



**Republic v Shikuku (Criminal Case 35 of 2019)
[2024] KEHC 11360 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 35 OF 2019
AC MRIMA, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC STATE

AND

GODWIN SHIKUKU ACCUSED

JUDGMENT

Introduction

1. Godwin Shikuku, the accused herein, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were that on the 7th day of July 2017 at Toboo farm in Kaipei Location within Trans-Nzoia County, jointly with another not before the Court murdered Leonard Masika Wasike (hereinafter referred to as ‘the deceased’).
3. The Accused pleaded not guilty.
4. The prosecution’s case was heard by Hon. Chemitei, J and Hon. Kimaru, J (as he then was). Upon closure, the Accused was placed on his defence.
5. Yours truly heard the defence case.
6. A look at the trial now follows.

The Prosecution’s case:

7. The prosecution called five witnesses.
8. Esnas Nanjala Juma testified as PW1. She was a wife to the deceased. It was her evidence that on 7th July 2017 at about 6.30pm, she was at home with her husband, the deceased.



9. The deceased gave her money to take some maize to the posho mill and asked her to pass by and pick him up at the local bar on her way home.
10. It was PW1's further evidence that, on her way back home, she passed by the bar and found the deceased drinking. Suddenly, the Accused appeared and picked the bottle which the deceased was drinking from and instead drank the alcohol. The two then quarreled.
11. PW1 stated that the deceased then left the bar and walked away. She followed him. After a while, as they were nearing the home of one Okeiro, the Accused appeared from a maize field carrying a hoe/jembe and a piece of wood.
12. Sensing danger, PW1 called the Accused three times but the accused did not respond. PW1 then told the Accused not to beat the deceased. To her surprise, the Accused turned to her and hit her on her head using the piece of wood he carried.
13. PW1 screamed and called the neighbours for help as she took off. She left the Accused and the deceased together.
14. After a short while, PW1 returned to where she had left the Accused and the deceased. She found that the neighbours had gathered and that the Accused was still beating the deceased. By then, the deceased was lying on the ground.
15. The Accused then disappeared into the maize field. The neighbours including one Benson and Okeiro, assisted PW1 to carry the deceased to his home.
16. According to PW1, the deceased had been assaulted on the hands and had a broken leg. PW1 nursed the deceased at home until the following day when she took him to Endebes Sub-County Hospital and thereafter reported the incident to the Police.
17. PW1 testified that the deceased was later transferred to Kitale Teaching and County Referral Hospital for specialized treatment where an X-ray established that there was a blood clot in the head. The deceased was then transferred, once again, to the Moi Teaching and Referral Hospital in Eldoret. Unfortunately, the deceased was pronounced dead on arrival.
18. PW 1 stated that the attack on the deceased by the Accused took place at about 8pm and there was ample moonlight. She clearly saw the Accused who, unlike the deceased, was not drunk. PW1 knew the Accused quite well as he was their neighbour and had just seen him at the bar.
19. It was PW1's affirmation that, apart from what happened at the bar, the Accused and the deceased had not really differed. She also stated that Okeiro's home is about 100 metres from the scene and that Okiero was the first person to arrive at the scene. To PW1, Benson's home was little far.
20. Benson Wafula Juma testified as PW2. He stated that he knew the deceased whom they worked together and was also his neighbour.
21. It was his evidence that on 7th July 2017 at around 8pm whilst he was in his house, he heard screams from someone saying 'wanauwa Masika'. PW2 rushed to his house and woke up his children, Sharo and Nelima.
22. PW2 stated that the three went towards the direction of the screams and found PW1, who was the deceased's wife, bleeding and still screaming.
23. PW1 told them that the deceased had been injured and was lying down. She led them there. On arrival, PW2 found Okiero and his mother. They told him that they heard the screams and came to help.



24. To PW2, the deceased was not talking by then. They assisted in taking the deceased and PW1 home. It was PW2's evidence that he did not see the accused at the scene.
25. Joseph Mulukhe Wasike, the deceased's father testified as PW3. It was his evidence that on 19th July 2017, he went to Moi Teaching and Referral Hospital in Eldoret to witness the postmortem of his son, the deceased. He observed that the deceased had head injuries and blood inside his head, but had no other injuries on the rest of the body.
26. Dr. Macharia Benson, a Pathologist at Moi Teaching and Referral Hospital testifies as PW4. He graduated in MBCH at the University of Nairobi in 2000 and attained a Masters in Pathology in 2006 and Post Graduate Diploma in Forensic Pathology in 2007. He was the one who conducted the autopsy on the body of the deceased.
27. It was his evidence that the body was identified by Andrews Musyomi and Joseph Makokha. He found that the deceased had defence wounds on his right hand and left upper limb.
28. It was further his findings that the deceased had extensive bruises on the skin covering the head frontal side and the left side. He also had a depressed skull fracture and extensive bleeding into his brain. The brain was swollen due to pressure caused by bleeding.
29. He then formed the opinion that the cause of death was raised intracranial pressure due to head injury due to blunt force trauma. He filled in and signed a Post Mortem Report which he later produced in Court.
30. No. 77925 PC Antony Kaasinja, was the subsequent Investigating Officer in the case. He was attached to Endebes Police Station and he testified as PW5. He stated that took over the matter from PC Simon Kirui who retired from service.
31. It was his evidence that on going through the file, he established that on 12th July 2017 at about 14.30hrs, PC Kirui was the station when he was called by CIP Omwenga to his office. Therein he found the deceased's wife crying. She had come to report assault. PW5 stated that PW1 narrated the ordeal in details.
32. PW5 stated that PC Kirui and the OCS went to Tobo Trading Centre and arrested the Accused. He was initially charged with assaulting the deceased's wife. He stated that on 17th July 2017, the deceased's wife reported that that the deceased had succumbed to the injuries.
33. On cross-examination, PW5 stated that no one from the bar was called to testify and that the name of the bar was not disclosed. It was further his case that the piece of timber used to allegedly assault the deceased was not recovered.
34. He further admitted that he did not visit the scene of crime. It was his case that the eye witnesses were not willing to testify.
35. Upon close of the prosecution's case, the Accused was placed on his defence. He gave a sworn defence and called no witness.

The Defence:

36. The Accused stated that he hailed from Endebes and he operated a boda boda for a living. That, on 7th July 2017, he was in a bar in Tobo Trading Centre at about 8pm taking drinks with a friend by the name 'Kaycee'. He stated that there were many other people in the bar.



37. It was the Accused's testimony that he did not see the deceased that day and was not aware if he was in that bar. That, he neither knew the deceased nor did he have any confrontation with anyone in the bar that day.
38. He further denied neither knowing PW1 nor any of the witnesses in the case.
39. On cross-examination, he stated that the bar was not very close to his home but he frequented it for a period of about 3 years before the incident. To him, the prosecution witnesses were not truthful.
40. He then urged the Court to uphold his defence and acquit him.
41. At the close of the hearing, parties were directed to file and exchange written submissions.
42. Whereas the prosecution filed its written submissions dated 4th October 2023, the Defence did not. The arguments in the submissions and authorities cited shall be dealt with in the analysis section of this judgment.

Analysis:

43. There is only one issue that arises for determination in this case. It is whether the Prosecution proved the charge of Murder beyond reasonable doubt against the Accused.
44. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients.
45. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
 - (a) the death of the deceased and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
46. This Court will deal with the above elements in seriatim.

Death and its cause:

47. There is no doubt that deceased died. The fact was attested to by PW1, PW3 and PW4.
48. As to the cause of death, PW4 produced the Post Mortem Report which he filled after he conducted the autopsy. In his professional assessment, the deceased died as a result of intracranial pressure due to head injury due to blunt force trauma.
49. The Accused did not controvert the cause of the deceased's death and there was no other contradictory evidence.
50. This Court, therefore, conclusively forms a finding that the prosecution rightly so proved the death of the deceased and its cause.

Who caused the death?

51. The second element of the offence of murder requires proof that the accused committed the unlawful act which caused the death of the deceased.
52. In this case, there was no eye witness. PW1 testified that when the Accused appeared from a maize farm, he attacked her and she raised alarm as she ran away. PW2 went to the scene and found the deceased



lying on the ground and unable to speak. The two people whom he found thereat, Okeiro and his wife, had also gone to rescue the deceased. Neither Okeiro nor his wife testified.

53. The upshot is that the matter now revolves on circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
- (ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (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.

54. The foregone principles were set out in the locus classicus case of R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.

55. The Court of Appeal in Musii Tulo (supra) in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

56. Further, the Court of Appeal in Sawe- Vs- Republic [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

.... 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 on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....

57. Later, the Court of Appeal in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR had this to say on circumstantial evidence: -

.... However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence.



Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:

It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial....

58. Returning to the case at hand, the evidence advanced by PW1 traced the steps of the deceased right from when they left home to when the deceased entered the bar for a drink. PW1 gave a vivid account of what the Accused did to the deceased in the bar in her presence and the quarrel that ensued.
59. When the deceased and PW1 left the bar and walked home, the accused seemed intent on attacking the deceased. He appeared from a maize farm while armed with a hoe/jembe and a piece of wood. He attacked PW1 who ran for her life leaving behind the deceased and the armed accused. PW1 raised alarm as she fled.
60. Shortly thereafter, PW1 returned to the scene only to find the Accused not there, but the deceased lying on the ground unable to talk. Okeiro and his wife, who had answered PW1's call for help, were assisting the deceased.
61. In his defence, the Accused denied neither knowing the deceased nor seeing him on the fateful day. He asserted that the witnesses were untruthful. He, however, admitted that he was in the bar that evening. To that end, the evidence of PW1 tallied with that of the Accused.
62. PW1 and PW2 also testified that they knew the Accused who was their neighbour in Endebes. In fact, PW2 stated that he used to work with the Accused. The Accused also testified that he hailed from Endebes. Suffice to note that this part of evidence by PW1 and PW2 was not properly challenged by the Accused who only dismissed it as untruthful.
63. Holding the discussion at that, the focus now turns on the evidence of PW1 relating to the identity of the Accused. Whereas there was no eye-witness who testified on seeing the Accused assaulting the deceased at the scene, the evidence of PW1, which tended to place the Accused at the scene, also ought to be legally assessed as well.
64. PW1's evidence was such evidence which called for corroboration. Corroboration may be in many ways. In some permissible instances, evidence of a single witness may be legally admitted even without any corroboration as long as the Court warns itself of the dangers of acting on such evidence.
65. The Court of Appeal of Uganda in *Obwana & Others v. Uganda* (2009)2 EA 333 dealt with a like scenario and rendered itself as under: -

It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.



66. This Court has carefully considered the evidence of PW1 and the record at large. There are no adverse remarks made by the Court on PW1's conduct and demeanor. The Court, therefore, no doubt believed her testimony.
67. PW1's testimony was further affirmed by the Accused's admission that he had been in the same bar which PW1 stated that both herself and the Accused were also in.
68. Further, given the fact that the knowledge of the Accused was confirmed by PW1 and PW2, this Court finds that the Accused was not forthright in denying knowing the deceased who was the husband to PW1. This Court further notes that the Accused did not deny knowing PW1 and/or PW2, but only dismissed their evidence as untruthful.
69. When PW2 answered PW1's call for help and ran to where PW1 was, it was PW1 who led PW2 to the place where PW1 had last left the deceased when she was attacked by the Accused. They found the deceased lying down, bleeding and unable to speak. They also assisted him to his home. That evidence was both corroborated and undisputed.
70. PW2 confirmed that he met PW1 as she was crying and bleeding. PW1's evidence on her injuries inflicted by the Accused was, hence, corroborated by PW2. The injuries were further corroborated by PW5 who testified that the Accused had been charged in Court with the offence of assaulting PW1 before the death of the deceased.
71. This Court has taken time to discuss the foregoing as a basis of affirming that the testimony of PW1 was not only truthful, but also believable. Therefore, the Court finds that PW1 left the deceased in the presence of the armed Accused as she fled from an attack by the Accused. This Court further finds that upon return to the scene shortly thereafter, PW1 found the deceased lying on the ground while injured and unable to speak.
72. On this Court's prudent assessment of the facts and the application of the law, it is hereby found and held that the totality of the prosecution's evidence primarily points to the guilt of the accused. There was no any explanation upon any other reasonable hypothesis than that of the guilt of the accused. In other words, there were no other co-existing circumstances which weakened the chain of circumstances relied on in inferring the guilt of the accused.
73. In the end, this Court finds and hold that it was the Accused who committed the unlawful act which caused the death of the deceased.

Malice aforethought?

74. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
75. Section 206 of the Penal Code defines 'malice aforethought' as follows: -
 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
 - a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.



- c. An intent to commit a felony.
- d. An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

76. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

77. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

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 accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his 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 those acts.

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 The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

78. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

79. On the conduct of the deceased before and during the attack, it is on record that it was the Accused who confronted the deceased in the bar and forcefully drunk his beer. By then, the Accused was not drunk unlike the deceased. The deceased did not seek any revenge on the Accused. Instead, he accompanied his wife and walked home.

80. It was the Accused who then followed the deceased through a maize farm and again confronted him. This time he was armed with a jembe and a piece of wood. Unprovoked, the Accused attacked PW1 and when she ran away, he attacked the drunk deceased who would ordinarily offer no resistance or at all.



81. The Accused purposed to harm or kill the deceased. He fully prepared himself for the mission in that on leaving the bar he went and armed himself and pursued the deceased. He also attacked the wife first and as she ran away he pounced on the drunk and defenseless deceased.
82. The deceased also sustained several injuries on the head, nervous system, spinal cord and the spinal column.
83. The injuries on the head caused massive bleeding and fractured the skull. The head is such a critical part of the human anatomy. It goes beyond any peradventure that once the human head is subjected to serious injuries, then death was eminent. Inflicting such injuries on someone can only be intentional. The rationale was apparent that it was to deprive the deceased of his life.
84. The manner of execution of the mission was very deliberate and targeted. The accused aimed the head and the spinal cord; very vital and delicate organs, with all his might.
85. By considering the cumulative actions of the accused in the manner he executed the killing and his conduct before and during the unlawful act, it is without any shred of doubt that the accused purposed to kill the deceased.
86. The prosecution, therefore, proved malice aforethought in this case.
87. In the premises therefore, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
88. The accused herein, Godwin Shikuku, is accordingly convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.
89. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Kimani, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

