

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. E001 OF 2024

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

BENJAMIN ODIPO DIENYA.....
ACCUSED

JUDGMENT

1. The accused is charged with murder, contrary to sections 203 and 204 of the Penal Code, Cap 63, Laws of Kenya. The allegation is that he murdered Catherine Anyango Magombe, also known as Nyangi, on 22nd January 2024, in Bumina area in Bukani Sub-Location, Bunyala West Location, Bunyala, Busia. He denied the charge, when arraigned on 28th February 2024. A trial was conducted, where the prosecution called 7 witnesses.
2. PW1, Zainet Awino Namisi, had met the deceased on 21st January 2024, after which they parted. The deceased was not with the accused, when PW1 saw her. She later heard that she had died. PW2, Mary Achieng, met the deceased and the accused together. They went together to the home of Lillian Otieno, alias Yatima, where they drunk liquor, in a local bar, called *mulingilo*. The 2, that is the accused and the deceased, left together, at about 10.00 PM, leaving her, PW2, behind. She travelled, and when she came back, after 3 days, the police asked her to record a statement, as the deceased had been found dead.
3. PW3, Lillian Fatuma Odhiambo, alias Yatima, served *mulingilo* to the accused, the deceased and PW2, on 22nd January 2024. The accused and the deceased left together,

sometime between 10.00 PM and 10.30 PM, without PW2, who the witness, PW3, sent on errand, to escort a certain Mercy. 3 days later she, PW3, identified the body of the deceased at the mortuary. PW4, Marystellah Knight Nyangili, saw the deceased, the accused, PW1 and PW2 together, on 22nd January 2024, at about 4.00 PM. They had supper together. The deceased and the accused left together to go look for Ogema, PW5, a brother of the accused. That was the last time she saw the deceased.

4. PW5, Benard Ogema Wycliffe, was the boyfriend of the deceased. He met her on 21st January 2024, and they spent the night together. They parted on 22nd January 2024, when he left, at 4.00 PM. He heard, 2 days later, that she had been found dead, and he went to the hospital mortuary to confirm. He was a brother of the accused. He stated that he was at the home of PW3 with the accused and the deceased, when she was last seen alive at about 10.30 PM.
5. PW6, Dr. Dida Emase, performed an autopsy on the body of the deceased, on 29th January 2024. The body was in a state of decomposition. No physical injuries were detected, possibly due to the state of the body. The genital organs were open, with the lower lips being wide apart. There was blood in her lungs, with the left lung having collapsed. He concluded that the cause of death was a blunt injury to the chest, due to sexual assault. He explained that the presence of blood in the chest cavity impaired the respiratory system, making it difficult to take in oxygen. He explained further that the body was bloated, and the opening of the lips of the vagina could be due to the bloating, or forced penetration. PW7, No. 92773, Police Constable Richard Onger, investigated the matter.
6. I put the accused on his defence; in a ruling I delivered on 23rd May 2025. He gave a sworn statement, on 17th June

2025. He testified that on 21st January 2024 he met the deceased and another woman. They were at a liquor joint, where they sat separately, the accused inside the house, while the 2 women sat outside. He left the liquor joint at 9.30 PM, but he did not see the 2 women, as he got out, and it appeared that the 2 left him at the home. He later learnt that the deceased had died. He denied causing her death.

7. At the end of the oral hearing, the accused filed written submissions, which I have read and noted the arguments made.
8. The offence of murder has several elements, or ingredients, which the prosecution is required to establish, beyond reasonable doubt, namely: proof of the death, the cause of it, the involvement of the accused person in the causation, and malice aforethought.
9. Regarding the death of the deceased, there is overwhelming evidence, that she died, as testified by PW1, PW2, PW3 and PW4. PW2 and PW4 testified to having seen her body at the mortuary. The accused also stated that he heard talk of her death. PW6 conducted postmortem on her body.
10. Regarding the cause of death, PW 6 had conducted the autopsy on the body. His opinion was that there was injury to the chest, which caused bleeding into the chest cavity, which suffocated her to death.
11. On the linkage between the accused and the causation, there is no direct evidence. The evidence available is that the accused and the deceased were last seen together, on 22nd January 2024, sometime between 10.00 PM and 10.30 PM, when they left the home of PW3. No one saw the accused person do anything to the deceased, that would have led to her death, and his linkage to the death is tenuous. None of

testimonies, from the witnesses, pointed to any misunderstandings or disputes, or grudges between the 2, that evening, as they interacted, or as they left the venue where they were drinking together. There would be no evidence to suggest that there was a motive or a reason for the accused to kill the deceased.

12. Regarding malice aforethought, as the cause of death was injury to the chest, which caused haemorrhaging into the chest cavity, anyone who caused such an injury, going by section 206 of the Penal Code, which defines malice aforethought, must have intended to cause such injury, possibly with an intention to causing her death, and malice aforethought could be inferred.

13. The case rests solely on circumstantial evidence. The circumstances were that the deceased and the accused were last seen together. Circumstantial evidence would be sufficient proof of the offence alleged, if it points inexorably to the guilt of the accused. I am not persuaded that the evidence herein points to that. All there is, is that the 2 were last seen together, but that fact alone, without more, would not suffice. The evidence did not bring out a circumstance of animosity or hostility between the accused and the deceased, which would have established an environment conducive for causing of a murder. In any event, there was no evidence to eliminate the possibility of the intervention of a third party, given that there was a suggestion that the deceased was separated from her husband, who was said to be looking for her.

14. I am not, therefore, persuaded that a case has been established, beyond reasonable doubt, that the accused herein, Benjamin Odipo Dienya, caused the death of the deceased herein, Catherine Anyango Magombe, to warrant his being convicted of her murder. Consequently, I do hereby

acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya. The accused shall be set free from prison custody forthwith, unless he is otherwise lawfully held. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT, AT
BUSIA, ON THIS 14TH DAY OF NOVEMBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, Advocates for the Republic.

Mr. Otieno, instructed by Masiga Otieno & Associates, Advocates for the accused person.