



Republic v Ihaji (Criminal Case 17 of 2019) [2024] KEHC 6406 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 17 OF 2019
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

OBED IHAJI ACCUSED

JUDGMENT

1. Obed Ihaji (The Accused) was charged with murder contrary to Section 203 as read with Section 204 of the [penal code](#).
2. The particulars of the charge are that on 2/3/2019 and 3/3/2019 at Bukhananga village, mutaho sub-location, shisere location in Kakamega South sub-county murdered Caroline Anota Makutu.

Analysis of the evidence and determination

3. Section 203 of the [penal code](#) defines murder as follows: "any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder."
4. The above elements were expounded in the case of Anthony Ndegwa Ngari v Republic [2014] [eKLR](#), where the court set out the requirements as follows:
 - (a) the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
5. For the prosecution to secure a conviction each of the above elements must be proved.
The death of the deceased and what caused it.



6. There was no post-mortem report that was submitted in evidence and a pathologist was never called as a witness. I have taken note of the fact that post-mortem report was marked for identification, but was never produced.
7. Thus the death of the deceased and its cause was never proved.

Whether the Accused committed the acts that led to the death of the Deceased.

8. The prosecution called a total of 6 witnesses, but none of them was an eye-witness to the killing. Thus the prosecution's case is purely circumstantial.
9. I have perused the witness testimonies to ascertain that may lead to the Accused herein as perpetrator.
10. PW1 went to the scene after the body had been found. According to this witness, the body was found about 10 meters from the Accused's house. She further stated "I think she (the Deceased) was inside the accused person's house and he dragged her body to put in a hole. I did not see the accused do anything to the Deceased". This witness did not witness the killing and the rest of her testimony was based on mere speculation.
11. According to PW2, the body was found 20 metres from the accused's house. The trail, he said, led to the Accused's house as there was blood from the Accused's house to where the body was. He further stated that in the house of the deceased, there was blood on the bed, clothes and on the mattress. However there was no forensic examination carried out to establish if the blood found on the bed belonged to the deceased.
12. PW3, the Assistant Chief also told the court that he checked the scene upon arrival ,and he found that there were marks showing the body was dragged to where it was found . They followed blood trail which led them to the deceased's house. He got into the house and saw blood on a mattress and on jeans. He further stated that when the police took the body, the crowd became violent and went on to burn the mattress, clothes and other items in the house.
13. On the marks that the two witnesses told the court about the Investigation's officer testimony was silent was on this. He said he did not see blood in the accused 's house. He further told the court that crime scene personnel visited the scene and took photographs but the photos were never produced. It is also apparent that the blood trail referred to by PW1 and PW2 blood trail was never investigated further as no forensic report was submitted in evidence.
14. The mattress and clothes that reportedly had blood was equally destroyed in the fire. Thus there was no forensic evidence before court that would have established if the blood that was reportedly in the Accused's bed was that of the deceased.
15. Circumstantially therefore , even if the death of the deceased had been proved , there is nothing linking the Accused to her death.
16. The investigations officer told the court that he recorded a statement from one Vincent Lumumba who told him that that he had given a ride to the deceased and the accused; that he left the two in the Deceased's house. However Vincent was never called as a witness.
17. In his defence, the Accused denied killing the deceased. That he did not know her and denied that he was ever given a ride to his house by Vincent.
18. It is the duty of the prosecution to prove their case beyond reasonable doubt. In this case they have failed dismally. There is no conceivable reason why the post-mortem was not produced and the pathologist not called to testify leading to a situation where the death of the deceased and its cause



has was not proved. There was equally no explanation as to why Vincent Lumumba , the person who reported to have told the police that that he took the deceased and the accused to the accused's house was not summoned.

19. When the prosecution fail to prove their case the accused is entitled to an acquittal, not as a matter of grace but as a matter of right (Ref: [MTG vs Republic](#) (CR. Appeal No. 067 of 2022) (2022) KEHC 189 (KLR)
20. The prosecution has failed to prove its case and consequently the accused is entitled to an acquittal . The Accused is hereby acquitted of the charge , under section 215 [Criminal procedure code](#) . He shall be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nairobi, via Microsoft Teams, this 30th day of May 2024.

S. Chirchir

Judge

In the presence of:

Godwin – Court Assistant

The Accused.

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