



**Republic v Kajuju (Criminal Case 3 of 2019)
[2024] KEHC 4215 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 3 OF 2019
SN MUTUKU, J
MARCH 18, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

AGNES WAITHERA KAJUJU ACCUSED

JUDGMENT

The Charge

1. Agnes Waithera Kajuju is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 23rd day of December 2018 at Nuat Estate Rimpa Area within Kiserian Township in Kajiado North Sub-County in Kajiado County she murdered Clifford Mabeya Mayaka.
2. The accused pleaded not guilty to the charge. The matter proceeded to full hearing with eleven (11) witnesses testifying for the prosecution. I took over the conduct of this case after five (5) witnesses had testified before Hon. Mr. Justice Mwita. I took the evidence of six (6) witnesses.

Prosecution evidence

3. I have taken time to review all the evidence tendered by the 11 witnesses which shows that the deceased was found dead inside his house situated in Rimpa area in Kiserian by his father Daniel Mayaka Okindo (PW1) on 23rd December 2018. The deceased had failed to go to his parents' home that day as he used to, and his father started looking for him. According to his father he found vomit on the driver's door of deceased's motor vehicle registration number KBU 713X Toyota Passo and inside the bedroom.
4. On cross- examination PW1 testified that he was the first at the scene. He stated that after the postmortem, the pathologist informed them that one of the deceased's arteries was blocked. He stated that he was never informed of the actual cause of death of the deceased. He stated that he had never



seen the accused before he saw her for the first time at the police station and that what connected the accused to the deceased were the items recovered from her. He also stated that he had found vomit at the bedside and toilet.

5. PW1 testified that he called his friend and neighbour, Methusela Onchiri, PW3, who joined him at the scene where he found the deceased's naked body lying on the floor, face down. PW3 stated that he noticed that the body had blood on the nose and mouth. He rushed to Kiserian Police Station to report the matter and that the police visited the scene and took away the body. On cross-examination, PW3 stated that he did not know what killed the deceased and he had never seen the accused before.
6. The evidence of PC Joash Ombati, from Central Police Station, testified that he was called by DCI Kiserian to locate a suspect who was hiding within his jurisdiction. Using intelligence, he was able to locate the accused at Kawangware House No. 501. On visiting the house, police found three women and a child. The Accused identified herself as the owner of the premises. The police recovered the black Oppo Phone whose IMEI Number was given as 866468039072261 and a wristwatch. These items were identified by PW1 as belonging to the deceased.
7. Police also recovered 3 rolls of cannabis sativa and a drug called Frusemide Injection and a syringe. The accused was arrested and escorted to Kiserian Police Station where she was held in custody for further investigations.
8. Noreen Agiza Mwavishi, PW4, stated that she resides in Kawangware. That on 18th March, 2019 she received a call from DCI Kiserian informing her that her Identity Card which she had lost in 2017 was found with the accused and had been used to register the following telephone numbers: 0746371482; 070444602 and 0758749604. She stated that she had never met the accused or had any connection with her.
9. Further evidence from Godfrey Nyagwacha, PW5, a guard on duty on the night of 23rd December 2018 is that the deceased arrived between 12.00 and 1-00am. PW5 said he did not know the name of the deceased but knew his vehicle. PW5 opened for the deceased, and he entered. PW5 said he did not know what happened to the deceased. On cross-examination he stated that on the said night the deceased lowered his car window and greeted him. That he did not check inside the vehicle and that he only saw the deceased.
10. Magdalene Kamunya, PW6, testified that she was married to the deceased but had separated in 2010; that on 22nd December, 2018 the deceased was in Embakasi visiting his daughter but did not find her. He said he would return the following week. She stated that on 23rd December, 2018 she received a call from her sister informing her to rush to the deceased's house as he was found dead; that on arrival, she saw his body on the floor next to the door. She stated that she was informed by PW1 that the deceased had died from poisoning.
11. The evidence of Gerald Motari Moyaka, PW7, brother to the deceased is that he was called by PW1 who informed him that the deceased had died. He went to the deceased's house and found him naked and lying face down on the floor near the main door. He saw that the deceased was bleeding from the nose and that the house was in disarray with items scattered everywhere. On cross examination he stated that it was the accused who had killed his brother by poisoning him.
12. James Michael Welimo, PW8, a Government Analyst testified that on 31st December 2018, he received the following samples:
 - a. Stomach contents.
 - b. Kidney and liver samples.



