



**Republic v Olilo (Criminal Case 76 of 2018)  
[2024] KEHC 12953 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 76 OF 2018  
SC CHIRCHIR, J  
OCTOBER 17, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ALBERT OPATI OLILO ..... ACCUSED**

**JUDGMENT**

1. Albert Opati Olilo (The accused) was charged with murder contrary to Section 203 as read with section 204 of the penal code.
2. The particulars are that on 30/11/2018 at an unknown time at Eburanyi Location, Luanda Sub-location within Vihiga murdered Lyala Atupa Abonyo.
3. The prosecution called a total of 6 witnesses and at the conclusion, the accused person was put on his defence. He opted for a sworn statement.

**Analysis of the Evidence and Determination**

4. Section 203 of the penal code defines the offence of murder as follows: “any person who with malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
5. The above elements of the offence were expounded in the case of Anthony Ndegwa Ngari v Republic [2014] e KLR, where the court stated that the prosecution must prove that :-
  - (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.



6. I will hereafter address and determine whether each of the above stated elements have been proved in this case

### **The Death of the Deceased and its Cause**

7. PW5, the pathologist produced the postmortem report (PExb. 1). He told the court that the deceased sustained a tear on the left upper limb on the shoulder, bruises on the right side of the mouth and the neck, a tear on the vagina with dry blood, there was extensive bruising under the skin of the front side of the neck and the neck muscles. He formed the opinion that the cause of death was failure to breathe, due to manual strangulation. The body of the deceased was identified by Joseph Mboya and James Owega. Thus the death of the deceased, and what caused it, was proved.

### **Whether the Accused caused the death of the accused.**

7. PW1 was the stepson to the deceased, he was called to the deceased house by his uncle, who had apparently noted that the deceased had not woken up. They both went to the deceased's house and found her body on the bed. The house was in disarray, he further stated. He did not witness the killing.
8. PW2 was the daughter of the deceased who resided away, in her own home. She was called and notified about her mother's death. She therefore arrived after the incident.
9. PW3 was the chief of the locality. He too was called and informed about the incident. He did not witness the murder.
10. PW4 was one of the 'nyumba kumi' elders. He was also notified about the killing. He went to the deceased house, and found her dead.
11. Thus there were no eye-witnesses to the killing of the deceased. It follows that the evidence linking the accused to the killing is purely circumstantial. It also follows that I must carefully examine the evidence tendered to ascertain whether the threshold required of circumstantial evidence has been met.
12. The nature of circumstantial evidence was explained in the court of Appeal decision in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, where the court stated as follows:

“However, it is a truism 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 a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” (Emphasis added)

7. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court went on to state:

“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 Subject



person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v 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 Subject; (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.”

7. With the above guidelines in mind , I will now turn to consider the circumstances of this case.
8. PW1 told the court that when he got to his step mother’s house, there was an opening on the wall of the house and the mabati door was loose. In the house, he could see evidence of a commotion. The scene was therefore indicative of the fact that someone had forced himself to the house and perhaps exited through the loosely shut door.
9. He further stated that he was told by several people that a suspect by the name Albert Mbatia alias Bahati was seen very early that morning carrying items suspected to have been stolen.
10. Later in the day he got a call from the police instructing him to meet them at the house of the accused. A search was conducted at the accused mother’s house. A sufuria, two hammers and a large grey bag were found. He further stated the items were identified by the deceased’s daughter as belonging to the deceased.
11. He told the court that the accused used to occupy both his house and that of his mother; that there were 4 homes within compound and there were other people in the compound when they arrived, who included an elder brother of the accused’s going by the name Shem
12. PW2 , the daughter of the deceased was called to the police station to identify the recovered items. She named the items as a large sufuria, cups , an axe, a jembe and a skirt . The items were her mother’s , she said. However she did not know how the items ended up at the police station.
13. PW3 told the court that he investigated and established that the accused was seen early in the morning carrying some items. He went and informed the police. From the police station, he accompanied the police to the accused’s house.
14. He further testified that as they approached the house belonging to the accused’s mother, he saw someone quickly exiting the house, using an “ another door” . He told the court that the Accused was not there during the search. The items found were a large sufuria, a jembe and cups. He later led the police to Ebusakemi Primary School playground where the police arrested the Accused. He stated that the Accused was not present during the recovery of items.
15. The last witness (PW6), was the investigating officer. He told the court that his investigations led him to the Accused’s house. They arrested the accused at Ebusakemu primary school and took him to his house. They recovered cups, basins, slippers and a packet of half- used salt. He stated that the items were identified by one Daniel Agando, a casual laborer at the deceased’s home and the accused signed the inventory of the recovered items.
16. He further told the court that he found the Accused drunk at the Ebusakemu Primary School; that the suspect is the one who led them to his house. He did interrogate the laborer who told the investigating



