



**Republic v Elijah (Criminal Case E018 of 2021)
[2023] KEHC 19138 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E018 OF 2021
LM NJUGUNA, J
MAY 31, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIUD NAMU ELIJAH ACCUSED

JUDGMENT

1. Eliud Namu Elijah, 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 are that on the March 16, 2021 at Iriari Village, Runyenjes West Location, in Embu East Sub County, within Embu County murdered Dorothy Karimi Muturi. The case proceeded for trial and wherein the prosecution called seven (7) witnesses in support of its case.
2. PW 1, Lydia Murugi Muturi, a sister to the deceased testified that on March 17, 2021, she received a call from Caroline Karimi who informed her that her mother had passed on. That she left for the scene where she found the deceased lying at the accused person's gate near the road. It was her case that the body had injuries on the left side of her head and upon entering the accused person's compound, she found the chief and the DCI officers. That she called the accused herein who informed her that he was far. Thereafter, the body was taken to Kieni mortuary and on March 23, 2021, she attended the post mortem and identified the body to the pathologist who conducted the post mortem on the body of the deceased.
3. PW2, Lydia Ngari Muturi stated that on March 17, 2021, she was called by a member of the public who informed her that there was a person lying at Iriari village, Runyenjes West location and that she looked like she was dead. That she went to the scene and she confirmed that indeed the deceased herein had died and that she was bleeding from the injuries on the head. She testified that the accused was not at home at that particular time. She later called the OCS Runyenjes Police Station who went and took the body away.



4. PW3, Agnes Wanja Ileri testified that on March 16, 2021, the accused reported to her that his house had been broken into and while still there, the deceased also showed up and after some talk, the deceased admitted to having broken into the accused's house. The deceased agreed to return the items that had been taken from the accused person's house but on the way, the deceased ran away. That the following day, she received a call from PW2 informing her that there was a dead person within her village and the person turned out to be the deceased herein. She visited the scene and found the body near the accused person's gate and it was bleeding from the head.
5. PW4, Eric Bundi a clinical officer testified that he conducted mental assessment on the accused person and found him fit to stand trial.
6. PW5, Carol Wanjiru, testified that the deceased was her mother and that the accused was the deceased's husband. She stated that in the month of February on a date she could not remember, the accused went to where she was working and told her that he was not in good terms with the deceased. That on March 16, 2021, she was off duty when she heard some noise on the road by motor cycle operators saying that there was a body at the accused's gate. She proceeded to the scene where she found the body of her mother (deceased herein). She reiterated that the relationship between the deceased and the accused was not cordial.
7. PW6, Dr Godfrey Njuki Njiru conducted post mortem on the body of the deceased and formed the opinion that the deceased died as a result of a cardio pulmonary arrest from severe head injury consistent with assault.
8. PW7, Corporal Pauline Mugambi testified that she was the investigating officer in the matter and that on March 17, 2021 she was instructed by the DCI to attend the scene of murder which had been reported at Runyenjes Police Station vide OB No 14/17/3/2021. That she visited the scene where she established the body was for one Dorothy Karimi Muturi. She stated that the body had a head injury and some bruises; that she drew a sketch plan for the scene and further recorded statements of the witnesses and thereafter charged the accused with the charge herein. It was her evidence that she charged the accused because he was nowhere to be seen. Further that, the accused and the deceased fought on the material night and that the accused had told the daughter to the deceased that he was going to kill the deceased.
9. After the close of the prosecution's case, the accused herein was placed on his defence and he gave a sworn defence. He stated that on 16th and March 17, 2021 he was at home with the deceased. That he left for Gatara town and upon coming back, found that his house was broken into and that he suspected that the deceased herein was responsible. He stated that he confronted her over the same and the deceased admitted and in the presence of PW3 the deceased agreed to return the said items. That after that, he did not see the deceased again and on March 17, 2021 he woke up early because he wanted to visit the NHIF offices as his name did not feature in the records. He stated that after he had been attended to, the sub chief called him and informed him that somebody had been murdered near his place but he said he was not aware of the same. He was arrested five (5) days later and charged with the offence herein.
10. After the close of the defence case, directions were given on filing of submissions and both parties complied with the said directions.
11. The prosecution submitted that the evidence adduced by its witnesses is sufficient to prove its case beyond any reasonable doubt. That the prosecution witnesses proved death of the deceased through the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 who all confirm that the deceased died as a result of injuries he sustained on the material day. That their testimonies were corroborated by post



mortem report produced as exhibit 1 which concluded the deceased died of cardiopulmonary arrest from severe head injury due to an assault. Reliance was placed on the case of *Republic Vs Stephen Sila Wambua [2017] eKLR*. It was the prosecution's case that the prosecution witnesses did not specifically spot the accused person caused the injuries on the deceased but that fact alone cannot weaken the prosecution's case because a fact need not be proven by only direct evidence; the same can also be demonstrated through circumstantial evidence. Reliance was placed on the case of *Republic Vs Richard Itweka Wabiti [2020] eKLR* in which the court noted that circumstantial evidence is the best form of evidence because it takes into consideration the surrounding circumstances which when examined together, gives an accurate proposition of a fact. It was submitted that the accused having been the last person to be seen with the deceased and the strained nature of their relationship, there is no other conclusion other than that the accused person caused the death of the deceased. That an overt act such as the one herein can only lead to the conclusion that the perpetrator intended to kill the deceased. The deceased's injuries, notably the head injury, showed that the intent to kill was there. This court was thus urged to find that the evidence on record is sufficient to convict the accused herein for the offence of murder.

12. On his part, the accused person submitted that the prosecution did not prove the case against him beyond reasonable doubt. That the prosecution did not prove the necessary ingredients of the charge of murder as the evidence did not link the accused to the deceased's death. That this was a case of suspicion which in itself is unsubstantiated and the same could not form the basis of conviction. Reliance was placed inter alia on the cases of *Chiragu & Another Vs Republic Criminal Appeal 104 of 2018 [2021] KECA 342 (KLR)* and *Republic Vs David Manyara Njuki & 7 Others [2004] eKLR*. In conclusion, this court was therefore invited to be persuaded by the authorities herein and acquit the accused person.
13. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of prove is always that of 'beyond any reasonable doubts' [See *Miller Vs Minister of Pensions [1947] 2 ALL ER 372 – 373*].
14. In the instant case, the accused person is facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Murder is defined as 'when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.' The elements of murder and which the prosecution ought to prove are;
 - a. The death of the deceased occurred
 - b. The death was caused by unlawful acts;
 - c. That the accused committed the unlawful act which caused the death of the deceased; and
 - d. That the accused had malice aforethought.(See *Anthony Ndegwa Ngari Vs Republic [2014] eKLR*).
15. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
16. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. Dr Godfrey Njuki Njiru who conducted post mortem on the body of the deceased formed the opinion that the cause of death was as a result of cardio pulmonary arrest from severe head injury consistent with assault. As such death was proven.



17. As to whether the death was caused by unlawful acts, under Article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See *Guzambizi Wesonga Vs Republic [1948] 15 EACA 63*]. The post mortem report by Dr Godfrey Njuki Njiru stated that the cause of death was as a result of cardio pulmonary arrest from severe head injury consistent with assault. As such, the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
18. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution's evidence as presented before the court. I note that no prosecution witness saw the incident in which the deceased herein died. The prosecution is therefore relying on circumstantial evidence.
19. In cases where evidence is of a circumstantial nature, the circumstances from which the inference of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually thus the court has to weigh the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused should be considered. In drawing these inferences, the court must have regard to the common cause of nature and to human conduct and their relations to the fact of the particular case. The court, thereafter, has to consider the effect of the proved facts. In deciding the sufficiency of circumstantial evidence, for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt. [See Court of Appeal decision in *Bonaya Tutu Ipu & Another Vs Republic [2015] eKLR*].
20. In this case, PW5 testified that previously, the accused had gone to her place of work and told her that he was not in good terms with the deceased due to some money. It was also her evidence that the relationship between the deceased and the accused was not cordial that, sometime back on May 15, 2021, the accused had told her that he would kill the deceased. PW3 in her evidence stated that the accused had reported to her that his house had been broken into and that the deceased had admitted to having broken into the accused's house and had agreed to return the items that she had stolen from the accused person's house but she declined to do so. PW3 testified that the accused and the deceased left her place together. That the accused had gone to her place at 9.30 pm on the March 16, 2021 to report a case of house breaking. The deceased also joined them after a while which means that they must have left her place after 9.30 pm. The prosecution based on this evidence relied on the doctrine of the person last seen with the deceased.
21. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. The prosecution having adduced evidence that the accused was the person who was last seen with the deceased before she died, the accused herein had a duty to give an explanation of how the deceased met her death.
22. In the Indian case of *Ramreddy Rajeshkhanna Reddy & Another Vs State of Andhra Pradesh, JT 2006 (4) SC 16* the court held that:

' Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.'



23. The accused in this case was thus required to offer an explanation in his defence. Sections 111(1) and 119 of the [Evidence Act](#) provides as follows:

' 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.'

'119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

24. In the circumstances of this case, it is my view that the accused person's defence failed to offer any plausible explanation and his defense, in my view, amounted to a mere denial.
25. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person who unlawfully caused the deceased's death.
26. Finally, on the question of whether there was malice aforethought on the part of the accused, the Court of Appeal in the case of [Joseph Kimani Njau Vs R \(2014\) eKLR](#) 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 subject;

- 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.'



27. In the instant case, PW6 who conducted the post mortem on the body of the deceased formed the opinion that the deceased died as a result of cardio pulmonary arrest from severe head injury consistent with assault. The accused person must have intended to cause the deceased grievous harm or death.
28. In the end, I find that the prosecution has proved the case of murder against the accused person and I therefore find him guilty as charged and convict him accordingly.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF MAY, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

