Republic v Ekiru (Criminal Case E034 of 2015) [2024] KEHC 13136 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E034 OF 2015

RN NYAKUNDI, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC .... PROSECUTION

AND

PETER ETABWA EKIRU .... RESPONDENT

JUDGMENT

1. The Accused was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 18th day of April, 2015 at Kapkeno village, Olare location, in Eldoret East District within Uasin Gishu County, murdered Samwel Wekesa.

2. The Accused person pleaded not guilty placing the prosecution to disapprove his innocence as provided for in Art 50(2)(a) of *the Constitution*. The lead counsel for the Prosecution was, Mr. Mark Mugun and the accused person was represented by Legal Counsel Mr. Chepkwony.

3. In order to discharge the burden of proof, as dictated by Section 107(1), 108 and 109 of the *Evidence Act*, the prosecution summoned four witnesses to prove the following elements for the offence of murder, contrary to Section 203 as punishable under section 204 of the Penal Code.

    a. The death of the deceased

    b. That his death was through unlawful acts or omission of the accused

    c. That the accused had malice aforethought as defined in Section 206 of the Penal Code

    d. As such, the quality of identification evidence placed the accused person at the scene of the crime.

    The brief summary of the facts and evidential material in support of the prosecution case.

4. Pw1 Pauline Kosgey identified herself as a housewife and that between the night of 17th and 18th April, 2015 at about 1:00Am she was keeping vigil in church. A distance away from the church, which is next to her house she saw the lights on which made her anxious with a desire to ascertain what were the events going on at that homestead. She therefore proceeded to access the house by opening the doors leading to the various rooms and on arriving at one of the rooms, she came into contact with a human head. She subsequently flashed the torch and as a consequence identified the body to be that SAMWEL WEKESA. The victim on observation by PW1 was bleeding from the mouth, and as a response to the whole episode, she raised an alarm to wake up her in-laws whom she informed about the death of the deceased. In addition, PW1 told this court that the deceased body was on top of a mattress and the door to the house was also open. The other observations included the missing jacket which the deceased used to wear and was not within the house. Her bag was also missing. The witness did not stop there, she explained that the accused used to be a casual worker, having been engaged for a month and 12 days to the date of the incident. PW1 having been confronted with the body of the deceased she became anxious to check on the whereabouts of the accused who occupied one of the rooms of the homestead. The following day, information on the incident had been received by members of the locality who also inquired about the whereabouts of the accused. The investigations were commenced with assistance of the community policing unit which resulted in the accused person being arrested in possession of the suit case black in color and green paper bag duly identified as having a link with the commission of the offence. The clothes inside the bag apparently in the evidence of PW1 belonged to the deceased.

5. Next in line was PW2, David Kiptoo who gave evidence and stated as follows: That on 18th April, 2015 at 2:30AM he received a telephone call from one Erick, a clan elder in respect of an incident involving the deceased and the accused person. His role was to put together a team to search and trace the suspect in the name of the accused person. According to PW2, it did not take long before he received information that the suspect had been traced at Ngarua in Burnt Forest. The witness sought the assistance of the police officers to accompany him to go to the scene and on arrival there were many other members of the public trying to establish on the cause of death of the deceased. The body of the deceased was found having been handcuffed with a rope lying diagonally at the scene. According to PW2 this was now a police case as between the cause of death of the deceased and the involvement of the accused person before court.

6. The prosecution further adduced the evidence of PW3, Noah Kiprono a resident of Ngarua whose occupation is that of masonry. In PW3's recollection of the events of 18th April, 2015 while asleep in his house, he received a telephone call from one peter who requested him to step out of the house so that he could go to the scene of the offence in which it was reported that the deceased had been killed. Similarly, in the same set of events PW3 told the court that someone had been found carrying a bag suspected to be that of the deceased. He was followed closely and eventually stopped for a quick interrogation as to his destiny and the luggage he was in possession of at the time of suspicion. This led to an immediate arrest. The chief of the area also arrived at that scene and eventually the accused was taken in as a suspect of the offence of murder against the deceased. In the testimony of PW3, the recovery of the bag and a black suit case from the accused, pieced together raised the bar of suspicion to that of a suspect in so far as the accused person is concerned.

7. Finally, the prosecution summoned the evidence of PW4 NO. 55926 PC (W) Irene Chepkoech who conducted investigations of this case having taken over from sergeant Wafula. In this respect PW4 tendered in evidence the following exhibits:

    i. A suit case produced as Exhibit 1

    ii. Blue jeans trouser produced as Exhibit 2

iii. Green trouser produced as Exhibit 3

iv. Old striped T-shirt produced as Exhibit 4

v. Blue trouser produced as Exhibit 5

vi. 2 jackets produced as Exhibit 6(a) and (b)

vii. Black pair of shoes produced as Exhibit 7

8. As the prosecution and defence had consented to produce the post mortem report without calling the maker. It was admitted in evidence as Exhibit 8.

