



**Republic v Gachau (Criminal Case 17 of 2015)
[2022] KEHC 12128 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE 17 OF 2015
FN MUCHEMI, J
AUGUST 18, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER IHUHU GACHAU ACCUSED

JUDGMENT

1. The accused faces a charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge are that on 17th August 2015 at King'ong'o GK Prisons within Nyeri County, he murdered Shem Mugendi alias Jeremiah.
2. This case was heard by Matheka J who placed the accused on his defence on 19th December 2019. The case was taken over by Ngaah J who did not hear any witness for he was transferred out of the station. I took over this case from the honorable Judge and heard the defence case after taking directions under Section 200(3) of the [Criminal Procedure Code](#).
3. The accused was represented by Mr. Ombongi throughout the trial whereas Ms. Magoma was the prosecuting counsel up to the close of the prosecution case. The case was taken over by Mr. Ondimu and finally by Ms. Mwaniki both of whom are prosecution counsels.
4. The prosecution called a total of nine (9) witnesses in this case. The postmortem was conducted by Dr. Obiero Okoth on 19/8/2015 who gave his opinion as to the cause of death as multiple head injuries caused by blunt and sharp trauma as well as manual strangulation.
5. The evidence of the Prison warders at GK Prison Nyeri where the offence was allegedly committed was that some of the officers were on duty on the material night of 17th August and 18th 2015. They were PW2, PW3, PW6 and served different shifts. A commotion was heard in cell no. 7 at around 4.00am which prompted PW2, one P.C Aden and PW6 to go there. On arrival, they noticed that the prisoners therein looked very worried. One of the prisoners came forward holding a hammer and said that he had



finished the deceased but had no problem with the officers who had come to the cell. The body of the deceased who was one of the prisoners in cell No. 7 lay on the top decker bed with his hands handcuffed and blood oozing from the head. The accused was identified as the person holding a hammer and said in Kiswahili “Nimemumaliza” (I have finished him).

6. The accused was immediately handcuffed and the matter reported to the Prison authorities. PW8 the investigating officer and his team visited the scene. The body of the deceased was still in cell 7 on the upper bed of the double decker covered with a blanket. PW8 seized the hammer suspected to be the murder weapon as an exhibit which together with other exhibits were later forwarded to the government chemist for analysis. The accused was taken for mental assessment and found fit to plead by Dr. Mendwa PW4 on 18th September 2015. The body of the deceased was taken to Embu level 5 hospital where Dr. Obiero conducted the postmortem.
7. The accused in his sworn statement of defence denied the offence. He told the court that he was a prisoner housed in Barracks B cell No. 7. He further testified that around 6.30pm on July 17, 2015, one IP Martim, a prison warder presiding over the parade found the deceased talking on phone which is not allowed in prison. The parade took place in cell 7. IP Martim then left the cell and came back with other officers namely SP Muindi and Sergeant Kariuki. IP Martim demanded that the deceased hands over the phone to him. When the deceased denied that he was in possession of any phone, he was handcuffed and taken to the security office by the officers. The deceased at the time was in good health but when he was returned to the cell, he had been assaulted and was complaining that he had been killed for nothing. The deceased had a fresh injury on the head was placed on his bed on the upper decker. The accused further said that the deceased complained to IP Martin that they had returned a sick and injured man to the cell. The officer ordered that the accused be handcuffed and taken to the punishment cell. The following morning, the accused said that he was arrested as a murder suspect and was later charged with the offence.
8. The accused called one witness (DW1) a fellow prisoner who said he was with him in Block B cell 7 at the material time. DW1 supported the accused in that the deceased was taken by three prison wardens from the cell for refusing to surrender a mobile phone. DW2 further testified that he woke up in the morning, he found the deceased on his bed and thought that the prison wardens had brought him back. He later learnt that the deceased had died of head injuries.
9. DW3 said he had been brought from Naivasha maximum prison where he was serving sentence to testify in favour of the accused but had since changed his mind and was not willing to testify. On cross-examination by the defence counsel Mr. Ombongi the witness said a statement he had earlier recorded could be used by the court though he had declined to answer any questions on his statement.
10. The defence relied on their submissions for no case to answer filed on 28th March 2019 was submitted before Matheka J put the accused on his defence. It was submitted that the evidence of PW9 the Government analyst that matched the blood on the hammer with that of deceased was not reliable since the samples were received three months after the date of the offence. Further that the murder weapon was not dusted for finger prints by the investigating officer. The defence relies on Section 48 of the *Evidence Act* and on the case of *Mutonyi Vs Republic*[1982]KLR 203 and that of *Daries Vs Edinburgh Magistrates*[1993]. The defence argued that the expert witness PW9 did not give the background facts on how the exhibits were handed over to him.
11. It is trite law that the burden of proof lies on the prosecution and must be beyond any reasonable doubt. The burden does not at any one time shift to the accused in a case of this nature. The prosecution must prove the following:-
 - a) That the deceased died and that it was due to the unlawful act of the accused.



