



**Republic v Gundu (Criminal Case 1 of 2017)
[2022] KEHC 427 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 1 OF 2017
LM NJUGUNA, J
APRIL 28, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

GEORGE KAMAU GITAU ALIAS GUNDU 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](#) and the particulars of the offence being that on December 16, 2016 at Rwika Market of Mbeere Sub-County he murdered Lucy Ndegi Njuki.
2. Upon arraignment, he pleaded not guilty and a plea of not guilty was entered. The case proceeded for trial and wherein the prosecution called a total of Nine (09) witnesses who testified in support of its case.
3. PW1, Henry Munene Kiragu stated that the deceased was his neighbour and that he had known her since he was a child. That on 16/12/16 at around 7 30 pm, he went to Mbinu Joint Bar and was treated by the owner, one Magara to one glass of beer; and that he found the deceased, Njoroge, Ben and others. It was his case that at around 10 30 pm, Magara told them that he wanted to close the bar and so he asked them to leave but the deceased remained behind. That while leaving, he met the accused person herein at the door who entered the bar again and then came out with the deceased. He further stated that the accused person carried some maize flour (for the deceased) in a paper bag; and the two went their way towards Rwika Technical. That the following day on his way to work towards the Social Services Offices where a crowd had gathered, he saw the body of the deceased and that the accused herein was being assaulted by the crowd. He stated that the deceased had blood due to injuries on the body and that she had no clothes on the lower part of the body. That the police thereafter came and arrested the accused herein while the body of the deceased was taken to the mortuary. Upon cross examination, he stated that he met the accused herein for the first time on the material evening and that



- he was in the company of the deceased in the bar. He reiterated that the public was calling the accused herein as Gitau but otherwise known to people as Ndungu. He further stated that the accused herein went in and out of the bar several times and did not sit in the bar continuously like other customers.
4. PW2, Ben Mwangi Mwaniki stated that the deceased was a family friend since 1997 and that he only came to know of the accused person on December 16, 2016 when he saw him in the bar with the deceased. He stated that while in Mbinu bar at around 9 00 p m in company of the deceased, Njoroge, Magara and others, the accused came in and ordered for a drink. It was his evidence that the accused person herein walked around the bar holding his drink and that he did not sit at one place. That at some point his interest was drawn to the harsh way that the accused was talking to Magara saying that ‘hakuna mahali utanipeleka’.which prompted Magara to order that the accused herein be thrown out of the bar and previously before that, the accused person had offered to buy the deceased a drink, an offer which the deceased declined. That even after he was forcefully ejected out of the bar, the accused person did not go away and instead stood outside the bar. That at around 10.30 p.m. he left the bar to go home leaving the deceased in the bar and upon stepping out, he found the accused herein complaining in low murmurs but he did not hear what exactly he was saying. That the following morning, he got a twitter message that a lady had been found dead at Rwika Market and on going there, he learnt that the deceased was one Lucy Ndegi and that the DCI officers were also around the area and when he was asked if he could identify the accused person who at that time was seated in the DCI van, he told them that the accused’s name was Ndungu or George Kamau. On cross examination, he reiterated that he saw the accused person come to the bar and that he had offered the deceased a drink to which she declined. That the accused said that the deceased was his sweet heart.
 5. PW3, Phides Wandia Njiki, stated that the deceased was her sister and that on 22.12.16 at Embu Level 5 Hospital mortuary she identified the body of the deceased to the doctor who carried out the post mortem.
 6. PW4, Dr. Joseph Thuo testified that on 06.01.2017, he carried out mental examination on the accused person herein and gave a mental assessment report. He stated that he found him mentally fit to stand trial but applied to amend the report by deleting the words ‘and is on teratment’ which was a typing error by her secretary. He thus produced the report as P.Exh 1.On cross examination, he stated that the patient had no mental illness and that he had to amend the report since the accused person was not on any treatment. On June 6, 2019, PW4 was recalled for further cross examination wherein he stated that he could only confirm using a medical record that the accused was undergoing mental treatment before he was examined. He referred to DMFI 1 which stated that the accused person attended three clinics in the hospital on January 29, 2015 and that he was given a fourth appointment on February 26, 2015 and that he did not attend. According to him, from the said record, there is no definite conclusion that could be made on whether the accused person healed from the mental disturbance. He confirmed that he did not have the benefit of the treatment card at the time when he was making his report and on re-examination, he confirmed that the nature of the illness generally may keep recurring.
 7. PW5, Simon Ngari testified that on December 16, 2016 at 8 30 pm while at Migingoo bar, the accused person entered the bar and was served with drinks but later left. That on December 17, 2016 while at his house, he was informed that Lucy Ndegi who is a subject in his village had passed on. He confirmed having gone to the bar at around 7 00 pm while on the other hand, the accused came in at around 8 00 pm and that he sat in the main bar. He also stated that the deceased came in shortly afterwards and sat in a different place and that the accused person and the deceased never talked to each other and that they left at different times. He was categorical that he did not witness the death of the deceased herein.
 8. PW6, David Kariuki Mwaniki testified that on December 17, 2016 while in his house, his father informed him that the deceased herein who is his aunt had been murdered and he asked him to take



