



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Koech (Criminal Case E004 of 2022)
[2024] KEHC 11416 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E004 OF 2022
HI ONG'UDI, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

NEWTON KIPKURUI KOECH ACCUSED

RULING

1. Newton Kipkurui Koech the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 12th January, 2022 at Karandich village in Tinet Location, Kuresoi South sub-county within Nakuru county murdered Moses Kipkurui Yegon.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing, with the prosecution calling a total of six (6) witnesses. PW1, Simon Kiprotich Kemei testified that on 12th January, 2022 between 10-11.00pm he was closing up his hotel when he was called by one David Rono and informed him of a seriously injured person found near his home. He went to the place and saw the injured person. They made several calls and two village elders came. The Member of the County Assembly sent them a vehicle which was used to take the injured person to hospital.
3. PW1 later linked up with Robert Maritim (a village elder) and they went to Mzee Safisa's home. It was Mzee Safisa who told them of the accused being the suspect and they went for him from where he slept at a neighbour's. They found him with two others. After talking to him he accepted to accompany them to the home of Robert Maritim from where he was later taken to the police station. A rungu (EXB 1) was afterwards recovered by the police from Richard's shamba in the absence of the accused.
4. PW2 Robert Kibet Maritim told the court that upon being called by PW1 he went to the place where the suspect was at Rono's house. They found five (5) young men there and he asked who among them



- had injured another one and the accused was pointed at. PW1, PW2 and other villagers left with the accused. Thereafter the police were alerted and they came for him.
5. PW3 – Benjamin Kipng’etich was with his father (Richard Kimtai) at the shopping centre. He later left for home where he reached at 9.00pm. Thereafter he went to see his neighbor Raymond Cherop at around 10.00pm. While there they heard screams from a distance and headed there. They found a crowd of people with the deceased lying down bleeding from the head and nostrils. He was later taken to the hospital and the witness returned home.
 6. On the way he met the accused and they went to his place to sleep. They were just the two of them in the house. Shortly thereafter Nyumba kumi elders came knocking, and demanded for the accused. The elders tied up the accused’s hands and left. He followed slowly and the elders told him the accused had killed someone. He was locked up at the centre and later taken to the police station. The next day at around 10.00am a crowd of people came to where he was and he was handcuffed and later taken to the police station where he was shown a rungu (EXB 1) and phone.
 7. In cross examination he said when he met the accused on the road he had nothing on him. He never saw where the rungu EXB1 came from.
 8. PW4 Shadrack Kipyegon Kirui stated that on 12th January, 2022 he was at the market centre between 7.00 - 8.00pm. He had met Gideon and they left for his place to sleep. At around midnight PW3 came to him and informed him of the accused’s arrest. Together they went upto the hotel where the accused was locked up and later went back to sleep.
 9. The next morning, he went home, and later to the scene of incident, where he found many people but he did not see anything unusual there. Thereafter they went to PW3’s house where the accused used to sleep. PW3 was then handcuffed by police officers and elders. They proceeded to do a search in the shamba from where they recovered a rungu tied in a polythene. PW3 requested him to bring him a sweater which he did. Upon bringing it, he too was arrested and they were taken to the station and he was released after 21 days.
 10. In cross examination he stated that nothing was recovered from where the accused used to sleep.
 11. PW5 Dr. Lilian Kadhiri who performed the post mortem found the cause of death to be severe head injuries, (EXB 2). The deceased had cut marks on the forehead, head, back of the head, depressed fracture on the forehead, deep injuries in the chest, heart. He had lost a lot of blood.
 12. PW6, No. 63774 Cpl Anthony Muriithi was the investigating officer. After interrogating the accused and two other suspects he decided to charge the accused and treat the other two as prosecution witnesses (PW3 and PW4). He confirmed seeing an injury on the deceased’s head. He visited the scene but found nothing tangible there. He produced the rungu as EXB1.
 13. In cross examination he confirmed that there was no eye witness in the matter, and no witness identified the rungu (EXB 1). When referred to the post mortem report he said the same showed the deceased had been hit by an unknown person. Further that the owner of the farm/home where the rungu was found was never interrogated. On further inquiry by the court he said there was no connection between the rungu (EXB 1) and the accused.
 14. The prosecution at this point closed its case and elected not to file any submissions.
 15. Mr. Mongeri for the accused filed written submissions dated 8th August, 2024 on no case to answer. Upon summary of the evidence counsel submitted that the prosecution seemed to rely on weak



circumstantial evidence. In support counsel relied on the case of Republic V Grace Wambui Wambugu [2019] eKLR where the Judge quoted Teper V Republic [1952] AC in which it was stated:

“Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

16. He further argued that the rungu produced as EXB1 had no linkage with the accused as stated by the investigating officer - PW6.