9. It is trite that oral evidence given on oath by the above witnesses forms the substratum of the provisions of Section 306 of the Criminal Procedure Code which requires a trial court to evaluate the totality of the evidence to establish whether there is direct or circumstantial evidence to implicate the accused person with the commission of the offence. In this respect it is the offence provided under Section 203 of the Penal Code.

10. In this respect, the accused person was placed on his defence under Section 306 as read with 307 of the Criminal Procedure Code. The accused person under the guidance of Learned Counsel Mr. Chepkwony elected to give unsworn statement in which he denied the offence of killing the deceased as alleged by the prosecution witnesses

Analysis and determination

11. It is now the turn of this court to answer the question whether the prosecution has discharged the burden of proof of beyond reasonable doubt to limit the right of presumption of innocence under Art. 50(2)(a) of *the Constitution*. Section 203 of the Penal Code which provides for murder envisages the following ingredients to prove it to the required standard outline in our criminal law:

a. That there was death of the deceased

b. That the case of such death was unlawful

c. That the death was caused with malice aforethought

d. That the accused is responsible directly or indirectly for causing the death of the deceased.

12. It is incumbent upon the prosecution to proof all the ingredients beyond reasonable doubt. This doctrine is clearly articulated in the following authorities:

13. In the case of Miller –v- Ministry of pensions (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

> “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

14. In the case of Woolmington –v- DPP (1935) AC 462 at pp 487 Viscount Sankey, L had this to say

> “ But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.
>
> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ….. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ….. It is not the Law of England to say as was said in the summing up in the present case: ‘if the Crown satisfy you that this woman died at the prisoner’s hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident….”

15. Three important concepts play a role in determining whether a standard of proof is satisfied in a criminal case: ‘beyond a reasonable doubt’, reasonably possibly true’ and ‘possibilities.’ ‘Additionally, there must be interaction between these three concepts:

    a. An accused cannot be convicted if his version can be regarded as reasonably possibly true.

    b. An accused can only be convicted if the prosecution is able to prove its case beyond a reasonable doubt.

    c. The manner to attain the standards in beyond a reasonable doubt’ and ‘reasonably possibly true’ is dependent on the degree of probabilities of the truth of a case, as required by the case.

16. With regard to the first ingredient, it is indisputable that the deceased is dead. All the prosecution witnesses including the accused testified to this fact of death of the deceased. It is trite that proof of death in our jurisdiction is by dint of medical evidence. With regard to the facts of this case, the body of the deceased was subjected to a post mortem at Moi Teaching and Referral on 23rd April, 2015, having been duly identified by Ronald Baraza and Samuel Kamau. Accordingly, the first ingredient has been proved beyond reasonable doubt

17. Regarding the second ingredient, it is settled law that all homicide is unlawful unless excused by law as postulated in Art. 26(3) of *the Constitution* (see R V. Gusambiza S/o Wesonga (1948) 15 EACA 65). In Section 203 of the Penal Code, any person who causes the death of another by any means whatever is deemed to have killed that other person. The alleged causation of death as defined in Section 213 of the Penal Code need not be the sole cause of death but must be a substantial or significance cause of death or have substantially contributed to the death. In essence, in assessing whether this element has been proved beyond reasonable doubt, the court has to look at the critical features of the unlawful acts of omission or commission within the range of potentially fatal acts which resulted in the death of the deceased.

18. The means by which a person causes the death of another may be direct or indirect, as long as those means are, or are caused by, the defendant’s act. To prove the accused’s acts caused death it is not necessary to prove they were the sole or only contributing cause of death. However, it must be proved the defendant’s acts were a substantial or significant cause of death or contributed substantially to the death. In the instant case, between 17th and 18th April 2015, PW1 gave a narration that when he was keeping vigil in church, he saw the lights on in the nearby house which caused him some kind of anxiety.

