



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mogire & another (Criminal Case 7 of 2019)
[2023] KEHC 21792 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 7 OF 2019
REA OUGO, J
JULY 26, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ZACHARIAH ONYONKA MOGIRE 1ST ACCUSED

JARED RIANGA MATIBE 2ND ACCUSED

JUDGMENT

1. Zachariah Onyonka Mogire and Jared Rianga Matibe are charged with the murder of Josphat Nyandwaro Matibe contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on the night of 20th and 21st March 2019 at Nyamware sub-location within Kisii South Sub- County in Kisii County, the accused persons murdered Josphat Nyandwaro Matibe.
2. The prosecution in order to prove its case called 6 witnesses. The 2nd accused person and the deceased were brothers while their cousins are the 1st accused person and David Keraro (Pw3). Josephine Nyanchoka Matibe (Pw2) is the mother to the deceased and the 2nd accused person. They all live in Nyamware sub-location and Japheth Keragori Ogori (Pw1) is their assistant chief. The prosecution also relied on the evidence of two expert witnesses, Richard Kimutai Langat (Pw4), a government analyst, and Dr. Morebu Peter Momanyi who testified as Pw5. The investigating officer in this case was No. 98937 P.C Gisiri Samwel (Pw6).
3. The prosecution case was that there was a land dispute between the 2nd accused person and the deceased. Later, when they were having the matter adjudicated over by Pw1 there was a further dispute that emerged between the deceased and the 1st accused person. The accused persons later killed the deceased person.
4. Pw2 testified that on 10th March 2019 he was approached by the 2nd accused person, Evans Momanyi and Silvans Mogire. They told him that there was a land dispute between the 2nd accused person and



the deceased and asked him to settle the dispute. Pw1 summoned Pw2 and asked the 2nd accused person to come with the elders. They all sat down in his office on the 13th March 2019 to resolve the issue. Pw1 recalled that the 1st accused person was also present during the meeting. The main issue was regards to subdivision of land. Pw2 had no objection to the subdivision but requested for time to relocate her house. During the deliberations the 2nd accused person and the deceased could not agree. At some point during the meeting the 1st accused person was upset because the deceased had abused his father. The 1st accused threatened the deceased but Pw1 intervened before the matter could escalate and they all went home.

5. Pw2 testified that after the meeting with the chief, it was resolved that she be given time to move her house which was in the middle of the land. She also recalled that Evans Morara who was present at the meeting told her that the deceased called him a witch. She testified that all was well until the 21st March 2019 at 7:00 a.m. when a boy asked her to go and see the deceased. Pw2 went to the deceased's home and found him dead. The body was near the door and she saw that he had sustained injuries. The previous night she had dinner with the deceased and did not see the 2 accused persons. On cross examination, she testified that the deceased asked the 1st accused person for forgiveness and the matter ended there. She testified that the deceased had also married a girl but they did not know that the girl was already married elsewhere. Two boys came for her and carried her away. Pw2 further recalled that upon discovering the deceased's death, she was at the deceased home crying. The 1st accused was by the road and asked her why she was crying. She got angry and threw a chair at the 1st accused person. The chair had blood stains but did not hit the 1st accused person.
6. Pw6 testified that the initial investigating officer was No. 101313 Gilbert Chisidanyi, it was later handed over to PC Maloba but he is off duty. During interrogation of the 1st and 2nd accused person, the investigating officer noted that there was blood stains in the trouser and slippers of the 1st accused. The recovered items, trouser, green slippers and shirt, were taken to the government analyst.
7. Pw1 who was also testified that he was at the scene and was the person who had called the police. The slippers the 1st accused person wore had blood stains on the lower part. Pw1 testified that after the police arrived at the scene they went to the house of the 1st accused. They recovered a trouser and axe from his house. The trouser had blood stains. The deceased's phone was also recovered from the 2nd accused person's house
8. Richard Kimutai Langat (Pw4) testified that he is a government analyst working in Kisumu and has worked in the said department for 29 years. He testified that he is charged with the responsibility of receiving samples from the police and analysing them. He holds a Bachelor of Science from Egerton University and Forensic Science from the University of Nairobi. He received a police exhibit memo on 4/4/2019 forwarding the following items:
 1. Blood stained purple trouser recovered from the 1st accused marked 'A';
 2. Blood stained green slippers recovered from the 1st accused marked 'B';
 3. Blood stained discoloured shirt from the 1st accused marked 'C'; and
 4. Blood sample from the deceased marked 'D'.
9. Pw4 found that the items marked 'A' and 'B' were lightly stained and the shirt marked 'C' had no visible stains. He extracted DNA from the items marked 'A' and 'B' and the DNA profile matched the DNA profile of the deceased.



