



REPUBLIC OF KENYA



**Republic v Mutenyo (Criminal Case 21 of 2018)
[2023] KEHC 2753 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 21 OF 2018
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD MUTENYO ALIAS BENA ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* vide information filed in court on 14/3/2018. It is alleged that on 1/1/2018 at Langas estate in Wareng district within Uasin Gishu County unlawfully murdered Paul Gitonga
2. The accused person pleaded not guilty and the matter proceeded to full trial.
3. PW1, Treshier Nyambura, testified that on January 1, 2018 she was coming from Kisumu Ndogo and was accompanied by Paul Gitonga. When they got to the gate of her home, a man hit the deceased with an item he had in his hand and the deceased fell down. She stated that this happened at night but there were security lights. She ran 30 metres away and when she turned back she saw that the deceased had been set ablaze. She ran back and tried to put out the fire but the accused threatened her. She then fled for her safety.
4. PW2, George Njuguna Mwangi, testified that the deceased was his elder brother. That at 2am on the material date he was at home. The wife to his cousin, Mama Mariana called him and told him to go see his brother who had been hit. When he got to the scene he saw his brother on the ground and his head was bleeding. The deceased was then taken to MTRH and treated at the hospital where he kept mentioning the name of Bena. The witness stated that he did not know Bena and he knew him when he was arrested and charged.



5. PW3, Joseph Mwangi Watene testified that on the material date he received a report from his son Njuguna that he was in hospital as his elder brother had been attacked at Langas. By the time he got to the hospital the deceased had passed on. He had head injuries and his body had been burnt.
6. PW4, Dr. Macharia Benson testified that on January 3, 2018 he carried out an autopsy on Paul Gitonga. His findings were that the deceased on examination was found to have sustained injuries to the face, head, 1st and 2nd degree burns involving the lower limbs, genital area and lower abdominal area. The Doctor attributed the cause of death to severe head injury due to blunt force head trauma.
7. PW-5 PC Yusuf Ismael testified as the arresting officer of the accused and after conducting investigations and taking recording the evidence from the witness charged the accused for killing the deceased.
8. The court found that the accused person had a case to answer and he was then put on his defence. He testified as DW1 and denied knowing the deceased or killing him. That he heard of the news of the death of the deceased a month after he had died. He was adamant that he did not commit the offence.

Analysis & Determination

9. The following issues arise for determination;
 1. At the heart of this case is whether the prosecution discharged the burden of proof of beyond reasonable doubt.

Before an accused person is stated to be found guilty of an offence and subsequently convicted the prosecution has a duty to prove its case beyond reasonable doubt concerning every ingredient as premised in the charge sheet. The burden of proof rests entirely with the prosecution and it never shifts save for tactical evidence to rebut the allegations by the accused. The law is trite that it does not require the accused to prove his innocence. Where the accused raises any issue to deny criminal culpability such as provocation, alibi, self-defence, the burden of proof nevertheless does not shift to the accused person. (see emphasis in *Mbugua Kariuki v The Republic* (1976-80), *Longinus Komba v Republic* (1973) LRT 127 (Onyiuke J), *Ernest Asami bwire Abanga alias Onyango v Republic* Nairobi CACRA No 32 of 1990. Mremo v Republic (1991) KLR 221 and in *Kioko v Republic* (1983) KLR 289 1982-88)”
 10. It was stated in the comparative case of *Ikaria v State* (2014)1 NWLR (pt1389) 639. Ogunbiyi, JSC thus “By the use of the phrase “Proof beyond reasonable doubt,” it presupposes that all the ingredients establishing the offences must be proved to such a degree that there would be no question or stone left unturned as to the certainty that it is the accused/appellant and none other than must have committed the act complained of. In other words, all fingers would irritably point towards the direction of the accused. The culpability of the appellant should not be in any shadow of doubt but a clear focus of attention. For such proof, to sustain, it must earn the credibility of witnesses’ testimonies who must give a first-hand account of facts which are within their personal knowledge. Any other source of information would be rated a hearsay evidence and therefore not admissible”
 11. The state primarily based their case in the testimonies of PW1, PW, PW3, PW4 and PW5. From my evaluation of the probative evidence against the accused it is prima facie circumstantial. What will the court be looking for? It is whether the following elements have been proved beyond reasonable doubt:
 - a. That the deceased is dead
 - b. That his death was due to an unlawful act by the accused



