Republic v Njoroge (Criminal Case 19 of 2018)
[2024] KEHC 13080 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13080 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 19 OF 2018

HI ONG'UDI, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

COLLINS MAINA NJOROGE ..... ACCUSED

JUDGMENT

1. Collins Maina Njoroge "the accused" stands charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that the accused on 25th day of February, 2018 at Kampi ya Moto junction in Rongai sub-county within Nakuru county, jointly with others not before court murdered Joel Mbuthia Kamau.

2. The accused denied the charge and the matter proceeded to full hearing with the prosecution calling six (6) witnesses. The defence called three (3) witnesses including the accused person.

3. PW1 – Monicah Ngonyo Kamau the deceased's sister testified that on 25th February, 2018 at around 5 pm the deceased visited her. Shortly thereafter a vehicle with five (5) occupants arrived at her place. She knew only one person whom she had schooled with and stayed with and the person was the accused herein. One of the occupants who had worn a marvin and glasses greeted the deceased. He then removed the marvin and mask. The deceased told him "afande usinipige" and he knelt down. The deceased was pushed down.

4. In cross examination she said the vehicle that came did not take long at her compound. That by addressing them as "afande" it meant they were police officers. She did not know that the deceased was a thief.

5. PW2 - Bernard Nderitu Thombe stated that on 25th February, 2018 around 4 pm he was in the club running the business when his brother in law (deceased) came there. After greeting him, he warned him not to get out as there were people looking for him at Kampi ya Moto. He had heard that police

were looking for him because of stealing. He sat in a private room as PW2 continued serving customers. Later PW1 then came rushing and informed him that the deceased had been picked by some fellows. She told him she had recognized the accused who was also his friend. He was not able to reach the accused on phone. He went all the way to junction, Naisuit, then Kampi ya Moto but never found him. It was his evidence that the deceased had stolen from the neighbor at Naisuit.

6. The next day he managed to get the accused on phone and he told him they had dropped the deceased at "Mama Njoroge's" place which was beside a shop. Later he learnt that the deceased had been killed. On inquiring from the accused, he told him he too had heard so.

7. In cross examination he said the deceased was being sought after stealing from a neighbor, who was constructing a home. He knew the accused as a Mason though he did not know if he was in charge of the said construction. The accused never told him whom he had left the deceased with. He reported to the police since the person who picked him was known.

8. PW3 – Peter Gicharu Kamau is a boda boda rider. He stated that the deceased was his younger brother. On 25th February, 2018 at 11pm he received, the news of the deceased's death. He informed his mother and the next day went to the mortuary with his elder brother George (PW4). He heard that the deceased had been killed by a mob for stealing. He knew accused as a neighbor. After burial the body was exhumed for post mortem to be conducted. In cross examination he said the deceased was a known thief. Their mother who died in 2019 did not want a post- mortem conducted because the deceased had died from mob justice.

9. PW4 – George Kibucho Kamau is a boda boda rider and a brother to the deceased. He stated that on 25th February 2018 at around 11pm he was called by the Chief Kampi ya Moto who told him the deceased had been killed at Junction. He informed their mother and PW3. The next day him and PW3 went to the mortuary and identified the body. No post mortem was done as they had no money. He knew the accused as a neighbor. In cross examination he said he did not know the relationship between the accused and the deceased but he knew the deceased to have been a thief.

10. PW5 – Dr. Ngulungu Titus the pathologist No A471, did the post-mortem on the deceased's body on 27th April, 2018 at the request of Menengai police station. Upon exhumation of the body of an African male aged 36 years in good nutrition he did the examination. He found injuries on the hands, laceration on the forehead, injuries on the skull bruises on the left side of the neck, compound fracture on the left leg, carbon soot showing the trachea, and laceration on the head. The cause of death was extensive injury to the chest and head injury. He produced the post-mortem report as PEXB 1.

11. PW6 No 111301 PC John Komen attached to Menengai police station took over investigations from PC Elkana Cheserk after he retired. The witness was stood down and directed to trace the initial investigating officer which was never to be. The prosecution finally closed their case.