- b) That the accused unlawful act was actuated by malice aforethought.
12. In this case, the prosecution's evidence is purely circumstantial in that there was no eye witness to the incident.
13. Circumstantial evidence must be examined in light of the principles set out by the Court of Appeal in *Sawe vs Republic* [2003] KLR 364 where the court held:-
- “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 hypothesis than that of guilt. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other 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.”
14. Similarly in the case of *Sylvester Mwacharo Mwakeduo & Another v Republic* [2019] eKLR:-
- “Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of *Judith Achieng' Ochieng' vs Republic*, Criminal Appeal 128 of 2006, this Court stated the law as follows:-
- It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-
- a) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
- b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- 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 and none else;
- d) In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt.”
15. The postmortem showed the cause of death to be multiple head injuries which were as a result of blunt and sharp trauma as well as manual strangulation. This report by Dr. Obiero confirms the death of the deceased.
16. The evidence of the officers who were on duty that night PW2 PW3 and PW6 was that they were attracted by a commotion from Block B cell 7 and proceeded there. Sergeant Kariuki who was the duty sleep-in officer on duty came with IP Martim and SP Muindi. The cell was opened by the officer who



- said that the prisoners looked worried and that the accused came forth holding a hammer. He said he had killed the deceased who was his colleague in Cell No. 7. The officers raised alarm by blowing whistles. The prison doctor accompanied other officers went to the cell and certified the deceased dead.
17. The accused was arrested and handcuffed after voluntarily surrendered to the officers saying that he had finished the deceased. He was then taken away by the officers from the cell. If the accused did not surrender to the officers, they would not have arrested him but waited for the investigating officer from the officer of Director of Criminal Investigation to come and commence his investigations. PW2 said that the cell had 94 prisoners and only a few of them using double-decker beds because majority slept on mattresses on the floor. The issue here is why the officers arrested the accused person leaving the other 93 prisoners in the cell. The answer lies on the fact that the accused surrendered to the officers, he was holding the murder weapon and said he was responsible of the death of the deceased.
 18. The accused's defence was that the officers came for the deceased because he had been seen in possession of a mobile phone in the cell which was contrary to the Prison rules. The accused named three officers as the ones who came to the cell after whistles were blown by PW2 and two others. This defence was in my view not credible in that the six prison officers who went to the scene had no reason to lie to the court on the incident. Three went first and three others followed. Further, the version of the defence was only partly supported by his witness DW2. This witness gave the date of the incident as May 15, 2015 while the correct date was the night of 17th and 18th May 2015. DW2 did not even know the name of the accused. In cross-examination, he said he knew accused only as "alias Muga" neither did he know the name of the deceased. Contrary to his evidence in chief, DW2 said in cross-examination that he was asleep and did not see the deceased being brought back to the cell by the 3 prison warders with injuries on the head as was alleged by the accused. In this regard, DW2 did not collaborate the accused's evidence that the deceased was taken away by the prison wardens in good health and brought back to the cell with injuries on the head. In my view, the defence of the accused was designed to exonerate him but did not pass the credibility test. In other words, this court did not believe the defence of the accused.
 19. The accused denied having been in possession of the blood stained hammer in the cell in the material night. During cross-examination of the prison warders, the defence attempted to demonstrate that it was impossible for a prisoner to sneak in a hammer or such a weapon into the cells. In his defence, the accused said he was undergoing a carpentry course at the prison but denied having carried a hammer from the workshop to the cell on the material day.
 20. However, the evidence of PW2, PW3 and PW6 who saw the accused holding a hammer in the cell was credible and reliable and well corroborated. Each witness described with clarity the chain of events in the material night. The defence did not allege that any of the three(3) witnesses and the other three officers who came following them after the alarm was raised had any grudge against the accused to justify giving false testimony against him. The overwhelming evidence of PW2, PW3 and PW6 was not shaken by the defence in my view.
 21. I am aware of the provisions of Section 25A of the *Evidence Act* that a confession is not admissible and shall not be used in evidence against an accused unless it is recorded in writing by a magistrate or by a police officer who is not the investigating officer. However, it is noted that no confession was recorded from the accused. The evidence before this court is that of PW2, PW3 and PW6 of how the accused was found in possession of the murder weapon and how he surrendered himself to the witnesses.
 22. The defence argued that the evidence of PW9 was not of any probative value because he failed to testify on the background facts regarding receipt of the exhibits and that the hammer was not dusted for finger prints. PW8 was handed over the hammer by the prison officers following surrender to them earlier by the accused. The evidence of PW2, PW3 and PW6 was well corroborated in that the accused was



