



REPUBLIC OF KENYA



**Republic v Muhabe (Criminal Case 10 of 2016)
[2024] KEHC 6400 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 10 OF 2016
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMMY OGEMBO MUHABE ACCUSED

JUDGMENT

1. Sammy Ogembo Muhabe (The Accused) was charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars were that on 11.2.206 at Erojo village, Erojo sub-location, within Vihiga County, murdered publicly Aseyo Munayo.
3. The prosecution summoned a total of 7 witnesses.

Analysis of the Evidence and determination.

4. Section 203 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."
5. The above definition was captured and explained in the case of [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR, where the court set out the elements of the offence 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.
6. I will proceed to consider the above elements and determine whether the prosecution proved each, beyond reasonable doubt.



Death of the Deceased and its cause

7. Dr. Masiko Collins Were (PW6), produced a post-mortem report in respect to the autopsy carried out by his colleagues Dr. Mirundu Mercy on the body of Purity Munayo Aseyo, the deceased herein. According to PW2, the body was identified by himself, one Mr. Bavon Muhedo, Hudson Aswahi, and Eunice Aseyo. On examination, the pathologist found that that the complainant was defiled and strangled. He concluded that the cause of death was asphyxia, secondary to strangulation. Thus the deceased's death and its cause was proved.

Whether the Accused committed the unlawful act which caused the deceased's death

7. PW1, the mother of the deceased told the court that when she arrived home in the evening the deceased was not there. She went looking for her. One of the houses she went to was the house of Mama Moraa. Mama Moraa's child told her that she saw the accused going with the deceased. She went to the accused's house and inquired about the deceased. The accused told her he had not seen her. On the way back, she saw the child lying on the toilet. She was naked. She further told the court that the deceased used to be very friendly to the accused.
8. PW2 told the court that he heard one Celestine Moraa telling the police that the deceased has been called by the deceased. When the police arrived on the scene, PW 2 accompanied them to the Accused's house. The police searched the Accused's house and found nothing, he said. The following day, the police came back at about 9 - 10 am. He was called by the police to go to sammy's, (the accused's house). He saw some clothes soaked in a bucket, a dress, a sweater, and a trouser belonging to the accused. The dress and sweater were a child's clothing. He further stated that he used to see the deceased wearing the said trouser. He identified the accused in the dock and stated that he had known him for a month prior to the incident. He told the court that the accused was a watchman in his uncle's house one Hudson Aswani and that the accused used to stay alone in the compound.
9. PW3 was the deceased's grandmother. She told the court that she had sent the deceased to go and call her siblings from the home of Vincent Susoyi, a neighbor. The siblings came but the deceased didn't. Later on when she saw the body of the deceased upon being discovered, it was naked, yet the child has left the house clothed. The child had worn sport shoes, a blue sweater with red/white pink stripes, she stated.
10. She further testified that the accused was among those who had responded to the screams in her home and he only went back after the police arrived. The police went to his house and arrested him. She stated that about 30 minutes had passed between the time she sent the deceased to go and call her siblings and the time the body was found. She was present when the police searched the accused's house. She stated that the clothes were on a mattress on the accused's bed, "hidden at some corner", she stated. The accused was not present when the house was searched. They also found a bucket in which the deceased's sweater and other clothes were soaked in. The other clothes belonged to the deceased.
11. She further told the court that by the time the items were recovered, the owner of the house had come. The owner of the house is the one who opened the house for the police. She stated that the police did not search the house on the same day. It was done 2 days later. The deceased's shoes were not recovered. She saw them floating on the feces inside the pit latrine.
12. PW4 was in the deceased's home (the home of PW3) the day following the incident. That was on 12/2/2016. While there, PW3 came with the police. He stated that PW3 gave the keys to the police to open the kitchen. In the kitchen they lifted the mattress and found a child's clothes. There was



also a trouser. Both items were for a child. He also saw a bucket. He was present when the clothes were recovered.. The next day, they found the trouser of the child in the bucket. They were soaked in water.

13. On cross-examination, he stated that the bucket was at a corner. He saw the trousers of the child in the bucket and her sweater. It was his testimony that only 2 items were in the bucket.
14. PW7 was the Government's analyst, based at Kisumu Chemist labs. He presented the laboratory report on behalf of his colleague Richard Langat. The report was done at the request of CPL Samuel Maina , service No. 61848. The samples he received were:
 1. Buccal swab of Sammy Ogembe (the accused), marked s.1
 2. Checked long trouser with white and purple colours , marked. S.2
 3. A purple white t-shirt marked S-3
 4. Vaginal swab in a tube marked P-2
 5. A light blue flowered dress marked P-2
 6. A rectal swab in tube market P-3
 7. Blood of deceased marked P-4

Upon analysis of the samples , his college prepared a report. report (P EXB 2b)

16. The results of the analysis were as follows:
 - a). The deceased's blood match that from the vaginal swab and rectal swab.
 - b). The DNA profile generated by the accused Buccal swab did not match any of the DNA profile.
17. The witness further told the court that 3 exhibits, namely the trouser, white t-shirt and dress has no biological material and no DNA results could be obtained from them.
18. His conclusion was that that there was nothing linking the DNA of the accused to the victim.
19. The foregoing is the evidence presented to the court
20. The person who is said to have last seen the accused and deceased together was one Celestine Moraa . This is according to the testimony of PW2. However Moraa was never called as a witness and that report thus hearsay and hence inadmissible .
21. The witnesses presented to the court did not witness the killing . The prosecution's case is therefore primarily circumstantial.