him to Rwika and upon arrival, they found the body of the deceased near the road. It was his evidence that the body had no clothes and it was bleeding from the eyes and mouth. They reported the matter at Gachoka police station. He further told the court that previously on December 10, 2016 at around 9 00 pm, him, his father and one Dickson Njue had met the deceased and that she was crying asking for help since she had been beaten by the accused person herein and she told them that if she were to die, Ndungu (the accused herein) would be responsible. That after they made the report they went to the scene where they found a crowd that had gathered and one Ben Mwaniki confirmed that on the previous night at around 10 00 pm, he was with the accused person and the deceased at Mbinu Joint at Rwika Market. That shortly thereafter, the accused came to the scene and when he was asked by the chief of Rwika what had happened to the deceased, he answered that he was too drunk and could not have known what happened. It was his further evidence that the clothes that the accused was wearing were stained with blood and the police officers from Kiritiri took the blood stained clothes with them. On cross examination, he reiterated that the accused person is known as Ngungu but his name as per the identity card is George Kamau Gitau.

9. PW7, Mwaniki Nthiga testified that on December 17, 2016, while at his house, his brother Moses Mbiti called him to inform him that his sister, the deceased herein had been killed and that the body was at Rwika. That he proceeded to Rwika with his son (PW6) and upon arrival, they found the body of the deceased naked and the same was bleeding from the face. That they reported at Gachoka Police Station. It was his evidence that the police from Kiritiri went to the scene and took photographs and later took away the body. On cross examination, he confirmed that he comes from the same village as the accused but they did not know each other prior to the incident.
10. PW8, Dr Phyllis Muhonja testified that she conducted autopsy on the body of the deceased herein and on the external examination, there were blood spills on the left inner thigh, central inner region of both eyes and the nasolabial folds; on the right and left hands, there were multiple abrasion wounds; on the left knee joint, there was an abrasion wound and on the right inner part of the fore arm, there was another abrasion. The ribs were intact but in the space between the 6th and 7th rib, the muscle was contused. The intestines around the nerves were reddened but the spleen was intact, the blood vessels and the cavity were intact. Around the groin, there were blood spills, and a thick discharge coming out of the vagina; the outer genitalia was reddened (inflamed) and the entire genital wall was inflamed. The right side of the skull had an extensive bruising of the scalp and beneath the skull bone, there was a massive subdural haematoma. The entire brain was swollen. As a result of the examination, she formed the opinion that the cause of death was raised intracranial pressure and massive right subdural haematoma and there was also sexual assault. She proceeded to produce Death Certificate Number 298830 as P Exh 2. Upon cross examination, she reiterated that the cause of death was blunt trauma to the head and not rape in as much as it was part of the findings.
11. PW9, Kenneth Mucambi who was the investigating officer testified that he was instructed together with Cpl Mutuku to proceed to the scene of crime at Rwika where allegedly, an incident had occurred. That at the scene, there was a body of a lady which was lying down which according to him was an indication that he had been raped and killed. He stated that at the scene, he met the area chief who was having one suspect who had been beaten by a mob. They removed the body from the scene and arrested the suspect and then proceeded to record statements from the witnesses. From the investigations, he found that the suspect was the last person seen with the deceased and the last place where they were seen is Mbinu bar which is at Rwika market. It was his evidence that some witnesses said that they saw the suspect in blue jeans which he also recovered and thereafter produced as P Exh 2 and he identified the accused person as the suspect he arrested. On cross examination, he reiterated that the accused person's trouser had blood like stains and he took it for further analysis at the Government Chemist.



