



**Republic v Chirchir (Criminal Case 21 of 2015)
[2022] KEHC 11275 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 21 OF 2015**

RB NGETICH, J

MAY 26, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON KIPKURUI CHIRCHIR ACCUSED

JUDGMENT

1. Simon Kipkurui Chirchir, the accused herein was charged with the offence of murder contrary to section 203 as read together with section 204 of the [Penal Code](#). Particulars are that on March 28, 2015 at Morocho village in Rongai District within Nakuru County he murdered Priscilla Wangui Mwangi. For which a plea of not guilty was entered on April 8, 2015.
2. In the trial, the prosecution called a total of 7 witnesses. PW1, PW2, PW3 and PW4 testified before Justice M Odero. The accused chose to have the matter proceed from where it had reached on February 10, 2020 before Justice Odero and I proceed to hear evidence of PW5, PW6 and PW7.
3. PW1 Moses Rotich Ekwon testified that he is the Assistant Chief of Morocho Sub-Location and on March 28, 2015 at around 9 pm when he was at his house, he heard a call from outside and found the accused Simon at the door who informed him he had killed his wife. He later called the chief to inform him of the incident and asked the chief to come with some people. He also received a call from Njoki PW3 informing him of the incident. Later he and the chief escorted the accused to the Rongai Police station
4. PW2 Jonathan Kipkoech Siele who is the area Chief testified that on March 28, 2015, he was called by the assistant chief who informed him that the accused had killed his wife. He proceeded to the assistant chief house where he found the accused and on inquiry, the accused informed him that he kicked the deceased who fell and died.



5. PW3 Elizabeth Njoki Maina testified that on the night of March 28, 2015 she was informed by a neighbour that the deceased was being beaten by the accused and when she rushed to the deceased's house, she found the deceased dead. She called the assistant chief to inform him of the incident.
6. PW4 Margaret Gekue who is mother of the accused and neighbor to the accused testified that on the night of March 28, 2015, she went to the house of the accused and found the deceased lying down. She screamed, and neighbours went to the scene. She said the accused was not at the scene at the time. She said PW3 informed her that she had called the chief. PW5 Ephantus Mwangi the deceased's father testified that he attended postmortem examination. He said the deceased was hit on the head.
7. PW6 Cpl Sheila Kegode testified that on March 28, 2015, she was stationed at Rongai Police Station and at around 9.30 pm she received a call from report office personnel who informed her that the area chief and the assistant chief had brought in a murder suspect. She booked him in and proceeded to the scene of the crime with the OCS. She said on reaching the deceased's home, they found the deceased's body lying on the floor but they did not see any injuries on the body at the time.
8. PW7 Dr Anthony Wainaina produced postmortem report prepared by Dr Daniel Wainaina who performed postmortem on the body of the deceased Priscilla Wangui on March 31, 2015 at Nakuru County Public Mortuary. He attributed the cause of death to severe head injury caused by multiple blows on the head.
9. Upon closure of prosecution case, the accused was found to have a *prima facie* case to answer and he chose to adduced sworn statement on his defence.
10. The accused Simon Kipkurui Chirchir who testified as DW1 stated that on the March 28, 2015, he arrived home from work at around 7.00 pm and did not find his wife in the house. His wife later arrived in 30 minutes while drunk and when he enquired where their child was, the wife told him to go and look for the child. He said upon hearing the wife's response, he pushed her away and she fell on the poles arranged in the sitting room.
11. The accused further stated that the wife stood up and walked outside and while outside, she fell again. He said she woke her up and left her sleeping before he went to look for their 2-year-old child and while at the shamba, he heard screams. He stated that he was later informed by neighbours that he killed his wife and he decided to report the matter to the assistant chief.
12. On cross examination, the accused said he did not see any injury on the deceased but she fell on the back of the head when he pushed her.
13. At the close of hearing, the defence counsel Ms Cheruto chose to file written submissions while the prosecution relied on evidence on record.

