Republic v Ochuna & another (Criminal Case 16 of 2018)
[2023] KEHC 24347 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24347 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE 16 OF 2018

AC MRIMA, J

OCTOBER 31, 2023

BETWEEN

REPUBLIC ..... STATE

AND

VINCENT SIMIYU OCHUNA ..... 1ST ACCUSED

CHRISTOPHER OKWARE BARASA ..... 2ND ACCUSED

JUDGMENT

Introduction:

1. Vincent Simiyu Ochunaand Christopher Okware Barasa were 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 9th December, 2016 at Mandroo village in Kaisagat Location within Trans Nzoia County, jointly with others not before Court murdered Queen Khalele (hereinafter referred to as 'the deceased').

2. When arraigned before this Court two years later, the accused pleaded not guilty to the offence. A trial followed. The hearing of the prosecution's case was partly conducted before Hon. Chemitei, J where the prosecution's case was fully heard and the accused were found to have a case to answer. The defence case was before yours truly.

3. The 1st accused gave an unsworn testimony and did not call any witnesses whereas the 2nd accused gave a sworn defence with no witnesses.

4. Each of the accused was represented by a separate Counsel.

The trial:

5. Five witnesses testified for the prosecution. Their case was straight-forward. That, on 8th December, 2016 at around 10pm, PW1 (Shadrack Kaangu) who was a son to the deceased was at home in Kesogon. He received a call from a Catechist and was informed that his mother, the deceased, was being assaulted in the homestead of one Mzee Barabara (not a witness) in Mandroo village in Kaisagat Location. The Catechist further told PW1 that he had been so informed by a village elder from Mandroo village. He urged PW1 to rush to the scene and rescue his mother. PW1 was also given the phone contacts of the village elder.

6. PW1 quickly called and informed his friend one Martin Juma Wanjala who testified as PW2. They had been friends for the longest and were neighbours. They decided to rush to the scene which was quite a distance away. Each of them rode a motor cycle. They liaised with the village elder until they arrived at the home of the village elder. They were advised to, and left their motor cycles thereat. In the company of the village elder, PW1 and PW2 walked to the home of Mzee Barabara which was just in the neighbourhood.

7. PW1 knew the home of Mzee Barabara. It was where the 1st accused hailed from. The 1st accused had worked at their home as a farm hand for a long time. He had, however, left not so long ago.

8. The three reached the homestead and walked into the compound. Led by the village elder, they met Mzee Barabara who was also well known to PW1. Mzee Barabara harshly asked why PW1 and PW2 were in his home. Shortly Mzee Barabara was joined by the accused who were both armed with clubs/ rungus.

9. PW1 and PW2 knew both accused. The second accused was a relative and a friend to the first accused who used to visit the first accused at the home of the deceased during the time the first accused worked there.

10. Mzee Barabara and the accused became increasingly hostile on PW1 and PW2. PW1, however, insisted on getting into the house of the 1st accused to find out how his mother was. He was denied access, but he was assured that his mother was in safe hands. They were told to leave the homestead and return in the morning. To avoid any act of lawlessness, the village elder advised PW1 and PW2 to leave. All the three left. They walked back to the home of the village elder

11. PW1 and PW2 then returned to their home and promised to be back in the morning as advised. They so obliged.

12. As they approached the home of Mzee Barabara in the morning, and as advised, PW1 and PW2 saw a police vehicle in the home. On arrival, they found the body of the deceased placed at the back of the vehicle. It was lifeless and had visible injuries. The body was taken to the mortuary and PW1 and PW2 were advised to record their statements with the police at the station. Both did so.

13. Lenet Tatugi testified as PW3. She was a neighbour to Mzee Barabara and the accused. In the night of 8th December 2016, at around 11pm as she was asleep at her home, she was woken by some noise from outside. She walked out and noted that several people were walking towards the homestead of Mzee Barabara. PW3 also joined them.

14. As they entered into the homestead, PW3 and the other people stood outside the house of one George Ochuna (not a witness). George was also surprised by the noise which came from the house of the 1st accused which was in their homestead. He said he had rushed to where the noise came from and found a woman who was in great pain inside the house of the first accused.

15. PW3 called the Sub-Chief and reported the matter. She was advised to lodge a report at the Kaisagat Police Station. She instead returned to her home and spent.

16. In the morning, PW3 returned to the home of Mzee Barabara. She found a police vehicle in the home. On approaching it, she saw a body of woman placed at the back of the vehicle. It was lifeless and had visible injuries. PW3 did not know the woman. The body was taken to the mortuary. PW3 later recorded a statement with the police.

17. The incident had been reported at Endebes Police Station where DCI officers had visited the scene and collected the body of the deceased. Scenes of Crime officers had also processed the scene.

18. On 9th December, 2016, No. 65207 Cpl. Nicholas Onyango Otieno who testified as PW5 was tasked to take over the investigations of the case.

