Republic v Wanjala alias Ture (Criminal Case 1 of 2021)
[2023] KEHC 25810 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE 1 OF 2021

AC MRIMA, J

NOVEMBER 30, 2023

BETWEEN

REPUBLIC ..... STATE

AND

COLLINS NABISWA WANJALA ALIAS TURE ..... ACCUSED

JUDGMENT

1. Collins Nabiswa Wanjala, 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 of the offence were that in the night of 6th December, 2020 at Kipsongo Trading Centre in Trans Nzoia County, he murdered Antony Wekesa (hereinafter referred to as 'the Deceased').

2. When the accused was arraigned in Court, he pleaded not guilty to the offence. The trial followed. The hearing was conducted by two Judges. Hon. Kimaru, J (as he then was) recorded the evidence of the prosecution witnesses and after the close of the prosecution's case, the Court found that a prima facie case had been established to place the accused on his defence.

3. This Court, yours truly, recorded the defence evidence. The accused opted for and gave a sworn testimony and called no witness.

The Trial:

4. The prosecution lined up 6 witnesses to place the accused as the perpetrator of the offence. The prosecution's case was that in the night of 6th December, 2020 at around 8:00 p.m., PW1 one Selina Nakhwele, who was the wife of the deceased received her husband's call with a request to meet him at the Kipsongo trading centre. PW1 obliged. The two met and walked home. On reaching a junction, they found a crowd of people. The place was well lit with security lights.

5. Two young men were fighting as the rest watched. The deceased asked those who were watching to instead separate those fighting. The accused was then angered by the deceased's sentiments and asked him why he was so intervening. The accused asked for keys from one of his companions and disappeared. He then resurfaced with a 'rungu' and hit the deceased once on the head. The deceased fell as the accused watched. Later, the deceased was rushed to hospital where he was admitted for around 9 days. He passed on 15th December, 2020.

6. PW2 was Nimlo Obongo Mose. He was a Manager in a bar within the trading centre. He was called by the owner of the bar in the night of 6th December, 2020 at around 9pm and told that some people were fighting outside the bar. He rushed to the bar only to find a crowd of people in a commotion. Some were armed. PW2 found the accused quarreling with one John (not a witness) while holding a piece of firewood. He managed to quell the disharmony and he learnt that the husband to PW1 had been injured and rushed to hospital.

7. PW2 managed to disarm the accused and kept the piece of firewood inside a store in his bar. He later identified it before Court.

8. PW3 and PW5 were brothers to the deceased. They identified the body of the deceased prior to the post mortem examination which was conducted by Dr. Dennis Nanyingi (PW4) on 21st December, 2020 at the Kitale County Referral Hospital Mortuary.

9. PW4 observed that the deceased was of good nutrition and physique. Externally, the deceased had a stitched wound on the right parietal area of the head. Internally, there was a skull fracture and haematoma between the skull and the brain. He formed the opinion that the cause of the deceased's death was head injury secondary to assault. He filled in a Post Mortem Report which he produced in Court.

10. The incident was initially reported at Kipsongo Police Post as an assault case. On 21st December, 2020, PW1 went to the DCI Trans Nzoia West offices where PW6 No. 49084 SS Samson Kataka was on duty. She reported the death of the deceased. PW6 organized for, and, a post mortem examination of the body of the deceased was conducted on that very day. PC Rotich (not a witness) witnessed the exercise.

11. PW6 was then designated as the investigating officer. He visited the scene and recorded statements from potential witnesses. He was satisfied that the accused was culpable and recommended that he be charged. The accused was arrested by members of public in Kitale town and escorted to Kitale Police Station. The accused was mentally examined and found fit to stand trial. He was subsequently charged.

12. After close of the prosecution's case, the Court found that the accused had a case to answer. His sworn testimony was that he was not the one who injured the deceased, but PW1's relatives. He narrated how he found himself at the scene, having been hired by deceased to take him there by the use of his motor cycle. The destination was a drinking den. He witnessed people armed and fighting and as the fighting intensified he was asked by the deceased to help him fight. He declined and left.

13. To his surprise, the accused was instead arrested and charged with the present offence. He vehemently denied taking any part in the death of the deceased.

14. After close of the defence case, parties were directed to file and exchange written submissions. Both complied.

15. Learned Counsel for the accused, Mr. Gemenet, argued that the prosecution had failed to discharge its burden of proof to the required standard to establish that the accused murdered the deceased. Several

decisions were referred to in disproving the evidence on record. He urged this Court to acquit the accused.

