



**Republic v Kosgei (Criminal Case 14 of 2018)
[2023] KEHC 2678 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 14 OF 2018
HK CHEMITEI, J
MARCH 30, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BARNABAS KOSGEI ACCUSED

JUDGMENT

1. The accused herein 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 22nd day of September 2018 at Legetetwet sub location Mogotio sub county within Baringo county murdered Stella Kongato.
2. The accused denied the charge and the prosecution called a total of 7 witnesses to establish its case. The accused on the other hand when placed on his defence gave sworn evidence and called two witnesses. Before looking at the merits or otherwise of the matter it is necessary to summarise the evidence as presented during trial.
3. PW1 Victor Kibet Kosgei testified that on the material day he arrived at his home at 9.30 pm and he heard some noise from his neighbour although he could not understand what they were saying. He said that he slept and on the following day the chief told him what had transpired. He went to the homestead and saw the deceased body. When cross examined he said that he did not witness the incident.
4. PW2 Jonathan Kosgei testified that his wife was called around midnight on September 23, 2018 by Barnaba's and asked that he goes to his place immediately. He obliged and upon reaching the scene he found him and he explained to him how the deceased had been away for a week and she came home drunk. He asked the wife to get into the house in vain and he told him to cover her with a blanket.



5. As soon as he arrived in his home the accused called again and he went with his wife and despite the accused attempting to wake her up she was already dead. He said that the police came the following day and took the body. He said on cross examination that there was no evidence of any struggle.
6. PW3 Grace Chelagat testified about the call she received from the accused. She said that PW2 was her husband. She said that she went with him the second time the accused called and found the deceased having been covered with a blanket. It was her evidence that the deceased although lying down had already died. On cross examination she said that she had known the deceased for over 10 years and she used to take alcohol.
7. PW4 Kipkulei Songoiyo the Assistant Chief Legetetwet sub location testified that he received a phone call at night from his neighbour Grace Kosgei who told him that the deceased was unwell and she needed hospitalisation. He told her that she be taken to the hospital but after a while she called to tell him that she had died. He went to the scene and found three other persons and the deceased was already dead.
8. He went on to testify that the deceased had injuries on her head and the scene looked disturbed. There were some stones on the table. He knew both the accused and the deceased as husband and wife and they used to take alcohol.
9. He thereafter called the OCS who came around 8 o'clock and took the body away after taking photographs at the scene. When cross examined he said that he did not witness the incident and he did not record in his statements about the stones and the disturbance of the scene.
10. PW 5 Musa Kipkulei a brother to the deceased identified the body during post mortem exercise.
11. PW6 Peris Jepkorir Ruto a sister to the deceased testified that the deceased told her that she had differences with the accused and she had gone home. She had however told her that she was going back but unfortunately, she heard the following morning that she had been killed.
12. She went to her home and she saw the body in the police vehicle. When cross examined she said that she did not witness the incident and she denied that she brewed beer.
13. PW7 Corporal Japheth Kuluma carried out the investigation. He testified that he went to the scene of the incident and saw the body and the clothes were thrown all over in the home. He also recovered a stick which had been used to assault the deceased.
14. He arrested the accused and took him to the police station. He also took the body to the mortuary and that he attended the post mortem exercise.
15. When cross examined he said that a neighbour had heard the commotion in the deceased home that night after she came home while drunk around 11pm. He said that he did not take any item or samples for analysis to the Government Chemist.
16. When placed on his defence the accused in his sworn defence admitted that the deceased was his wife and that she had gone away to live with her sister at Milimani village for about three weeks leaving him with the children.
17. He went on to state that he was awoken by a thud on the roof around 2.30am and he took his torch and went outside to check and he found her without shoes and full of mud and very drunk. He called Jonathan his neighbour who came and witnessed what was going on. The deceased could not get into the house and she covered her with a blanket. He went back to the house and left the door opened.