- c. Blood.
13. After examining the samples, he prepared a report dated 24th June, 2019 (Ex. 17(b)) showing that alcohol in form of ethanol was detected in the deceased's blood at the level of 14.58mg per 100mls an indication of minimum intake of 0.4 half litre bottles of beer or 0.8 tots of whisky. There were no chemically toxic substances detected in the post mortem samples of the deceased.
14. PW8 further testified on behalf of and produced a report (Ex.18(b)) prepared by his colleague Eunice Wamuyu Njogu who had since retired. He testified that the following items were received at the Government Chemist from PC Kamakia on 20th February 2019:
- a. A1(a) – a broken whitish round tablet found to have ephedrine, a drug used to lower blood pressure.
 - b. A1 (b)- a whole whitish-round tablet the same drug as in (a).
 - c. A1 (c) – a whitish ovoid tablet containing diazepam, a drug used to lower anxiety.
 - d. A1(d) - a pinkish round tablet containing a drug used to prevent bacterial infection.
 - e. A1(e)- a packet with 6 2ml intact vials containing a drug used to reduce fluid congestion in organs.
15. He testified that the exhibits were being examined to ascertain whether they contained any poisonous substances. He stated that after the examination, the results showed that there were no chemically toxic substances found.
16. PW8 also produced another report (Ex. 19(b)) prepared by Lillian Gacheri on 20th February, 2019 containing 3 rolls of an equivalent weight 2.98 of plant material. After examination, the plant material was found to be cannabis sativa.
17. Dr. Johnsen Oduor, PW10, examined the body of the deceased on 24th December 2018 and prepared a report, Ex. 16. His evidence was that he performed the post mortem at Umash Funeral Home and found total blockage of the left coronary artery due to cholesterol. He found the other systems normal. His opinion was that the deceased died due to acute myocardial infraction caused by blocked artery.
18. The Investigating Officer, PW11, was CIP Peter Omari. He stated that together with other officers they went to the scene of crime on 23rd December, 2018 where they found the body of the deceased lying naked in the sitting room. He noted that the deceased was bleeding from the mouth and the nose and items were scattered all over the house and that the phones belonging to the deceased were not found at the scene.

Defence of the accused

19. In her defence, the accused stated that she was a barmaid at Kilimani in Nairobi and that she knew the deceased. She stated that on 22nd December, 2018 she was working. At 10:00pm a man went to the counter where she was working and bought her beer. After changing her shift at 11.00pm, the deceased asked her to keep him company. They negotiated a price of Kshs. 1500/-. They left together for Rongai after taking beer using his motor vehicle. She testified that the deceased started vomiting. She stated that when she asked him why he was vomiting, he told her that he normally vomited after taking alcohol.
20. She testified that they arrived at his place and went to the bedroom where the deceased vomited again. The deceased took water, and they went to bed. She found herself in the bedroom. She went to the sitting room downstairs where she found the deceased lying on the floor with blood oozing from



his mouth. She touched him and found him cold. She realized that the deceased was dead, and she panicked. She took his phone and Kshs. 30,000/- from his wallet and left. She testified that on 18th February, 2019 police officers went to her house and conducted a search. They recovered the deceased's phone which she was using, his watch, his ATM card, her drugs and those of her child. She was arrested and taken to Kabete Police Station. She admitted to the police that she had taken the phone belonging to the deceased but had not poisoned him.

21. On cross examination she stated that the watch and ATM card belonged to Allan Mukaka who cut communication with her when she was taken into police custody. She stated that she was found with bhang, drugs and syringe. She stated that the drugs were for her heart ailment that she has hypertension and was given those drugs to reduce palpitations. That the syringes belonged to her child. She stated that she did not have a prescription. She stated that she had not known the deceased before the day they met at the club.

