



**Republic v Simiyu (Criminal Case E010 of 2022)  
[2024] KEHC 7570 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 7570 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E010 OF 2022  
REA OUGO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHRISPINUS KUNDU SIMIYU ..... ACCUSED**

**JUDGMENT**

1. The accused person, Chrispinus Kundu Simiyu, is charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the information dated 24<sup>th</sup> March 2022 are that on 8<sup>th</sup> day of March 2022 at Kibabii "A" in Bungoma South Sub-County within Bungoma County murdered Emmanuel Mukhwana. The accused person pleaded not guilty to the charge. Seven (7) witnesses were called by the prosecution in support of its case.
2. The accused person's mother, sister and brother testified as PW1 (Esther Kundu), PW2 (Pamela Namalwa) and PW3 (Martin Sifuna Kundu) respectively. The accused's sister-in-law, Alice Situma, testified as PW4. Dr. Elly Kiplimo Kosgei (PW5) performed the post-mortem. No. 118317 PC Stanley Langat (PW6) was the arresting officer while No. 235761 PC Robinson Otero (PW7) was the investigating officer in this case. The deceased was a 5-month-old baby and PW2's son.
3. The prosecution case was that the accused person quarrelled with PW2 on the material morning and the accused person strangled the deceased. The prosecution evidence is summarised as follows:
4. PW1 testified that on 8//3/2022 at 7:30 a.m. she went to look for firewood when her grandson, Melvin, came to tell her that the deceased had been beaten by the accused person. She testified that the child was on the sofa when she left but when she returned home, she found him on the floor. The child was weak but she did not see any physical injuries. She took the child to the hospital at 9:00 a.m. and he died at the hospital. Her grandson, Melvin Juma, who witnessed the incident was in primary school



- and he left home in May. On cross-examination she confirmed that she did not witness the offence take place and neither did she find the accused person at the scene.
5. PW2 testified that she was in the kitchen preparing porridge when she had the child crying. She explained that the deceased was on the sofa. She found Melvin holding the child and he told her that he found the deceased when he had fallen. PW2 testified that she had not seen the accused person that morning. She was referred to her statement and further testified that she quarrelled with the deceased that morning and he told her that she should go and get married. She went to the house to hide and then heard the child cry. She took the child from Melvin and took her to hospital in the company of PW1. The child died while in hospital. On cross-examination, she testified that Melvin did not tell her that the accused person hit the deceased. She testified that the accused usually leaves home early at 6:00 a.m. and was not at home between 8:00 to 9:00 a.m. She testified that her issue with the accused person is that he quarrels with her and if he is released, he will continue quarrelling her and she seeks that he be held in remand for 3 years. She testified that the child died at 1:00 p.m. She testified that Melvin ran away and that she did not know if Melvin hit the deceased.
  6. PW3 who was at the shamba was informed of the incident and went to the scene. There were people at the scene. He saw the deceased with PW2 and he was crying. He advised them to take the child to the hospital. On cross-examination, he testified that he found the accused person home amongst the people who were at the scene.
  7. PW4 testified that on the material day, she heard noises at her father-in-law's home and proceeded to the scene. PW1 gave her the child to take to the hospital. The deceased at the time was crying. She went to the hospital with her neighbour Metrine but they could not get treatment. She then gave the child to her neighbour to take him to the referral hospital. She testified that she did not see the accused person on that day.
  8. PW6 testified that on 8/3/2022 at 1700hrs he was called by the OCS I.P Fredrick Simiyu to visit the murder scene. Acting on the report made in O.B No. 10 of 8/3/2022 and in the company of his colleague he went to the scene. He found the accused person had been tied with a rope and placed inside a house. He had head injuries as a result of being beaten by the mob. At the scene was also the body of the deceased. The residents reported that he participated in the murder of the deceased by strangling him. They took the accused person from the scene and took him to the police station. He handed the accused person to the DCI once they took over the case. Later the deceased's body was picked by the OCS.
  9. Dr. Elly Kiplimo Kosgei (PW5) testified that he is currently based at Bungoma Referral Hospital. He carried out the deceased's post-mortem. On the external appearance of the body, he had a bruise on the head, ligature marks on the anterior neck and a highly mobile neck. On the internal examination, the head had a massive subdural haematoma. He had a fracture on the thyroid bone. PW5 formed the opinion that the cause of death was severe asphyxia from strangulation with a severe head injury.
  10. The investigating officer, PW7, testified he was directed to conduct the investigations after a report was made in the Kibabii police post. He was informed that the suspect was in custody and he interrogated him. He went to the scene and PW1 showed him where the fight started and where the accused person is suspected to have strangled the deceased. They went to Bungoma police station where he recorded statements from the available witnesses. He compiled the file and forwarded it to ODPP who recommended the offence of murder. He further testified that there was also one eye witness, Melvin Juma who did not testify in court because he was missing. During cross-examination, he testified that the witness who saw the accused person kill the deceased had not been found. He further testified that



the accused person was not fit to take the plea and that he could not tell whether he was mentally unwell at the time he committed the offence.

11. When the accused person was placed on his defence, he testified that he was a casual worker and that the deceased was his nephew. He recalled that on 8/3/2022 he went to work at 6:00 a.m. He worked until noon and went home after he was informed that they had visitors. He was arrested at 4:00 p.m. The accused denied strangling the deceased.