12. In his sworn evidence the accused stated that the deceased was his nephew. On 21st February, 2018 he went with Chief (Johana) and two officers to the deceased's home. A lady called Saline Jekum Cheruiyot had complained of a theft. He used to do construction work as Saline's home. They followed foot prints of the suspects and arrived near a school. They found the deceased's wife and found everything that had been stolen. The deceased was not there. Together with the police they carried the recovered items to the AP Camp and he then went to work. He said he witnessed the deceased's arrest on 23/2/2018, and he is the one who pointed out the deceased to the police. On 25/2/2018 he was away in Olkalou for a family meeting, he said.

13. Upon cross examination he said he had known the deceased for a long time and they were from the same village. They stayed about 3 meters from one another. The stolen items included nails, construction

material and cement. He stated that Monica the deceased's wife was not held in custody. He denied finding PW2 in his house. He added that they found the deceased on the road on 23rd February, 2018. That the deceased was known to be a thief who worked together with PW2. He produced the affidavit (DEXB1) sworn on 26/2/2018 by one Margaret Wanjiku Kamau (deceased's mother). He stressed that the deceased was a thief.

14. DW3 - Daniel Wamau Kalonzo stated that the accused was his step brother. They met on 24/02/2018 in Nyandarua, Wakahiga village where they had a family meeting. The meeting was from Saturday to Sunday 25/02/2018. He produced the minutes of the meeting as DEXB 2.

15. In cross examination he said he had known the accused as James and that's what his identity card reads. He knew the accused in 2012 though his father died in the year 2000. He confirmed that the meeting ended at 3pm and the incident occurred at 5.30pm. He did not know what happened after the accused left though he doubted whether he had arrived. He appeared not clear on when the meeting ended.

16. DW4 - John Chemelin Chepyegon is the Chief of Kampi ya Moto location of Rongai sub county. He said he had known the deceased for over ten (10) years as they are from the same location. Further that the deceased used to steal, break into people's homes and steal sheep. That in 2018 he received a report from the village elder of several houses having been broken into and things stolen.

17. He went on to state that the accused being a neighbour to the complainant came with them to the scene when police came. The APs arrested the deceased and he later learnt that the deceased had been killed by mob justice. This was long after his arrest by the police. He went to the scene of mob justice and found the deceased's burnt body. He learnt that there was theft of sheep and the deceased was a suspect. He did not see the accused at the scene.

18. Upon cross-examination he produced his work ID Card (DEXB 3). He said he knew both the accused and the deceased. It was his evidence that the deceased was a thief but he had no recorded report. He further stated that there had been a house breaking incident and the deceased was a suspect.

Submissions

Defence submissions

19. These were filed by M/s H. Chepngetich of Geoffrey Otieno and Company advocates and are dated 12/04/2024. Counsel submitted that there was no eye witness and so the prosecution relied on circumstantial evidence. Counsel submitted that for a case based on circumstantial evidence to be proved the following elements as stated in the case of *Abanga Alia Onyango v Republic* Criminal Appeal No 32 of 1990 must be satisfied.

    i. The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.

    ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of 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 accused and no one else.

20. On the "last seen theory" counsel submitted that according to PW1 the deceased was last seen with an afande (police officer) while the accused was their driver. Secondly the prosecution failed to call the investigating officer to explain what actually transpired.

21. Counsel contended that malice aforethought as defined under section 206 of the *Criminal Procedure Code* was not proved, as there was no evidence that accused participated in the murder. Finally, she submitted the charge against the accused was based on mere suspicion which is not sufficient to prove guilt. Reliance was placed on the case of *Sawe v Republic* [2003] KLR:

> Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt

Prosecution's submissions

22. These were filed by Emma Okok Principal Prosecution Counsel. She submitted that the accused's defence of alibi has glaring discrepancies. She referred to the alleged family meeting and that the said timings did not add up. She further referred to the name of James referred to in the minutes yet the accused had at no point said he was one James and his names are clear. Further that DW3 clearly said he could not tell what happened after the accused left the meeting.

