



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Andole (Criminal Case 21 of 2020)
[2024] KEHC 1655 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 21 OF 2020
RN NYAKUNDI, J
FEBRUARY 23, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY ANDOLE ACCUSED

JUDGMENT

1. The accused person herein was charged with offence of murder contrary to section 203 as read with Section 204 of the *Penal Code* (Chapter 63 of the Law of Kenya). The brief particulars are that on 15.2.2020 at Tuiyobei village in Mois bridge Location, soy sub county within Uasin Gishu County Murdered Lucy Wanjiru. He pleaded not guilty to the offence. This therefore necessitated a full trial to be held in which the prosecution summoned five witnesses in support of the case. This was towards proving the guilt of the accused person beyond reasonable doubt. It should bone in mind that the burden herein never shifts to the accused person.

The Case Summary For The Prosecution

2. PW1 Barnabas Kemboi told the court that on 15.2.2020 at about 12.00pm he was telephoned by one Saina about the presence of a dead body at a particular scene within Tuiyobei village. The witness having informed the area chief he rushed to the scene where he found two ladies one who was a minor aged 15 years who directed him to the actual location of the body. On observation of the body PW1 saw a human being covered with a sack next to it was a red bag, vegetables, sandals, and underwear. The scene officer looked disturbed. He was later to be asked to record a statement with the police
3. It was further a case to the prosecution as reflected in the testimony of PW2 Caroline Naliaka. In her evidence, PW2 stated in court having identifying himself as the mother to the deceased. She narrated on how she had sent the deceased to go and sell some vegetables on her behalf. In the course of the day she also managed to come back home but on insistence of PW2 she was encouraged to continue hawking



the vegetables. According to PW2 on the material day she also prepared lunch expecting the deceased to come in and be served with the afternoon meal but she was nowhere to be scene. Unfortunately, the area chief broke the sad news of the death of the deceased. She proceeded to the scene in company of the chief where it was all laid bare that the deceased was no more and besides that evidence of having been raped and strangled to death. In the same breadth PW3 Anne Wafula stated in court that on 15.2.2020 the clan elder PW1 came to her house with the tragic news of the deceased's death. It was also the testimony of PW3 that the accused person happened to be in her home as one of the masons working in building the house.

4. The other witness summoned by the prosecution was PW4 Wilson Sirma the area chief who confirmed having received a report of the murder incident within his location. He visited the scene and saw the deceased body as a telephone call was made with the OCS to investigate the incident. From the record of the Prosecution case PW5 Inspector Kibor was tasked with the role of investigating the killing of the deceased and to establish culpability of a known person. As he stated in his testimony PW2 recorded witness statements, caused a postmortem examination to be carried out and also proceeded to recover the following exhibits. Red bag, White Sack, Pair of sandals. PW5 as the investigating officer also received the following samples extracted by the pathologist during the post mortem examination for forensic and DNA analysis. That being:
 1. Blood sample of Kennedy Andoge (Accused marked A)
 2. Finger nail clippings of Kennedy Andonge (Accused marked B)
 3. Stands of hair of Kennedy Adonge (Accused Marked C)
 4. Blood samples of Lucy Wanjiru (Deceased marked D)
 5. Nail clippings of Lucy Wanjiru (Deceased marked F)
 6. High vaginal swap from Lucy Wanjiru (Deceased marked G)
 7. Strands of hair from Lucy Wanjiru (Deceased marked E)
5. Another piece of evidence in support of the prosecution case PW6 Dr. Alex Barasa who conducted the postmortem examination at Kitale County Hospital. PW6 confirmed that the deceased suffered the following injuries:
 1. Multiple bruises on the face,
 2. Nail marks on the neck
 3. Cyanosed nails
 4. Bruised vaginal wall
 5. Fractured cartilage airway obstruction.
6. In correlating the findings of the postmortem examination PW6 formed the opinion that the cause of death was asphyxia secondary to strangulation. At the close of the prosecution case, the accused was placed on his defence where he elected to give a sworn statement and vehemently denied being involved in the murder of the deceased. The accused version of the events of 15.2.2020 culminating into the death of the deceased was that he did not know about the incident and had spent most of the time at the place of work. He indicated that he has skills in masonry and had been contracted to work for PW3.



