



**Republic v Dida (Criminal Case E009 of 2022)  
[2024] KEHC 13924 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13924 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E009 OF 2022**

**JN NJAGI, J**

**OCTOBER 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HALKANO GALGALO DIDA ..... ACCUSED**

**JUDGMENT**

1. The accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 25<sup>th</sup> November 2022 at Bulti Dula area in Marsabit North Sub County within Marsabit County he murdered Makai Adano Duba (herein referred to as the deceased).
2. The prosecution called 13 witnesses in the case at the closure of which the court found the accused to have a case to answer and placed him to his defence. The accused offered his defence and did not call any witness.

**Case for prosecution**

3. The case for the prosecution is that both the deceased and the accused were residents of Turbi township in Marsabit North subcounty. That they used to graze their goats at Bulti Dula area of Marsabit County.
4. It was the evidence of Halkano Halake Duba PW5 that he lives at Turbi township. That the deceased and the accused are his neighbours. That on the 24<sup>th</sup> November 2022 he was going to fetch water with a water booster at Bulti Dula well which is about 18 Km from Turbi Township. The husband to the deceased herein told him that his wife and his worker were going to the same place. He asked him to give them a lift. He gave the deceased and the accused a lift to the said place. That on getting to the well, the deceased and the accused found their goats at the well. They alighted at the well. He, PW5 fetched



- water. When he was ready to go back, he asked them whether they would go back with him. They said that they were going to look for lost goats. He left the at the well.
5. Hassan Wario Qanchara PW7 testified that he was at the material time grazing his livestock at Bulti Dula area. That on the 25/11/2022 his goats had gone missing. He went looking for them at the quarters where the deceased had camped but he did not find her. On the following morning, he heard screams. He went to the bush where the screams were coming from. He found the body of the deceased at the place. There were other people at the place. Many other people went to the place. The accused was among them. Members of the public said that the accused is the one who had killed the woman. He was detained. He, PW 7, called the Chief of Turbi and informed him. The chief went to the place with policemen. Policemen re-arrested the accused.
  6. Boru Malicha Yarso, PW1 and Ali Mulole Kura PW2, testified that they are residents of Turbi township where the deceased and the accused were their neighbours. That the two were also herders at Bulti Dula. That on the 26/11/2022 they separately received reports that the deceased herein had been killed at Bulti Dula. They separately went to the place and found the body of the deceased in the bush. They found many other people at the place. The body had a wound on the right side of the neck. There was a knife handle beside the body. Policemen went to the place and collected the body. They re-arrested the accused who had been arrested by elders.
  7. The then Acting Chief of Turbi location Abdul Galiye Sora PW8 testified that on the 26/11/2022 at 9 am he was at Turbi when he received a phone call from Hassan Wario PW7 who told him that the deceased herein had been killed. That he, PW8 went and reported at Turbi police station. He went with policemen towards the scene. He was left on the way and policemen proceeded to the scene. After one hour, policemen went back with the body of the deceased. They were also accompanied by he accused.
  8. It was the evidence of PC Isaack Omondi PW 12 of Turbi police station that he was on the 26/11/2022 at the police station when he was sent to visit the scene where the deceased herein was reported to have been killed. He went to the scene with other policemen. They were led to the place by community leaders. At the scene they found the body of the deceased. It had a stab wound on the right side of the neck with a stainless knife lodged therein. Beside the body was a handle of a knife and a face mask. The accused had been arrested by members of the public as a suspect to the murder. They re-arrested him and escorted him and the body to Turbi police station. The body was taken to Marsabit Referral Hospital for post mortem which was performed on the same day by Dr. Arero PW 10. The doctor removed the knife and took vaginal swab of the deceased. The doctor found the wound to have gone through most of the major vessels of the neck. He formed the opinion that the cause of death was due to excess bleeding as a result of a deep neck injury. The doctor completed a post mortem report to that end.
  9. Cpl Solomon Gachia PW 13 testified that he was instructed to take over investigations of the case on 26/11/2022. The body of the deceased herein was at the time in a vehicle outside the police station and a suspect the accused was in police custody. He escorted the body to Marsabit Referral Hospital where a postmortem was conducted. The doctor removed the knife blade. He removed clothes from the deceased – head scarf, green/brown clothe and black and brown shorts and handed them over to him for DNA analysis. The body was handed over to the family of the deceased for burial.
  10. It was further evidence of Sgt Gachia that the accused told him that he wanted to confess to the offence. That he handed him over to C.I Abdulrahman Ibrahim PW 9 of DCI Office Marsabit North who recorded a statement under caution from him in which the accused confessed that he raped the deceased and that he stabbed her with a knife after she threatened to report the rape to elders.