23. It's her submission that the accused could still have made it on time and gone to PW1's home with police officers. On winding up on this issue counsel submitted that the alibi defence was raised at the tail end of the trial and was therefore an afterthought. Reliance was placed on the Court of Appeal decision in *Victor Mwendwa Mulinge v Republic* [2014] eKLR where the court stated:

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution..... In *Karanja v Republic* (supra), this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought"

24. Counsel while referring to the defence narrative that the deceased was killed by mob justice submitted, that DW4's evidence on this was hearsay as he never witnessed the killing. That the affidavit produced as EXB1 was not made by the accused person. She urged the court to invoke the doctrine of last seen and infer guilt on the accused.

Analysis and determination

25. Having carefully considered the evidence on record, both submissions and cited decided cases I find the main issue for determination to be whether the charge of murder has been proved against the accused. For a charge of murder to be established the following ingredients must be satisfied:

    i. Proof of death

    ii. The unlawful act of killing/causing death (actus rea).

    iii. Malice aforethought (mens rea).

Proof of death

26. There is no dispute that Joel Mbuthia Kamau lost his life on 25th February, 2018. This had been confirmed by his sister (PW1), brothers (PW3 and PW4). Dr. Titus Ngulungu (PW5) the pathologist did the post mortem upon exhumation of the body. He produced the post mortem report (EXB 1) confirming the death and cause of death. His finding was that the cause of death was extensive injury

to the chest and scalp and blood loss. This was therefore not a natural death. I am therefore satisfied that the first element has been established.

The unlawful act of killing/causing death (actus rea)

27. None of the witnesses saw the deceased being killed. The prosecution has therefore relied on circumstantial evidence to prove its case. What then is circumstantial evidence? This is evidence that is indirect that does not on its face, prove a fact in issue but gives rise to a logical inference that the fact exists. Such evidence required the drawing of additional reasonable inferences in order to support the claim. It is evidence that relies on our inference to connect it to a conclusion of fact.

    i. *Muchene v Republic* [2002] 2 KLR 367

    ii. *Munyao v Republic* [2002] 2 KLR 504

    iii. *Nzivo v Republic* [2005] 1 KLR 699

    iv. *Mohamed & 3 others v Republic* 1 KLR 722

28. The key witnesses here are PW2 and PW1 who are husband and wife and close relatives of the deceased. Their evidence is clearly set out at paragraphs 3-7 of this judgment. It was PW2's evidence that when the deceased visited him on 25/2/2018 at 4pm at his place of business he warned him not to go out as there were people looking for him because of a theft he had allegedly committed.

29. On the other hand, PW1 testified that the deceased came to her house on the same date at 5pm. Before long a vehicle with five (5) occupants arrived. She identified the accused as one of the occupants. Another of the occupants was identified by the deceased as "afande" meaning "officer" It is PW1's evidence that these five people arrested the deceased and put him in the boot of their car and left with the accused driving it. She informed her husband (PW2) and the search started. PW1 and PW2 never saw the deceased alive again.

30. The accused in his defence raised an alibi. He stated that on 25th February, 2018 he had gone for a family meeting at Olkalou and returned on 26th February, 2018. He however said he went to the deceased's home on 21st February, 2018 with Johana the chief and Saline Jepkum Cheruiyot (his employer) and there was recovery of all his employer's stolen items. This was in the absence of the deceased. He also confirmed having witnessed the arrest of the deceased by two police officers who took him to the police station. Accused's step brother (DW3) produced minutes of their family meeting held on 25th February, 2018 from 11pm (DEXB 2) while the accused produced the affidavit of the deceased's mother (who is also deceased) as D. EXB 1.

31. DW4 John Chemelin Chepyegon Chief Kampi ya Moto location of Rongai told the court that the deceased was a known thief and was arrested by APs as a suspect. He stated that he found the deceased's burnt body long after the arrest by the police. To him it was mob justice that was meted on the deceased.

32. It is clear that the prosecution case is based on the evidence of PW1 and PW2 that the deceased was arrested on 25th February, 2018 after 5pm. The charge is that the deceased was killed on 25th February, 2018.

33. The accused has raised a defence of alibi. He claims to have been at a family meeting in Olkalou and so could not have participated in the killing.

34. On an accused's defence of alibi M/s Okok for the prosecution cited the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR where the Court of Appeal stated:

> " "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution..... In *Karanja v Republic* (supra), this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought"

Counsel Okok has submitted that the accuseds defence of alibi has so many discrepancies.