12. After the close of the prosecution's case the accused herein was placed on his defence upon the court finding that the prosecution had established a prima facie case.
13. DW1, George Kamau Gitau (the accused herein) gave an unsworn statement wherein he stated that on December 16, 2016, he was at home. On December 17, 2016, he heard people say that a person had been murdered and so he went to Rwika to see for himself and upon arrival, he found many people who said that he resembles Ndungu and who started beating him claiming that he was the one responsible for the death of the woman. He reiterated that he did not kill the deceased and that he does not even drink alcohol. He thus prayed for leniency and further produced D Exh 1.
14. After the close of the defence case, directions, were given for both parties to file their submissions wherein both chose to rely on the evidence on record in support of their respective cases.
15. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of prove is always that of "beyond any reasonable doubts" [See *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].
16. In the instant case, the accused person is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Murder is defined as "when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." The elements of murder and which the prosecution ought to prove are;
 - a. the death of the deceased occurred
 - b. the death was caused by unlawful acts;
 - c. that the accused committed the unlawful act which caused the death of the deceased; and
 - d. that the accused had malice aforethought.(See *Anthony Ndegwa Ngari vs Republic* [2014] eKLR).
17. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
18. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. PW8 Dr Phyllis Muhonja testified that she conducted post mortem on the body of the deceased and wherein she formed the opinion that the cause of death was a blunt trauma to the head. As such death was proven.
19. As to whether the death was caused by unlawful acts, under Article 26 of *the Constitution* of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). PW 8 gave evidence that the death of the deceased was as a result of blunt trauma to the head. As such the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
20. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution's evidence as presented before the court. I note that no prosecution



witness witnessed the incident in which the deceased herein died. But in the same breadth, the witnesses confirm that the accused person was the last person with whom the deceased person was last seen.

21. The evidence of PW 1 was corroborated by that of PW 2 who confirmed that the accused was the last person to be seen with the deceased when they both left Mbinu Joint Bar on the 16/12/2015 at around 10.30 pm.
22. As to whether the accused had malice aforethought, this can be discerned from the evidence adduced by the prosecution. Section 206 provides that malice aforethought means: -
 - “(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 flight or escape from custody of any person who has committed or attempted to commit a felony.
23. The prosecution is relying on circumstantial evidence to prove the charge of murder against the accused person herein. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of *Abanga alias Onyango v Republic* CR A NO 32 of 1990 (UR) in the following terms:
 - a) The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.
 - b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.
 - c) 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.”

[See also *Simon Musoke v R* {1958} EA71]
24. Were the fatal injuries inflicted by the accused herein? The identification of an accused can be by direct evidence of the eyewitnesses who testify that they saw the accused commit the offence but also, the prosecution can also prove identification of the accused by circumstantial evidence. This is evidence proving events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue. In this case, there was no prosecution witness who saw the accused herein murder the deceased. The prosecution sought to rely on the doctrine of the last seen.
25. In the Indian case of *Deepack Sauna v State of Delhi* the court in developing the doctrine of last seen stated: -

“In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased



and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt.”