Accused's Submissions

14. Counsel for the accused filed submissions dated February 7, 2022. She submitted that the prosecution failed to prove the charge of murder against the accused; that none of the prosecution witnesses witnessed the accused commit an unlawful act which caused the death of the deceased and prosecution therefore failed to prove the accused person committed an unlawful act that led to the death of the deceased.
15. The defence counsel submitted that the prosecution failed to establish any malice aforethought or mens rea on the accused person. She submitted that there were no injuries on the deceased body neither were weapons found at the murder scene. She cited the case of *Bonaya Tutu IPU & another v Republic*



[2015] eKLR where the court in reaching its decision referred to the case of *Chesakit v Uganda* CR App No 95 of 2004, where the Court of Appeal in Uganda stated as follows: -

“in determining a charge of murder whether malice aforethought has been proved, the court must put into account factors such as the part of the body injured, the types of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused.”

16. Defence counsel further submitted that the beating by accused was occasioned by the heat of the moment and there was no malice aforethought of killing the deceased.
17. She submitted that the yardstick used to arrest the accused was based on his own confession which was not in conformity with section 25 A (1) of the *Evidence Act* cap 80 and further, the confession relied on by the prosecution was not made before a judge and is therefore inadmissible before court. She urged this court to acquit the accused person as the prosecution failed to meet the threshold of proving the case beyond reasonable doubt.

Analysis And Determination

18. I have considered evidence presented by the prosecution as well as accused's defence and submissions filed. The issue for determination is whether the prosecution have proved the charge of murder beyond reasonable doubt.
19. For the offence of murder, there are three elements which the prosecution must prove beyond a reasonable doubt in order to secure a conviction. They are: -
 - a. The death and cause of the deceased
 - b. That the accused committed the unlawful act which was the cause of death of the deceased.
 - c. That the accused had the malice aforethought
20. PW7 a doctor confirmed that the deceased died as a result of the assault. He produced postmortem report with the opinion on the cause of death being severe head injury by multiple blows to the head - blunt trauma/objects. This proved that the injuries inflicted on deceased's body resulted in his death.
21. On the second ingredient, the scene of the crime is the house where the deceased and accused lived together as husband and wife. From evidence adduced, the incident occurred during the night and the accused had returned home from work and they only lived with the deceased together with the child.
22. On the third ingredient, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law, as was stated in the case of *Republic v Boniface Isawa Makiod* [2016] eKLR that referred to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”



23. The prosecution is required to prove malice aforethought existed in the mind of the accused. Malice aforethought is defined by section 206 of the [Penal Code](#): -
- “malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
- a. An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not
 - b. The 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.”
24. From the foregoing there is overwhelming evidence proving that the accused inflicted injuries on his wife who is the deceased herein, leading to her death. The circumstantial evidence clearly points at the accused as the perpetrator of the offence thus proving actus reus.
25. The accused said he pushed the deceased after the deceased responded to his question on where she had left their child. The two having been the only ones in the house and accused having admitted that he pushed her, there is no doubt that the push inflicted injuries on the deceased. However, the accused may not have thought the push and fall would end up resulting in fatal injuries. In my view the mense rea in the mind of the accused was not proved. There is no doubt actus reus was proved.
26. The prosecution in failed to prove beyond reasonable doubt that the accused had intention to cause death of the deceased; the ingredient of malice aforethought has been proved beyond reasonable doubt. The prosecution have however established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person.
27. Sections 179 of the [Criminal Procedure Code](#) provide as follows: -
- “ (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”
28. Section 207 of the [Penal Code](#) provide that killing under provocation might lead to a reduction of a murder charge to one of manslaughter. For the offence of manslaughter, the death must have been caused in the heat of the passion before there is time to cool; the provocation must be sudden, which must be caused by an unlawful act or insult and the provocation must cause the person provoked to assault the person by whom then act or insult was done.
29. PW4 who was the mother of the accused person and a neighbour indicated to the court she had not witnessed any altercations between the accused and the deceased before the fateful day. The accused



herein testified that they lived with the deceased in harmony and without any fights for a period of 4 years.

30. From the foregoing, I find that the prosecution have proved beyond any reasonable doubt a charge of manslaughter contrary to section 202 as read together with section 205 of the Penal Code against the accused person and the accused is convicted accordingly under section 215 of the Penal Code.

Final Orders

31. The charge against the accused is reduced from murder to manslaughter under section 202 as read together section 205 of the Penal Code.
32. Accused is convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU THIS 26TH DAY OF MAY, 2022.



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RACHEL NGETICH
JUDGE

In the presence of:

Kemboi - Court Assistant

Accused - present

Rita for State

