



REPUBLIC OF KENYA



**Republic v Simiyu (Criminal Case E001 of 2023)
[2024] KEHC 11669 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E001 OF 2023
AC MRIMA, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC STATE

AND

EMMANUEL JUMA SIMIYU ACCUSED

JUDGMENT

1. Emmanuel Juma Simiyu, the accused herein, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence are that on the 1st day of January 2023 at Nabai A Kiminini Sub County murdered Margaret Esinyen (hereinafter referred to as ‘the deceased’).
3. The Accused pleaded not guilty.

The Prosecution’s case:

4. Florence Naliaka Simiyu, the wife to the Accused and the mother to the deceased testified as PW1. She stated that on 1st January 2023 at about 11.00pm the Accused came home and then stepped out with a lamp and a matchbox. It was her case that shortly afterwards, she heard bird cries near the river and decided to get out of the house.
5. It was her evidence that on stepping out of the house, she saw the Accused’s shoes. She then got back in the house to check on her children and realized that one of them, Margaret Esinyen, the deceased, was missing. Alarmed, she rushed to her neighbours, Rael and Robert and informed them of her missing child.



6. It was PW1's further evidence that the two neighbours and herself accompanied her to the river where they found the Accused having sex with the deceased. On asking him what he was doing, the Accused jumped up and hit Robert with his fist prompting them to run away.
7. She testified that the Accused said that he was going to kill himself and then followed them to Robert's house. The Accused then accused PW1 of having a sexual affair with Robert and allegedly surrendered her to Robert. The Accused then returned home.
8. PW1 also stated that while with neighbours, they went to a Nyumba Kumi elder to report the incident. They found the village elder's wife and informed her of what had transpired. The village elder's wife subsequently called her husband. They waited for the elder until 3am when he arrived and informed them that the Police had arrived at PW1's home.
9. They all accompanied the elder to PW1's home and on arrival, they found the deceased dead, but she been placed between the two other two children who were asleep.
10. The police processed the scene and collected the body to Kitale County Referral Hospital mortuary for preservation and further police action.
11. PW1 observed the deceased. She had bruises on her face and back and there was a stab wound around the left shoulder at the front.
12. On the identification of the assailant, PW1 stated that there was ample moonlight and she saw the accused clearly. It was her case that the Accused was drunk that night and that he had lived with him for seven years. PW1 stated that whenever the Accused became drunk he would sleep with animals.
13. It was PW1's further statement that when she saw the deceased at the river, she was naked but when she arrived home, she found her dressed up.
14. PW1 stated further that the following day, that is after the incident, she accompanied the Police to the scene at the river where they found the deceased's clothes which were recovered by the police. PW1 stated that she had dressed the deceased for bed but she was in different clothes when she found her dead.
15. Upon being cross-examined, it was her evidence that there were two outer doors to their 6 roomed house and they usually used the front door.
16. She stated that on the material day, the Accused came home at night, entered into the house and went out, returned, lit the lamp and went out again.
17. PW1, however, stated that she did not see the Accused leave the house with the deceased since the Accused put out the light and the inside of the house was totally dark.
18. She confirmed that her neighbours accompanied her to the river. She admitted that she did not hear any cries of the deceased and that the Police did not recover any knife. She also admitted that she did not see the Accused taking back the deceased to the house.
19. Rael Nelima testified as PW2. She was a neighbour to PW1 and the wife to Robert.
20. It was her evidence that on 1st January 2023 at 11.00 pm, PW1 went to her home and narrated to her the events of that night from when her husband had arrived home.
21. PW2 accompanied PW1 and Robert to the river. On reaching thereat, they heard the Accused crying 'Mama yangu Margaret, 'Mama yangu Margaret' and saw the Accused having sex with the deceased.



- Upon being asked by PW1 what he was doing, the Accused rose and wanted to beat PW1. Robert, stepped in between them and since the Accused had already released a punch, he hit Robert.
22. She testified that the Accused then ran away towards the river saying that he was going to kill himself. Thereafter they went back home and shortly thereafter, the Accused came to her home.
 23. It was her evidence that after a while, they rushed to a Nyumba Kumi elder and informed him of what had transpired. She stated that the Nyumba Kumi elder told them not to leave until the Police had arrived.
 24. Further to the foregoing, it was her evidence that the Police took them to PW1's home where they found the deceased dead lying between the other two children.
 25. On cross-examination, it was PW2's evidence that she saw the deceased from a distance and to her, it wasn't clear it was the deceased or another person. She confirmed that she did not hear the child crying, only the Accused. She also confirmed that no knife was recovered.
 26. Robert Nyongesa testified as PW3. He was the husband to PW2 and a neighbour to PW1.
 27. PW3 wholly reiterated and corroborated the evidence of PW2 and PW1 on what happened on the fateful night.
 28. He added that he knew the Accused well since they had worked together and readily recognized him that night. He noted that the Accused was drunk.
 29. Ben Haila Mzee, the Vice-Chairman of Nyumba Kumi testified as PW4.
 30. He stated that on 2nd January 2023 at about 00.10am, his wife called him while he was still at the shops and informed him that some neighbours had come to their home to see him.
 31. He testified that he upon being explained to by PW1 over the phone what had happened, he called another village elder, Kizito Wekesa, and passed on the information.
 32. It was PW4's evidence that when he eventually went back home, he called for reinforcement of three neighbours and walked towards the home of the Accused. On the way, they met the Accused who informed them that there was a funeral at his home. They accompanied him back to his home. The Accused then showed them three children asleep covered in a blanket and the Accused also showed them the dead child who was in between the two other children.
 33. PW4 stated that he called another village elder and went to Kiminini Police Station. They reported the matter and returned to his home with the police. They picked PW1, PW2 and PW3 and proceeded to PW1's house.
 34. According to PW4, the Accused stated that he was the one who found the deceased having drowned in the river.
 35. Kizito Luseno Wekesa, another village elder testified as PW5.
 36. It was his evidence that on 2nd January 2023, he was called by PW4 at about 2am with the information that a man had taken his daughter aged 8 years and defiled her in the river.
 37. PW5 called the Area Chief and mobilized some youth and left home to go to the river. Shortly thereafter, PW4 called and informed him that the child was dead.
 38. PW5 then met PW4 who was with the Accused on the road with other people. PW5 then arrested the Accused and took him to Kiminini Police Station.