35. It is settled law that the prosecution has the burden to prove its case beyond reasonable doubt. Further that when a defence of alibi is raised it's the duty of the prosecution to disapprove it. How does it do this? What quickly pops up is at what point the prosecution should be made aware of such defence of alibi coming up.

36. In the case of *Republic v Sukha Singh s/o Wazer Singh & others* (1939) 6 EACA 145 the Court of Appeal held thus:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he had been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped".

37. A perusal of the record herein reveals no disclosure of the defence of alibi. It never popped anywhere even in cross- examination. It was only introduced during the defence hearing. Generally, a failure to disclose a defence of alibi at the earliest opportunity to enable the prosecution investigate it is a serious omission. See:

    i. Nyakundi J in *Charles Kasena Chogo v Republic* [2019] eKLR

    ii. *Waka Evans Amira v Republic* [2012] eKLR

38. I will however still evaluate the alibi defence evidence against that of the prosecution. The accused only told the court that he was in a family meeting at Olkalou on 25th February, 2018. No details like time of arrival and departure were given. His step brother (DW3) said the meeting was held on 25th February, 2018 and ended at 3pm. Later he said it ended at 2.35am. A perusal of the minutes (DEXB 20) shows that the meeting was on 24th February, 2018 and started at 11.56pm and ended at 2.35an. He further said he did not know what happened after the accused left them. The accused never made mention of this.

39. I have perused the list of attendees of the family meeting (D. EXB 2). The name Collins Maina Njoroge (accused) appears nowhere. DW3 tried to explain that he knew the accused as James and his ID card read James. The accused never explained anywhere that he has an alias name of James. He cannot pretend not to have seen (DEXB1) which he asked his witness to produce. DW3 also claimed that the accused's ID card reads James. This ID card was never produced in court to establish that.

40. DW4 who is the chief did not witness what he claimed was mob justice on the deceased. The accused in his evidence stated that DW4 was one of those who went with him and police officers to the deceased's home from where they recovered stolen items belonging to his employer. DW4 never alluded to anything near this in his evidence.

41. An affidavit (DEXB1) alleged to have been sworn by the deceased's mother was produced by the accused. The source of this affidavit and even how it was obtained was never explained to the court. The alleged deponent was already deceased at the time of its production. She could not therefore be examined on it. The deponent never witnessed the deceased being killed, for her to claim he was killed by mob "justice".

42. In justifying the claim of mob justice PW3, PW4 (brothers of the deceased), accused, and DW4 told the court that the deceased was a known thief. DW4 was very careful not to mention any dates in his evidence. Even if the deceased was a thief did it justify his being killed? No report was produced before this court of any complaints to the police administration against the deceased's conduct. Even the person referred to as "Saline Jepkum Cheruiyot" was never called as a witness.

43. My analysis of the accused's defence of alibi reveals that the same is a made-up story. It has distorted itself by the evidence of the accused himself and DW3.

44. Upon consideration of the evidence by the prosecution in its totality and in particular the evidence by PW1 and PW2 I am satisfied beyond reasonable doubt that the accused and his gang of officers came to the house of the couple (PW1 and PW2) on 25th February, 2018 after 5pm. They bundled away the deceased into the boot of the car they came with. That was the last time the deceased was seen alive by PW1 and PW2. There is no record of him having been taken to any police station.

45. From the charge sheet, the deceased died on 25th February, 2018 which is the same day he was picked from the house of PW1 and PW2. The accused cannot escape the blame. He knows where they took the deceased and what was done to him.

46. Under section 206 of the *Penal Code* malice aforethought is 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 cause d 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 flight or escape from custody of any person who had committed or attempted to commit a felony.

47. In his evidence the chief (DW4) said the deceased's body was burnt. The post mortem report (EXB1) does not make a mention of any burns on the deceased's body. The injuries were all over the body, and were brutal. This combined with the way he had been handled from the house confirms that the accused and his team were not out for anything good for the deceased.

48. I am satisfied that the prosecution has proved malice aforethought against the accused person. I find all the three (3) ingredients of murder established. The accused is therefore guilty of the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code* and is convicted.

49. Orders accordingly.

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

H. I. ONG'UDI

JUDGE