



Republic v Njeru (Criminal Case 21 of 2016) [2022] KEHC 548 (KLR) (26 April 2022) (Ruling)

Neutral citation: [2022] KEHC 548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 21 OF 2016
LM NJUGUNA, J
APRIL 26, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID MACHARIA NJERU ACCUSED

RULING

1. The accused person herein faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that; on the 22nd day of September 2016 at Gichiche Location, Mbeere South Sub-County within Embu County murdered Anthony Muchiri Kithaka. He pleaded not guilty to the charge and the case proceeded to full hearing during which the prosecution called a total of seven (7) witnesses and closed its case.
2. At this point, the court has a legal duty to make a ruling or decision on whether an accused person has a case to answer or not. Under Section 306(1) of the Criminal Procedure Code, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one of several accused persons committed the offence, should after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
3. On the other hand, when the evidence of the witnesses of the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court should proceed to put the accused to his/their defence and whereby the accused is supposed to present evidence in defence (see Section 306(2) of the Criminal Procedure Code).
4. As such, at this stage, this court’s role is to consider the evidence on record and make a determination as to whether the same presents a prima facie case that would warrant this court to call upon the accused to give his defence.



5. Under Section 211 of the *Criminal Procedure Code*, a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person (see also *Ramanlal Trimbaklal Bhatt Vs Republic* [1957] EA 332 at 334 and 335).
6. However, it is trite that where the court is not acquitting the accused person at the close of the prosecution's case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused person are upheld and the accused is acquitted (see *Festo Wandera Mukando Vs Republic* [1980] KLR 103).
7. As earlier stated, the prosecution called seven witnesses in support of its case.
8. PW1, Joseph Muchiri Kivumbu was the chief of Gicheche location at the material time. It was his testimony that, on the 22nd day of September 2016 at around 2.00 am he was asleep when he was woken up by James Kivuti and his two children who told him that the brother of James Kivuti namely Muchiri and his son had been beaten up by one David Macharia, the accused herein and had been left for the dead.
9. He went to the scene and he was told by the wife of Kivuti that the accused had gone to their house and beat up her son and his brother-in-law. The lady took him outside the house where he found the deceased lying on the ground and was breathing faintly. He called a neighbour one Silvano who took the injured person to hospital but the deceased had already died. He instructed PW2 (the assistant Chief) to arrest the accused as they waited for the police to arrive. The police arrived later and he took them to the home of the accused and he was arrested.
10. It was his further evidence that the wife of the accused surrendered a stick to the police from their house which was suspected to be the murder weapon. That a hat with green and black colours identified to be that of the accused was also recovered from his house.
11. In cross-examination he stated that Kivuti did not tell him whether he saw the accused beating the deceased or not. That he did not find the accused at the home of Kivuti when he went there but that the hat was recovered in the house of the deceased.
12. PW2, Justus Malembo Ngondi was the assistant chief of Gachiche sub-Location at the material time. He stated that on the 22nd September 2016, he received a report from John Kivuti and his two children that Kivuti's brother namely Muchiri and Kivuti's son had been beaten by the accused herein. He instructed Kivuti to make a report to the Chief (PW1). After a short while he went to Kivuti's house where he found PW1 and by then the deceased had already died and Thomas Kinyua was seriously injured. PW1 took the injured to the hospital. The body of the deceased had injuries on the head, arms and other parts of the body. The accused was arrested and taken to the scene and later to Kiritiri Police Station.
13. In cross-examination, she stated that the police recovered a hat and a stick from the scene and the stick had blood stains.
14. PW3, Samuel Nyaga Macharia testified that on the 22nd September 2016 at around 5.30 am, the assistant chief (PW2) told him that the deceased had been killed by the accused. PW2 told him to get other youths to go to the house of the accused. He led seven youths to the house of the deceased where they found him sleeping. They enquired from the accused what had happened and he told them that he had beaten the deceased because he had harvested his miraa. He took them to the shamba to show them where the miraa had been harvested. The accused was arrested and they found the deceased lying outside Kivuti's house and had injuries on the head.



15. In cross-examination he stated that it was PW1 who told him that the deceased had been killed by the accused. He did not witness the incident. It was also his evidence that police recovered a hat and a stick which was used in the murder.
16. PW4, Francis Mugo Njiru identified the body of the deceased at Embu Level 5 hospital, on the 28th September, 2016 in the company of the mother to the deceased.
17. PW5, John Kivuti Kithaka who is the father to Thomas Kinyua told the court that on the 22nd September, 2016 at around 1.00 am he was on duty at GPA Academy where he was working as a watchman when his son Albert Macharia went to his place of work and told him that the accused had beaten his son, Thomas Kinyua and the deceased, who was his brother.
18. In the company of his children he went home and made a report to PW2. PW1 accompanied them to his home where he found the deceased lying outside his home with multiple injuries and Thomas Kinyua was inside the house also with serious injuries on the head. PW1 looked for a vehicle which took Thomas Kinyua to hospital but the deceased had already died.
19. PW6, Dr. Phylis Muhonja, a forensic physician at Embu Level 5 hospital produced the post-mortem report which was prepared by Dr. Silvester Maingi after he carried out the post mortem on the body of the deceased. In his opinion, Dr. Maingi concluded that the cause of death was braised intra cranial pressure due to acute brain injury with sub-dural bleeding as a result of blunt force trauma to the head. She also produced the mental assessment report on behalf of Dr. Thuo which showed that the accused has no mental abnormality and he was fit to stand trial.
20. The investigating officer, Cpl. Hassan Aden, testified as PW7. He stated that the case was investigated by Cpl. Benson Onsongo from whom he took over, on the 5th August, 2019. He stated that after he took over the case, he bonded the remaining witnesses and took over a head cap belonging to the accused, brown jacket and black trouser which he produced as exhibits in the case.
21. In cross-examination it was his evidence that he did not conduct any investigations in the case and he could not tell the owner of the exhibits that he produced in court.
22. The accused person herein is facing a charge of murder contrary to Section 203 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”.
23. 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 he unlawful act which caused the death of the deceased; and
 - d) That the accused had malice aforethought.

