



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Onguti (Criminal Case 10 of 2019)  
[2023] KEHC 21693 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 10 OF 2019  
AC MRIMA, J  
AUGUST 3, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**ELIJAH ONGUTI ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused herein, Elijah Onguti, was 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 3<sup>rd</sup> April, 2019 at Geta Farm within Trans Nzoia County, the accused murdered Annah Nyangete Onguti (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned in Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution’s case began before Hon. Kimaru, J (as he then was) where the first witness testified. After the close of the prosecution’s case, this Court found that a prima facie case had been established to place the accused on his defence.
3. The accused gave a sworn defence.

**The Trial:**

4. The prosecution line up five witnesses to prove that the accused committed the offence. The prosecution’s case had it that the accused was the deceased’s son. They lived together with the deceased’s granddaughter one Harriet Kerubo (testified as PW3) in Geta farm. PW1, one Duncan Okeri Onsongo was their neighbour.



5. It was stated that on April 3, 2019, the deceased received a call from her daughter, PW2 one Janet Kerubo Onguti. The deceased had asked PW2 to give her some money and to also run a certain errand for her. The deceased did not, however, revert back to PW2 during the day.
6. The deceased was later been seen by their neighbour one Nyachiro around midday. She went about her duties.
7. PW3 returned home from school around the same time. Although the main door to their house was locked, the kitchen door was open. She then had lunch and thereafter went to fetch water as she waited for the deceased to return home. That did not, however, happen.
8. PW3 sat outside waiting for the deceased as she was under the presumption that she had left the house. When it was around 7:00 p.m. and her grandmother (the deceased) was nowhere on sight, PW3 started crying. It is at this juncture that the accused found PW3 crying.
9. After establishing the cause of PW3's sadness, the accused called his sister PW2. She advised him to secure the cattle. She then called the deceased's cell number to ascertain her whereabouts. However, her calls went unanswered. This prompted her to go to the deceased's home.
10. In that same night, PW1 was having dinner at 9:00 p.m. when he heard the accused passing by the nearby road and saying;

*“Wachawi wa Geta wamemuua mama wangu na wamemfungia kwa nyumba.”*

PW1 was informed that night by her daughter that the deceased had been missing for a while. PW1 reluctantly walked to the deceased's house in the company of other family members.

11. PW1 and PW2 gathered with other members of the public. As the house was locked from outside, PW1 requested members of the public that had gathered there including the accused, not to tamper with what appeared to look like a crime scene. However, the accused ignored his counsel and broke the window into the house.
12. The accused peeped and found the deceased lying on the floor. He raised alarm. PW2 also confirmed that the deceased was lying inside her house in a pool of blood through the window. She also found her phone in the house. From the window pane, PW1 saw the deceased's body lying on a pool of blood on the floor. She had suffered a head injury. PW1 then called the village elder and Police officers from Geta Police Station.
13. PW1 recollected that prior to her death, the deceased bickered a lot over land with the accused. They, however, continuously resolved the issues. On one occasion, the accused vowed to do something. He also tended to indulge in alcohol drinking. All factors considered, PW1 testified that they had a good relationship.
14. The matter was investigated by PW5, No. 23159 CI Peter Omare. He proceeded to the crime scene upon receiving the report on April 4, 2019.
15. He found the deceased's house door locked from outside. On peeping through the window, PW5 saw the deceased's body lying on the floor on a pool of blood in the bedroom. The gathered members of the public who assisted him to unlock the door. After accessing the bedroom, PW5 took six photographs of the deceased which he produced in evidence. He then removed the body to the mortuary.
16. During his investigations, it emerged that the accused went around the neighbourhood stating that people had killed his father and have now killed his mother and locked the body in the bedroom. It is



- these utterances that formed PW5's opinion that the accused knew the culprit. He arrested and charged him.
17. The establishment of the deceased's cause of death occurred on April 12, 2019 at Mt. Elgon Hospital mortuary where an autopsy was conducted by Dr. Moses Okumu. His general observation was that the deceased was in good health and physique. On her external appearance, she had a cut on the right and left frontal areas. Internally, her scalp suffered hematoma. She had a comminuted fracture on the right frontal occipital area with exposed brain matter. His conclusion was that the deceased died due to severe head injury due to brain damage due to trauma from a blunt object (possibly assault). He filled in a Post Mortem Report which was produced by his colleague Dr. Alex Wanyonyi Barasa, who testified as PW4.
  18. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.
  19. His sworn testimony was that he was at work during that fateful day being 3<sup>rd</sup> April, 2019. He then returned home at around 6:00p.m. He found PW3 crying. She explained to her that the deceased could not be traced. He called the deceased's cell number but the calls went unanswered. He then called PW2 and asked her to stay with PW3. PW2 informed her that she had spoken with the deceased in the morning hours.
  20. The accused began to trace the deceased at the neighbours and their relatives but could not find her. He then went to PW1's house. They accompanied each other back to the house and that is when they realized that her phone was ringing from inside the house. The accused broke the window and saw the deceased lying on the floor. He then alerted his neighbours that the deceased was dead.
  21. He stated that he had a good relationship with the deceased during her lifetime. Denying that he committed the offence, he testified that he did not know who committed this heinous act. He affirmed that no report had been made to the Police concerning his utterances.
  22. After close of the defence case, parties were directed to file written submissions. The accused's Counsel filed written submissions dated 2<sup>nd</sup> February, 2023. Learned Counsel, Mr. Bikundo argued that the prosecution failed to discharge its burden of proof to the required standard. As such, he urged this Court to acquit the accused.
  23. Learned Counsel for the State Ms. Kiptoo relied on the record. She maintained that the prosecution had discharged its burden of proof to the required standard to establish that the accused murdered the deceased.

**Analysis:**

24. 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.
25. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.



### **The Death of the Deceased:**

26. 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).
27. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there were witnesses who testified that they saw the lifeless body of the deceased. They include PW1, PW2, and the accused. The body was later collected by the police, taken to the mortuary and an autopsy carried out.
28. The second way in which the death of the deceased was proved was through the evidence of PW4 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.
29. PW4 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 severe head injury due to brain damage due to trauma from a blunt object (possibly assault).
30. 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:**

31. 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.
32. 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.
33. The foregone principles were set out in the locus classicus case of *R-vs- Kipkering arap Koske & Another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI -vs- Republic* (2013) eKLR, *Musii Tulo vs. Republic* (2014) eKLR among many others.
34. 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) AL 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.'

35. Further, the Court of Appeal in Sawe- Vs- 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.....

36. 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.

37. The only evidence that pointed to the accused was that of PW1 when he alleged to have heard the accused shouting by the road that those who had killed his father had also killed his mother and locked her inside the house. That evidence was not corroborated by any material evidence. None of the other members of PW1's family who were with PW1 testified to that end. That created a serious doubt as to the truthfulness of PW1's testimony.

38. As the potential witnesses did not testify and no reasons were given for such, then the inference to be drawn is that had they testified, their testimonies would have been adverse to the prosecution. (See Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412).

39. Further, there was overwhelming evidence that the deceased and the accused, despite occasional disagreements, related quite well. Even PW1 affirmed as much.

40. As the accused denied making the alleged statements and the PW1's testimony was not corroborated in any manner whatsoever, then the evidence of PW1 cannot be a basis to find a conviction in this matter.

41. 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.

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

#### **Disposition:**

43. 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.

44. 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 3<sup>RD</sup> 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.

