



**Republic v Serem (Criminal Case E002 of 2016)
[2024] KEHC 10122 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E002 OF 2016
RN NYAKUNDI, J
AUGUST 12, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMUEL KIPLAGAT SEREM ACCUSED

JUDGMENT

1. Samuel Kiplagat Serem faces the charge of murder before this court contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on 24th December, 2015 at Kaptait village in Eldoret West Sub-County within Uasin Gishu County murdered Alfred Kibet.
2. In answer to the charge, the accused pled not guilty to the charge as stipulated under Section 203 of the *Penal Code*. The accused was at all times represented by Learned Counsel Mr. Miyiinda whereas the prosecution was under the leadership of Senior Prosecution Counsel Mr. Mark Mugun. The prosecution in discharging its burden of proof called 5 witnesses as tabulated hereunder;
3. PW1 Sila Kiplimo a resident of Kaptait in Uasin Gishu who works as a casual labourer testified to the effect that on or about 24th December, 2015, he had attended a circumcision ceremony. On his way home he met a certain girl called Katoi who informed him that one Alfred had been stabbed at a centre which was 300 metres away. Apparently according to PW1, the victim of assault was his cousin by affinity. He therefore went to the scene, found his cousin who later passed on out of the injuries sustained, lying down and on quick observation, he noticed that he had been stabbed on the right side of the chest. The evidence by PW1 further discloses that together with other members of the public decided to take him to the hospital immediately for purposes of medical attention and treatment. On cross examination by learned counsel Mr. Miyiinda, PW1 acknowledged that he did not know the events which led to the assault of the deceased. Therefore, being not an eye witness, he had no clue on the murder incident.



4. PW2 Titus Kipkoech also a resident of Kaptait told the court that on 24th December, 2015 at about 7PM while on his way home from a circumcision ceremony in company of PW1, they were informed of the incident in which the deceased had been stabbed. In answer to the distress call, to the scene, they found the deceased lying down in a pool of blood with a major injury on the left side of the chest. On cross examination likewise, he had no history of the stabbing incident.
5. PW3 Kennedy Cheruiyot a resident of Kaptait like PW1 and PW2, testified that on 24th December, 2015, he received a telephone call to the effect that one Alfred had been stabbed and passed on as a result of the injuries. On 28th December, 2015 his one of those witnesses who attended the post mortem on the body of the deceased at the Moi Teaching and Hospital. PW3 further informed the court that at the time of examination he noticed that the deceased had a stab wound on the left side of his chest. This was also the testimony of Noah Cheruiyot, which is identical with that PW3 on the issues arising out of the post mortem. The police commenced investigation in the matter as per the evidence of PW5 inspector George Matika. He told the court that at the time of the incident he was based at Ziwa police post at Moi's bridge. With regard to this incident, on 24th December, 2015 an assault report was made to the police station. The victim was taken to Ziwa Sub-county hospital where he passed on while undergoing treatment. The body was transferred to MTRH for a post mortem examination. On the investigation, the accused was apprehended and subsequently arrest for the offence of murder. In addition, PW5 evidence discloses during the arrest of the accused person, he was in possession of a blood stained knife and also wore a bloodstained T-shirt. The blood stained t-shirt, the photographs taken at the scene, the post mortem report and the blood stained knife were produced as evidence in support of the prosecution case.
6. In his defence, the accused on oath denied any complicity in the offence, which allegedly occurred on 24th December, 2015. According to the accused, on the material day, he took his mobile phone to be charged at Sokomoko trading centre. Thereafter he decided to go home and watch TV. Around 7:30Pm on the way as he was walking home he met the deceased who told him in Swahili dialect, "*mimi na wewe leo tutamaliziana hapa*" shortly thereafter, there was a scuffle as the deceased who was already armed with a knife aimed it at him and in retaliation, he fought back in order to defend himself from the imminent attack. All in all, in the testimony of the accused, a full blown fight broke out between him and the deceased. Thereafter he sought assistance from the police who were on patrol. Simultaneously they effected an arrest and subsequently charged him with the offence of murder. Besides the testimony of the accused person, he also had an independent witness by the name Abdul Tuwey. DW2 evidence discloses that on the day of the murder, he was at the shopping centre with the accused and had a social evening outside the hotel. That is when the deceased Alfred Kibet arrived and sat next to where they were seated. It did not take long before the deceased stepped out shortly to by 'Kangumu' within no time he came back and started causing disturbance within the hotel. In addition, DW2 explained to the court that after watching news, the accused left for his home but the deceased followed him immediately towards the same direction. According to DW2, the events which culminated to as between the deceased person were not within his knowledge at the time they stepped out of the hotel.
7. I have taken the liberty to appreciate the evidence tendered by the Prosecution and the rejoinder in answer to the charge and his core witness. The critical issue for determination by this court is whether the prosecution has discharged the burden of proof of beyond reasonable doubt.