He then proceeded to open the first door out of the three doors in that particular house. According to PW1, he proceeded to the other bedrooms and on opening the second door he saw the head of a human being. By use of a torch, he saw the body of the deceased who was bleeding from his mouth besides other multiple injuries. The witness further testified that on examining the room he confirmed that some of the deceased's clothes and his bag were missing from the vicinity. This same house according to PW1 was also occupied by the accused person who occupied third door. He had also worked for him for about three weeks but at this moment he was not within the homestead. The following day PW1, received a telephone call that the accused person had been seen looking for alternative employment. That is when he instructed the caller to have him arrested immediately for purposes of investigations as to his involvement in the death of the deceased. It was further the testimony of PW1 that the accused was arrested in Burnt forest being in possession of the suit case black in color and a green bag with all the items identical to those belonging to the deceased. The witness on being shown the items in court, he was able to identify them positively as those stolen or carried away from the same house in which both the deceased and the accused occupied as at 17.04.2015. PW2 David Kiptoo the assistant chief told the court that on 18th April, 2018 he received a telephone call from a clan elder in respect of the murder involving the deceased and the accused as a suspect but had already taken flight from the scene. It was the evidence of the Assistant chief that the suspect had been arrested being in possession of goods suspected to belong to the deceased.

19. PW3 Noah Kiprono also a witness for the prosecution told the court that on the night of 17th and 18th April, 2019 regarding the chain of events in which the deceased had been killed and simultaneously an arrest having been executed against the accused person who was carrying a bag suspected to have a correlation with the commission of the crime at Kapkeno village. PW3 acting on that information proceeded to the scene which was nearby where he saw the suspect and the suit case together with a bag allegedly recovered in his possession. During the hearing PW3 was able to identify the black suit case and a bag found in possession of the accused person.

20. Lastly, PW4, detective PC Irene told the court that the recovered items from the accused formed the basis of investigations and recommendations for him to be charged with the offence of murder against the deceased. The following items in his possession were produced as exhibits

    a. Black suitcase
    b. Assorted clothing
    c. Blue jeans trouser
    d. Cream Khaki trouser
    e. Stripped t-shirt
    f. Blue Khaki trouser
    g. 2 black jackets
    h. Shoes

21. With the above factual matrix from the prosecution, the accused person was placed in his defence in which he gave unsworn statement and denied the offence of killing the deceased. Of significance and as put out by PW2, the body of the deceased was found having been handcuffed with a rope lying diagonally at the scene. The injuries as inflicted also reveal an act that was unlawfully perpetuated. The injuries were, therefore, as a result of a deliberate act of another person.

22. On whether the accused had malice aforethought when he unlawfully killed the deceased, under section 206 of the Penal Code, 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
>
> (c) an intention to commit a felony.
>
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

23. It is the duty of the prosecution to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e), malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

24. The facts in the present case reveal a perpetrator who was on a mission to cause grievous harm on the deceased person. As aforementioned, PW2 told the court that the deceased was found having been handcuffed with a rope lying diagonally at the scene. The evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased. The autopsy report dated 22nd April, 2015 indicated that the cause of death was a severe head injury due to assault. An attack on one's head and vulnerable body parts is an attack on the life of a person. The perpetrator had the ultimate intention of eliminating the deceased although the motive is unclear.

25. It cannot be gainsaid that the entire case of the prosecution hinges on circumstantial evidence. So far as the evidence on record in the present case is concerned, it emerges that it was not disputed that on the night of 17th and 18th April, 2015 on or about 1:00AM, PW1 whose house is next to the church premises left for her house and she could hear the radio was on and the lights at the same time. She describes as having three doors. That is when on further verification, she encountered in one of the doors a human being who had been hit on the head. This human being happened to be the deceased person. According to PW1 on further investigation she found that some of the clothes belonging to the deceased were missing including a blood suit case and a bag. This same house was occupied by the accused person. In essence, the accused and the deceased person were staying together though living in separate rooms. The import of PW1 testimony, is that the deceased and the accused person in this fateful day and hour, were expected to be asleep in their respective rooms. However, when she visited the house, the accused was missing while the deceased had sustained serious injuries to the head, the impact of which he was also bleeding from the mouth. This piece of evidence, imports the last seen theory together which is a presumption conclusively to be drawn from the testimony of PW1. It is apparent that PW1 had gone to keep vigil in the church which is in the same compound with the house

which became the scene of crime in so far as the chain of evidence does establish beyond reasonable doubt. There are two pieces of evidence which prompted PW1 to visit that house during the odd hours of around 1:00AM. The first being the sound of the radio and the lights of the house which was still on, something she found unusual given the time when it was expected that the occupants had fallen asleep.

