



**Republic v Seropit (Criminal Case 25 of 2019)
[2023] KEHC 3612 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 25 OF 2019**

AC MRIMA, J

APRIL 27, 2023

BETWEEN

REPUBLIC STATE

AND

SIMON KIPKOGEI SEROPIT ACCUSED

JUDGMENT

1. This case is one of the matters which was delayed by the advent of the dreadful worldwide Covid-19 pandemic. Whereas the accused was arraigned before Court for the first time on 1st October, 2019, the hearing of the case began around 3 years later.
2. The accused person herein, Simon Kipkogei Seropit, 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 12th September, 2019 at Kimoson Farm within Trans Nzoia County, the accused person murdered Wilborne Kipkogei Sang.
3. When the accused person was arraigned before this Court, he pleaded not guilty to the offence. The entire hearing of the case was conducted before Hon. Kimaru, J (as he then was). After the close of the prosecution's case, the Court found that a prima facie case had been established to place the accused on his defence.
4. The accused tendered his unsworn defence and the matter was reserved for submissions. Awaiting the filing and highlighting of the submissions, my Lordship was promoted to the Court of Appeal. The matter was then placed before yours truly for judgment writing.

The trial:

5. The prosecution called 6 witnesses in its bid to establish the charge.



6. It was the prosecution's case that the accused and the deceased person were friends, neighbours and area residents of Kepseton village. Other area residents included Eliud Kiprotich Kirop (who testified as PW1 and was a neighbour to both the accused and deceased), a Village Elder one Shadrack Kipkosgei Bitok (who testified as PW2), the deceased's father one Hillary Sang (who testified as PW3) and the deceased's mother one Susan Rugut (who testified as PW4). Other witnesses were Dr. Dennis Nanyingi (PW5) and the Investigating Officer No. 69453 Cpl. Tom Ogero (PW6) who was attached to the DCI Kitale East office.
7. It was alluded that the month of September in 2019 saw the AIC Church of Kepseton benefit from the construction of a kitchen facility. Among those who took part in its construction were PW1 and PW2.
8. PW4 recalled that on the 3rd September, 2019, the deceased informed her that he had sold his phone to the accused for Kshs. 800/= in order to raise funds for his tertiary education. She was further informed that the accused had paid an initial deposit of Kshs. 400/= when receiving the phone and the balance was to be paid later. PW3 corroborated this narrative.
9. One week later, that was on 10th September, 2019, the accused and deceased person shared a cup of tea at the deceased's home. According to PW4, she was made aware that as at that time, the accused had not fulfilled his financial obligations to the deceased person in paying the balance of Kshs. 400/=. The failure to make good the balance later resulted to a fight between the accused and the deceased. That was on the following day, that is 11th September, 2019.
10. PW1 returned home from the construction site at the Church at around 5:00 p.m. on 11th September, 2019 and found several people gathered in his home including the accused and his father (one Japher Tenai and who was not a witness). PW1 learnt from the accused that the deceased had beaten him.
11. Before long, the deceased arrived at PW1's home. A meeting was convened with a view to amicably resolve the matter between the accused and deceased. The meeting was duly conducted and concluded with a warning to the accused not to engage in fights against the deceased any further.
12. During the daytime hours of the following day, that is 12th September, 2019, PW1 went to work at the Church site as before. He was with, among others, the Pastor of the Church and PW2.
13. PW1 was then sent to fetch some water from the home of the father to the accused using a motor cycle. He proceeded and found the accused and his brother at their home. He also saw the deceased standing by the roadside near the compound of the home of the accused.
14. PW1 collected some water and left. He then returned only to find the accused and the deceased engaged in a physical fight. He intercepted to stop the fight. He also saw one Reuben beating the deceased. He scuffled out the deceased away from the scene.
15. PW1 made efforts to prevent the deceased from going back to the scene. The deceased wanted to collect his phone from the accused due to the non-settlement of the balance.
16. With a view to foster a resolution of the rather protracted matter, PW1 called the father of the accused, the father of the deceased (PW3) and PW2 to a meeting. The deceased also joined them. During the meeting, it transpired that the deceased had borrowed Kshs. 400/= from the accused. As a condition to the loan borrowing, the accused retained the deceased's cell phone.
17. All this while, PW4 had taken the deceased to hospital. The deceased told PW4 that he had been cut with a slasher on his shoulder. Upon her return home, PW4 also joined the meeting.



