



**Republic v Mwachiungu (Criminal Case 16 of 2019)  
[2024] KEHC 1896 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1896 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 16 OF 2019  
A. ONG'INJO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MWINYI HAMISI MWACHIUNGU ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused Mwinyi Hamisi Mwachiungu faces a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that Mwinyi Hamisi Mwachiungu on the night of 30<sup>th</sup> and 31<sup>st</sup> day of December 2018 at Consolata Area in Likoni Sub-County within Mombasa County murdered Faith Kawira.
3. The prosecution called 6 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

**Prosecution Case**

4. PW1, Adan Mohamed Bindo, a Village Elder in Consolata Area said that on 1.1.2019, he was in his house when Maina went at 12.45 pm and reported that their neighbour's house had been locked from outside and they were worried because they had not heard from the woman of the house. PW1 said that the woman was not known to him but she was called Faith Kawira. He said that he proceeded to the house and confirmed the house was locked. That they went and reported to Inuka Police Station and the OCS instructed them to go and break into the house and inform him what was inside.
5. PW1 informed court that they went and broke into the house and found the woman dead on the bed facing up. He said the body was covered and there was foul smell emanating from the room. That



- according to Maina, they suspected there was domestic violence and that the deceased and her husband by the name Mwinyi Hamisi used to take alcohol, and that they would quarrel and fight when drunk. PW1 said that they went back to Inuka Police Station and reported what they found. That PW1 knew the accused but he did not know his wife and that the scene was about 5-minutes-walk from PW1's house.
6. PW2, Catherine Kinye, testified that the deceased was known to her. That there was a time she employed the deceased in her hotel and they became friends. She said that she hosted a party on 29.12.2018 and the deceased was in attendance. That PW2 was to host another party on 1.1.2019 and expected the deceased to be in attendance but instead received news that she had been killed. PW2 said that she proceeded to the kiosk of Mama Nyambura who had given information about the deceased's demise and they went to the house of the deceased. PW2 said that they found the door had already been broken and the deceased's body lay on the bed.
  7. PW2 said that Faith's right hand had been broken, that the neck was also broken, she had bruises on the face, and she had stab wounds on the legs and the abdomen. That it looked like after the incident the assailant washed the body as there were no blood stains in the house and the room was properly arranged. PW2 informed court that the deceased disclosed to her that the accused used to batter her. That on 29.12.2018 at the party, the deceased had marks on her neck and she complained that the accused tried to strangle her. That members of the public held the accused and kept him in the room at the scene where the deceased's body lay. That PW2 went to Inuka Police Station and reported and 2 police officers accompanied them to the scene and the accused was arrested while the deceased's body was collected and taken to Coast General Hospital Mortuary.
  8. PW3, Dr. Gabriel Mngola from Coast General Teaching and Referral Hospital said that he had the Postmortem Form for Faith Kawira which had been prepared by Dr. Nabil. He said that Dr. Nabil was known to him and that he was conversant with his signature and handwriting. He said that the postmortem was signed by Dr. Nabil and it had the hospital stamp. Dr. Mngola said that postmortem was conducted on 16.1.2019 and the body of the deceased was identified by Robert Muthure and Chris Maore.
  9. PW3 said that according to the P3 Form, there was a cut wound on the left supra orbital region, the right humerus was fractured, there was peripheral cyanosis and central cyanosis, the body was partially decomposed, there was a bruise on the right distal and dorsal aspects, there were sharp marks or cut wounds on the right anterior legs, there were bruises on the left thigh anteriorly, there were deep cut wounds on the left proximal part of the leg anteriorly, there was a 5 cm deep sharp cut wound mid leg, 2 cm deep stab wound, defence cut wound on the left thumb, 4 penetrating stab wounds on the abdomen supra umbilical cord, and there was a bruise on the abdomen left laterally to umbilicus.
  10. PW3 testified that on internal appearance of the body, there was scalp hematoma on the right parietal region, there was cervical column injury and slight hematoma under the neck, and there was cervical spine injury. PW3 said that Dr. Nabil formed the opinion that death was caused by asphyxia due to manual strangulation and hemorrhagic shock due to multiple penetrating stab wounds.
  11. PW4, No. 55894 P. C. Daniel Mbeleti, the Investigating Officer from Inuka Police Station said that on 1.1.2019, he was at the station when the OCS Patrick Lumumba informed him that he had received a report of a murder and they proceeded to the scene in the company of other officers. That members of the public had broken the door to the room which had the dead body of the deceased. PW4 said that the body was lying on the bed facing up, that the neck which looked broken faced the right side, there were multiple bruises all over the face, the deceased's right upper arm had a mobilized bandage tied on