found with the murder weapon which was blood stained immediately after the deceased was struck dead. PW9 found the blood on the hammer matching with that of the deceased. PW8 testified that he prepared and signed the exhibit memo that was used to forward the exhibits to the Government Analyst. In my considered view, the information in the exhibit memo dated May 20, 2015 and the expert evidence of PW9 does not leave any gap in the recovery, processing and forwarding of the exhibit to the Government Analyst.

23. This court takes judicial notice of the fact that the government chemist receives exhibits for analysis but does not conduct the analysis immediately due to shortage of personnel and inadequate facilities including accessories. During the intervening period after receipt, the exhibits are preserved in a manner that they remain in the same chemistry as they were during receipt. The Exhibit memo shows that the date the hammer and the blood sample of the deceased were forwarded was on May 20, 2015 which was only three (3) days after commission of the offence. I also take judicial notice that blood samples are extracted by the doctor as post-mortem is conducted and preserved in the right temperatures until the investigating officer picks them to forward to the government chemist. The official stamp by the government chemist of October 5, 2015 does not mean that the blood sample was forwarded late or was spoilt. Wherever it was kept before the analysis was conducted, I am of the view that it was properly preserved. I am not convinced by the defence that the exhibits were spoilt by the time they reached the Analyst. If the blood sample was useless, the government Analyst would not have used it.
24. The evidence of PW2, PW3 and PW6 was sufficient to identify the accused person as the person they found holding the blood hammer immediately after deceased was fatally wounded. The officers knew the accused as a prisoner serving sentence in GK Prison Nyeri. The particulars of the accused were well documented in the said prison. There was therefore no possibility of mistaken identity.
25. The evidence on record has in my considered view established the following culpable facts:-
 - i. That the accused surrendered to the prison warders before they even talked to any of the prisoners in Cell No. 7.
 - ii. That before the accused surrendered as the suspect, he consistently repeated that he had “finished” the deceased.
 - iii. That the lifeless body of the deceased lay on the bed as the accused held the murder weapon and uttered the words that he had finished him.
 - iv. That the blood on the hammer matched that of the deceased.
26. In my considered view, the said circumstance cumulatively form a complete chain that points the guilty to no other person but the accused.
27. It is my finding that the prosecution have established that the unlawful act of the accused caused the death of the deceased and as such he is responsible of the said death.
28. The prosecution have a duty to prove that in executing the unlawful act, the accused was possessed of malice aforethought . Section 206 of the *Penal Code* sets out the tenets of malice aforethought. The issue is whether the accused formed the necessary intention to kill the deceased. There was no evidence of motive or quarrel that was established with certainty.
29. However , the evidence of the doctor as exhibited in the postmortem form, shows that the deceased suffered very intensive injuries on the head and had been manually strangled. The intensity of the



injuries is a factor to be considered in determining whether the accused had malice aforethought. This is covered in Section 206 of the Penal Code:-

- b, “An intention to cause grievous harm to another
- c, Knowledge that the act or omission causing death will probably cause death or grievous harm to someone.....”

30. The accused inflicted very severe injuries on the deceased which can only be assessed as grievous harm. He used a hammer to hit the deceased several times on the head and manually strangled him while the poor man was in handcuffs and could not defend himself. The infliction of the severe fatal injuries is evidence of intention to cause grievous harm to the deceased.
31. It was held in the case of *Republic v Ndalamia & 2 others* KLR [2003] 638 that:- “for the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm...”
32. The accused in this case as explained in the foregoing analysis had knowledge that his unlawful act would cause death or grievous harm to the victim. Coupled with the severity of injuries inflicted, it is my considered view that the accused had the intention to murder the deceased as described in Section 206 (b) and (c).
33. It is my finding that the prosecution have established the existence of malice aforethought on part of the accused.
34. Consequently, I find the accused person guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.
35. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 18TH DAY OF AUGUST, 2022.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 18TH DAY OF AUGUST, 2022

