



REPUBLIC OF KENYA



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**Nyamburi v Republic (Criminal Case 7 of 2019)
[2023] KEHC 21971 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE 7 OF 2019
RPV WENDOH, J
AUGUST 23, 2023**

BETWEEN

PETER BOKE NYAMBURI ACCUSED

AND

REPUBLIC STATE

JUDGMENT

1. Peter Boke Nyamburi was charged with two others, for the offence of murder contrary to Section 203 as read with 2004 of the Penal Code.
2. The particulars of the charge are that on 23/3/2019 at Kubweye village, murdered Samson Nyamburi Boke.
3. They denied the charge. The 2nd and 3rd Accused were acquitted after close of the prosecution case when the court found no evidence connecting them to the offence.
4. The prosecution called a total of five witnesses in support of their case. The hearing commenced before J. Mrima who heard the first four witnesses. This court only heard PW5 and the defence.
5. PW1 Charles Chacha Mwita, aged 82 years, knew both the deceased and accused who are brothers since childhood, being immediate neighbours. He recalled that on 23/3/20, at about 4:00p.m he was with the deceased when one Peter came home; that the deceased had asked Peter to look for a land buyer. They went to the land where deceased showed Peter the land and deceased left him with Peter. They left but before they reached the road, they met the Accused riding on a motor cycle and he asked what they were doing and he said they were looking for the route to the plot; that Peter was also asked what he wanted and he explained; that accused alighted from the motor cycle and followed the deceased and asked how he wanted them to live. Both PW1 and Peter followed accused and deceased and found Accused on top of the deceased and deceased was pleading with Accused to set him free. He tried to separate them but Accused threatened to kill PW1 and he left for home. Shortly thereafter, he heard



- that deceased had died. He went to the scene and found the deceased's lifeless body at the place he had left deceased struggling with Accused. He observed the body and found a blood stained stone next to the deceased's head. He saw an injury to the back of the deceased's head.
6. PW2 Rose Atieno Charles recognised Accused and the other suspects as her immediate neighbours; PW2 also knew the deceased as a brother to Accused's and deceased and an uncle to Accused 2. She recalled that on 23/3/2019 about 5:00 p.m she was informed by her grandchild Charly Toto that there were screams from the neighbouring home. She rushed there and met motor cyclists who informed her that the deceased may have been killed. Being a village elder, she called the Assistant Chief. She proceeded to the scene, found deceased on the ground, not breathing. She observed him and saw blood oozing from the head, nose, mouth and ears and there was a large blood stained stone nearby. Crowds gathered and when the Assistant Chief came, she went away. She denied witnessing the incident save for being told what happened; that deceased's father stated that deceased had given three title deeds to one Jacob who refused to attend when summoned. Soon thereafter, the family were served him with eviction order by the court. According to her, the family had disagreed with the deceased.
 7. PW3 Wycliffe Chacha Boke is a nephew to Accused 1 and 3 and cousin to Accused 2. Deceased was his uncle too. He recalled 23/3/2018 about 5:00 p.m when at Maberu stage, one Magige informed him that there was a problem at his home. He rushed home and found a crowd of people and the deceased was lying on the ground with an injury to the back of his head. He learned from his wife that deceased and accused, fought over land ownership which deceased wanted to sell. He did not find Accused 1 at the scene. He saw stones near the deceased body and he saw one stone in court, PEXNO. 1.
 8. PW4 Nsoto Mwita Samuel told the court that he hails from the same clan with all the accused. He recalled 23/3/2019 about 5:30p.m, while riding his motor cycle, he met a police officer coming from deceased's home. He came back and went to the deceased's home, found him lying facing downwards and was bleeding from the nose and mouth and had an injury to the back of head; that there was a stone near deceased's body and he was dead. He asked the Assistant Chief to arrest the accused person who had been seen assaulting deceased. Accused disappeared but he helped in his arrest.
 9. PW5 Dr. David Mwita of Migori County Referral Hospital performed post mortem on the deceased. Externally, he found multiple bruises on the right and left side of the head, a big wound on the occiput (back of the head) and another on the forehead and depressed skull fracture on frontal forehead. The Doctor formed the opinion that the cause of death was head injury caused by a blunt object.
 10. PW6 CPL Peter Ngumi was the investigating officer who took over from the first investigating officer Christopher Somei when the suspect had already been arrested and statements recorded. He produced the stone found at the scene as an exhibit and the mental assessment report.
 11. When called upon to defend himself, the accused opted to give sworn evidence. He testified that on 23/3/2017, about 7:30p.m he was en route vehicle travelling from Nairobi where he had gone to sell cattle which belonged to his employer George Chacha; that he had been buying and selling cattle in Maberu and transporting them to Nairobi;. He knew the deceased as his half brother, same father but two mothers. He denied killing the brother but that he found the brother had died when he came from the journey. When he observed the deceased, fainted and he came to when in hospital where he was admitted for three days. After burying deceased, their houses were burnt. He denied there having been any land dispute; that the father had subdivided the land to the two wives and that it is a buyer Jacob Nyasundi who had a dispute with him.
 12. After close of the defence case, both counsel filed written submissions. The prosecution counsel Ms. Kosgei submitted that the charge of murder was proved to the required standard as the death of deceased is not disputed; Though Counsel submitted that PW3 testified to seeing the Accused take