39. Dr. Dennis Nanyingi, a Senior Medical Officer attached to Kitale County Referral hospital testified as PW6. He stated that he was a holder of a MBCHB from Kenyatta University and had 8 years' experience.
40. He referred to the Post-Mortem Report he prepared after conducting an autopsy on the body of the deceased on 5th January 2023. The body was identified by Jane Wanjala and Moses Wanjala.
41. It was his evidence that the deceased had external bruises on the face, neck, abdomen, upper limbs and back, had lacerations on vaginal imposita and a gaping anus with visible lacerations.
42. Internally, PW6 stated that the upper part of trachea was constricted with inflamed imposita (mucus and blood) and that both lungs were collapsed.
43. He further stated that the heart was puffy with air inside and when cut blood gushed out with pressure. He formed the opinion that the cause of death was asphyxia secondary to strangulation. He also confirmed that the deceased had been assaulted and raped.
44. He took specimens for further analysis including the nails for DNA, urine for biochemistry, blood for DNA, high vaginal and anal swabs for DNA.
45. On cross-examination, he asserted that the deceased's heart was puffy meaning it was obstructed and that there was pressure inside, embolism, which was fatal. He clarified that there can be non-fatal embolism which can stay over time. He stated that an air bubble can cause embolism.
46. Nyongesa Godfrey, a Clinical Officer at Kitale County Hospital testified as PW7. He had examined the Accused at the facility.
47. According to PW7, the Accused was stable looking and in handcuffs. It was also well oriented in place, time and person.
48. The Accused had normal male genitalia and there was fecal matter around his penile shaft and the groin area.
49. It was further his observation that the penile shaft had lacerations and had a shiny dry stain. As regards the anal area, he stated that it was normal. It was his evidence that he collected blood samples for HIV, syphilis, Hepatitis B and urinalysis.
50. He took wet swabs on his penile shaft and made the impression that there was defilement. PW7 produced the P3 Medical Form as an exhibit.
51. PW7 also examined the deceased. He found blood stains and clear discharge at the vaginal opening and lacerations. Her hymen was missing. He further observed that her anal opening was loose with tears and lacerations. He also produced the P3 Medical Form as an exhibit.
52. No. 78491 PC Zaddock Wafula, the investigating Officer testified as PW8. It was his evidence that on 2nd January 2023 at about 0200hrs, he received a call from Kizito Wekesa, a village elder to the effect that he and other persons had arrested the Accused for murder and defilement.
53. Upon receiving the Accused at the Police station, PW8 interrogated him whereupon the Accused directed him to the scene of crime.
54. PW8 further stated that the accused told him how he raped and killed the deceased. On visiting the scene, he did not find the deceased. The accused then led him to his house which he had taken the deceased after the ordeal and showed him the deceased.



55. PW8 observed the deceased. He saw colorless liquid around the anus. After processing the scene, he removed the body to Kitale County Hospital mortuary together with the Accused. The Accused was examined by PW7 and found with pieces of fecal matter around his penis.
56. PW8 then processed the Accused and upon conclusion of investigations, he charged him before Court. He also organized for a post mortem exercise on the body of the deceased which was conducted by PW6.
57. With the foregoing evidence, the Court found that the Accused had a case to answer and was placed on his defence.

The Defence:

58. The Accused gave an unsworn testimony. He did not call any witness. He stated that he was not aware of what had happened until the deceased met her death.
59. On closure of the respective cases, parties were directed to file written submissions.
60. The Prosecution filed written submission dated 4th March 2024. It discussed the offence of murder which this Court will appreciate in the analysis section of this judgment.
61. In buttressing the fact that the Accused was responsible for causing the death of the deceased, the decision in *Stephen Haruna v AG of the Federation* [2010] eKLR was relied on where it was observed as follows: -

The doctrine of last seen means that the person last seen with the deceased bears the full responsibility for his death."