(See *Antony Ndengwa Ngari Vs Republic* [2014] eKLR).
24. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
25. As for the death of the deceased, it is not in doubt that the deceased died. PW6, Dr. Phylis Muhonja produced a post-mortem report which was prepared by Dr. Sylvester Maingi after he conducted the



post-mortem on the body of the deceased. The body was identified to him by PW4 who was in the company of the mother to the deceased. As such, the death of the deceased was proved.

26. As to the death having been caused by unlawful acts, Article 26 of *the Constitution* of Kenya 2010 protects the right to life and it provides that life can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorised by the law or excusable under the law or under justifiable circumstances, such as self-defence or defence to property. (See *Guzambizi Wesonga Vs Republic* [1948] 15 EACA 63). PW6 gave evidence that the death of the deceased was caused by braised intra cranial pressure due to acute brain injury with sub-dural breeding as a result of blunt force trauma to the head. The death of the deceased was therefore caused by acts which are not excusable or authorized by law and thus the same was unlawful.
27. As to whether the accused committed the unlawful act which caused the death of the deceased, none of the prosecution witnesses saw the incident in which the deceased herein was killed. From the evidence on record PW5 who is the father to Thomas Kinyua told the court how his two children namely Albert Macharia and Karimi went to his place of work at 1.00 am at GPA Academy where he was working as a watchman and told him that the accused had beaten Thomas Kinyua and the deceased, and had left them for the dead.
28. The court notes that these two children of Kivuti were not called as witnesses to tell the court what exactly happened to the deceased and to confirm to the court that indeed it was the accused who beat the deceased if at all. PW5 on his part, in cross-examination, stated that he did not witness the incident and could not tell what caused the death of the deceased. The evidence in that regard is just hearsay and has no probative value in this case.
29. PW1 in his evidence stated that the wife of Kivuti (PW5) told him that it was the accused who went to their house and beat up their son and her brother in law. From the record, the wife of Kivuti did not testify in the case and therefore the evidence of PW1 was at best hearsay evidence.
30. Similarly, the evidence of PW2 as to what he was told by Kivuti on who beat the deceased was also hearsay.
31. On the evidence of PW3 regarding what the accused told them after he enquired what had happened to the deceased is neither here nor there. It is clear from the evidence that the accused person did not make or give a confessionary statement as required under the law.
32. A number of exhibits were produced which included a head cap, brown jacket and a black trouser. According to PW1, the stick was surrendered by the wife of the deceased to the police from their house which was suspected to have been the murder weapon. The hat with green and black colours allegedly identified to be that of the accused was also recovered. Though PW1 wanted the court to believe that the stick that was surrendered by the wife to the deceased was the murder weapon, there was no evidence to confirm the same and to connect the accused with the stick and the murder of the accused.
33. PW7 who was the investigating officer after he took over from Cpl. Benson Onsongo told the court that he did not conduct any investigations on his part.
34. In cross examination he admitted that he could not tell the owner of the exhibits though he produced them. Though PW6 in her evidence stated that blood samples were kept for collection for purposes of matching with blood stains with those found at the scene, there was no evidence that the samples were subjected to tests and the results if any.



35. In view of all these, I have no doubt in my mind that the prosecution did not prove who caused the unlawful death of the deceased herein. They heavily relied on hearsay evidence. In the case of *Kinyatti Vs Republic*, the Court of Appeal defined hearsay evidence as follows;

“The assertion of a person other than the witness who is testifying, offered as evidence of the truth of that assertion was made”.

36. The court went on to hold that, as such as a general rule, statements other than one made by a person while giving oral evidence in proceedings is inadmissible as evidence of a stated fact. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.

37. Further, the prosecution sought to rely on circumstantial evidence. In the case of *Republic Vs Kipkering Arap Koskei & Another* [1949] 16 EACA, the Court of Appeal for Eastern Africa held as follows;

“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 guilt. The burden of proving the 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”.

38. That being the case, the prosecution did not establish a prima facie case either by way of direct or circumstantial evidence.

39. Despite having succeeded in establishing the death of the deceased and the cause of the death, they have not adduced any evidence to connect the accused with the offence of murder as charged.

40. From the foregoing, the accused person herein is acquitted of the charge of murder.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