- officer that the bottle of half – used salt was what he had used the previous evening in the deceased’s house. He charged the accused on the basis of the recovered items.
17. On cross-examination, he insisted that the Accused was present when the inventory of the items was being done; that the accused signed the inventory, in any event.
  18. Thus to recap , the circumstances are that the accused was seen carrying suspected stolen items quite early in the morning . The time estimate given was between 5.30 to 6a.m . However “none of the people” who allegedly saw the accused carrying those items testified. consequently, there is no witness who testified to have seen the accused carrying what appeared to be the deceased’s household items.
  19. However, the charge is premised on the fact that the deceased’s items were found in the Accused’s house. It is trite law that once the prosecution brings evidence to demonstrate that stolen items were found in the accused’s house, the onus is on the accused to give an account of why the items were found in his house.
  20. But the question that must first be answered is whether the prosecution has established that the deceased’s items were indeed found in the Accused’s house.
  21. The circumstantial evidence in this regard came from from PW1 PW3’ and PW6. These witnesses testified that the deceased’s items were found in the Accused’s house. According to PW3 the items were identified by one Daniel Agendo but according to PW1 they were identified by the daughter of the deceased ( pw2) at the police station
  22. Further according to PW3 the Accused was absent when the search was being done. He also stated that he is the one who signed the inventory , “to show that the items had been recovered” . PW3’s testimony is in contradiction to that of the the investigation’s officer, who told the court that the accused was present during the recovery of the items, and signed the inventory.
  23. I have considered the above stated testimonies of PW1, PW3 and PW6 evidence in the regard. I take note of the contradiction between PW1’s and PW6’s evidence. The contradiction is on whether the Accused was present when the search was being done. Their contradiction dents the credibility of this piece of evidence .
  24. It is trite law that minor contradictions may be ignored if it does not materially affect the prosecution’s case or is not indicative of a deliberate attempt to lie by a witness. ( See Eric Onyango vs Republic ( 1972) E.A 32) . In this case I consider the contradiction material because the question of whether the deceased’s goods were found in the house of the accused is central to this case. Indeed I would go further and state that it is the only evidence that would link the accused to the death of the deceased. Therefore there is need to prove beyond reasonable doubt, that the said goods were found in the accused’s house.
  25. Something else cast doubt on whether the goods were found in the house of the deceased. PW1 told the court that the house where the goods were found was the deceased’s mother’s house; that he used the said house as a kitchen. However it was also the evidence of PW1 that in the compound where the accused lives, there were other people living there, including the accused’s elder brother. Further it was PW3’s evidence that the Accused mother’s house was open and when they approached someone walked out hastily using a different door. I pose the same question the defence did: who was this person? Were there any attempts to investigate the identity of this person, who exited the house on seeing the police arrive?; considering that there were other people living within the compound and the fact that the house was opened , could these “other people” be the ones who placed the items in the accused’s mother’s house? . It is important to remember at this point that according to the investigation’s officer , he had the accused , he was in his company at this point , and therefore it follows that the accused could not have been the one exiting the house through the other entrance.



26. I have considered the accused's defence . He denied that the items were found in his house. He also testified that he was taken from the place he was arrested of arrest and taken directly to the police station. His testimony was corroborated by PW1 who told the court that the items were in the accused's mother's house. The accused was not questioned as to whether he used the mother's house as a kitchen and hence would be considered as his house for purposes of the search and recovery. He was not also questioned about the signature in the inventory vis-a vis his denial that he was not there when the search and recovery went on.
27. In the pertaining circumstances , that is to say :- the items were found in the accused's mother's house and not his house ; that the accused was not the only resident in the compound; that the house was open and therefore accessible to any one in that compound, the circumstances are such that it cannot be said that only the accused and no one else could have placed the items there.
28. For circumstantial evidence to form a basis of conviction “ 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.” ( Ref Ahmad Abofathi) (supra)
29. There is another piece of evidence that would have easily identified the perpetrator of the crime, but strangely the prosecution did not avail it. The pathologist told the court that he found evidence of sexual assault of the deceased. He collected vaginal swabs among other samples from the body. The Investigating Officer told the court that he took the sample to the Government Chemist. The prosecution evidence was silent on what happened to the results of the said analysis. was sample ever analyzed? If in the affirmative ,why were the results not produced? I am of the view that the results of the DNA analysis of the vaginal swab would have identified the person who sexually assaulted the deceased, and hence the most likely killer.
30. In conclusion, I am not satisfied that the circumstances of this case point to the accused person as the one, and no one else as the perpetrator of the crime.
31. Any doubts in criminal cases must always be resolved in favor of the accused. And as it has often been stated this benefit belongs to the accused as a matter of right and not a favour .
32. In conclusion, the prosecution has failed to prove the offence of murder against the accused, and I hereby acquit him in accordance with section 215 of the criminal procedure code.
33. He shall be set free fourth unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. Chirchir**

**Judge**

In Presence of:-

Godwin Luyundi- Court Assistant.

The Accused.

Ms. Osoro for the state.