19. PW5 recorded statements from several witnesses. He established that the deceased and the 1st accused were in an intimate sexual relationship and that in the night of 8th December 2016 the deceased was in the house of the first accused where she sustained the fatal injuries.

20. PW5 organized for a post mortem examination of the body of the deceased which was performed on 16th December, 2016 at the Kitale County Teaching and Referral Hospital Mortuary by Dr. Okumu. The Doctor testified as PW4.

21. The body was identified by Alfred Taabu Kanenge and David Mlunda Khalele prior to the autopsy.

22. PW4 observed the body of the deceased carefully. The deceased was of an elderly woman. She was naked. She was also of a good physique and nutrition. The body had rigor mortis. It had bruises on the forehead and on the anterior chest wall. Internally, there were fractures on the left 5th, 6th and 7th ribs. There was bilateral haemothorax. There was also scalp haematoma.

23. PW4 formed the opinion that the deceased died as a result of severe haemorrhage and head injury secondary to assault. He filled in the Post Mortem Report which he produced in evidence.

24. On completion of investigations, PW5 recommended that the accused be jointly charged with others not before Court with the information of murder. However, the accused were at large. The police kept on searching them. The accused were arrested in a funeral in Kaisagat village two years later.

25. The accused were taken for mental assessment where they were found fit to stand trial. They were subsequently charged.

26. After close of the prosecution's case, the Court found that the accused had cases to answer. They were placed on their defenses.

27. The 1st accused gave an unsworn statement. He denied killing the deceased and raised an alibi. He stated that on the alleged date he was working in Nakuru and was, therefore, not anywhere near the scene. He had only received a message that a certain woman had been found in the farm of his grandfather and had been injured.

28. That, he relocated back home in 2017 and continued working a as boda boda rider until when he was arrested on 12th September, 2018 while attending a funeral. He was taken to Endebes Police Station where he was interrogated and taken for mental assessment and later arraigned before Court.

29. He further stated that PW1, PW3 and PW3 were untruthful.

30. The 2nd accused gave a sworn statement. He denied taking part on the killing of the deceased and also raised an alibi. He stated that on the material night he had left his home in Kaisagat and spent in the home of the then Kwanza Ward MCA one Teresa Masibo (not a witness) where he used to work.

31. The 2nd accused further stated that on the material night he was called by his wife and informed that there was commotion outside their house. He advised her to remain inside the house and that he would be home the following morning. He truly arrived home at around 11am and learnt of the death of the deceased. He denied disappearing and affirmed that he had remained at his home throughout. He also denied ever meeting the 1st accused on the subject night since the 1st accused had been raised in Nakuru and rarely came to the village. He did not know where the 1st accused was in the instant night.

32. After close of the defence cases, parties filed written submissions.

33. Through their respective submissions, the accused contended that the prosecution failed to discharge its burden of proof. They contended that the circumstantial evidence was so weak as to sustain a conviction. They referred to various decisions in buttressing their arguments and urged this Court to dismiss the information and grant the accused their liberties.

34. The prosecution filed its submissions as well. It countermanded that it had discharged its burden of proof to the required standard to establish that the accused murdered the deceased. It urged this Court to find the accused culpable as charged. It also referred to several decisions.

Analysis:

35. 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.

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

The death of the deceased:

37. 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).

38. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, PW1 and PW2 vouched that they saw the lifeless body of the deceased which was later taken to the mortuary. PW5 also vouched the death of the deceased in attending a post mortem examination of the deceased.

39. The second way in which the death of the deceased was proved was through the evidence of PW4, a Medical Doctor who conducted the autopsy on the body of the deceased.

40. PW4 concluded that the cause of death of the deceased was severe haemorrhage and head injury secondary to assault.

41. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

42. In this matter, there was no eye-witness account on what exactly happened until the deceased died. According to the police, they established that the deceased had been jointly attacked with clubs/rungus and sticks.

43. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

SUBPARA (i)

The circumstances from which an inference of guilt is sought to be drawn, must be congently and firmly established;

SUBPARA (ii)

The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

SUBPARA (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.

44. The foregone principles were set out in the locus classicus case of R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.

45. The Court of Appeal in Musii Tulo (supra) in expounding the above principles expressed itself as follows:-

> 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -
>
> > 'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

46. Further, the Court of Appeal in Sawe- Vs- Republic [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

> "…. 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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused……"

47. Returning to the case at hand, according to PW1 and PW2, when they were informed that the deceased had been injured and he was in the homestead of Mzee Barabara, they visited the homestead in the company of the area village elder. PW1 knew the homestead as the 1st accused had worked at their home in Kesogon.

48. When the three met the owner of the homestead and as they were finding out the whereabouts of the deceased, both accused appeared armed with clubs. PW1 and PW2 were, hence, ordered outside the home. PW1, however, insisted to see his mother and it was the accused and Mzee Barabara that assured PW1 that the deceased was safe. They were told to leave and come back in the morning. On the direction of the village elder, the three left.