7. It follows therefore in those circumstances whether it's conceivable that the prosecution in its quest to secure judgment for murder against the accused person that very burden of proof of beyond reasonable doubt is deducible from the facts of this case.

Analysis And Determination

8. What is the threshold to be proven by the prosecution by the offence of murder contrary to section 203 as read with Section 204 of the penal code. It is a non-negotiable legal terrain to be discharged by the prosecution at all times whether by way of direct or circumstantial evidence. The central element of the offence remain to be
 - a. The death of the deceased
 - b. That her death was through unlawful acts or omission of the accused
 - c. That the accused had malice aforethought
 - d. As such, the quality of the evidence placed the accused person at the scene of the murder.
9. A host of decisions elaborately speak to the issue of burden and Standard of proof required by the state to establish the guilty of an accused person. In *Miller vs Minister of Pensions* (1947) 2 ALL E.R 372 at Page 373 to page 374, Lord Denning Stated quite succinctly that: “ The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice also in *Andrea Obonnyo & Ors V.R* (1962) E.A 542 the court stated at P. 550 as follows:

“ As to the standard of proof required in criminal case Denning, L.J (as he then was) had this to say in *Bater v. Bater* (1950) 2 all E.R 458 at 459 “ It is true that by our law there is a higher standard of proof in criminal case than in Civil Cases, but this is subject to the qualification hat there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degree of proof within that standard. Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear.
10. The prosecution case of 6 witnesses against the accused person is purely based on circumstantial evidence. The two combined cases, sets out the key guidelines in which the facts of this case shall be tested with a view to single out whether the accused is the one who actually strangled the deceased so as to be held culpable. As a starting point in this discussion it is good to make known the best evidence emerging applicable to the circumstances of this case. In the case of *R v Hiller* (2007) 233 A.L.R 63 *Shepherd v R* (1991) LRC CRM 332 the court observed that

“ The nature of circumstantial evidence is such that while no single stand of evidence would be sufficient to prove the defendant's guilty beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strands that required proof beyond reasonable doubt but the whole. The cogency of the inference of the guilt therefore was built not on any particular strand or evidence but on the cumulative strength of the strands of circumstantial evidence. Also in *Simon Musoke V rea* 715 held that “In a case depending



exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.

11. Structuring the commission of the crime as underpinned with the above ingredients on the guiding principles I endeavor to make the following findings. First, in respect to the death of the deceased, there is no doubt that Lucy Wanjiru was killed on 15.2. 2020. Her body was discovered at Tuiyobei village, Soy sub county. According to PW1, PW2, PW3 PW4, & PW5 on visiting the scene each saw the body of the deceased with multiple injuries. It is the same body in which PW6 Dr. Alex performed a postmortem examination and a death certificate No. 1473856 was issued as absolute evidence that her right to life has come to an end albeit prematurely. It is my conclusion on this ingredient that sufficient circumstantial evidence as corroborated by medical evidence that the threshold of beyond reasonable doubt has been met by the prosecution.
12. Second is the ingredient of Unlawful Death of the Deceased.

“when a man of sound memory, and of the age of discretion unlawfully killeth within any country of the realm any reasonable creature in reirem natura the King’s place with Malice Aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, die of the wound or hurt within a year and a day after the same. In the case of Smith (1959) 2QB 42-43

