



**Director of Public Prosecutions v M (Criminal Case 59 of 2016)
[2023] KEHC 25775 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 59 OF 2016
TW CHERERE, J
NOVEMBER 22, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTION

AND

M M ACCUSED

JUDGMENT

1. MM (Accused) and PM (P) used to cohabit as husband and wife, on and off, and the union was blessed with a son. On 16th September, 2016, Accused went to the home of P mother where P and her son were living at the time and left with P and that was the last time her mother AKK saw her daughter alive for on the following day 17th September, 2016, she receiving devastating news that P had been murdered. She went to the mortuary on 18th September, 2016 and confirmed that indeed P was dead subsequent to which she reported the matter to police.
2. CPL Paul Lagat on 17th September, 2016 visited Kaungira area after a report from the area chief that there was a body of a female. He went to the scene and saw the body of a female and a broken stick next to it. Photographs of the scene were taken and the body was removed to the mortuary. On the same day, he received information that deceased used to cohabit with the owner of a house that was about 100 metres from the scene. The witness went to the home and did not find the suspect but from outside his house recovered a piece of broken walking stick which he suspected was used to assault the deceased and he collected it as an exhibit after photographs of the scene were taken.
3. Subsequently, Accused was arrested and charged that on 16th September, 2016 at [Particulars withheld] village, Nthimbiri Sub-location, Nthambiri Location in Imenti Norh Sub- County within Meru County murdered PM.



4. Accused conceded that he picked P from her mother's house on 16th September, 2016 and that they spent the night in his house. He explained that he parted ways with P on the morning of 17th September, 2016 and he did not know how she died.

Analysis And Determination

5. 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.
6. In the case of Joseph Githua 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.”

7. 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”

1. Section 203 and 204 of the Penal Code under which accused is charged provide for the offence of murder and the punishment for it respectively. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
9. 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 Pauline; that Accused caused the death and that he was actuated by malice.

Death

10. The postmortem form PEXH. 1 reveals that P suffered multiple bruises on the forehead with swollen right eye, bruises on both hands with fracture left arm, multiple bruises on both legs with fracture of right and left tibia and fibula bones and had died of severe head injury due to blunt injury to the head.
Whether Accused committed the unlawful act which caused the death of P
11. No witness saw Accused murder M and it is apparent that he was charged on the basis of circumstantial evidence that he was the last person who was seen with P when they left her mother's house on 16th September, 2016.



12. As we know from Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”
13. In Abanga alias Onyango v Republic CA CR. Appeal NO. 32 of 1990 (UR), the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused 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.”
14. In the case of Stephen Haruna v The Attorney General of the Federation {2012} LPELP 782 the Court had to say thus:

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.” (See also Republic v E K K [2018] eKLR and Stephen Haruna v The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009).
15. Accused does not deny that he picked P from her mother’s house on 16th September, 2016 and that that was the last day she was seen alive but raised an alibi that they parted ways with her at 08.00 am on the morning of 17th September, 2016 and he did not know how she died.
16. The area chief who is alleged to have been the first person that saw deceased’s body was not called as a witness and it is therefore not clear if the body was recovered before or after 08.00 am when Accused said he parted ways with P.
17. Concerning blood stained sticks one recovered at the scene where the body was recovered and another allegedly outside Accused’s house, it is apparent that only one of the sticks was taken to the government chemists. The prosecution neither called the person who identified Accused’s house nor did the investigating officer identify which of the two sticks was taken for analysis and the link between Accused and the stick that was suspected to have been used to murder the deceased is therefore missing.
18. The murder not having been witnessed and Accused having raised an alibi, I find that Accused offered a minimum explanation of what he knows about the death of the P which in my considered view is reasonable in the circumstances.
19. In the end, I find Accused that the prosecution case has not been proved beyond reasonable doubt and Accused is found 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.

DELIVERED AT MERU 23rd DAY OF NOVEMBER 2023

WAMAE. T. W. CHERERE

JUDGE



Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For the Accused - Ms. Atieno Advocate

For the State - Ms. Rita Rotich (PC-1)