a stone and hit the deceased, there is no such evidence on record; that PW5's testimony placed the accused at the scene of the murder and the alibi raised is an aforethought which did not dislodge the prosecution evidence.

13. Ms. Okota, the accused's counsel also filed submissions in which she argued that there was no eye witness at the scene of crime; that the alleged eye witness was not called as a witness; that the evidence is hearsay that cannot be relied upon. It was also submitted that the evidence is circumstantial. Citing the case of Republic vs. Kipkering Arap Koseke and Another 16 EACA 135; that the evidence does not satisfy the legal requirements of evidence to justify a conviction; that the evidence before court is mere suspicion that cannot found a conviction.
14. I have duly considered the evidence tendered before this court and submission of both counsel. This being a criminal trial the onus is upon the prosecution to prove its case beyond all reasonable doubt. What constitutes beyond reasonable doubt was discussed in Woolington vs. DPP (1935) AC 462 Viscount Sankey L. C. said:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

15. According to Halsbury Laws of England, 4th Edition Volume 17 paragraph 13 and 14.

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

16. The accused is charged with offence of murder under Section 203 of the Penal Code. To prove the said charge, the prosecution has to prove beyond any doubt the existence of the following:-
 1. Proof of death;
 2. Proof that the death was caused by the omission or unlawful act committed by the accused;
 3. Proof that the Accused had malice aforethought.

Of Death

17. There is no dispute that Samson Nyamburi Boke met his death on 23/3/2019. The Accused admits that fact. Post mortem was performed on the body by PW5 Dr. Mwita whose opinion was that the



cause of death was injury to the head caused by blunt object caused by blunt force trauma to the head. PW1, PW2, and PW3 all saw the injuries inflicted on the deceased's head.

Whether Accused committed the unlawful act:

18. None of the witnesses saw who inflicted the fatal injuries on the deceased. The prosecution case therefore turns on circumstantial evidence. The law is settled that courts should exercise great caution when relying on circumstantial evidence. In *Teper vs. Republic* (1952) AC P 489 the Court said:
19. Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."
20. In the case, of *Ahamad Abolfathi Mohammed & Another vs. Republic* (2015), the court of Appeal said that circumstantial evidence is usually the best evidence. The court said:-

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."