11. It was further evidence of Sgt Gachia that the accused led him to his house where he conducted a search. He recovered a black/red jacket, navy blue underwear and sweat pant trousers that were blood stained. He prepared an exhibit memo and forwarded the following things to the government analyst, Marsabit for DNA profiling: the knife blade, the knife handle, the face mask that was collected at the scene, blood sample of the accused, the buccal swab of the accused, the vaginal swab of the deceased and the clothes of the accused and those of the deceased. The items were examined by a government analyst PW 11 who generated DNA profiles from all the exhibits except the vaginal swab. The analyst found that the DNA profile generated from the accused's clothes – the jacket and the sweat pant trousers – matched the DNA profile generated from the blood swab of the deceased herein. The face mask recovered at the scene was also found to have had a DNA profile matching the buccal swab of the accused. The accused was charged with the offence. During the hearing, the doctor PW 10 produced the postmortem report as exhibit, PExh.4. The government analyst PW 11 produced his government analyst's report as exhibit, P.Exh.13. C.I. Abdulrahman Ibrahim PW 9 produced the confession statement as exhibit, P.Exh.2. The investigating officer PW 13 produced the knife handle, the blade, red cream clothe of the deceased, the head scarf of the deceased, the shorts of the deceased, red/black jacket of the accused, sweat pant trousers of the accused, inner wear of the accused, the face mask, the exhibit memo, the inventory of the search on accused's house and the certificate of search as exhibits, P.EXhs. 3, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15 respectively.

### **Defence Case**

12. The accused when placed to his defence stated in a sworn statement that he lives at Turbi township where he is a boda boda taxi rider. That on the material day he was going to the grazing field to take food to herders on a motor cycle. That on his way back he was stopped by a woman who was unknown to him. She asked for a lift to a place called El Bulti Dula. He gave her a lift and dropped her at the said place. He returned to Turbi. On the following day the owner of the motor cycle he had been riding told him that a woman had been killed. He went to the scene with the owner of the motor cycle. He found that it is the woman he had given a lift who had been killed. He further said that policemen beat him up at the police station for him to admit that he is the one who killed her. He admitted out of the beating. He denied that he is the one who killed her.

### **Submissions**

13. Counsel for the accused submitted that the case was not proved beyond reasonable doubt. That none of the prosecution witnesses saw the accused commit the offence. That the only evidence against the accused is that he confessed to committing the offence but there is no evidence that the accused was at the scene of the offence.
14. It was submitted that the prosecution was relying on circumstantial evidence which evidence did not meet the parameters of such evidence wherein it has to be shown that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt of the accused, as held in *R v Kipkering Arap Koske & another* 16 EACA135.
15. It was submitted that the case was based on suspicion. That suspicion however strong cannot provide a basis for inference which has to be proved by evidence, as held in *Joan Chebichii Sawe v Republic*, Crim Appeal No.2 of 2002. Counsel for accused urged the court to find that the case was not proved beyond reasonable doubt and acquit the accused.



## Prosecutions Submissions

16. The prosecution submitted that the case against the accused was proved beyond reasonable doubt. That the death of the deceased was proved by the doctor who performed the post mortem and found that the cause of death was due to excess bleeding as a result of a deep neck injury.
17. The prosecution submitted that the accused was the last person to be seen with the deceased when PW5 who gave the two of them a lift up to Bulti Dula well on 24/11/2024.
18. The prosecution submitted that the above evidence is confirmed by the fact that the accused upon arrest confessed to raping and then killing the deceased to prevent her from reporting him. That the confession was recorded by a police officer PW9 in the presence of the accused's father and a translator. More so that the defence did not object to the production of the accused's statement which details the murder of the deceased. The prosecution relied on the holding in the case of *Uvii v Republic* (Criminal Appeal No.37 of 2018) (2022) KECA 1418 (KLR) (16 December 2022) (Judgment) where the Court of Appeal approved of the holding in *Kinyua v Republic* (2003) KLR 294 that:

“Considering the evidence adduced during the trial as a whole we are satisfied that the statement by the appellant was properly admitted. That evidence of confession has to be carefully considered before basing a conviction on it. In the celebrated case for *Tuwamoi v Uganda* [1967] EA at p91 it was stated: -

“We would summarize the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

19. It was submitted that the confession of the accused was corroborated by the forensic evidence of government analyst PW 11 who analyzed a jacket and sweat pants belonging to the accused and found DNA belonging to the deceased. That in addition the purple face mask recovered at the scene had the DNA of the accused which meant that the accused was at the scene where the deceased met her death.
20. It was submitted that since the accused was the last person to be seen with the deceased on 24/11/2022, the doctrine of “last seen with” and circumstantial evidence point irresistibly to the accused as the one responsible for her murder. The prosecution cited the case of *Kaburu v Republic* (Criminal Appeal 103 of 2023) (2024) KECA 536 (KLR) (9 May 2024) (Judgment) where the Court of Appeal said the following on last seen doctrine:

In cases where the doctrine of last seen applies, the law presumes that the person who was last seen with the deceased bears full responsibility for his/her death. Therefore, if an accused person was the last person seen in the company of the deceased, and the circumstantial evidence overwhelmingly supports this conclusion, there is no room for acquittal. The appellant, in such circumstances, has the duty to provide an explanation regarding how the deceased met their death. In the absence of a satisfactory explanation, both the trial court



and the appellate court are justified in drawing the inference that the accused person was responsible for killing the deceased.

40. Generally, the doctrine of last seen places a legal obligation on the person last seen with a deceased individual to provide an explanation regarding the events leading to their death. Failure to provide a satisfactory explanation can lead to the inference that the accused person is responsible for the death.

21. It was submitted that the accused in his defence denied that he knew the accused despite witnesses attesting to the fact that they knew each other and PW 5 leaving them together and the next time she was seen she was dead. That his face mask was left at the scene and his clothes had the blood of the deceased which contradicts his statement that he met the deceased for the first time when he carried her on his motor cycle and dropped her at Bulti Dula.

22. The prosecution submitted that the circumstantial evidence points to the accused as being responsible for the death of the deceased. The prosecution in this regard cited the case of *Abamad Abolfathi Mobammed & another v Republic* (2018) eKLR where the Court of Appeal stated the following on reliance of the same:

However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”

23. It was submitted that the fact of the accused being found with blood stained clothes which blood was established to be the deceased's and his face mask having been found at the scene, creates a chain so complete that the conclusion can be only be that it is the accused who killed the deceased.

24. The prosecution submitted that the accused stabbed the deceased on the neck which can only be with the sole intention of causing her grievous harm or death and from his own confession was to silence her from reporting him for rape. Therefore, that malice aforethought has been established. The prosecution cited the case of *Robert Onchiri v Republic* (2004) KLR 19 where the Court of Appeal held that:

“The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of crime by the person who possess the motive – see *Karukenya & 4 others v Republic* [1987] KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed deceased with a knife or the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder.”



25. The prosecution submitted that the case has been proved beyond reasonable doubt and the court should find the accused guilty of murder.

### **Analysis and Determination**

26. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions*, [1947] 2 ALL ER372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

27. In *Elizabeth Waithiegeni Gatimu vs. Republic* [2015] eKLR, Mativo J. (as he then was) expressed himself as hereunder on the issue:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

28. The accused is facing a charge of murder contrary to section 203 of the Penal Code. The section defines murder in the following terms:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

29. In the case of *Republic Versus Andrew Omwenga* 2009 eKLR the court held:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:



(a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) That the accused had the malice aforethought”.

30. This court has therefore to analyze the evidence in light of these essential elements required to be proved by the state against the accused person. I will deal with the ingredients of the charge as hereunder.

### **Death of the deceased**

31. Dr. Arero Duba PW 10 of Marsabit County Referral Hospital performed a post mortem on the body of the deceased and found it with an extensive deep cut wound on the right side of the neck with part of a knife blade in situ. The blade had cut through most of the major vessels of the neck. He formed the opinion that the cause of death was due to excessive blood loss due to deep cut wound. From this evidence, there cannot have been any other cause of death of the deceased other than what was opined by the doctor. I therefore accept the evidence of the doctor as to the cause of death of the deceased. The deceased died as a result of a deep cut wound on the neck. The death and cause of death of the accused was therefore proved.