### Submissions by parties

12. The court directed that the parties file written submissions. The prosecution relied on the evidence already on record to advance its case.
13. The accused person through counsel, M/S Onyando & Co Advocates, submitted that the prosecution failed to offer sufficient evidence to convict the accused person on the charge of murder. They argue that the prosecution failed to offer evidence directly connecting the accused with the alleged murder, as the prosecution closed their case without calling the alleged eye witness.
14. They also submit that the doctor's evidence was wanting and of no probative value. The doctor alleged that the deceased died as a result of strangulation, and when cross-examined he stated that strangulation action does not automatically lead to the death of a person. The investigating officer was not able to explain whether the body was subjected to forensic examination to conclusively arrive at the finding that the accused was the person who committed the offence by dusting off of fingerprints.
15. It was further submitted that the decision to charge the accused person was purely based on suspicion. In the case of [Mary Wanjiku Gichira v Republic](#) Criminal Appeal No. 17 of 1998, it was held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and point to his guilt. This is because a conviction has the effect of taking away the accused freedom and at times a life.”
16. They submit that the prosecution evidence tendered falls below the standard required to convict the accused for the offence of murder and urge that the accused be acquitted under section 215 of the [Criminal Procedure Code](#). The accused person gave sworn testimony, denied the charge, and raised the defence of *Alibi*, which defence was not dislodged by the prosecution. The defence raised by the accused person was credible and they urged the court to acquit the accused person.

### Analysis and determination

17. I have considered the evidence adduced herein by the prosecution witnesses and the accused person. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard, beyond any reasonable doubt. The accused is charged under sections 203 and 204 of the [Penal Code](#) which read as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”
18. The prosecution is required to prove the death of the deceased, that the accused person caused the unlawful death and that he was actuated by malice.



19. The death of the deceased is not in dispute. PW1 and PW2 both testified that they rushed the deceased to the hospital and he was pronounced dead. The doctor who performed the post-mortem, PW5, testified that he was of the opinion that the cause of death was severe asphyxia from strangulation with a severe head injury

20. I now turn to consider whether it was the accused person who caused the unlawful death. The whole prosecution case is centred around the reported statements of Melvin Juma. PW1, PW2, PW3 and PW4 all testified that they did not witness the accused person strangle the deceased. PW1 stated that she was informed by Melvin that the accused person had assaulted the deceased. PW2 testified that she was in the kitchen preparing porridge when she heard the child. Upon entering the sitting room, she found the child had fallen down, and Melvin was holding him. It was Melvin who told her what transpired. PW3 was in the shamba when the incident took place and did not witness the crime. The evidence of PW1, PW2 and PW3 was therefore hearsay. In *Kinyatti v Republic* [1984] eKLR the court of appeal held that:

- “ 4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.
5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.”

21. The Court of Appeal in *Francis Mwangi Wanjohi & another v Republic* [2020] eKLR stated:

“ Accordingly, the evidence presented to the court about what John Waweru, George Maritim and Peter Mwangi told Gladys Njeri regarding the motorcycle and the arrest of the appellants was inadmissible as hearsay evidence and ought to have been rejected by the trial court. That evidence was highly prejudicial to the appellants. As we will demonstrate shortly, without it, there was no other evidence, direct or circumstantial upon which the court below could have founded a conviction. Gladys only appeared after the police arrived at the scene when the motorcycle was found and the appellants arrested. She also did not witness the discovery of the deceased person’s body.

Whereas by section 143 of *Evidence Act* no particular number of witnesses are required to prove a fact, it is equally essential that the prosecution must make available all witnesses necessary to establish the truth even if their evidence turns out to be inconsistent with the charge. After all, the purpose of a criminal trial is to ensure that an individual accused of a crime receives a fair and impartial evaluation by an impartial arbiter of the evidence in order to determine if he is guilty or not. That is why, the trial court has the power and the duty to call witnesses whose evidence appears essential to the just decision of the case. But where the evidence called by the prosecution is barely adequate, the court may infer that if the evidence of uncalled witnesses was tendered, it would have been adverse to the prosecution. See *Bukenya & Others v Uganda* [1972] EA 549.”

22. In this case, the person who could have shed light on what transpired was Melvin Juma. The investigating officer, PW7 testified that he did not take the statement of the witness and that the said witness, Melvin Juma, did not testify in court. Interestingly, PW1 testified that Melvin Juma left home in May of 2020 and it is therefore not clear why no statement was taken from him. The evidence of PW1, PW2 and PW3 was hearsay evidence and therefore inadmissible. Having rejected the evidence of



PW1, PW2 and PW3 the prosecution evidence is inadequate to prove beyond reasonable doubt that it was the accused person who committed the offence.

23. The upshot is that the prosecution has not proved the charge against the accused person to the required standard, beyond reasonable doubt. I find the accused person, Chrispinus Kundu Simiyu, not guilty of the offence of murder and acquit him accordingly under section 215 of the [Criminal Procedure Code](#). The accused is free to go unless lawfully held.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Chrispinus Kundu/ Accused -Present

Mr. Okangi h/b for Mr. Onyando for the Accused

Prosecution/ State Counsel - Absent

Wilkister -C/A