62. The Prosecution further submitted that the unsworn testimony bore no probative value as was observed in the case of *Maber May v The Republic* [1999] KLR.
63. In his written submissions dated 2nd April 2024, the Accused submitted that the cause of death was not proved since the Post Mortem Report indicated that the deceased's heart was puffy with air inside and that it was unusual to have air or other foreign objects in the blood stream
64. On the foregoing, the Accused submitted that the deceased's death could have been caused by the embolus and not by the Accused.
65. As regards the specimens collected from the Accused for DNA analysis, it was submitted that the Prosecution did not call any of it to link the Accused to the defilement of the deceased.
66. In conclusion, it was his case that there was no direct evidence to demonstrate that the Accused caused the death of the deceased. The defence urged that the Accused be acquitted.

Analysis:

67. Having comprehensively captured and appreciated the parties' respective cases and evidence, the only issue that arises for determination is whether the Prosecution proved the charge of Murder against the Accused and if so, beyond any reasonable doubt.
68. In Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the Court of Appeal established the elements that, if proved, constitute the offence of murder. It enumerated them as follows: -
 - (a) the death of the deceased and its cause;



- (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
69. This Court will, hence, interrogate each of the elements in turn.

The Death and its cause:

70. The fact of death was not only proved by way of evidence, but there was consensus by the parties of its occurrence. For avoidance of doubt, on 25th April 2023, pursuant to the parties' consensus the Court made the following order: -

“The fact that the deceased died is not in issue.”

- 71. As regards the cause of the deceased's death, PW6 produced a Post Mortem Report on the findings from an autopsy he conducted.
- 72. As a result of his examination, PW6 formed the opinion that the deceased died as a result of asphyxia secondary to strangulation/assault/rape.
- 73. Since there was no other contradictory evidence on the cause of death, this Court, therefore, conclusively forms a finding that the deceased was strangled to death.
- 74. The first limb for the offence of murder is answered.

Who caused the death?

75. Apart from PW1, PW2 and PW3 testifying that they found the Accused having sex with the deceased at the river the night the deceased died, no witness testified on seeing the Accused killing or assaulting the deceased.

76. The upshot is that the matter now revolves on 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.

77. 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 v Republic [2013] eKLR, Musii Tulo v Republic [2014] eKLR among many others.

78. 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.'

79. 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.....

80. Later, the Court of Appeal in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR had this to say on circumstantial evidence: -

.... 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....

81. Returning to the case at hand, the Accused was the last person to be seen with the deceased. He was having sex with her. When he was confronted by PW1, PW2 and PW3 he became wild and attacked PW3. The three ran away. After a while, the Accused followed and threatened them further. He even alleged that PW3 had an affair with his wife, PW1.

82. Further, it was the Accused who led the police to where the deceased body was. He first took them to the river where he was found by PW1, PW2 and PW3 sexually assaulting the deceased and then led them to the house where he had placed the deceased between the two other children. It was still the Accused who went to the village elder, PW4, and told him that there was a funeral at his home long before the matter was reported to the police.

83. The Accused, therefore, knew what had happened to the deceased. He could not be truthful in his defence that he was unaware of what befell the deceased.

84. Therefore, on this Court's prudent assessment of the facts and the application of the law, it is hereby found and held that the totality of the prosecution's evidence primarily points to the guilt of the accused. There was no any explanation upon any other reasonable hypothesis than that of the guilt of the accused. In other words, there were no other co-existing circumstances which weakened the chain of circumstances relied on in inferring the guilt of the accused.



85. In the end, this Court finds and hold that it was the Accused who committed the unlawful act which caused the death of the deceased.

Malice aforethought?

86. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.

87. Section 206 of the Penal Code defines 'malice aforethought' as follows: -

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- 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.
- c. An intent to commit a felony.
- d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

88. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

89. In *Joseph Kimani Njau v Republic* [2014] eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v Republic* [1993] KLR 171, 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 accused; -

- 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. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v Director of Public Prosecutions* [1975] AC 55”. (emphasis added).

90. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which



malice aforethought can be inferred in the case of Republic v Tubere s/o Ochen [1945] 12 EACA 63 as follows: -

- 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.

91. It is evident that the accused took the deceased away from home. The intention was clear and had been long thought out. It was to create an enabling environment to orchestrate the heinous act of defiling, assaulting and killing the deceased.
92. He not only killed the deceased but also assaulted, defiled and sodomized her. Instead of being the source of security for her children and creating a safe environment expected of a home with a father, he become the monster that would horribly plan to defile and sodomize and kill his own daughter by the river in the cover of darkness.
93. Having regard to the manner in which the Accused executed his acts and taking into consideration of the tender age of the deceased and bearing in mind the position of responsibility the deceased abused over his own daughter, there was a clear state of mind to cause harm to the deceased.
94. The prosecution proved malice aforethought in this case.

Disposition:

95. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
96. Having said as much, the State proved all the ingredients of the offence of Murder.
97. As such, the Accused, Emmanuel Juma Simiyu, is found guilty of murdering his daughter Margaret Esinyen.
98. The accused is accordingly convicted of Murder pursuant to Section 322(2) of the Criminal Procedure Code.
99. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Wesonga, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.