### **Whether the accused committed the unlawful act that caused the death of the deceased**

32. It was the evidence of Halkano Halake Duba PW5 that he on the 24/11/2022 gave a lift to the deceased and the accused in a water booster and dropped them at Bulti Dula well. The deceased was found dead two days later. The accused has not given an explanation as to what happened to the deceased after he was left in her company at the well.
33. There is no doubt from the evidence of the investigating officer PW 13 that he collected a jacket and sweat pant trousers from the house of the accused. The same were taken to the government analyst where they were examined by PW 11 who found the clothes to be stained with blood that matched the DNA profile of the deceased. There was no challenge on the DNA profile. I therefore find that the accused was found with clothes that were stained with the deceased's blood. The accused has not given an explanation of how he came into contact with the blood of the deceased. The only conclusion is that he is the one who stabbed her with a knife and came into contact with her blood when he did so.
34. C.I. Abdulrahman Ibrahim testified that he recorded a statement under caution from the accused in the presence of the accused's father. That he followed the confession Rules 2009 when he recorded the statement. He said that the accused confessed that he raped the deceased after which he stabbed her with a knife when she threatened to report him to elders over the rape. The accused did not raise an objection to the production of the statement in court. I find that the accused gave the statement voluntarily to PW 11. The statement was taken in accordance with the laid down law.
35. The accused retracted his confession in his defence. It is trite that the court will only act on a retracted confession if the same is corroborated in some material particular by independent evidence. However, that corroboration is not necessary in law and the court may base a conviction on a confession alone if it is fully satisfied that the confession is true, see *Tuwamoi v Uganda* (supra). In this case the confession of the accused was corroborated by the forensic evidence of the government analyst, PW 11 in that the accused's clothes were stained with blood that matched the DNA profile of the deceased. The accused in his confession gave detailed information as to what happened between him and the deceased leading to her death. I find that the confession of the accused was true.
36. The circumstantial evidence in the case also proves that the accused is the one who killed the deceased. It was the evidence of the investigating officer, PC Omondi PW12, that he collected a purple face mask at the scene. That he prepared an exhibit memo and sent the face mask together with other exhibits to



the government analyst. The analyst PW 11 generated a DNA profile from the face mask and found that the profile matched the DNA profile generated from the buccal swab of the accused. The accused has not given any explanation as to how his face mask came to be found at the scene. In the absence of any explanation the court can only conclude that the accused was at the scene of murder. The presence of the accused at the scene of murder cannot be explained in any other hypothesis other than that he is the one who killed the deceased.

From the foregoing I find sufficient evidence to prove that the accused is the one who killed the deceased.

### **Whether the accused had the malice aforethought in stabbing the deceased**

37. The prosecution in a case of murder is required to adduce evidence showing that the killing of the deceased was done with malice aforethought. Section 206(b) of the Penal Code defines malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances –

(a) .....

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

38. The doctor who performed post mortem on the body of the deceased PW 10 found it with an extensive deep cut wound on the right side of the neck with a knife blade in situ that severed most of the vessels of the neck. In the case of *Karani & 3 Others v Republic* [1991] KLR 622, the Court of Appeal held that malice aforethought can be inferred from the nature of the injuries and weapon used to inflict them. In the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the East African Court of Appeal set out the circumstances in law under which malice aforethought can be inferred, that:

- a. The nature of the weapon used (whether lethal or not).
- b. The part of the body targeted (whether vulnerable or not).
- c. The manner in which the weapon is used (whether repeatedly or not).
- d. The conduct of the accused before, during and after the attack.

39. The fact that the accused in this case inflicted a deep injury on the deceased's neck is clear indication that he intended to kill her. Malice aforethought has therefore been proved.

40. The upshot is that the prosecution has proved beyond reasonable doubt the charge against the accused. The accused is found guilty of the offence of murder as charged and is convicted accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2024**

**J. N. NJAGI**

JUDGE

In the presence of;



Mr. Otieno for prosecution

Mr. Nyenyire for accused

Court Assistant – Jarso

14 days R/A.

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