



**Director of Public Prosecutions v Gregory (Criminal Case E030 of 2021)
[2023] KEHC 25774 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E030 OF 2021
TW CHERERE, J
NOVEMBER 23, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

LUCAS NGORI GREGORY ALIAS ZERO KINDE ACCUSED

JUDGMENT

1. Simon Boran, a security guard at Isiolo Hospital was on duty on the night of 03rd April, 2021. He went to casualty area around 10,00pm and met his neighbor Lucas (Accused herein) who informed him that he had picked an injured lady on the road and had taken her to hospital where she died. Upon seeing the body of the deceased patient, Simon recognized it as that of one Elizabeth who was known to him and he reported the matter to one of her relatives called Susan.
2. On the same date at about 09.00 pm, Alfred Tinani was informed by his daughter Rita that his sister in law Elizabeth had died at Isiolo County Hospital. He went to the mortuary two days later on 05th April, 2021 and upon confirming the death reported the matter to police. He then accompanied police who interrogated Accused and he said he had found Elizabeth injured on a public road and had taken her to hospital where she unfortunately died.
3. Elimlim Tenani did not know how his wife met her death and his role was to identify her body to the doctor that conducted the postmortem at Isiolo County Hospital on 07th April, 2021. The postmortem form PEXH. 1 dated 07th April, 2021 revealed that deceased suffered fracture of cervical bone and multiple stab wounds on her genitals and had died of excessive blood loss. 5 photographs indicating the injuries that were inflicted on the deceased were taken and they were tendered as exhibits.
4. The investigating officer confirmed that upon interrogating Accused, he stated that he had picked deceased lying injured on the road and had taken her to hospital where she died. Not being convinced with Accused's explanation, he arrested him. He subsequently searched Accused's house and collected



2 knives and a t-shirt, trouser and jumper from Accused's house and together with deceased's dress, vaginal swab and blood samples of Accused and Deceased submitted them to government chemists. The results contained in a report dated PEXH. 6 revealed Accused's DNA profile was not detected in Deceased's dress and vaginal swab and deceased's DNA was not found in the two knives and Accused's clothes.

5. Subsequently, Accused persons was charged that on 03rd April, 2021 at an unknown time at Lambi Garba area in Isiolo North Sub County within Isiolo County murdered Elizabeth Dinja Elimlim.
6. Accused denied committing the offence and reiterated that he had picked Elizabeth injured on a public road and escorted her to hospital where she died.

Analysis And Determination

7. Section 203 and 204 of the [Penal Code](#) under which the accused persons are charged provide for the offence of murder and the punishment for it.
8. In the case of [Joseph Gitbua Njuguna v Republic](#) [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows: -

“...Under section 203 of the [Penal Code](#), any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”

9. The foregoing sections require that the prosecution prove beyond reasonable doubt. In [Stephen Nguli Mulili v Republic](#) [2014] eKLR the court emphasised the prosecution's duty in a criminal case and state that;

“...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, (2013) eKLR”

10. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the said death and that he was actuated by malice.
11. That Elizabeth suffered fracture of cervical bone and multiple stab wounds on her genitals and had died of excessive blood loss was demonstrated by medical evidence in the form of a postmortem report PEXH. 1.
12. it is on record that none of the witnesses saw Accused kill the Elizabeth. It is also apparent that the evidence against Accused is largely circumstantial for the reason that he was the one that escorted Elizabeth who was injured to Isiolo Hospital where he died.



13. In *Neema Mwandoro Ndurya v. R* [2008] eKLR, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”
14. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence, the threshold to be met if a conviction is to be based thereon has been explained in a number of cases among them *Sawe v Rep* [2003] KLR 364 where the Court of Appeal held that:

“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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”
15. In *R. v Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa stated that:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”
16. In yet another case of *Mwangi v Republic* [1983] KLR 327 the Court of Appeal held that: -

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”
17. From the time Accused escorted Elizabeth to hospital, to the time of his arrest and the time of giving his testimony, Accused maintained his innocence and explained that he took Elizabeth whom he knew to hospital after he found her lying on the road injured.
18. In these circumstances, the question is whether circumstantial evidence against Accused can be said to be incompatible with his innocence and incapable of explanation upon any other reasonable hypotheses than that of his guilt or whether there are other existing circumstances, either from the prosecution or the defence that weaken the chain of circumstances the prosecution seeks to rely.
19. Having considered the evidence on record, I find that Accused’s defence is reasonable and totally weakens the chain of circumstances the prosecution seeks to rely and fails to meet the threshold



enunciated in the leading cases I have cited in this judgment, and does not amount to a compelling rational inference of the Accused person's guilt.

20. In the end, I find Accused Not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) and is hereby acquitted. He shall be set at liberty unless otherwise lawfully held.

DATED THIS 23rd DAY OF November 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

For the Accused - Ms. Maore Advocate

For DPP - Ms. Rita Rotich (PC-1)