Analysis and Resolution

8. It is both a constitutional dictate under Art. 50(2)(a) of the *Constitution* that the accused has a right be presumed innocent until the contrary is proved. The issue of proof is a matter of evidence and



procedure as laid down in Section 107(1), 108 and 109) of the *Evidence Act*. As stated in the case of *Guyo Fora Duba v. Republic* Nakuru CACRA No. 89 of 1999. The state has to prove that the accused has committed the actus reus elements of the offence charged, with the mens reas required for the offence. Any doubt in the prosecution evidence shall be resolved in favour of the accused. What is the expectation of the trial court under Section 203 of the *Penal Code*, it is the duty clearly? According to the Court of Appeal, in *Anthony Ndegwa Ngari v Republic* (2014) eKLR, for cases of murder, the republic is supposed to prove each of the following ingredients beyond reasonable doubt:

- a. The fact of death;
 - b. The fact that deceased's death was caused by an unlawful act or omission;
 - c. That the accused committed the unlawful act which caused the death of deceased; and
 - d. That the accused had malice aforethought.
9. In order for this court to determine the existence or non-existence of facts in issue, it has to bear in mind that this is clearly and squarely a matter within the scope of circumstantial evidence as profoundly illuminated in the following cases; In *Neema Mwandoro Nduzya v R* [2008] eKLR the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in *R v Taylor Weaver and Donovan* (19280 21 Cr App R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

10. In its earlier decision in *Mwangi and Another v Republic* (2004) 2 KLR 32, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

See also *Regina v Exall and Others* (1866) 176 ER 850

11. In the persuasive case of *Kitosi Abu and another v Uganda* Criminal Appeal No. 154 of 2010 it was held that;

“In respect of circumstantial evidence this court knows of no principle that invariably before basing a conviction on circumstantial evidence there must be corroboration. In fact, this Court of Appeal has in the recent case of *Hon. Akbar Hussein Godi v Uganda* (Criminal Appeal No. 62 of 2011 (unreported) made a reinstatement of the principle that when properly handled, circumstantial evidence may be the best evidence to prove a proposition. The court stated as follows in *Godi's case*: -

“Thus the appellant was convicted on circumstantial evidence. We appreciate this evidence to be in the nature of a series of circumstances leading to the inference of conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of the facts required to



be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. The court proceeded to cite the case of *Republic v Thomas Gilbert Chocmo Ndeley* Nariboi Criminal Case No. 55 of 2006, where the court stated that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of providing a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

Though a decision of the High Court of Kenya, we find the enunciation of the principle as regards the application of circumstantial evidence in the words of the above quotation very appropriate and as representing the position of the Law on circumstantial evidence even in Uganda.”