“Where the earlier injury inflicted by the accused is held to be an operating cause, and a substantial cause, the accused person and that other person are both guilty of homicide.
13. Section 203 of the [Penal Code](#) provides that it is unlawful to kill any person unless such killing is authorized or justified or excused by law. Pursuant to Section 202 and 203 of the [Penal Code](#) an offender who commits an unlawful killing will be guilty of either murder or manslaughter, depending on the circumstances of the case. The allegedly causative acts or omissions need not be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death. The means by which an accused person causes the death of another may be direct or indirect, as long as those means are, or are caused by the accused’s Acts of omissions.
14. In considering the facts of this case the range of evidence from the prosecution witnesses and autopsy report shows the circumstances which contributed to the death of the deceased primarily flow from unlawful Acts or Omissions by a third party. The facts and evidence demonstrate that the killing of the deceased was not authorized, justified, or excused by law. With that in mind, the prosecution has discharged the burden of proof to the effect that the deceased’s injuries were wrongfully inflicted and they became the proximate cause of the homicide.
15. Thirdly is the element of malice aforethought: Malice aforethought is element for the offence of murder. Malice aforethought is defined in Section 206 of the [Penal Code](#) in the following terms
 - a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish tht it may be caused



- c. An intent to commit a felony
 - d. An intention to facilitate the escape from custody of a person who has committed a felony.
16. There are numerous authorities covering manifestation of malice aforethought in homicide cases of the charge under Section 203 of the Penal Code. For the offence of murder and proof of malice aforethought in *Rex V Tubere s/O Ochen* (1945) IZ EACCA 63 the court held that: “ In determining existence or nonexistence of malice one has to look at the facts providing the weapon used, the manner in which it is used and part of the body injured. In *Hyam v DPP* (1974) A.C the court held that: “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
17. The court in *Ernest Asami Bwire Abanga alias Onyanog V R* (CACRA No.32 of 1990) stated that “The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased
18. The case of *S v Pistorias* 2016 (1) SACR best illustrates the manifestation of Malice Aforethought in a murder charge as follows:
- “ In cases of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore gambling’ as it were with the life of the person against whom the act is directed. It therefore consists of two parts:
- (1) foresight of the possibility of death occurring, and
 - (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways.
- For example, it has been said that the person must act ‘reckless as to the consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.’
19. I gather from the evidence before this court this was a premeditated murder when one looks at the chain of events which culminated the death of the deceased. The proper appraisal of the evidence is the correctness of the findings of facts and quality of the report of the government analyst. Apart from the accused person raising an alibi defence the circumstances from which the conclusion of guilty and being at the scene of the murder is fully established in the government analyst report. There is no snap in that chain of the report to entitle him a benefit of doubt that he was elsewhere on the material



day of the murder other than the scene of the crime. Indeed, from the analyst report circumstances of last seen together can be pieced in such a manner that a very strong presumption of evidence is against him. Take for example the issue of rape which was one of the unlawful act committed against the deceased apparent prior to her death. The investigating officer gave a narration in that angle of recovery of exhibits and the extract samples taken at the time of the postmortem as between deceased and the accused person. What is the significance of the analyst report? This is all about the analysis of the following exhibits.

1. Blood sample of Kennedy Andoge (Accused marked A)
 2. Finger nail clippings of Kennedy Andonge (Accused marked B)
 3. Strands of hair of Kennedy Adonge (Accused Marked C)
 4. Blood samples of Lucy Wanjiru (Deceased marked D)
 5. Nail clippings of Lucy Wanjiru (Deceased marked F)
 6. High vaginal swap from Lucy Wanjiru (Deceased marked G)
 7. Strands of hair from Lucy Wanjiru (Deceased marked E)
20. From the analysis the government analyst made the following positive findings that every person has a unique DNA which is acquired from his/her parents who contribute half each from biological mother and father. By examining the DNA from a blood sample or anybody fluid it is possible to determine the origin of the blood or body fluid given the blood samples or body fluid of the suspects,
21. Conclusion and Opinion: Based on the finding the DNA profile generated from hair (item E) Vaginal swap (Item G) and finger nails (Item F) matches the DNA profile of Lucy Wanjiru (Deceased) The DNA profile generated from the nails (Item B and hair (Item C) matches the DNA profile of Kennedy Andogo (Accused)
22. This DNA match shows that the aforesaid facts of death of the deceased were especially within the knowledge of the accused. In a case of murder based on circumstantial evidence, dead body, the finger nails clippings of the accused, strands of hair, and the DNA samples from the deceased showed a clear correlation of medical evidence that points to the accused person as the one who participated in inflicting the fatal injuries upon the deceased.
23. Following the analysis of the evidence it is inescapable that the prosecution has discharged the burden of proof of beyond reasonable doubt based on the circumstantial evidence to move this court to find the accused guilty and convict him of murder contrary to Section 203 as read with Section 204 of the penal code.