Analysis and Determination

22. I have reviewed all the evidence of the prosecution and the defence of the accused. I have reviewed all the exhibits produced in this case. It is my duty to determine if the evidence adduced in support of this case proves beyond reasonable doubt that the accused committed the offence of murder as charged.
23. The offence of murder is created by section 203 of the *Penal Code* in the following terms:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
24. The burden of proof lies with the prosecution and does not shift. The standard of proof is beyond reasonable doubt. The prosecution has the duty of proving beyond reasonable doubt that there is an unlawful act or omission causing the death of a human being; the identity of the accused person before the court is the perpetrator and that the accused committed the offence with malice aforethought, in other words, the act or omission causing death was premeditated.
25. The evidence is clear that none of the witnesses for the prosecution witnessed the death of the deceased. All the evidence surrounding that death of the deceased is based on circumstantial and the defence of the accused person. It is trite that the burden of proof in a criminal case lies with the prosecution and does not shift to the accused. It is the duty of the prosecution to tender evidence that proves beyond reasonable doubt that the accused killed the deceased. The law on circumstantial evidence is settled. The circumstantial evidence must point directly to the accused as the culprit (see *Sawe -v- Republic* [2003] KLR 364).
26. My careful analysis of all the evidence shows that the deceased was found lying naked in his sitting room. He had stains of blood on his mouth and nose. He was alone in the house when found dead. There is no doubt that he had been in company of the accused the previous night as admitted by the accused since there is no evidence by the prosecution that the deceased came home with the accused.
27. According to the accused, the deceased had picked her up at the bar where she was working the night before he was found dead in his house. They negotiated the price and went to his house together for the night. According to the accused, they went to sleep but when she woke up, she was alone. She went looking for the deceased and found him lying on the ground in the sitting room, naked. She touched him and found him cold. She realized that he was dead and panicked. She admitted taking his phone and money and leaving the house.



28. Other than the evidence provided by the accused in her defence, the only evidence by the prosecution witnesses is that the accused was found in possession of the deceased's phone. The prosecution's theory was that the accused had poisoned the deceased. She denied poisoning him.
29. I have examined the evidence of the Government Analysts and the pathologist as well as their respective reports. The drugs recovered from the accused were explained by PW8, James Michael Welimo who produced other two reports prepared by his colleagues. There were no toxic substances found in the body of the deceased after his blood, liver and stomach contents were examined. The drugs recovered from the accused did not contain chemically toxic substances.
30. The postmortem report showed that the deceased died due to what Dr. Oduro Johannsen called myocardial infraction due to total blockage of the left coronary artery due to cholesterol. In simple terms, the deceased died as a result of a heart attack caused by total blockage of the coronary artery.
31. The evidence of the pathologist as to the cause of death of the deceased, coupled with the evidence of PW8 and the reports from the other Government Analysts, clearly shows that the cause of death was not due to poison or due to toxic substances or what PW6 Magdalene called spiking with "mchele", a term used to loosely express the use of poisonous substance applied into food or drink of the victim without their knowledge with the aim of immobilizing them in order to steal from them or attack them in any other way.
32. My careful reading of the evidence does not reveal that the deceased was poisoned. The blood test, the stomach contents examination and liver did not produce any results pointing to poisoning. The evidence clearly points to cardiac arrest or heart attack as explained by the pathologist.
33. What the available evidence shows is that the deceased died. At the time of his death, he was with the accused in his house. The cause of death has nothing to do with an unlawful act or omission on the part of the accused. The death of the deceased has been explained through the evidence of the pathologist. The evidence from the other experts shows no foul play on the part of the accused.
34. There is evidence to show that the accused was found in possession of cannabis sativa, a prohibited substance. She was found in possession of the phone belonging to the accused. She also admitted stealing his money, Kshs 30,000. She may have committed other crimes. However, the accused is before this court for the offence of murder. That is the offence she has been tried on. The ODPP is at liberty to prefer other charges if there is evidence to support those charges.
35. It is my considered view that the evidence tendered in respect of this case does not prove beyond reasonable doubt that the accused committed the offence for which she has been tried. As far as the evidence adduced in support of this case show, the accused is not guilty of murder as charged and I so find and hold. There is no evidence to support this charge. Consequently, I enter a finding of not guilty and acquit the accused. She is free to go home unless for any lawful cause she is held in custody.
36. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH MARCH 2024.

S. N. MUTUKU

JUDGE

