



**Republic v Wakhisi (Criminal Case E011 of 2022)
[2024] KEHC 15619 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E011 OF 2022**

DK KEMEL, J

DECEMBER 6, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

HERMAN MUKHEBI WAKHISI ACCUSED

JUDGMENT

1. The accused herein Herman Mukhebi Wakhisi has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the night of 10th and 11th March, 2022 at Bukeng'ele village in Bungoma South Sub-County within Bungoma County, the accused together with another who has since been discharged, murdered Purity Nekesa.
2. The Prosecution called a total of ten (10) witnesses in support of its case. However, vide a ruling dated 17th May 2024, the evidence of Belinda Anyango (PW1) who had initially been charged alongside the accused herein was expunged from the record. This then left the Prosecution with nine (9) witnesses.
3. The Prosecution's case is that the deceased herein lost her way while heading home and eventually failed to turn up. The following day, frantic efforts were made by the clan elder (PW2) plus the villagers in the search for the deceased whose body was eventually recovered from a nearby river. Further, investigations led to the discovery of the body of the deceased which was found at the river and that there were blood stains which led to the house of the accused herein. The house was searched and some fresh cowdung that had been used to cover the bloodstains were collected as well as some half burnt wooden stick. The body was taken to Bungoma County Referral Hospital where a post mortem was conducted by Dr. Elly Kiplimo Kosgey (PW5) who noted some deep cut wounds on the forehead as well as blood (hematoma) in the brain. He formed the opinion that the cause of death was asphyxia due to drowning and severe head injury. The post mortem report was produced as exhibit 1. The scene was processed and photographs taken by the scenes of crime officer Johana Tanui (PW8) which were produced as exhibits 2 and 3. Some of the recovered exhibits were forwarded to the Government



Chemist for analysis by Polycarp Luta Kweyu(PW10) who found that the bloodstains on a polyethene bag and soil/cow dung had some DNA profile which matched with the DNA profile of the deceased herein.

4. At the close of Prosecution's case, this Court established that the accused had a case to answer.
5. Placed on his defence, the accused testified on oath and stated that the charge against him is false. According to him, on 10th March 2022, he was travelling from Nairobi to Bungoma and that he has a fare receipt which he presented in Court as exhibit 2A & 2B. He told the Court that he arrived in Bungoma on 11th March 2022, at around 6.00 a.m. and that he was arrested at 4.00 p.m. while at the market selling clothes. He told the Court that he has seen the photographs as presented by PW8 but denies ownership of the said house as his door is made of timber while the one on the photographs is metallic. He told the Court that he departed from Nairobi at around 6.00 p.m.

On cross-examination, he stated inter alia; that the fare receipt issued to him does not have the name of the individual who issued it and that it does not have an official rubber stamp; that he maintains that he travelled to Nairobi on the date in question; that the fare receipts had been in his possession since then to date; that he had no difference with PW9 prior to the incident; that he was not taken by the police to the river where the body was recovered; that he did not raise the issue of having been assaulted by PW9 from the beginning until his defence hearing; that he has not availed photographs of his house so as to controvert those of the prosecution.

6. At the close of the defence hearing, parties were directed to file and exchange their written submissions. Both parties complied.
7. I have considered the evidence adduced herein by both the Prosecution witnesses and the defence proffered by the accused. The main issue for determination is whether the Prosecution has proved its case against the accused to the required standard and which standard has been held to be that of beyond any reasonable doubt.
8. The offence of murder is defined in Section 203 of the Penal Code as follows:-

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

9. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-
 - i. The fact of the death of the deceased.
 - ii. The cause of such death.
 - iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused persons.
 - iv. Proof that said unlawful act or omission was committed with malice aforethought.
10. In the case of *Libambula vs Republic* (2003) KLR 683, the Court of Appeal rendered itself on the question of motive as follows:-

“ We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of *Evidence Act* Cap 80 Laws of Kenya.



Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”

11. Notably, on the fact of the cause of death of the deceased, there cannot be any doubt as the cause of death was confirmed by PW5 in the post mortem report. The deceased died as a result of a deep cut wound on the forehead measuring 3cm×6cm; deep cut wound on the occiput measuring 5cm×6cm and asphyxiation from drowning. Dr Elly Kiplimo’s medical opinion on the cause of the deceased’s death was proof that the deceased did not die of natural causes.
12. The photographs produced by PW8 and the results of the post mortem report dated 17th March 2022, were proof that whoever assaulted the deceased intended to cause her grievous harm, if not to kill her. There was clearly malice aforethought. Under Section 206 of the Penal Code, malice aforethought is defined as follows:-

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

13. From the foregoing observations, it is clear that ingredients (i), (ii) and (iv) of the offence of murder had been proved herein. What remains for determination is whether the deceased met her death as a result of the accused’s actions or omissions.
14. The Prosecution did not adduce any evidence that anyone witnessed the deceased’s murder. This was after the evidence of the accused’s wife (PW1) was expunged from the record following a successful application by the accused herein. However, based on the evidence of PW8, several items with bloodstains were recovered from the house of the accused herein, and which were duly forwarded to PW10, a Government chemist for analysis. The Prosecution vide PW4, was able to prove that the accused not only knew the deceased but that they were related as he was a son to the aunt of PW4, who is the mother of the deceased herein. She told the Court that she was not aware if the deceased knew the accused prior to her demise.
15. Vide Government Analyst report dated 18th April 2023, the forensic evidence from the samples of blood that was adduced by PW8 confirmed that the blood stains on the items recovered from the accused’s house bore the DNA of the deceased herein and placed the accused at the murder scene. The accused has insisted that the house as contained in the photographs adduced by PW8 did not belong to him as his house has a wooden door while the one on the photograph bore a metallic door. The accused’s defence is an alibi to the effect that he had travelled to Nairobi on 9th March 2022, wherein he arrived on 10th March 2022 and went about his business of procuring clothes for his business as



Luanda Market. He insisted that he travelled back from Nairobi on 10th March 2023 and arrived in Bungoma on 11th March 2023 at 6.00 a.m. He availed fare receipts in Court. During cross-examination of PW8 the defence did not raise any issue of an alibi with him at all. However, in relying on an alibi defence, the entirety of the Prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the accused was elsewhere and not at the scene of the crime. The conduct of the accused and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the Court.

16. In support of this right proposition, the Court in *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 held:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

17. In this case, the plea of alibi was never even part of the cross-examination issues raised by the accused. Though in law, time of the disclosure might not be in issue, the Prosecution no doubt required adequate notice to investigate the allegation of the alibi defence.

18. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See *Nyakundi J IN Charles Kasena Chogo v Republic* [2019] eKLR.

19. As was pointed hereinabove, this is a case that is based on circumstantial evidence as no one witnessed the incident. However, the circumstances shown above proves this is one instance where the burden of proof shifts to the accused to displace the Prosecution’s evidence by demonstrating that another person other than him could have caused the deceased’s death.

20. In the case of *Republic vs Mjomba Jason Mwambili* [2016] eKLR, this very court rendered itself on the issue of circumstantial evidence when it stated as follows:-

“Circumstantial evidence can be accepted when an accused person’s guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.”

21. The burden shifted to the accused in accordance with Section 111 (1) of the *Evidence Act* Cap 80 (Laws of Kenya) for him to explain how the DNA of the deceased was discovered in his house.

51. Section 111(1) of the *Evidence Act* provides as follows:-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:



Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”

22. Although no one witnessed the accused killing the deceased, this Court finds and holds that all the circumstantial evidence adduced in this case pointed irresistibly to his guilt. This Court further finds that the circumstances of this case taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability that accused committed the offence. He did not adduce any tangible evidence or co-existing circumstances that could weaken or destroy the inference of guilt against him. Even though the accused has maintained that the house where the incident did not belong to him, all the witnesses testified herein and stated that the house belonged to him. In fact some of the civilian witnesses hailed from the area and had known him quite well such as the mother of the deceased (PW4). It is noted that the accused did not raise any issue regarding a different house with those witnesses.
23. Accordingly, having carefully considered the evidence that was adduced by both the Prosecution and the accused, this Court finds that although there was no direct evidence implicating the accused in the death of the deceased herein, the Prosecution proved its case to the required standard, which was proof beyond reasonable doubt by demonstrating that the deceased met her death as a result of the unlawful acts or omissions on the part of the accused and that the alleged unlawful acts or omissions were committed with malice aforethought on his part.
24. For the foregoing reasons, i hereby find Herman Mukhebi Wakhisi guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convicts him accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:-

Herman Wakhebi Wakhisi.....Accused

M/s Wakoli.....for Accused

M/s Kibet.....for Prosecution

Kizito/Ogendo..... Court Assistant