Decision On Sentence

24. The convict Kennedy Andole after a full trial has been found guilty of murder contrary to Section 203 as read with 204 of the [Penal Code](#). The facts as they emerged between the prosecution and defence case has been clearly captured in the main judgement. [Francis Muruatetu case](#) (2017) eKLR to determine the measure of the blameworthiness of the accused person. As developed by the Supreme Court on the Muruatetu case, the court has to consider the convict personal circumstances, the seriousness of the crime and the surrounding circumstances in which it was committed, the sentencing principles like deterrence, rehabilitation, proportionality, reparation, equality, and etc. 25. In the case of *Veen v*



The Queen (No. 2) (1987-88) 164 CLR at 476 Per Mason CJ, the court had this to say on sentencing discretion:

“ However sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”

It is now the court’s task to proceed and hand down an appropriate sentence of the offence. It is trite that the imposition of a fair and proportionate sentence is not a mechanical function but one which is nuanced with legislative framework and the anatomy of judicial discretion. The court is required to weigh and balance a variety of factors as outlined in the

25. In arriving at the sentence of the accused persons, I have taken into account the submissions by learned counsel M/s Muiruri on mitigation incorporating the aspects of the convict person being first time offender, that as appropriate he is remorseful and regrets the criminal acts which culminated in his arrest and subsequent prosecution. It was also the case for the prosecution that the offence committed by the convict is serious in which learned prosecution counsel Mr. Mugun proposed a custodial sentence to meet the justice of the case. From the victim impact statement, the court was urged to release the convict so as to go back home and take care of his children. Further the court was also favored with both the children’s officer and probation officer’s reports in overall consideration I take the following approach. First by reflecting and guiding jurisprudential principles on sentencing.
26. In *Su Matyity* 2011 (1) SACR 40 (SCA) para 13 the court provided the differential minimum between regret and remorse as follows:

“There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all before a court can find that an accused person genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed: what has since provoked his or her change of heart. Whether he or she does indeed have a true appreciation of the consequences of those actions.

27. Given this background, one has to take into account the surrounding circumstances upon which the cruelty of that high magnitude used by the accused person against the deceased. In consideration of the aggravating factors, the mitigation offered by learned counsel on behalf of the accused and further his respective personal circumstances a serious crime of this nature impacting on the right to life in Article 26 of the constitution it is appropriate to impose a sentence with a deterrent effect. The country seems to be experiencing an upsurge of family violence and abuse, rape, sexual assault and other gender based violence. This one such case that an act of gender based violence resulted in the death of the deceased.



The highlighted factors in this case shows a premeditated homicide by the convict to an innocent girl at the prime age of her life. Furthermore, no evidence of provocation was ever the cause to launch such an attack to take away the life of another person. In the analysis of the evidence also I find no justification, authorization by law or excuse of this brutal murder. Having weighed one factor after another the measure of the sentence to be imposed against the convict is that of custodial punishment. In this regard, I exercise discretion to sentence the convict to 10 years imprisonment with effect from 9.6.2020 taking into account Section 333 (2) of the *Criminal Procedure Code*. The section sets the maximum remand credit that in determining the sentence to be imposed on a person convicted of an offence a judge may take into account any time spent in custody by the person as a result of the offence. Subject to any provisions of the law which may grant remission to the convict on the sentence imposed calculation of remand credit be computed from 9.6.2020. 14 days Right of Appeal Explained

DATED, SIGNED AND DELIVERED AT ELDORET ON THE 23RD DAY OF FEBRUARY 2024

In the Presence of the;

The convict in person

Mr. Mugun for the state

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R. NYAKUNDI

JUDGE