18. In order to resolve the dispute, it was agreed that the accused should return the phone to the deceased and that the deceased to repay the said Kshs. 400/= to the accused. PW1 then retreated to his home.
19. The Village Elder, PW2, then accompanied the father of the accused to collect the phone that was at their home. They found the accused at home and the phone was handed over to PW2. Thereafter, PW2, the accused and his father proceeded to the home of the deceased where the phone was handed back to the deceased's family. PW3 and PW4 then refunded the sum of Kshs. 400/= to the accused.
20. Following this exchange that took place at 6:00 p.m., visible from the natural light, PW4 then called the deceased with a view to return to hospital. The deceased appeared. It was here, and in the presence of PW3 and PW4, that the accused stabbed the deceased on the chest with a knife.
21. PW3 heard the deceased cry; "Woi, baba". PW3 suspected that it was either the accused or his father who had stabbed his son as they both stood next to the deceased. PW4 heard the deceased state in their dialect; "Mama, you called me to be killed?" ... and the deceased fell down.
22. PW4 screamed upon witnessing what had transpired. The accused and his father then vanished. PW4's screams caught the attention of PW1 and PW2. Efforts were made to rush the deceased to hospital. He was hopped on a motor cycle alongside PW3. PW4 told PW1 and PW2 that the deceased had been stabbed by the accused. The deceased later succumbed to the injuries he had sustained.
23. The matter was reported to the Police. PW6 took over the investigations. He testified that the accused surrendered himself at Moi's Bridge Police station. He was later transferred to Cherangani Police Station. He then interrogated the witnesses and collected evidence. He subsequently charged the accused with the present offence.
24. The deceased's body was preserved at Kitale County Referral Hospital for an autopsy which was conducted by PW5 in the presence of PW3 and one Joseph Kiptoo Tuwei.
25. According to PW5, the deceased's external appearance showed a sternum wound measuring 2cm by 2cm at the level nipple line. Internally, the deceased suffered a hole in his heart traversing through the pericardium myocardium and endocardium. He had blood clots in the precordial myocardial and endocardial areas. The rest of his system was normal.
26. PW5 concluded that the deceased died as a result of heart failure secondary to stab wound injury. The Post Mortem Form was produced as an exhibit.
27. After evaluating the prosecution's evidence, the Court determined that the accused had a case to answer. The accused opted to give an unsworn statement.
28. His unsworn testimony was that he was at loggerheads with the deceased because around 2 months prior, he had given him Kshs. 1,000/= on condition that he retained his cell phone as lien. He later on held a meeting with the deceased, PW2 and one Kipchirchir so that he could return back the deceased's phone in exchange for his money. He testified that the deceased instead of having his phone back wanted to fight the accused.
29. The accused further stated that PW2 later handed the phone over to PW4 who instead gave the accused Kshs. 400/=. The accused acquiesced his right to recover the balance stating that he did not want to continue that way. According to the accused, the dispute had been resolved.
30. On his way back, the accused testified that the deceased ran after him, held his neck and pushed him to the fence. The deceased then removed a knife on his pocket. In defending himself, the accused pushed him down and ran away to his home. He then heard people screaming.



31. The accused urged the Court to be acquitted accordingly.

Parties' submissions:

32. Parties were thereafter directed to file their respective rival written submissions.

33. Mr. John Bororio, Learned Counsel for the accused in his submissions dated July 4, 2022, argued that the prosecution had failed in its duty to prove that the accused committed the offence.

34. He urged this Court to acquit the accused.

35. Miss Kiptoo, Learned Prosecution Counsel, in her undated submissions filed on July 6, 2022 maintained that the prosecution established to the required standard of proof, being beyond reasonable doubt, that the accused murdered the deceased.

Analysis:

36. 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 vs. 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.

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

The death of the deceased:

38. 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).

39. In this case, the death of the deceased is not in doubt. It was proved

PW5 who conducted the autopsy on the body of the deceased. PW5 testified on the observations he made and concluded that the deceased died as a result of heart failure secondary to a stab wound injury.

40. As the evidence of PW5 was not impugned in any way, 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:

41. The prosecution built up a case theory to sum up that the accused caused the unlawful act that led to the deceased's death. That was vide the evidence of 6 witnesses.

42. In his defence, the accused corroborated the fact that the deceased had given him his phone in exchange of some money which the accused was to refund. He admitted that the money was returned to him after he surrendered the phone.

43. The accused tendered an unsworn defence. Such a defence is of very little probative value, if any for the reason that it denies the prosecution the opportunity to test the evidence by way of cross-examination. Be that a sit may, it must be considered all the same.



44. The instant defence is to be weighed against the evidence of PW3 and PW4. It must further be weighed against common sense. For instance, if it was true that the accused was held by the neck by the deceased and pushed to the fence, and that the accused only pushed the deceased away who fell off, then how come that the deceased sustained such serious injuries? The injuries, which pierced through the heart of the deceased, were not commensurate to a fall as narrated by the accused. The same must have been caused by a deliberate directly exerted force from the front of the deceased.
45. By, therefore, placing the prosecution's evidence and the defence, side by side, the defence must give way. It appears that the defence was a mere afterthought and defeats logic. It did not create any doubt on the prosecution's case.
46. The defence is, hence, unsustainable and is hereby rejected.
47. The upshot is that there is sufficient evidence to prove that it was the accused who committed the unlawful act which caused the death of the deceased.

Whether there was malice aforethought:

48. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
49. 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.

50. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
51. In *Joseph Kimani Njau vs 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 v Director of Public Prosecutions* [1975] AC 55". (emphasis added).

52. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

53. As established by the Prosecution, the accused and deceased person ultimately resolved the dispute. Each party had their share of their bargain. The dispute appeared to have been resolved on an equilibrium. It was thus a surprise when the accused person stabbed the deceased straight on the chest.

54. It may well have been that the accused had unresolved issues with the deceased. It remains unclear why the accused acted as such given the fact that the accused admitted that the dispute with the deceased had been resolved.

55. The accused must have purposed to do harm to the deceased. He prepared himself by carrying a knife, a weapon capable of killing someone. Even the manner of execution of the mission was very deliberate and targeted. The accused aimed the heart; a vital and delicate organ, with all his might. The knife went through the heart. The accused was, therefore, well aware that once the heart was pierced, then high were chances that the deceased will die.

56. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.

57. The prosecution case proved malice aforethought in this case.

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, Simon Kipkogei Seropit, 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 27TH DAY OF APRIL, 2023.



A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Bororio, Learned Counsel for the Accused.

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

Regina/Chemutai Court Assistants.