26. The Nigerian Case *Achie v State* (1993) [See also *Ismeni v State* (2011) Kuktan JSC said of the doctrine that:

“In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”

In the absence of any explanation by the defendant as to how the deceased met his death, the court can allow an inference that the defendant killed the deceased.”

27. In *R v ECK*, Lessit J (as she then was) in analysis of the doctrine of the last seen with deceased alive stated: -

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of *Moses Jua v the state*(2007) (PELR – CA/11 42/2006.

The court while considering the last seen doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”

28. The statutory rebuttable presumption is spelt out under sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”



29. The accused in his defence stated that on 16/12/2016, he was at home and on December 17, 2016, he heard people say that a person had been murdered and so he went to Rwika to see for himself and upon reaching, people said that he resembled Ndungu and they started beating him claiming that he was the one responsible for the death of the woman. It is of importance to note that the prosecution's evidences thus places upon the accused a burden to discharge a rebuttable presumption of having been the last person seen with the deceased herein who was later found dead. He therefore ought to have explained what happened or caused the death of the deceased which he failed to do.
30. On the defence of insanity PW4, stated that on 06/01/2017, he carried out mental examination on the accused person and gave a mental assessment report and that the accused herein was fit to stand trial though he applied to amend the report by deleting the words 'and is on treatment' which was a typing error by her secretary. On 06/06/2019, he was recalled for further cross examination wherein he stated that he could only confirm using a medical record that the accused was undergoing mental treatment under him before he examined him. He referred to DEXH 1 which stated that the accused person attended three clinics in the hospital on 29/01/2015 and that he was given a fourth appointment on 26/02/2015 and that he did not attend. He formed opinion that from the said record, there is no definite conclusion that could be made whether the accused person healed from the mental disturbance or not.
31. In my considered view, it may well be that the accused person previously had presented as a mentally unstable person (schizophrenic) when he presented Dex 1 but there was no evidence that this documented condition affected his mind on the material night in such a manner as to bring this case within the provisions of section 12 of the *Penal Code*, as it relates to the actual time of offence. In order to qualify as a complete defence, the mental disease or condition pleaded by an accused should be one that affects his mind so as to be incapable of understanding what he is doing or knowing that he ought not to do the act. That Dex 1 shows that the accused person herein was schizophrenic during the first attendance but later on January 13, 2015, after another hospital visit, it was reported that the accused had some improvement and thereafter, he was prescribed for some, medications with further instructions that he was to report back for another check up on February 26, 2015 which he failed to show up for. PW 4 stated on his report dated January 6, 2017 that the accused was fit to stand trial.
32. It is my considered view that based on unimpeachable evidence by PW1, PW2, PW4, PW6 and PW7 concerning historical and immediate events to the offence, it cannot be said that the alleged illness which on the face of it was never first raised at the time of taking of the plea, deprived the accused at the time of the commission of the offence, the mental capacity to know what he was doing or that it was wrong. Mere mental illness not shown to affect a person so as to be incapable of understanding what he is doing or that he ought not to do the act is not a defence under section 12 of the *Penal Code*.
33. On the facts of this case, it cannot be that the accused was swinging successively between sanity and insanity in the entire period. Regarding the specific events of 16/12/2016, these are consistent with evidence of the surrounding circumstances before the date, with regard to the accused's mental state. In my view, it would amount to stretching the statutory defence provided in section 12 of the *Penal Code* to unreasonable limits to conclude, as the defence seemed to require of this court.
34. After considering all the evidence, I am satisfied that the case against the accused has been proved beyond reasonable doubt. He is guilty of murder contrary to section 203 as read with section 204 of the Penal Code. I so find and convict him accordingly.
35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF APRIL 2022.



L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

