externally and inside the body of the deceased. It was concluded that the deceased's cause of death was cervical spine fracture with asphyxia due to strangulation.
- 33. This Court, therefore, finds and hold that the death of the deceased and its cause were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

- 34. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long dead in her house.
- 35. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -
 - (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
 - (ii) The circumstances should be of a definite tendency unerringly pointing towards 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.
- 36. The foregone principles were set out in the locus classicus case of *R v Kipkering arap Koske & Another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI v Republic* (2013) eKLR, *Musii Tulo v Republic* (2014) eKLR among many others.
- 37. The Court of Appeal in *Musii Tulo* (*supra*) in expounding the above principles expressed itself as follows:-
 - 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and



incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v R* (1958) EA 715 citing with approval *Teper v R* (1952) AC 480 thus: -

It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

38. Further, the Court of Appeal in *Sawe v Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

.... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....

39. Returning to the case at hand, the totality of the prosecution's evidence pointed to the fact that the accused were not culpable for the death of the deceased.

40. The only evidence that pointed to the accused was that of PW3. That evidence was not corroborated by any material evidence. The DNA analysis did not point to any of the accused although it revealed that the deceased had sexual intercourse with several men. Even the allegation that the accused called PW2 to find out if the police had left the scene was not proved. Further, the said Anthony Juma who was with PW2 at night when PW2 met the accused did not testify and no reasons were given for such. (See *Bukenya & Others v Uganda* (1972) E.A. 594, *Kingi v Republic* (1972) E.A. 280 and *Nguku v Republic* (1985) KLR 412).

41. PW4 was the investigating officer. His evidence was largely hearsay.

42. This was a matter which carried no evidence or at all pointing to the guilt of the accused. It is apparent that the accused were charged for the reason that they were allegedly found by PW2 near the house of the deceased that night. However, there is evidence that there was a funeral in the neighbourhood and many people attended that night. There was also a chang'aa drinking den next to the house of the deceased where many people patronized that night.

43. Whereas there may be some suspicion that the accused may have been involved in the death of the accused, that suspicion alone, however, strong cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.

44. The prosecution, therefore, failed to prove that any of the accused was responsible for the death of the deceased in any way whatsoever.

Disposition:

45. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused are found not guilty of the murder of the deceased.

46. Consequently, the accused are hereby acquitted pursuant to Section 322(1) of the [Criminal Procedure Code](#). They are hereby set at liberty unless otherwise lawfully held.



Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF AUGUST, 2023.

A. C. MRIMA

JUDGE

JUDGMENT DELIVERED VIRTUALLY AND IN THE PRESENCE OF:

MR. BIKUNDO, LEARNED COUNSEL FOR THE ACCUSED.

MISS. KIPTOO, LEARNED PROSECUTOR INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE STATE.

REGINA/CHEMUTAI – COURT ASSISTANTS.