10. The accused persons were placed on their defence. Zacharia Onyonka (Dw1) testified that the dispute on the land was between the 2nd accused person and the deceased. He had no interest in the shamba and was present during the meeting to represent his elder brother who was not present at the time. Although the deceased had abused a parent during the meeting, this issue was resolved. On 20/3/2019 he slept at home and on the following morning he heard some noise near the deceased's house and he thought a child had died. He went to the deceased's home and saw someone lying on the ground. There was a chair next to the deceased. Dw1 decided to go near the body to check whether the deceased was alive or had died. Pw2 was present and she took the chair and threw it at Dw1. Dw1 brushed it off as he thought that Pw1 was angered by the death of her son. He testified that the chair had blood drops and when Pw2 threw it, the blood splashed on his clothes. Dw1 was arrested while at the scene. The police then took him to his house and searched it and only found a clean axe and panga. They also searched his toilet but found nothing there. They asked for the clothes and he gave them to the police. He testified that he did not have the deceased's phone and that the same was removed from the house of the 2nd accused person. On cross examination, he testified that the trouser with the blood is the one he had worn on the material day.
11. The 1st accused person's wife, Josephine Muragwa testified as Dw3. She testified that on 21/3/2021 as she made breakfast she heard loud cries and they went to her house. The police then came to the house and took a panga and axe that were in the sitting room. They also took the clothes that the 1st accused had worn on that morning.
12. Jared Rianga Matibe (Dw2) testified that on 21/3/2021 he woke up at 5:00 a.m. to attend to his boda boda business. While he was at Suneka he received a phone call informing him that his brother had died. He went home and when the police arrived they asked for the deceased's closest relative. The police then arrested him. Dw2 denied killing the deceased.
13. The prosecution did not file any submissions. The defence filed submissions. The 1st accused submitted that evidence against the 1st accused was circumstantial evidence and that there was no substantial evidence against the 1st accused. That the prosecution must prove the charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts must be in favour of the accused (see *Pius Arap Maina vs. R* [2013] eKLR). That it is not the duty of the accused to prove anything on the allegations of a criminal nature. That the evidence adduced does not implicate the 1st accused. The 2nd accused submitted that the prosecution did not adduce any direct evidence to show that the 2nd accused murdered the deceased. That the only evidence against him is that they had a misunderstanding with his late brother. That a mere misunderstanding is neither an element or an ingredient of murder and that the prosecution must prove all the ingredients of murder (see *Roba Galma Wario vs. Republic* [2015] eKLR & *Antony Ndegwa Ngaria vs Republic* [2014] eKLR). That no witness saw the 2nd accused kill his brother. That the prosecution case was based on suspicion which cannot be a basis for a conviction (see *Sawe vs Republic* (2003) eKLR. That the circumstantial evidence against the 2nd accused does not point to his guilt (see *R vs Kipkering Koske & Another* 16 EACA 135).

Analysis And Determination

14. In order to establish the offence of murder under the provisions of section 203 and 204 of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
 - a. Proof of the fact and the cause of death of the deceased.
 - b. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission.