18. That at 4 a.m. he woke up and discovered that the deceased had not come inside and upon checking he found that she could not talk. He called Jonathan who came and they discovered that she had died. He denied that he was involved in her murder and that the deceased sister brewed changaa.
19. Upon cross examination he said that they had been married for 25 years and he loved her although she was taking alcohol. He said that he did not see the injuries that night but he saw them in the morning.
20. DW2 Wilson Koech testified that the deceased was his neighbour and that on September 22, 2018 he went looking for changaa and she found the deceased at her sister's place called Milimani village who was selling changaa.
21. He said that there was a fight which involved the deceased and some young men around 9pm. The deceased was injured and she was bleeding from the hand and she fell into some fireplace and the other fellow was cut using a panga. Everybody according to him took off and the following morning he saw people at the accused place and they were told that she had died.
22. When cross examined he said that he knew the deceased as they stay about a kilometre from his place. At the place of changaa he said that it did not take long before the fight ensued between the deceased, her sister Eunice and some other men. He said that he saw her bleeding as she came out of the house. That she fell on the dustbin which had fire. He said that he did not know where she went after that and if she was later injured.
23. DW3 Margaret Kosgei is the sister to the accused who testified that the accused and the deceased had problems together as she used to leave her home. After that she took one of the children to stay with her and took her to school. She said that she was called about the incident although she did not witness the same.
24. On cross examination she said that they had agreed to take care of the children as a family. During post mortem she saw injuries on the body which were on the hand, eye and thigh.
25. After the close of the defence case the parties were directed to file written submissions which only the defence complied. The sub total of the said submissions is that the prosecution did not prove the ingredients of murder.
26. That the weapon which was produced by the state namely the stick had no blood stains and this being a village area it is possible to get sticks everywhere. In any case the deceased clothes did not have any blood stains as is expected when someone is hit with a stick.
27. He went on to submit that none of the witnesses saw the accused injure the deceased and as such it was incumbent upon the prosecution to prove the case circumstantially. That none of the witnesses was able to establish that despite her drunken habits the accused used to beat the deceased. Consequently, the counsel for the accused submitted that the state could not prove the case against the accused beyond any reasonable doubt and she ought to be set free.

Analysis and determination.

28. The ingredients of the offence of murder are now well settled, namely, death and the cause of deceased's death; the accused caused the death through an unlawful act or omission and the accused possessed the intention to cause harm or kill or had malice aforethought.
29. What is evident is a troublesome marriage between the deceased and the accused. There was sufficient evidence that the deceased had gone away for some weeks and left the accused with the children.



30. At the same time, it was not disputed that the deceased abused alcohol and there was evidence as well that on the material day she was in her sister's home at Milimani. Her sister seemed to have engaged herself in the brewing and selling of changaa.
31. Further that the deceased came home during the night and the accused was at home. The only person who heard the commotion was pw1 although he did not hear what they were saying. By the time pw2 and 3 arrived the deceased was already dead.
32. The only person who knew what transpired by the time she arrived home was her husband the accused. In his defence he said that the deceased arrived home while drunk and he only heard someone hit the roof. When he went to check outside he saw her drunk and unable to walk. He said that he left her outside after covering her with a blanket and left the door opened with the hope that she will wake up and come inside the house.
33. There was however conflicting evidence on the time factor. Whereas the accused said that she arrived at 2am the other witnesses spoke of the midnight. Nonetheless it is clear that she arrived home around midnight or thereabouts.
34. I have perused the post-mortem report which was produced by consent. It appears that the deceased sustained multiple injuries including fire burns on her buttocks and thighs. There were bruises on the other parts of the body and the pathologist opined that the cause of death was multiple injuries secondary to 2nd degree burns following blunt force trauma following assault.
35. In the absence of an eye witness to the incident, the only option is to turn on circumstantial evidence. As was stated in the *Simoni Musoke v. R* (1958) E A 71 case
- “In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation Upon any other reasonable hypothesis than that of guilt.”
36. The evidence on record in my view as presented by the prosecution is merely suspicion. There was no direct evidence connecting the deceased death to the accused. Of significance is the evidence of Dw2 who claimed that while they were taking changaa at the deceased sisters home a fight ensued between the deceased, her sister and some young men. If there was such incident the prosecution ought perhaps to have pursued the said lead.
37. This is important because the injuries including the burns seemed to have been sustained by the deceased at the fight. None of the prosecution witnesses mentioned the issue of the burns even after seeing the deceased injuries while her body lay half naked that morning. The deceased as stated in the above cited case of Kipkerring needed not to prove anything and it was incumbent for the prosecution to do so.
38. In *Joan Chebichii Sawe v Republic* (2003) eKLR, the court stated much about suspicion. It stated that,
- “We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring



guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt."

39. In this case it is true that there was bad blood between the deceased and the accused which had led her to run away to her sister for over two weeks. She came home that night and she did not make it for the morning and the only person who called the neighbours including the local chief was the accused. The murder weapon, the stick, allegedly collected from the house was not subjected to any forensic analysis to establish whether there were any bloodstains or at all. Neither was it identified by any of the witnesses. It was only produced by the investigating officer without giving an option to any of the witnesses who may have seen him collect it from the accused house that morning when he carried out his investigation.
40. It appears that the evidence of the area chief and the investigating officer where they said that the house was in such a mess was not taken into account when they were recording their statements. Neither was the evidence of the accused children who were at home that night ever recorded.
41. All in all, it is the finding of this court that the evidence which was presented against the accused was largely circumstantial and based on suspicion. Suspicion alone cannot convict however heavy it is. This court in fact agrees with this line of suspicion since for example why did the accused and the brother leave the deceased outside for the night despite her drunken stupor. What was difficult in pulling or carrying her to the house?
42. In the premises, this court finds that the matter was not proved beyond a shadow of doubt. The benefit goes in favour of the accused who is hereby set free under the provisions of section 215 of the *Criminal Procedure Code* unless lawfully held. The sureties are hereby discharged.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 30TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE

