



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ombasa (Criminal Case 21 of 2017)
[2023] KEHC 23897 (KLR) (Crim) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 21 OF 2017**

**LN MUTENDE, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

DORCAS OMBASA ACCUSED

RULING

1. Dorcas Ombasa Mukiira, the Accused, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the offence are that on the 29th April, 2017, at Dagoretti Sub – County within Nairobi County she murdered Lucy Wesonga Wamalwa (Deceased).
2. Facts of the case are that on the 29th April, 2017, one Edwin Nyabwara reported a case of death to the Police at Riruta Police Station. Following the report, PW6 No. 79888 P.C James Wanjohi Mwangi and PW4 No. 57711 Corporal Benjamin Kimeli visited the scene of the incident and caused the body of the deceased to be taken to hospital. They recovered the murder weapon, a knife. Both the reportee and accused herein were treated as suspects. Investigations carried out however resulted into the accused being charged and the reportee treated as a witness.
3. To prove the case the State availed six (6) witnesses. PW1 Margaret Wahu Maina, a Government Analyst, examined items recovered at the scene and made a report which she adduced in evidence.
4. PW2 Emily Akinyi Maganda who had employed the deceased learnt of her death after she failed to return home as expected.
5. PW3 No. 83321, P.C. Joseph Lusau Gachecha a Scene of Crime Officer took photographs of the scene that he produced as evidence.



6. PW4 No. 57711 Corporal Benjamin Kimeli who visited the scene with PW3 escorted the body to the City Mortuary.
7. PW5 Dr. Joseph Ndungu, a Forensic Pathologist adduced in evidence a Post Mortem Report filled by Dr. Dorothy Njeru who performed an autopsy on the body of the deceased. The cause of death was found to be chest injuries due to penetrating sharp force trauma (stab).
8. PW6 investigated the case and caused the accused to be charged. From investigations conducted, by PW6, he alleged to have established that the deceased and the reportee had separated. On the fateful date, the deceased while in company of her two (2) children and aunt went to the house occupied by the reportee and found him in company of the deceased. They disagreed and the deceased was stabbed resulting into her demise.
9. At the close of the prosecution's case the aunt did not tender evidence. Other witnesses who may have tendered evidence were also not availed. In the case of *Bhatt vs. Republic* (1957) EA 332 the court stated that:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

10. Section 203 of the *Penal Code* provides that:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

11. The stat was required to prove elements of the offence of murder thus:

- i. The fact of death
- ii. The perpetrator of the act or omission
- iii. Whether the act or omission was done unlawfully and with malice afore thought.

12. Police Officers who visited the scene stated that the deceased was already dead such that they moved the body to the mortuary. Ultimately a post mortem was conducted and it was opined that the deceased died as a result of a penetrating sharp trauma. This was proof of death.

13. No direct evidence was adduced of a witness who witnessed the act that resulted into the death of the deceased. Therefore, this court must consider if circumstantial evidence adduced would result into the



accused being called upon to answer the charge in defence. In the case of *Tooper vs. R.* (1952) A.C at page 489, it was stated that:

“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 the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence.”

14. In the case of *Republic vs. Kipkering Arap Koske & Another* 16 EACA 135 it was held that:

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

15. The only evidence that tends to connect the accused with the death of the deceased is the DNA profile generated by the Government Analyst. There was a brown jacket marked B indicated as having belonged to the accused. Then there was a white jacket indicated as belonging to Edwin Nyakaba the husband of the accused and reportee of the incident to the police; and a knife suspected to have been the murder weapon. Per the finding of the Government Chemist those three items had blood stains that matched the DNA profile generated from the blood sample of the deceased with a probability match 1 in 8.2×10^{20} . Both the reportee and Accused were arrested at the outset. According to PW6, the only witness who could give an account of stabbing was the reportee who did not testify.

16. Section 107 of the *Evidence Act* provides that:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

17. The burden of proof in criminal cases is beyond reasonable doubt. It therefore behoved the State to avail evidence that would prove that the accused as opposed to other persons who were present stabbed the deceased. What was adduced was evidence of suspicion.

18. In the case of *Sawe v Republic* Crim. App. No. 2 of 2002 it was stated that:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira vs Republic* (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

19. The state charged the accused based on hearsay evidence that was not proved to the required standard. Therefore, I find the accused not guilty hence proceed to acquit her pursuant to Section 306(1) of the *Criminal Procedure Code*.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 28TH DAY OF SEPTEMBER, 2023.

L. N. MUTENDE



JUDGE

In the presence of:

Accused – present virtually

Ms. Ogweno for ODPP