17. Further reliance on this submission was placed on the case of Pius arap Maina V Republic [2013] eKLR (Criminal Appeal No. 247/2011 where the court noted that:

“It is gainsaid that the prosecution must prove a criminal charge beyond any reasonable doubt. As a corollary, an evidential gap in the prosecution’s case raising material doubts must be in favour of the accused”.

18. Counsel additionally submitted that the prosecution case had glaring gaps. The first being that there was no evidence of the use of the rungu (EXB 1) by the accused to injure the deceased. Further that no witness was called to testify of the attack and whoever told PW1 and PW2 about the accused did not testify. Moreover, he argued that there was no evidence on how the rungu EXB 1 was retrieved. Counsel referred to the case of Shaaban Bin Hussein V Chong Fook Kam [1969] ALL ER 1626 where Lord Devlin said:

“Suspicion in its ordinary sense is a state of conjecture or surmise where proof is lacking. ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is as an end”.

19. I have considered the evidence adduced by the six (6) witnesses plus the submissions by Mr. Mongeri the defence counsel. The issue is whether the prosecution has established a prima facie case against the accused to have this court place him on his defence.

20. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a quality verdict if no other explanation in rebuttal is offered by an accused e.g where an accused if placed on his defence elects to remain silent. This was the holding in the case of Ramanlal Bhat V Republic [1957] E.A 332. Also see Republic V Abdi Ibrahim Orol [2013] eKLR.

21. First of all, there is no dispute that the deceased (Moses Kipkurui Yegon) died on 12th January, 2022. Secondly from the evidence adduced plus the post mortem report (EXB 2) there is no dispute that he did not die a natural death. He had severe injuries which caused heavy loss of blood.

22. The prosecution in this case called a total of six (6) witnesses none of whom was an eye witness. The case was therefore based on circumstantial evidence. Besides the cases cited by the defence, in the case of Sawe V Republic [2003] KLR 364, the Court of Appeal stated thus:

“It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; 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 no one else”.

23. In the case before this court it was PW1’s evidence that Mzee Safisa is the one who gave them the accused’s name as the culprit. Mzee Safisa never recorded a statement and he was never called as a witness. PW3 and PW4 who were initially arrested and held as suspects before being turned into prosecution witnesses did not give any scintilla of evidence implicating the accused in the murder. According to PW1 and PW2 they went to pick the accused after the report from Mzee Safisa. PW1 said they found three (3) young men in the house and the accused after being talked to agreed to go with them. PW2 on the other hand said they found five (5) young men in the house. He then asked who among them had injured another one. All of them pointed at the accused. He then begged to leave with the accused. It is therefore not clear if it was three (3) or five (5) young men who were in that house. Be it as it may were they ever called as prosecution witnesses save for PW3? The answer is NO. The alleged recovery of the rungu (EXB 1) was by police officers and village elders none of whom appeared before this court as a witness. How was it recovered and who led to its recovery? When asked by the court to explain the connection between the rungu (EXB1) and the accused person the investigating officer (PW6) said there was none. So why was it in the first place brought to court as an exhibit? Lastly there is no one who testified as to having seen the accused injure the deceased or even near the scene. Even David Rono who allegedly found the deceased lying near his home was never called to testify. The court does not know what he saw or heard.
24. In the face of all the gaps I have raised above, my finding is that the prosecution has failed to establish a prima facie case against the accused person. Placing him on his defence would be a pure academic exercise.
25. For my part I find the accused not guilty and acquit him under section 306(1) of the Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held under a separate warrant.
26. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI
JUDGE