The court of Appeal defined circumstantial evidence as in *Abamad Abbolfathi mohammed & Ano v Republic* (2018) eKLR as "evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved..... It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics....."

In the same case, the Court proceeded to set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

"Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v*



R Cr. App. No 32 of 1990, this court 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 the guilt of the Subject;
- 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.”

22. The circumstances in this case were that the deceased’s clothes were found in the house where the accused used to stay. He was staying in the house of his employer and he was the only occupant.

23. I have given a lot of consideration to the prosecution’s evidence in this regard and I have doubts on its credibility. My reservation is based on the following:

- a). The police arrested the accused on February 11, 2016 being the date of the incident. According to PW2 the police searched the house the same day and found nothing. They came back the following day to carry out a search. The search was conducted in the absence of the accused. There was no evidence that the scene had been secured and therefore there was no guarantee that the crime scene had not been tampered with. The investigation officer did not testify and no explanation was therefore forthcoming on whether the crime scene was secured .
- b). Secondly, PW2 told the court that the police searched the house of the accused on the same day of arrest but found nothing. Yet the following day, he saw some clothes soaked in a bucket. They were those of the deceased’s and the accused. It is intriguing why a bucket, an item that can easily be identifiable would have been missed on the first day of the search. According to PW3 the bucket was in a corner. Why would a police officer, who is presumably possessed of some training in conducting searches miss something as a bucket, even if “it was in a corner”.
- c). The other unresolved issue is on where the clothes were found. The prosecution witnesses gave different accounts. PW2 told the court that the clothes were in a bucket, PW3 said there were clothes on a mattress ,on the bed which the accused spent. She also said they found a bucket, and in it were the deceased’s and accused’s clothes. PW4 on the other hand said they lifted a mattress and found children’s clothes. The next day they found the trouser in a bucket, and a sweater. PW4 said he went to the deceased’s house on 12th, that is when the search was done and clothes found under the mattress. The next day, they found the trousers of the child in the bucket. Going by the evidence of PW2, it is apparent that the searches were done three times, on the 11th, the 12th and 13th . The witnesses’ testimonies contradict each other therefore on where the clothes were found and how many times were the searches carried out.
- d). Going by the testimonies of PW3 and PW4 which were consistent in that the clothes were under the mattress, then the question that naturally follows is , who then moved the clothes from the bed to the bucket . Was there a deliberate tampering with the scene?
- e). Further, PW2 told the court that a search was done on the day of the killing (i.e., 11/2/2016) and the following day which should be the 12th. PW3 on the other hand said the search was done after 2 days. This should place the search on the 13th or 14th. Yet according to PW4, it was done on 12th and 13th. ? Bearing in mind the fact that the accused was arrested the 11th, and all these subsequent searches were done in his absence.



- f). Though the house was reportedly locked, the keys were not on the hands of the police. PW2 told the court that the keys were in the hands of the owner of the house one Hudson, and that he is the one who opened the house for the police. PW4 on the other hand told the court that the keys were with the said PW3.
25. The contradiction on whether the clothes were on the bed or in a bucket; the contradiction on the date of the searches ; the fact that the police did not find anything on the first day, but reportedly found the aforesaid items on the 2nd or subsequent dates; the fact that the keys for the house were not being held by the police, and finally the fact that the search was conducted in the absence of the accused in the absence of the accused, raises the question of the integrity of the scene.
 26. The investigation officer never testified. It is he who would have given an account of how and where exactly the search was done and whether the scene was secured to prevent tampering
 27. Three of the prosecution witnesses testified that the victim's clothes with some for the accused were found inside the Accused house. This would shift the burden to the accused to explain why the victim's clothes were in his house. However I am not satisfied that the manner in which the search was done ruled out any interference with the scene by any one else.
 28. Finally, the Government analyst report states that the DNA profile generated by the suspect, (buccol swab) did not match any DNA profile of the deceased.
 29. For circumstantial evidence to form the basis of conviction “ the circumstances 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(Ref: *Ahmed Abolfathi*) (*supra*)
Also in *Sawe v. Republic* [2003] KLR 364, the Court of Appeal held : “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon.....” (Emphasis added)
 30. Considering how the search was conducted; the possibility that anyone could have had access to the crime scene as the same was not secured, am not satisfied that the circumstances point to the accused as the only, and none else , as the perpetrator of the crime. The chain does not simply complete.
 31. What I see in this case is a case of half-hearted investigation and prosecution of the case. The person who was reported to have seen the deceased with the accused was one Celestine Moraa. She was never called as a witness. Further the investigation officer, who would have explained to the court the when and how of the search/es that went on in the accused's house, did not testify.
 32. It is trite law that any gaps in the prosecution case must always go to the benefit of the accused. In *Pius Arap Maina v Republic* (2013) eKLR the court stated: “It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gap in the prosecution's case raising material doubts must be in favour of the Accused”
 33. I have considered the accused defence, he said he heard screams from the deceased's home and he went there. He was arrested because someone mentioned that he was seen with the deceased. He could not explain how the deceased's clothes ended up in his house. It is important to bear in mind the fact that the search was done after the accused has been arrested. He was never taken back to his house for purposes of the search. Thus, his statement that he did not know how the clothes found his way to his house could not be challenged.



34. In any event, it is the prosecution's duty to prove the guilt of the accused. The accused has no responsibility to prove his innocence.
35. Looking at the totality of the evidence am not satisfied that prosecution proved its case beyond reasonable doubt.
36. Consequently, I hereby acquit the accused pursuant to section 215 of the [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.

