



**Republic v Chenya (Criminal Case 19 of 2016)  
[2023] KEHC 3399 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3399 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 19 OF 2016**

**AC MRIMA, J  
APRIL 27, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**SAMMY ANGURUKE CHENYA ..... ACCUSED**

**JUDGMENT**

**Background**

1. Sammy Anguruke Chenya, the accused person 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 night of 10<sup>th</sup> November 2016 at Springa village in Kaboret Sub-location within Trans Nzoia County, the accused murdered Evans Okong'o.
2. When the accused was arraigned before this Court, he pleaded not guilty to the offence. The case was heard by two Judges. Hon. Chemitei, J. recorded the evidence of PW1, PW2 and PW3 whereas the rest of the evidence was taken by Hon. Kimaru, J. (as he then was).
3. After the close of the prosecution's case, this Court found that a *prima facie* case had been established to place the accused on his defence. He gave sworn testimony.

**The Case:**

4. The prosecution called a total of 6 witnesses to justify the charge leveled against the accused. Until his death, the deceased was employed by one Peris Gathini Mulweye who testified as PW1. Her place of abode neighbored the home of the accused. PW2 was Enos Kundu Wandati, was similarly a neighbour to the accused and PW1.
5. On 10<sup>th</sup> December, 2016, the deceased stepped out to head to Obama Shopping Centre. That was the last time PW1 saw him alive.



6. PW1 found it unorthodox that the deceased neither returned to her house that day nor reported back the following day. Relying on her suspicion, she began to look for the deceased. She would later be informed that morning that the accused person's house amassed a pool of blood. PW1 proceeded to the house of the accused and confirmed what she had been told. She, however, did not find the accused person at home.
7. Meanwhile, PW2 received a call from one Kennedy Fuchaka who informed him about the offence. PW2 went to the accused person's homestead where he saw blood on both sides of the gate. He was accompanied by two of his brothers as well as his son. He found the accused's uncle at the scene. The accused person was still not in sight.
8. PW1 reported the matter to Kabolet Police Station where PW3 No. 71070 Corporal Harun Ombaso received the report. On calling the Police, PW2 was informed that they were on their way. PW3 accompanied by other personnel arrived at the scene. They, together with PW2 saw a red slipper, the deceased's phone purchased by PW1 and a dragging mark trail of blood that led to the deceased's body from the accused person's gate. It had been buried in a grave covered by fresh soil within the accused person's compound.
9. PW3 exhumed the deceased's body. It had a correlated red slipper whose other pair had been seen from the gate. After the exhumation exercise, DCI officers were called to take over the conduct of the matter and continued with investigations.
10. PW6, 234522 CIP Martin Munene was the investigation officer. He recovered several blood-stained items including, dry leaves, a cigarette butt, an axe found behind the bedroom door of the accused person's house, a white vest, a jembe that was suspected to have dug the shallow grave, brown trousers, a pair of red slippers, a black coat and the deceased's phone. He testified that at the scene, there appeared evidence of a struggle.
11. The accused would later be found at Check point at 3:00 p.m. He was being assaulted by an angry mob. He was rescued and subsequently arrested and escorted to the Police Station.
12. PW1 recalled that the accused was violent. On one occasion, the accused broke the door of the deceased's house with an axe. She also stated that the accused was a jealous lover. He was not in good terms with the deceased since the deceased worked with the wife of the accused and the accused suspected a love affair between the two. According to PW2, the accused and deceased were friends; and occasionally drinking buddies.
13. The deceased's body was taken to the mortuary where Dr. Shitote on 13<sup>th</sup> December, 2016 conducted an autopsy. The Post Mortem Report which she prepared was produced by PW4 Dr. Alex Wanyonyi Barasa. From observation, the deceased was generally healthy with a normal physique. He suffered multiple bruises and lacerations on the head (severely deep), thorax and right lower limb. There was also internal hemorrhage on the thorax and skull. There were eight compound cut wounds on the head penetrating to the brain and multiple deep cut wounds on the chest as deep into the peritoneal cavity with an open deep cut wound. He also had body fluid.
14. Dr. Shitote concluded that the cause of death was a severe head injury due to assault.
15. On 14<sup>th</sup> February, 2017, Richard Kimutai Lang'at, BSc, a Government Analyst received the following samples from PW6 to examine and determine the genetic relationship: -
  - i. Blood stained dry leaves collected from the crime scene 'A-1';
  - ii. Blood stained cigarette collected from the crime scene 'A-3';



- iii. Blood sample from the accused person 'B-1';
  - iv. Blood swab from the deceased 'C-1';
  - v. Blood serum from the deceased 'C-2';
  - vi. Blood stained vest from the deceased 'D-2';
  - vii. Blood stained axe 'D-1';
  - viii. Blood stained brown pair of trousers 'D-3';
  - ix. Blood stained black coat from the accused 'D-4';
  - x. Blood stained vest from the accused 'D-5'.
16. It was reported that 'A-1', 'A-3', 'D-1', 'D-2', 'D-3' and 'D-5' were heavily stained with human blood while 'D-4' was moderately stained.
  17. The Analyst generated DNA samples and carried out the analysis. He concluded that the samples generating from the 'A-1', 'A-3', 'D-1' and 'D-2' matched the deceased's DNA profile with those from the 'D-5', 'D-4' and 'D-3' matched the DNA of the accused person.
  18. The Government Chemist Report prepared by the said Richard Kimutai Lang'at was dated 12<sup>th</sup> January, 2018 and was produced by his colleague one Polycarp Lutta Kweyu who testified as PW5.
  19. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.
  20. His sworn alibi defence was that he left home on 9<sup>th</sup> November 2016 to his workplace where he worked through the 10<sup>th</sup> November, 2016. He was paid his wages. He then left for home and ended up drinking busaa in the neighborhood.
  21. In the course of drinking, Police emerged and arrested him alongside others for drinking illicit brew. They were taken to Kachibora Police Station. He denied committing the offence stating that during the night of 10<sup>th</sup> November, 2016, he was at the Police Station. He further denied knowing the deceased.
  22. Parties were directed to file their respective final written submissions. Mr. Bikundo, Learned Counsel for the accused relied on his written submissions dated 26<sup>th</sup> November, 2022 to urge this Court to find that the elements to a charge of murder had not been established beyond reasonable doubt.
  23. Miss. Kiptoo, Learned Prosecutor relied on the Court record to submit that the prosecution had discharged its burden to the required standard proving that the accused person committed the offence that he was charged with.

**Analysis:**

24. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.



25. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

**The death of the deceased:**

26. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
27. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they found the body of the deceased buried in a grave. The body was exhumed by the police, taken to the mortuary and an autopsy carried out. The body was later released to its relatives and was subsequently buried.
28. The second way in which the death of the deceased was proved was through the evidence of Dr. Shitote who conducted the autopsy on the body of the deceased. A Post Mortem Report was produced by PW4 on behalf of Dr. Shitote.
29. PW4 observed a litany of injuries both internally and on the body of the deceased. There were 8 deep cut wounds on the head which penetrated to the brain. Other injuries were on the chest. She confirmed that the body of the deceased was lifeless.
30. The cause of death was said to be severe head injury secondary to assault.
31. This Court, therefore, finds and hold that the death of the deceased in this case was proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

32. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long dead and buried.
33. Be that as it may, the case, therefore, revolves around 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 congenitly 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.
34. The foregone principles were set out in the locus classicus case of *R v Kipkering arap Koske & another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI v Republic* (2013) eKLR, *Musii Tulo v Republic* (2014) eKLR among many others.
35. 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.'

36. Further, the Court of Appeal in *Sawe v 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.....

37. Returning to the case at hand, the totality of the prosecution's evidence pointed to the fact that the accused was culpable for the death of the deceased. There are several reasons for such a holding. First, when the deceased did not report to work on 10<sup>th</sup> December, 2016 or the following day, PW1, the employer, began looking for him. Following a dragging trail mark of blood within the compound of the accused's home that led to a freshly dug grave, the body of the deceased was found buried within the compound of the accused.

38. Second, the deceased's mobile phone and one red slipper were found within the compound of the accused. During the exhumation process, the other red slipper was found on the deceased's body.

39. Third, was the Government Analyst's Report. On one hand, it was observed that the dry leaves, the cigarette butt, the axe, the deceased's vest, a brown pair of trousers and the accused's vest were heavily stained with blood. On the other hand, the accused's black coat was moderately stained.

40. In his conclusion, the Analyst stated that the blood samples generated from the dry leaves, cigarette, axe and deceased's vest matched the deceased's DNA profile with those from the accused's vest, trouser and black coat matched the DNA of the accused person.

41. The evidence of the Government Analyst was not challenged. The presence of the deceased's blood on the clothes of the accused, the axe found in the accused person's house and coupled with the copious amount of blood drawn from the dry leaves overwhelmingly painted the picture of how the deceased died. It was apparent that the axe inflicted fatal injuries on the deceased person.

42. Fourth, the accused person's vest also carried a large amount of his blood. The trouser and coat that he wore also bore his blood. It could only be deciphered that for whatever reason, the accused person and the deceased engaged in a serious brawl whether as against each other; the resultant effect being seriously bleeding. However, it is only the deceased who died. That corroborated the evidence of PW3 that there had been a struggle going by the marks he found in the compound of the accused.

43. Fifth, the accused did not give any account for the fact that the body of the deceased was found buried in a grave in his compound. Sixth, likewise, the accused did not account for the blood of the deceased on his clothes and on the axe and leaves recovered in his compound.

44. Seventh, the alibi defence did not outweigh the prosecution's evidence. In fact, it was a mere denial going by the evidence against the accused.



45. On the basis of the foregoing, 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.
46. Having established that it was the accused who caused the death of the deceased, I must also hasten to comment that the date on the information on which the offence was committed reads 10<sup>th</sup> November, 2016. However, a look at the evidence reveals that the incident that led to the death of the deceased took place on 10<sup>th</sup> December, 2016.
47. The error is, however, not fatal to the prosecution's case. This Court finds that the error can be cured courtesy of Section 382 of the [Criminal Procedure Code](#).
48. 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.

**Whether there was malice aforethought:**

49. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
50. 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 flight or escape from custody of any person who has committed or attempted to commit a felony.
51. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
52. In [Joseph Kimani Njau v Republic](#) (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in [Nzuki v 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).

53. There is evidence that the accused was not in good terms with the deceased. He suspected that, since the deceased worked with his wife then, there was a love relationship between the two. The accused and the deceased had severally differed although they occasionally used to drink the local brew together.
54. The number and nature of injuries inflicted on the deceased reveal that by all means the accused intended to kill the deceased. The deceased had eight deep stab wounds on the head that penetrated to the brain. The injuries were inflicted by the use of an axe. They were other several injuries on the body.
55. The accused was well aware that certainly such injuries would cause the death of the deceased. The head is such an important part of the human body such that when such injuries are inflicted, death is assured. The injuries were, therefore, intentional and sustained.
56. It can only be the finding of this Court that the totality of the evidence points out that the accused planned and went all out to execute the killing of the deceased.
57. That is proof of malice aforethought.
58. 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*.
59. The accused herein, Sammy Anguruke Chenya, is accordingly convicted of Murder pursuant to Section 322(2) of the *Criminal Procedure Code*.
60. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court in the presence of:

Mr. Bikundo, Learned Counsel for the Accused.

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

Regina/Chemutai – Court Assistants.