- c. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the [Penal Code](#).
15. The fact and cause of death is not in dispute. David Keraro (Pw3) testified that he is the deceased's cousin. On 27/3/2019 he attended the deceased's post mortem and identified his body.
16. Dr. Morebu Peter Momanyi (Pw5) testified that he is a senior medical officer at Nyaribari Chache sub-county. He conducted a post mortem on the deceased on 27/3/2019 at 3:45 p.m. On the external appearance there were multiple deep linear cut wounds on the entire body. There were two deep linear cut wounds on the neck and they measured 12 cms and 7 cms respectively. On the internal appearance, he noted that the trachea was completely cut and the carotis was completely cut in the right part of the neck. The liver and spleen were pale. He arrived at the conclusion that the deceased died due to severe haemorrhage secondary to deep cut wound on the neck.
17. The next issue is whether the cause of deceased's death was a result of the direct consequences of the accused persons unlawful act or omission. In this case there were no direct witnesses and the prosecution case entirely rests on circumstantial evidence. The weight of circumstantial evidence was discussed in [Abamad Abolfathi Mohammed and Another v Republic](#) [2018] eKLR, where the Court of Appeal stated:
- “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
18. However, to sustain a conviction based on circumstantial evidence, certain threshold must be met. The Court of Appeal in [Sawe v Rep](#) [2003] KLR 364 held that:
- “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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”
19. In this case the evidence of Pw1 and Pw6 were very crucial for the prosecution case. The prosecution case was that the 1st accused person's wore clothes that had blood of the deceased. Pw4, a government analyst, testified that the blood in the 1st accused person's trouser and slippers matched that of the deceased. However, the 1st accused person testified that Pw2 threw a chair at him when he was at the deceased's home and the blood from the chair splashed on his clothes. In her testimony, Pw2



acknowledged that she had thrown a chair at the 1st accused, and this chair had blood on it belonging to the deceased. I therefore find that the 1st accused person gave a plausible explanation why the deceased's blood was found on his clothes. Further, the 1st accused person also testified that when he went to the deceased's home he went close to the body to check if the deceased person who was lying on the ground was still alive. Based on the evidence of Pw1 and Pw6, it is evident that the deceased was found lying in a pool of blood. Given the circumstances, it is reasonable to consider the possibility that the blood on the 1st accused person's slippers might have originated from the same pool of blood in which the deceased was lying. According to Pw4's testimony, the slippers and trousers appeared to have light stains, which is consistent with Dw1's account that his clothes and slippers became stained when he visited the scene after the deceased was already found dead. It is not in dispute that the crime scene was not secured as Pw1, Pw2 and Dw2 all testified that they entered the deceased's house and saw that he was on the ground with cut wounds on his body. Pw6 who was the investigating officer also testified that the deceased's family were already at the scene by the time the police arrived. The lightly stained trouser and slippers of the 1st accused person suggest that the blood on the 1st accused person's clothes and slippers originated from the scene after the deceased had already died. This contradicts the notion that the 1st accused person attacked the deceased, as one would have expected his clothes to be heavily stained in that case. In my view, prosecution ought to have considered the circumstances at the crime scene as a whole before charging the 1st accused person with the offence.

20. With regards to the evidence against the 2nd accused person, Pw6 testified that they arrested the 2nd accused person because he had threatened the deceased. Therefore, based on Pw6's testimony, apart from the 2nd accused person's previous threats to the deceased, there was no evidence establishing a connection between the 2nd accused person and the murder of the deceased. Curiously, Pw1 on the other hand testified that the 2nd accused person was arrested on grounds he was in possession of the deceased's phone. Pw1 testified that the deceased's phone was recovered from the 2nd accused person's home and they all wondered how he came to have possession of the deceased's phone. On the contrary, Pw6 testified that the phone was found in the 1st accused person's house and the only reason why they arrested the 2nd accused person was that he had threatened the deceased. The court in *Philip Nzaka Watu v Republic* (2016) Cr App 29 of 2015, observed as follows:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

21. The contradictions in the evidence of Pw1 and Pw6 in my view are material as it creates doubt in the mind of the court as to who had possession of the deceased's phone. One could reasonably infer that the individual in possession of the deceased's phone shortly after his death might be responsible for the tragic event. However, with the contradicting evidence in Pw1 and Pw6 testimonies it is not possible to deduce who between the 1st and 2nd accused person was in possession of the deceased' phone. I find that the contradiction in Pw1 and Pw6 testimony regarding the retrieval of the deceased's phone was so substantial to the extent of affecting the conviction against the accused persons.
22. In the end, I find the circumstantial evidence by the prosecution to be unsatisfactory and that the prosecution failed to prove its case to the required standard, beyond reasonable doubt. From the



foregoing, I enter a verdict of not guilty and do hereby resolve the benefit of doubt in favour of the accused persons. For reasons I have given above, I acquit Zachariah Onyonka Mogire and Jared Rianga Matibe and they are discharged from these proceedings and set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS ON THIS 26TH DAY OF JULY 2023.

R.E. OUGO

JUDGE