- c. That in killing the deceased accused had malice aforethought
 - d. That it is beyond per adventure the deceased death was caused by the accused.
12. With regard to proof of death the prosecution adduced medical evidence vide the post-mortem report exhibit which showed one Paul Gitonga is dead. With regard to the cause of death the findings and opinion by the pathologist indicates that the deceased suffered the following severe injuries:
- a. Extensive Scalp sub gated hematomas involving frontal accepital and parieta.
 - b. Depressed skull fracture left parietal temporal
 - c. Multiple faces bruises
 - d. 1st and 2nd degree burns involving the lower limbs pelvic region and genitals. (See Paulo s/o Mabula v Reginam (1953) 20 EACA 207, Rex v Billa s/o Luhoyo (1947) 14 EACA 137, Rex v Kingori wa Gakuya and Another (1946).
13. As indicated from the evidence the deceased person death was on the basis of serious grievous harm which occasioned the results of death. Therefore, it is conclusive that his death was unlawful going by the opinion of the doctor that he died of severe injury due to blunt force trauma. In terms of criminal responsibility, the accused person raised no justification known in law to exonerate him from the commission of the offence.
14. What distinguishes murder from other homicides is the element of malice aforethought as manifested in Section 206 of the [Penal Code](#).
2. Whether the accused person committed the offence of murder
Murder is defined by section 203 of the [Penal Code](#) as follows;
Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
15. The ingredients of murder were explained in the case of [Roba Galma Wario v Republic](#) [2015] eKLR where the court held that;
- “For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
16. In order for one to be found guilty of murder, the following elements must be proved;
1. Mens rea (Malice Aforethought)
 2. Actus Reus

Whether there was malice aforethought

17. Section 206 of the [penal Code](#) provides as follows;

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 flight or escape from custody of any person who has committed or attempted to commit a felony.

18. The jurisprudence around this question can be ascertained from case law in Robertson (2004) 34 Cal 4th 156 the court held: “ That malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” In the same category the court in Rex v Tubere s/o (Ochen) 194512 EACA 63. It was held that it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured.

19. I have considered the evidence by the witnesses and from the same it is not possible to establish the relationship between the accused and the deceased or what led to the altercation that resulted in the unfortunate demise of the deceased. However, it is not in dispute that the accused person set the deceased on fire. The evidence of PW4 corroborated the claim that the deceased was set on fire. It is my considered view that he knew that the act of burning him after hitting him would cause grievous harm to the deceased. Therefore, I find that the element of malice aforethought was satisfied to this extent.

20. The accused person was identified as the perpetrator of the heinous act that resulted in the death of the deceased. The accused was identified by recognition although the act occurred late at night. Further, when PW2 visited the deceased before he passed away, he was constantly naming the accused person but he did not state that he was his killer. It emerges that in order to determine whether the accused committed the act the court shall have to rely on circumstantial evidence. The test to be applied when considering circumstantial evidence is settled and there is now a long line of cases on that issue. In the case of *Sawe V Republic* [2003] eKLR the Court of Appeal stated:-

In order to justify a conviction 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 upon. 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 remain with the prosecution. It is a burden which never shifts to the party accused.”

21. In the case of *Abanga alias Onyango v Rep* Cr A No32 Of 1990(Ur) the court observed:-

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those 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.”

22. Applying the test above, my findings are as follows; PW1 identified the accused as the one who attacked the deceased and she identified him by recognition. PW2 corroborated the evidence with regard to the identity of the perpetrator by stating that the deceased was uttering the name of the accused in hospital before he passed away. As to whether the statements amounts to a dying declaration Section 33 (a) of the *Evidence Act* (Cap 80) states that:-

33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—

- (a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;.....”

23. The principles governing dying declarations were considered by the Court of Appeal in the case of *Philip Nzaka Watu v Republic* [2016] eKLR. The court held that:-

Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

24. Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *Choge v Republic* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into



evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

25. It is my considered view that the mere mentioning of the accused person does not amount to a dying declaration as he did not speak as to the cause of his death or to the transaction that caused his death.
26. However, PW2 corroborated the evidence of the murder scene and finding the deceased lying on the ground. Further, that there were lights where the deceased was. In my view, her evidence was enough to positively identify the accused as the perpetrator and the case is decided on the strength of her evidence. The injuries sustained by the deceased as per the testimony of PW4 corroborate the testimony that the deceased was burned after being hit on the head.
27. Therefore, upon considering the testimonies of the witnesses and the defence of the accused, I find that the offence of murder as expressly legislated under Section 203 of the *Penal Code* has been proved beyond reasonable doubt. As a consequence the accused is found guilty of the offence as charged and convicted in accordance with the law.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

.....

R. NYAKUNDI

JUDGE

Mark.mugun@gmail.com

In the presence of

Mr. Mugun for the State

Accused in Person.