26. This last seen theory put in perspective of section 111 of the *Evidence Act* is that the accused person was expected to offer some explanation as to when and under what circumstances he parted company of the deceased. It is true the burden to proof the guilty of the accused is always on the prosecution. However, in view of Section 111 of the *Evidence Act*, when any fact is within the knowledge is on any person the burden of proving that fact is upon him so as to rebut existence or non-existence of the facts on the last seen theory. This doctrine of last seen theory is underpinned in circumstantial evidence which forms the basis of guilt of an accused person. The comparative decision in Anjan Kumar Sarma & Others versus. State of Assam (2017) 14 SCC 359, it was observed as follows on the well settled principles of what is commonly known as the best evidence in proving facts in issue:

> " a. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;
>
> b. The facts so established be consistent only with the hypothesis of the guilt of the accused, that the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> c. The circumstances should be of a conclusive nature and tendency;
>
> d. They should exclude every possible hypothesis except the one to be proved; and
>
> e. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." (See also the same principles articulated in the following local authorities: R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and Simon Musoke v. Republic (1958) EA 715)

27. In Deepok Sarna Vs Republic the court of Appeal stated that: -

> " In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.
>
> In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts.

In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt."

28. The other inference to be drawn from the testimony of PW1, PW2, PW3 and PW4 which squarely places the accused person at the scene of the crime is the doctrine of recent possession of stolen property positively identified to belong to the deceased in an unexplained circumstance. The Court of Appeal the essential elements of the doctrine of recent possession in Eric Otieno Arum Republic KSM CA Criminal Appeal No. 85 of 2005 (2006) eKLR where the court held as follows:

> " In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant, in this case the deceased; thirdly that the property was stolen from the complainant herein the deceased and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

29. In addition, in the case of Kelvin Nyongesa & 2 others versus Republic (2001) eKLR the court stated:

> " Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard."

30. In the instant case, the prosecution introduced in evidence the following exhibits which were found to be in possession of the accused person:

    a. Black suitcase

    b. Assorted clothing

    c. Blue jeans trouser

    d. Cream Khaki trouser

    e. Stripped t-shirt

    f. Blue Khaki trouser

    g. 2 black jackets

    h. Shoes

    Soon immediately, PW1 visited the residence of both the accused and the deceased and on raising an alarm, the accused was traced and arrested being in possession of the above identified items, stated to belong to the deceased. The accused person in his defense, failed to give a probable explanation as to how he came to be in possession of the stolen items from the deceased person. I am therefore of the considered view that the prosecution has established the ingredients of the doctrine of recent possession to positively place the accused person at the scene of the crime.

31. The result of the foregoing is that the prosecution has established all the elements for the offence of murder contrary to section 203 of the Penal Code beyond reasonable doubt for a finding of guilt and conviction to be entered against the accused person.

Sentence

1. The Accused was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 18th day of April, 2015 at Kapkeno village, Olare location, in Eldoret East District within Uasin Gishu County, murdered Samwel Wekesa.

2. The accused pleaded not guilty to the offence as stipulated under section 203 of the Penal Code. The prosecution discharged its burden of proof beyond reasonable doubt resulting to a conviction by this court.

3. In imposing a proper sentence, I am alive to the of the fact that the case of Francis Muruatetu Versus Republic (2017) eKLR set the parameters of sentencing an offender found culpable under Section 203 of the Penal Code. The applicable factors include:

    a. Age of the offender

    b. Being a first offender

    c. Whether the offender pleaded guilty

    d. Character and record of the offender

    e. Commission of the offence in response to gender-based violence

    f. Remorsefulness of the offender

    g. The possibility of reform and social re-adaptation of the offender

    h. Any other factor that the court considers relevant.

4. I also must not lose sight of the principles in the 2023 Judiciary of Kenya Sentencing Policy Guidelines which expressly provides as follows:

    That sentences are imposed to meet the following objectives:

    a. Retribution: To punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding citizen.

    d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: To communicate the community's condemnation of the criminal conduct."

5. The central principles on sentencing is amplified in the cases of Titus Ngamau Musila alias Katitu-crminal Case No 78 Of 2014 quoting from the case of Santa Singh V State Of Punjab [1978],4 SCC 190 .... Stated as follows:

> “ "Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances extenuating or aggravation of the offence. The prior criminal record, if any, of the offender, the age of the offender the record of the offender as to employment, the background of the offender reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for rehabilitation of the offender, the possibility of return of the offender to a normal Life in the community, the possibility of treatment or training of the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence"

6. I have taken into account the mitigation and the aggravating factors and the accused is sentenced to 15 years' imprisonment with a credit period of pretrial detention under section 333(2) of the CPC being discounted. In computing that period, the record shows that the accused was arraigned in court on 4th may, 2015 and he is one of those unlucky persons who was never released on bond under Art. 49(1)(h) of *the Constitution*. He has been in remand custody for Nine years and five months. That period shall be discounted from the 15 years' custodial sentence.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER 2024.

..

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mugun for the state

Mr. Chepkwony Advocate