- it, the arm was broken, on closer observation both legs had deep cuts, and that there was no sign of blood. PW4 said that the deceased was dressed up and the house was neatly arranged.
12. PW4 informed court that he photographed the scene and removed the body to the mortuary. That he later recorded statements of witnesses and that James Mange Karisa in his statement said that on the night of 30.12.2018, he arrived home at 2100 hours and went to park his bicycle beside the house. That while going to his room, he heard a commotion in the accused's room and that the door was open but there was a curtain. That when he peeped through the curtain, he saw the accused who was armed with a belt and was assaulting the deceased. That he did not intervene as the accused would threaten them whenever they did.
  13. According to PW4, the witness said on 31.12.2018 at round 2200 hours, the accused went to his house and told him that his wife was dead and that he was going to inform his parents. That before the accused left, he warned him not to tell anyone and that he should also leave the plot's main door open. That Karisa however informed his brother, another neighbour and the village elder. That the village elder went to the police station and reported in the company of Karisa. That on 1.1.2019 at around 1600 hours, the accused appeared in the plot and was apprehended by members of the public and taken to the police station. PW4 said the photographs were handed over to the scenes of crime headquarters Mombasa for processing.
  14. PW5, No. 235210 CIP Klein Kulucha in charge of Crime Scene Investigation Coast Region, Gazette Notice No. 555548 of 30.6.2015 testified on behalf of CPL Anthony Kinyanjui who had been transferred and whom he had worked with and knew his handwriting and signature. That CPL Kinyanjui had prepared a certificate to a request made on 7.1.2019 from Inuka Police Station. That the certificate was Gazette Notice No. 217/11/1/2013. That on 7.1.2019, he received a sealed packet consisting of photographic enlargement request letter, and a flash disk with digital photographic prints. That the letter and packet were each signed and dated by Anthony Kinyanjui. That the flash disk was processed under supervision of Anthony and photographic prints prepared. That the certificate is dated 7.1.2019 and PW5 produced it as ExP3(c), the packet was produced as ExP3(a), the request letter as ExP3(b) and the photographs as ExP3(d), (e), (f), and (g).
  15. PW6, No. 101838 PC John Wandabwa, attached at Inuka Police Station said that he was the investigating officer and the file had been handed over to him in October 2022 by PC Daniel Mbeleti. He said that James Karisa was a witness but he could not be traced.

### **Defence Case**

16. The accused, Mwinyi Hamisi Mwachiungu gave sworn statement and said that he did not kill Faith. He said that he wished to rely on the statement he recorded. He said that the last time he saw Faith alive was on 23<sup>rd</sup> December 2018 and on 1.1.2019, he saw the body of the deceased. That between 23<sup>rd</sup> December 2018 to 31<sup>st</sup> December 2018, he had gone to Ukunda for a party and that on 1.1.2019, he went to his site where he found a crowd of people who told him that his neighbour had died. The accused said that he was arrested at the site and he said faith was not his wife.
17. The court herein also considered the accused person's submissions which were dated 12<sup>th</sup> January 2024 and filed on 15<sup>th</sup> January 2024. The accused submitted that the burden of proof in criminal cases always lies with the prosecution and does not at any given time during the case shift to the defence. That the prosecution is mandated to prove its case beyond reasonable doubt as was held in the cases of *Miller v Ministry of Pensions* (1947) 2 All ER 372 and *Gordon Omondi Ochieng' v Republic* (2021) eKLR that cited with approval the Nigerian Supreme Court case of *Bakare v State* (1987) 1 NWLR (PT 52) 579.



18. The accused argued that no evidence was tendered to show that the accused resided with the deceased, his personal belongings were in the premises or that he was at any time in the premises between 30<sup>th</sup> December 2018 when PW2 allegedly saw the deceased and 1<sup>st</sup> January 2019 at about midday when the deceased's lifeless body was discovered. The accused submitted that the prosecution failed to discharge the burden of proof of placing the accused at the scene of crime at all times material to the suit.
19. The accused submitted that the conduct of the accused was not of a guilty person. That he was arrested at the premises where he had gone oblivious of the shocking death of the deceased by members of the public who wanted to lynch him. He said that his conduct was not one of a murderer and no evidence showed him trying to run, escape or hide.
20. On malice aforethought, the accused contended that the Court of Appeal in the case of *Makokha v Republic* (2022) KECA 506 (KLR) expanded the meaning by applying the wisdom in the case of *Republic v Tubere S/O Ochen* (1945) 12 EACA where the court had previously observed that in determining whether malice aforethought had been established, one of the elements to be considered ought to have been the conduct of the accused before, during and after the incident.
21. The accused invited the court to find that the prosecution failed to prove their case beyond reasonable doubt and to proceed and acquit the accused under the provisions of Section 215 of the [Criminal Procedure Code](#).