12. The first ingredient is whether the deceased is dead. It is the evidence of PW1 to PW5 that the deceased Alfred Kibet is dead. The evidence is corroborated with that of the post mortem report by the pathologist dated 28th December, 2015. Therefore, there is no contention as to the death of the deceased. I find that this ingredient has been proved beyond reasonable doubt within the ambit of the principles in the *Guyo Fora Duba v. Republic* (*supra*) and *Woolmington v DPP* 1935 AC 462.
13. The second ingredient for this offence, is one which is line with Art. 26(3) of the *Constitution* on the right to life duly protected and guaranteed by the supreme law of the land. The limiting exception is in subsection 3 which provides essentially that all homicides are presumed by law to be unlawful except where such deaths are excusable by the *Constitution* or any other enabling statute. This ingredient is centred sequentially under causation issues defined in section 213 of the *Penal Code*. It also brings into perspective the defence governed by section 19 of the *Penal code* for a person is not criminally responsible for an event which occurs by accident unless he/she is charged with an offence which is expressly declares liability by negligence. See the principles in *Rex Gusambizi Wesonga* (1948) 1 EACA 65, *Siduwa Were v Uganda* (1964) EA 596 and *Tsikalata v Republic* (1996) EA 349.
14. The prosecution led evidence on the post mortem examination report admitted in evidence by consent which shows that the deceased suffered a penetrating wound through the heart. As a result of the examination, the pathologist opined the cause of death was a stab wound causing severe haemorrhage. There is no evidence that the death of the deceased falls within the exception contemplated in Art. 26(3) of the *Constitution*, Section 17 of the *Penal Code* on self defence or on provocation under Section 207 as read with Section 208 of the same *code*. If at the time of death, the original wound is still an operating cause and a substantial cause then the death can properly be said to be the result of the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history, can it be said that death does not flow from the wound. (see section 213 of the *Penal Code* on Causation issues to establish whether the death was unlawfully caused or not). Largely, from the evidence summoned by the prosecution, there was no alleged break in the chain of causation involving the conduct of the accused person. I find therefore that the death of the deceased was caused by an unlawful act and the prosecution has proved this ingredient beyond reasonable doubt.
15. Thirdly is the ingredient of malice aforethought. Section 206 of the *Penal Code* outlines the circumstances under which malice aforethought is deemed to be established or manifested. These are:

An intention to cause the death of or to do grievous harm to any person;



Knowledge that the act or omission causing death will probably cause death or grievous harm to someone; or An intent to commit a felony.

16. This is what the Court of Appeal had in mind in *Joseph Kimani Njau v R* (2014) eKLR when construing and interpreting the applicability of Section 206 of the *Penal Code* on malice aforethought that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

The intention to cause death;

The intention to cause grievous bodily harm;

Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from this acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of this act. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

17. In the instant case, the deceased was cut a penetrating wound that affected the other vital organs of the body, which as a result caused his death. The targeted part of the body clearly reveals an individual who was well aware that his act could cause a serious bodily harm. Essentially, the testimonies and evidence as adduced point out to an individual who was determined to terminate the life of the deceased person. On this ingredient therefore, I find that the element of malice aforethought was manifest.

18. The final question that this court ought to answer is that of identification. The circumstances of the present case lean more towards recognition. It was DW2’s evidence that on the material day, he was at the shopping centre with the accused and had a social evening outside the hotel. That is when the deceased arrived and sat next to where they were seated. It was not long enough before the deceased stepped out shortly to by ‘Kangumu’ and within no time he came back to cause disturbance within the hotel. Additionally, DW2 told the court that after they watched the evening news, the accused left for his home but the deceased followed him immediately towards the same direction.

In the case of *Wamunga v Republic* (1989) KLR 424 the Court of Appeal stated thus:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

Similarly, the same court in *Anjononi and others v Republic* (1980) KLR stated as follows:

“..... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

19. In my evaluation of the circumstances of this case, I find it to be a straightforward case of recognition than identification. The prosecution witnesses clearly placed the accused person at the centre of the crime. In the end, looking at the material evidence of both the prosecution and the defence, I strongly



hold the view that the prosecution case is of such strength as to hold the accused person liable for the offence of murder contrary to Section 203 of the *Penal Code* and as such I find him guilty and enter an order of conviction.

DATED AND SIGNED AT ELDORET THIS 12TH DAY OF AUGUST 2024

R. NYAKUNDI

JUDGE

Representation:-

Mr. Mark Mugun for the State