49. PW2 stated that he had also known the accused since when the 1st accused worked at the farm of the deceased where the 2nd accused used to visit him.

50. PW1 and PW2 testified that there was ample moonlight and that they actually talked to the accused and Mzee Barabara, hence, were emphatic of recognizing the accused without any doubt. They also readily informed the police and gave the names of the accused as the assailants.

51. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by way of recognition. The Court said thus: -

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

52. The Court of Appeal in Wamunga vs Republic (1989) KLR 426 stated as follows: -

> "…. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

53. The Court of Appeal further held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

54. Still the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR dealt with the distinction between recognition and identification of a suspect. The Court stated as under: -

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time,

is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."

55. PW1 and PW2 testified that the accused were not strangers to them. They met them at their home in Kaisagat. The accused also assured them that the deceased was safe and ordered them to leave and return in the morning. They were also armed with clubs.

56. To the contrary, the accused raised their respective defenses. They alleged that they were not anywhere near their home in the night in issue.

57. As is the position in law, an accused who raises an alibi defence does not need to prove it. The legal burden of proof in a criminal case always and throughout rests with the prosecution.

58. The fact that the 1st accused used to work at the farm of the deceased was not disputed. Likewise, the fact that PW1 was a son of the deceased was not countered. That was the same fate with the position that PW1 and PW2 were neighbours and friends and that PW2 had seen and known the 2nd accused when the 1st accused worked at the home of the deceased and the 2nd accused used to visit him. It was also not disputed that the 2nd accused used to visit the 1st accused at work. Even the intimate relationship between the 1st accused and the deceased was not denied.

59. PW1 and PW2, therefore, knew the accused quite well. Could it then be true that the accused were not with the deceased at their home on the fateful night? PW1 and PW2 answered in the negative. The accused affirmed the position.

60. The conditions prevailing in that night were explained by PW1 and PW2. There was ample and bright moonlight which allowed the correct recognition. Even PW3 vouched as much. Further, PW1 and PW2 talked to the accused. PW1 even insisted in getting inside the house of the 1st accused to find out how her mother was, but he was resisted and assured that she was safe.

61. There was also a reason why the deceased would be at the home of the accused that night. The deceased and the 1st accused were lovers.

62. PW1 and PW2 left the home of the accused after being assured that the deceased was safe. The assurance, as said, came from the accused. It cannot, therefore, be that the accused were not at their home. How else would they have known that the deceased was inside the house of the 1st accused and that she was safe?

63. By placing the prosecution's evidence and the defenses on a balanced scale, the evidence by the accused seem to be outweighed by that of the prosecution. The totality of it all is that, this Court is satisfied that the accused were positively identified by way of recognition by PW1 and PW2. They were, hence, at the scene on the material night and were armed with clubs. They knew that the deceased was inside the house of the 1st accused and assured PW1 and PW2 of her safety.

64. The accused were the last persons to be with the deceased. They can only be aware of what happened to her. The injuries found on the body of the deceased were caused by assault. They were blunt injuries which could be caused by clubs/rungus which were items the accused possessed.

65. This Court is, therefore, plainly persuaded that the prevailing circumstances in this matter taken cumulatively 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.

Whether there was malice aforethought:

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

67. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

68. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

69. 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 vs 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 vs. Director of Public Prosecutions (1975) AC 55". (emphasis added).

70. 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 vs. 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.

71. In this case, the deceased suffered injuries on the face and the ribs. Three ribs were fractured. The injuries were inflicted by more than the accused charged in this matter. They were caused by blunt items. The deceased was an elderly woman. What the woman had done to deserve such a brutal attack by several men whom one of them was her lover does not settle well in the mind of this Court.

72. Attacking an elderly and helpless woman in the circumstances of this case can only mean one thing; the attackers intended to kill the deceased. In fact, this is a case on gender-based violence.

73. The accused also denied PW1 and PW2 an opportunity to rescue the deceased. The intention was apparent. They wanted to ensure that the deceased was not rescued so that their mission would be accomplished.

74. Further, the chest is such a critical part of the human anatomy. It houses extremely vital organs without which one cannot survive. It, therefore, goes beyond any peradventure that once the chest is perforated, and the ribs fractured then that can lead to outright death.

75. That is the case with the head. A delicate part of the body whose interference can lead to death. The deceased suffered head injuries as well.

76. The forceful fracture of the ribs and the extensive injury to the head was a sure way of sending the deceased to the grave.

77. The accused must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. The accused aimed the chest and head; vital and delicate organs, with all their might.

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

79. The prosecution, therefore, proved malice aforethought in this case.

80. Therefore, all the ingredients of the offence of murder were proved in this case.

Disposition:

81. Deriving from the foregoing, 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.

82. The accused herein, Vincent Simiyu Ochunaand Christopher Okware Barasa, are accordingly and jointly found guilty of murdering the deceased. Each of them is hereby convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.

83. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE