Republic v Idd (Criminal Case 65 of 2019)
[2023] KEHC 26510 (KLR) (27 November 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 65 OF 2019

RN NYAKUNDI, J

NOVEMBER 27, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MUSTAFA IDD ..... ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in this count are that on the 30th September 2019 at Major village Moi's Bridge Sub location within Soy Sub-county the accused murdered Emma Wanyota. He pleaded not guilty to the charge it was therefore the prosecution turn to proof the charge beyond reasonable doubt. This therefore set in motion summoning of the prosecution witnesses to disapprove the presumed innocence of the accused.

2. The summary of the prosecution case is herein under stated as follows: PW1 Beatrice Naliaka the mother to the deceased on oath told the court that the accused is well known to her as a mobile carpenter who even repaired some of the furniture of her son Job Wanyota. He therefore became a trusted person to the family. In addition PW1 testified to the effect that on 30th September, 2019 she left with the deceased to Moi's Bridge with the deceased to source for solar services. Having received the necessary quotations he left the deceased behind to ride a motorcycle home but apparently she arrived at her home but the deceased was not yet in the compound. She made attempts to call the deceased but the phone kept on going off. She became suspicious and took the spare key to open the deceased's house and on putting on the lights she saw streams of blood on the mat in the room. She then started from inquiring Harriet from the solar company whether anybody was injured during the fixing of the solar system. However, even at this time the deceased was never traced and her phone could never be reached. A search find the deceased was initiated by PW1 including calling the deceased but their phones were switched off. That is when PW1 recalled that the accused had wanted to befriend the deceased at all

cost and if it would not happen he was going to terminate her life. The incident was reported at the police station at Moi's Bridge and investigations commenced in earnest. The deceased was arrested for further investigations to establish whether he is the one who had killed the deceased. According to the evidence by PW1 various efforts were made to search and recover the deceased's body. What was very clear in the 1st instance was the presence of blood streams in the room of the deceased. Finally, the body of the deceased cut into pieces was discovered in a nappier grass outside the compound. Some of the parts of the body were missing from that recovery scene. Soon thereafter PW1 testified that some of the body parts like hands and two legs were recovered at the roof of the house. They had later to proceed to the mortuary for a post mortem to be conducted.

3. The next witness was PW2 Job Wanyota who testified that on 30th September, 2019 at around 8.00pm he was in the house with PW1. He found the keys to his house and telephoned the deceased which call went to the voice mail. He proceeded to the house open the door and simultaneously had a motorcycle sound. In the house things were scattered all over with the presence of streams of blood. The deceased was not within the vicinity. It is only a little while the mutilated body of the deceased was recovered with severed body parts not put together. Apparently PW2 confirmed that the accused was well known to them and initial evidence pointed at his involvement in the murder of the deceased.

4. Next witness was PW3 Benard Wanyonyi whose evidence was to the effect that he received a telephone call from his brother's wife to the effect that Emma the deceased had been killed. He therefore became one of the witnesses who participated during the post mortem examination.

5. In the same breadth PW4 Sadika Hamisi of Moi's Bridge testified that on the 30th September, 2019 he was at home watching news when the parents of the deceased came into his home at 7.45pm. PW4 further testified that he joined the rest of the family members in the investigations to establish how the deceased met his death. The other witness of significance summoned by the prosecution was PW5 P/C Veronica Mwinami. As the investigating officer she visited the scene of the murder in company of corporal Wachira and other members of the public. What followed according to PW5 was recovery of the deceased body parts some of which were at the roof top of a house, a lap top Dell model , Tecno Mobile Phone, a Lap top charger, black material trouser, jumper with blood stains, flannel, black bag, a woman underwear, in addition blood samples were also collected from the deceased. All the necessary exhibit were forwarded to the government chemist for analysis. In her summary PW5 submitted all the exhibits as physical and documentary evidence in support of the prosecution case.

6. Finally PW6 corporal Stephen Lenawangwe gave evidence as one of the officers who visited the scene following a report made by PW1 arising out of missing of her daughter Emma from the homestead. The witness confirmed that the body parts of the deceased had been cut into pieces and the recovery was at the different locations. He produced in court two mobile phones as exhibit 5(a) & (b) the accused clothes as exhibit 9. At the close of the prosecution case accused person was placed on his defence he elected to give a sworn statement where he denied the allegation of murder but admitted having a love relationship with the deceased. The only thing he recalled was a telephone call from the deceased sister seeking information on her whereabouts. According to the accused his answer was to the effect that he happened to be at Eldoret while the deceased was at Moi's Bridge. In essence the accused person seemed to rely on an alibi defence. Having therefore come to a closure of both the prosecution and defence case the learned counsels elected to file written submissions giving their respective perspectives of the case. As it would be seen shortly in my decision the submissions so filed will also form the basis of the final judgement.

Analysis and Resolution

7. In law it is incumbent upon the prosecution to establish beyond reasonable doubt the following elements as stipulated in Section 203 of the penal code. These are:

    i. Death of a human being

    ii. Unlawful causation of that death

    iii. The said unlawful causation having been done with malice aforethought

    iv. The participation of the accused in causing the said death.

8. The burden of proof over time rests with the prosecution and it never shifts to the defence unless on specific statutory provisions under Section 111 of the *Evidence Act*. For this court to make a determination the following principles as elucidated in the locus classicus cases would be of importance. In Miller vs Minister of Pensions (1947)2. ALL 372 at page 373 to page 374. Lord Denning stated quite succinctly that: " The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence. Of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice. In Henry H Ilanga V. M Manyoka (1961) E.A 705 (C.A) IN Hornal v Newberger Products Ltd, Hodson L.J cited with approval the following passage from Kenny's Outlines Of Criminal Law (16th edn) at p. 416: " A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature....in criminal case the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilty of the accused.

9. It is indeed established in this case that from the post mortem report and circumstantial evidence by PW1, PW2, PW3, PW4, PW5, the deceased is dead and her right to life guaranteed in Article 26 of *the constitution* unlawfully terminated. The prosecution evidence by itself is in consonant with the guidelines in Nyamboga v Republic (1990-1994) EA 462, Ndiba v Republic (1981) KLRT 103 (Madam Wambuzi and Law JJA) Republic v Felix Nthiwa Munyao Nairobi HCCRC No. 43 OF 1999 (Etyang) & Musyoka and Others v Republic (2003) EA 177 (Gicheru Lakha and Keiwua JJA. As to whether the deceased death was unlawfully caused. This court finds and answer in the post moterm report which showed the deceased death arising out of multiple cuts which dismembered the upper and lower limbs which resulted in several bruises, cuts, haemorrhage, etc. The evidence of PW1, PW2, PW3 confirmed that the body parts of the deceased though recovered within the compound some had been hidden at the rooftop of the house. There is no doubt that the motive behind the accused persons unlawful act or omission was well articulated by PW1 that before this heinous crime accused had threatened to kill the deceased if she declines any further advances likely to negative the love affair. The perpetrator of this crime had stabbed the deceased and the consequence of it was only death. Causation and circumstantial evidence lead to the inevitable conclusion that death was the act intended by the accused person. The evidence by the witnesses of the body parts being recovered from various points some thrown to the top of the house others left to rot at some location within the compound speaks of volumes of the unlawful Act or omission by the accused person.

10. With regard to the ingredient of malice aforethought Section 206 of the Penal Code defines malice aforethought in the causation of the death of another human being as an ingredient of murder as follows:

> " Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:
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> a. An intention to cause the death of any person, whether such person is he person actually killed or not, or
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> b. Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.

11. The standard of proof required for this ingredient is drawn from the guidelines set out in the case of R. vs Tubere s/o Ochen (1945) 12 E.A.C.A 63, in that

> " It will be obvious that ordinarily an inference of malice will flow readily from the use of say, a spear or knife that from the use of a stick, that is not to say that the court take a lenient view where a stick is used. Every case has of course to be judged on its own facts."

12. In the instant case the facts of the murder revolve around the principles of circumstantial evidence in the case of R. V Kipkering Arap Koskei & Another 16 EACA 153 in which the court pronounced itself as follows:

i. That the circumstances from which an inference of guilt was sought to be drawn had been cogently and firmly

ii. That those circumstance were of a definite tendency unerringly pointing towards the guilt of the accused person herein

iii. There was no escape from the conclusion that within all human probability the crime was committed by the accused person and no one else, and

iv. That there are no other co-existing circumstances which would weaken or destroy the inference.

13. My task now is to consider those aspects of circumstantial evidence adduced by the prosecution and evaluate them against the defence case to draw the necessary conclusion. The nature of the prosecution circumstantial evidence is deducible from the following exhibits.

1. Blood sample from Emma Wakimia Wanyota (deceased) marked "A"
2. Blood stains collected from the scene marked "B"
3. Blood stained jumper from Mustafa Idd (accused) marked "C"
4. Blood stained long trouser from the accused marked "E"
5. Blood stained underwear from the deceased marked "D"

14. According to the evidence from the government analyst in his report dated 14/10/2019 the DNA profile generated by the blood stains from the scene (item B) the jumper and the long trouser (item C) and the underwear item (D) matched the DNA profile of Emma Wakimma Wanyota (deceased).