### **Analysis and Determination**

22. In consideration of the evidence of 6 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the [Penal Code](#) Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
23. Section 203 of the [Penal Code](#) Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
24. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR to include: -
  - i. That the deceased died;
  - ii. That the death was caused by an unlawful act or omission;
  - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
  - iv. That there was malice aforethought.

### **Death of the deceased**

25. There is no dispute as to the death of the deceased Faith Kawira.



## **Death was caused by an unlawful act or omission**

26. From the evidence of PW2, Catherine Kinya, when the deceased's body was discovered in the accused person's house, he saw that her right hand was broken, her neck was broken, she had bruises on the face, there were stab wounds on the face and the abdomen. Those injuries were confirmed by Dr. Nabil Varwani who conducted the postmortem on the body of the deceased who observed fractured right humerus, bruise on the right distal and dorsal aspects, cut wound on the right anterior leg, bruise on the left thigh anteriorly deep cut wound on the left proximal part of the leg anteriorly, there was 5 cm deep cut wound on the mid leg, deep penetrating cut wound on the mid leg, there was a defence cut wound on the left thumb, there were 4 penetrating stab wound on the abdomen above the umbilical cord. There was a bruise on the left side of the abdomen laterally to the umbilicus. Upon examining the internal appearance of the body, the doctor concluded that death was caused by asphyxia due to manual strangulation and hemorrhagic shock due to stab wounds. The injuries were not self-inflicted and they were not accidental. It is no doubt therefore that the cause of death was through an unlawful act.

## **Participation of the accused in the commission of the alleged offence**

27. There was no eye witness to the murder of the deceased and the evidence tendered by the prosecution witnesses is purely circumstantial.

Before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the Court of Appeal set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
  - ii. those 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.”
28. Evidence of PW4, the investigating officer, and PW1, the Village Elder, was to the effect that the accused person on 31.12.2018 at 2200 hours informed his neighbor James Mange Karisa that his wife was dead and that he was going to inform his parents. He warned James not to inform anybody. James however told his brother and another neighbor and as a result the matter was reported to the Village Elder, PW1 and PW4, the Investigating Officer.
29. Although James Mange Karisa was not traced to testify, what he told the village elder was corroborated by the evidence of PW2 who said that PW2, Cathetine Kinya, who said that the deceased had attended a party at her place on 29.12.2018 and she expected her on 1.1.2019 but she did not turn up. PW2 also said that on 29.12.2018, she saw that the deceased had marks on the neck and on inquiry the deceased said that it was the accused who had tried to strangle her. PW2 said that the deceased told her that the accused used to barter her. She further said that on the material day the accused went for the deceased at her place as they used to stay as husband and wife.



30. The neighbor who reported to the village elder about the deceased said he heard the accused assaulting the deceased on 30.12.2018 before the accused reported to him on 31.12.2018 at 2200 hours that the deceased was dead.
31. The accused locked the door to his house from outside and left to go and report to his parents about the death of his wife. When PW1 got permission from the police to break into the house, he found the dead body of the deceased lying on the bed in a neatly arranged house. The body had multiple serious injuries.
32. The circumstances surrounding the death of the deceased herein directly point to participation of the accused person in the commission of the unlawful act that led to the death of the deceased.

### **Malice aforethought**

33. Section 206 of the [Penal Code](#) defines malice aforethought 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”.

34. On the element of malice aforethought in respect to Section 206 of the [Penal Code](#), the court held as follows in the case of [Isaac Kimathi Kanuachobi -vs- R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

35. The elements to prove malice aforethought were settled in the case of [Ernest Asami Bwire Abanga alias Onyango v R](#) (CACRA No. 32 of 1990) where the Court held:

“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.”

36. The deceased died as a result of manual strangulation and hemorrhagic shock due to multiple penetrating stab wounds. The multiple injuries and the precision with which they were inflicted shows



that the perpetrator expressly intended to kill the deceased. The offence was premeditated, planned and committed by the accused person. There was obvious evidence of malice aforethought proved by the prosecution.

37. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322 (1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS THIS  
22<sup>ND</sup> DAY OF FEBRUARY 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Otwoma Advocate for the Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ngiri: I seek a mention date to confirm if accused has previous records.

Mr. Otwoma Advocate: We can have another date for mitigation.

Order: Mention on 19.3.2024 for records, Victim Impact Statement, mitigation and sentence.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

2.2024