21. In *Abanga' alias Onyango vs. Republic* Criminal Appeal 32/1991, the Court set down the principles to apply in order to determine whether circumstantial evidence can be a basis for a conviction. The court stated:-

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. The same principles were echoed in *Sawe vs. Republic* (2003) KLR 364. See also *R vs. Kiprerung* (supra).
23. In this case, PW1 told the court that on the said date, the deceased had just shown one Peter land measuring 100 x 100 which deceased wanted to sell when Accused arrived, asked PW1 and Peter what they wanted there; that accused alighted from his motorcycle and followed deceased asking how he wanted them to live; that though deceased retreated, the deceased chased him towards his house. PW1 and Peter followed and found Accused on top of deceased; that the deceased pleaded with Accused but he refused to let him go. Efforts by PW1 and Peter to intervene were fruitless as Accused threatened to kill PW1 and he left them. Shortly, afterwards PW1 was informed that deceased had died and went to



the scene and confirmed it. He found a stone next to the body. He did not find accused at the scene. Thought Accused denies that there was any land dispute with the deceased, a common thread in the evidence of the prosecution witnesses is that there was dispute over the land the deceased wanted to sell i.e. PW1, PW2 and PW3 alluded to that and the investigating officer confirmed what he gathered from investigations, that there was a land dispute and a civil case pending before the court. The land dispute was therefore the source of the conflict.

24. The accused raised an alibi defence that, infact he was travelling from Nairobi that day. An alibi defence is raised when an accused alleges that he was not at the scene of the crime but in a different place. The law is clear on how the court should consider alibi defence. In *Ssentale vs. Uganda* (1968) EA 365, the court said that an accused who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that truth or falsity of that answer. The burden will always rest on the prosecution to prove its case to the required standard.
25. In this case, the alibi has been raised late during the defence for the first time. I have considered PW1's testimony and the same was not shaken at all. It placed the Accused at the scene when in an altercation with deceased. In *R vs. Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA the East African Court of Appeal held:

If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

26. The accused raised this alibi for the first time on 21/3/2023 yet he was charged in April, 2019. He raised it over three years later. Further, though he claimed to be working for somebody, the prosecution had no opportunity of inquiring into the said alibi because the identity of and address the person he worked for was not ascertained. I find that the alibi is not convincing and it has not dislodged the prosecution evidence at all.
27. Further, according to PW1, Accused was the last person to be seen with the deceased. He was actually lying on the deceased, having chased him. They were in a scuffle. Deceased was found dead few minutes later.
28. Though no duty or burden is imposed on accused to prove his innocence, in certain circumstances, the law places a duty on Accused to explain certain facts particularly those peculiarity within his knowledge. By virtue of Section 111 (1) of the *Evidence Act*, the accused has a duty to give a plausible explanation to what happened to deceased. The section read:-

Section 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.

29. Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.
30. Provided further that the person accused shall be entitled to be discharged 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".



31. Since PW1 left the Accused on top of the deceased, the accused had a duty to explain what happened to the deceased soon after PW1 left them. I am satisfied that PW1 told the court the truth. Accused admitted that he had no grudge with all the prosecution witness. There is therefore no reason for PW1 to lie. In absence of an explanation, this court is satisfied that it is the Accused who inflicted fatal the injuries on the deceased and fled.

Proof of malice aforethought.

32. Section 206 of the Penal Code provides as follows:-

- a) an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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”.

33. In the case of Rex v, Tubere s/o Ochen (1945)EACA 63, the Eastern Court of Appeal observed as follows:-

In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

34. The use of a stone to inflict injuries on the deceased and targeting the head, was obviously meant to inflict grievous harm or cause death of the deceased. I have no doubt that malice aforethought has been proved.

35. Having considered all the evidence, on record, this court is satisfied that it is the Accused who attacked and fatally injured his half-brother because of a land dispute. I find him guilty of the offence of murder as charged and convict him accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 23RD DAY OF AUGUST, 2023 .

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Ms Biyaki holding brief Ms. Okota for Appellant

Appellant Present

Emma / Phelix –Court Assistant