The fact remains that this scientific evidence placing the accused as the killer of the deceased was never controverted by his testimony in court. There is nothing on record that the accused Mustafa Idd did anything to save the life of the deceased. There is also nothing that he took steps to safeguard and protect the right to life of the deceased under Article 26 of *the Constitution*. From the evidence on record both oral and documentary weighs against any probability that another person other than the accused killed the deceased. The substantial evidence that when the family and the neighbours were trying to search and find the deceased the accused was fully aware that he had severed the body of the deceased into various parts before he claimed that he was nowhere at the scene of the crime. There is no evidence to prove the facts and circumstances of existence of an alibi defence. There is not a single evidence or explanation on how the blood stains jumper and trouser marched the blood sample of the deceased. The cumulative effect of all the circumstances lead to conclusion that this was a case of pure murder and the accused was responsible for such heinous crime. It is evidence of a character that is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. The crime was committed by the accused and the circumstances proved by the prosecution formed themselves into a complete chain which clearly point to the culpability of the accused. Similarly in the instant case, the manner of the killing of the deceased is telling in which his body was cut into pieces some of the body parts were hidden within the scene of the crime which conclusion I draw was meant to destroy or temper with the evidence as a whole. It has not been denied by the accused that the deceased was his girlfriend during her survivorship. The cause of death from the post mortem report was opined to be due to strangulation and exsanguination. Incidentally the accused did not stop at strangulation but he went further to cut his arms and knees which were hidden at the rooftop of the house and some in the thicket within the scene. The evidence from PW5 & PW6 confirms the nature of the recovery of exhibits in connection to this murder of the deceased. Thus from the government analyst report admitted as an exhibit dated 14/10/2019 under section 111 of the *Evidence Act* where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused and in his defence fails to offer proper explanation about the existence of the said other facts the court is at liberty to always draw an appropriate inference. As such the inference I draw is that the failure of the accused to provide an additional link to the chain of circumstances placing him at the scene of the crime in a case governed by circumstantial evidence the chain is rendered complete as against his involvement in committing the offence of murder as stipulated in Section 203 of the Penal Code. By now from the manifestation of malice aforethought in the instant case the information captured in the prosecution case on account of the murder discloses malice aforethought as defined in Section 206 of the Penal Code. Indisputably, there is admissible evidence beyond reasonable doubt fronted by the prosecution on malice aforethought and positive identification of the accused.

15. Therefore, I find the accused guilt of the offence of murder followed with a conviction within the scope and object of Section 203 as read with Section 204 of the Penal Code.

Sentence

16. The convict Mustafa Idd having been found guilty for the offence of murder contrary to Section 203 and 204 of the Penal Code it is now this court's duty to impose an appropriate sentence. The maximum sentence for murder is the death penalty. From the facts this looks like one of those cases a trial court should consider passing such a sentence given the surrounding circumstances of this case. However, there are numerous competing principles which govern sentencing considerations. The primacy of deterrence was also propounded in Radich (1954) NZLR 86 in which the court stated that one of the main purposes of punishment ....is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them

they will meet with server punishment. In all civilized countries, in alleges, Deterrence) has been the main purpose of punishment and still continues so.

17. In the same legal scheme the court in A-lister Anthony Pareira vs State of Maharashira the court held that: " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and graving of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of just depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, mature of the offence and all other attendant's circumstances.

18. *The constitution* of Kenya 2010 is a living document fundamental to the governance of the country whereby according to the instrument the death penalty was never outlawed. It remains to be the legal sentence provided the primary objectives and principles of sentencing point to the trial court that is the proportionate sentence to impose upon the convict. The people of Kenya have provided a constitutional instrument consisting of separation of powers spread across the executive, the legislature and the judiciary as institutions and functionaries to exercise the powers provided in *the constitution* on behalf of the Kenyan people. Notwithstanding that position all power belongs to the people and the institutions so mandated by trustees with intension of working out and maintaining the governance and constitution order of this great Republic. I am of the view that once the court has passed the death sentence for execution it is open to the president in exercise of the powers vested in him by *the constitution* to examine, scrutinize, evaluate the evidence on record in criminal case of this nature to sign the executive order for execution of the sentence or come to a different conclusion from that recorded by the trial court. In this context the facts demonstrate that the accused committed this offence with express malice aforethought and the nature of malice or inhuman conduct will without much hesitation attract a death penalty against the accused person. The question is therefore as regards the scope and power of the president under *the constitution* to sign the execution orders or commute the sentence of death against the accused into a lesser sentence. This clearly is not the occasion to delve into this matter in greater details but to settle for a proposition that the interest of justice may also be served by imposing a custodial sentence.

19. In every case, it is the duty of a trial court to strive and arrive at a just sentence. This involves the application of the generally accepted sentencing principles of (a) denunciation (b) deterrence (c) separation (d) rehabilitation (e) reparation (f) offender-victim-community restoration. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Accordingly, the sentence should neither be unduly harsh in the sense of being incapable of objective justification to the aforesaid gravity of the crime or the convict's degree of blameworthiness and his or her antecedent profile. In the same vein sentence should also not be lenient against the reasonable expectation of the public.

20. Linked to these principles are the aggravating and mitigation factors offered by senior prosecution counsel Mr. Mugun on behalf of the state and on the other hand Mr. Omboto for the convict.

21. Given this background, and the precise factors which influence the sentencing discretion I am minded to look at nature and gravity of the crime, the manner in which it was committed by the convict, the age of the victim, and breach of trust by the convict as the care giver and protector of the survival rights of the victim. The mitigating factors though necessary considerations they do not go far enough to mitigate the seriousness of the offence and the blameworthiness of the convict. In light of the above approach I exercise discretion to sentence the convict 45 years imprisonment with effect from 22nd October. 2019. 14 days Right of Appeal explained.

DATED SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER, 2023.

R. NYAKUNDI

JUDGE

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In the Presence of

Mr. Mugun for the State

Mr. Omboto for the Accused

Accused in Person.