16. The prosecution argued that the evidence on record was sufficient to connect the accused with the death of the deceased. Several decisions were also referred to.

Analysis:

17. 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 v. 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.

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

The Death of the Deceased:

19. 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).

20. In this case, the death of the deceased is not in doubt. It was proved through the evidence of PW1, PW3 and PW5. Further PW4, a Medical Doctor, conducted the post mortem examination on the body of the deceased and produced a Post Mortem Report.

21. It was PW3 and PW5 who identified the body of the deceased prior to the exercise.

22. The cause of death was deduced as head injury secondary to assault.

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

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

24. It was the evidence of PW1 which directly pointed to the accused as the perpetrator of the heinous act that led to the death of the deceased.

25. The law relating to identification by a single witness is by now well settled. The Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -

    13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi v Republic* [1986] KLR 198:

        1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In *Mailanyi v Republic* (*supra*), the Court emphasized that:

> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

26. In *R -v- 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 a single witness. The Court stated 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

27. In *Wamunga v Republic* (1989) KLR 426 the Court of Appeal stated as under: -

> .... 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.

28. In *Anil Phukan v. State of Assam* (1993) AIR 1462 the Court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

29. Returning to the case at hand, PW1 stated that the place where the deceased was injured was well lit with security lights and that there were many people. She witnessed the accused confront the deceased and later attacked him with a rungu. The presence of the accused at the scene was confirmed by PW2 who knew the accused well. In fact, PW2 was the one who disarmed the accused of the piece of firewood.

30. PW1 identified the firewood as the weapon the accused used to hit the deceased. PW2 overheard that the accused had hit someone with the piece of the firewood which he carried and that the victim had been rushed to hospital.

31. The accused also testified to his presence at the scene. He, however, denied injuring the deceased.

32. The fact that the scene was well lit was affirmed by PW1 and PW2. Likewise, the fact that the deceased was injured at the scene was also attested to by PW1 and PW2.

33. PW1 narrated the events of that night. She was emphatic that it was the accused who confronted the deceased when the deceased urged the people thereat to separate those fighting. PW1 was then with the deceased. PW1 saw the accused leave only to return armed with a rungu and immediately hit the deceased on the head.

34. There was, therefore, ample opportunity for PW1 to see the attacker. Since the attacker confronted PW1's husband, then PW1 was obviously interested in the conversation. PW1 watched the accused confront the deceased. She also saw him return to the scene armed. She further witnessed the accused hit the deceased on the head.

35. This Court is satisfied that the conditions at the scene favoured a favourable opportunity for PW1 to clearly see the attacker. The place was well lit with security lights and the incident was not spontaneous. It took time. PW1 was, therefore, able to see the attacker so well and such favoured a positive identification.

36. The accused tendered his defence. Whereas he admitted being at the scene, he denied hitting the deceased either as alleged or otherwise.

37. A careful scrutiny of the circumstances in this case support the fact that PW1 identified the accused as the attacker without any possibility of error. The defence is, hence, disallowed.

38. This Court now finds and hold that it was the accused who attacked and injured the deceased. It then it goes without say that it was the accused who caused the fatal injuries.

Whether there was malice aforethought:

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

40. 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.

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

42. In *Joseph Kimani Njau v Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v 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 v. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

43. In the case of *Nzuki v. Republic* (*supra*), the accused had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to there having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed as follows: -

> There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged

> to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

44. This Court will now juxtapose the above with the facts in the case.

45. The evidence did not allude to any prior dealing between the accused and the deceased. The two met at the scene and the assault resulted. In such circumstances, the aspect of malice aforethought is apparently missing.

46. By applying the subjective test in *Joseph Kimani Njau v Republic case* (*supra*), this Court is unable to find malice aforethought in the circumstances of this matter. Whereas the accused caused the fatal injuries, there is no proof of malice to the required standard. The killing only amounted to manslaughter.

47. The foregoing analysis does not, therefore, support a conviction in respect of the information of murder. The accused is, hence, found not guilty of the murder of the deceased.

48. However, it is apparent that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.

49. In view of the provisions of Section 179(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya and given the state of the evidence on record and as analyzed hereinbefore, this Court finds the accused guilty of the offence of Manslaughter contrary to Section 202 of the *Penal Code* and he is accordingly convicted accordingly.

50. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF NOVEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Gemenet, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.