



REPUBLIC OF KENYA



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**Republic v Mbugi (Criminal Case 2 of 2018)
[2022] KEHC 12216 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE 2 OF 2018
FN MUCHEMI, J
AUGUST 18, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

EUSTACE GITONGA MBUGI ACCUSED

JUDGMENT

1. The accused faces a charge of murder contrary to Section 203 of the *Penal Code* as read with Section 204. The particulars of the charge are that on the night of 9th and 10th May 2017 at King'ong'o area within King'ong'o Sub location, Mukaro location in Nyeri Central Sub-County within Nyeri County, he murdered Duncan Muchui Gitemba.
2. The prosecution called a total of ten (10) witnesses in support of its case. Upon the prosecution closing its case, the accused was placed on his defence.
3. Precisely the evidence of the prosecution is that the accused, his girlfriend, PW1 and the deceased spent the evening together on the evening of 9th May 2017. The accused had come from Ruiru to visit the deceased who is his brother in law. He was working as prison warden in Nyeri GK Prison. The two went out of the prison compound where they enjoyed drinks together and later went to the Prison Officers' Mess before going to the house of the deceased at prison quarters. The arrangement was that the three were to spend the night in the house of the deceased.
4. Due to some disagreement between the accused and the deceased over the presence of PW1 in their company, the three left the house and went outside the gate of the prison. After a while the deceased walked towards Kiganjo Police Training College along the Nyeri/Kiganjo road. The accused followed him while PW1 was left behind. The officers who were manning the gate and others inside the prison quarters saw the accused go back to the house of the deceased at around 6.00am accompanied by PW1.



- He picked his bag after breaking into the house and both left the prison compound. He and PW1 went to the main road outside the prison gate. PW1 later took a taxi later and went away.
5. PW1 was sleeping in her house when the accused called her at around 4.00am saying he was in distress. PW1 called a driver of a matatu who took him to PW1's house where he showered and slept. The following morning the lifeless body of the deceased was found outside the gate of the Catholic church along the Nyeri/Kiganjo road.
 6. The accused was then arrested as a suspect in the deceased's murder. He underwent mental assessment and was found fit to plead by PW9. The post-mortem report of Dr. Muthuri was produced by PW6 Dr. Muriuki. It showed that the deceased died of a penetrating chest injury due to sharp force trauma. He also suffered another injury on the left arm.
 7. In defence the accused denied the offence. He told the court that he works with General Service Unit, Recce Company in Ruiru. He gave a sworn statement and said that the deceased was his brother-in-law by virtue of being a brother to his wife. He testified that on May 8, 2017 he visited the deceased at his work place in Nyeri G.K Prison and found him on night shift. On 9/05/2017 in the morning the two men had breakfast together in the house of the deceased.
 8. At around 9.00am the pair left for the Prison Officers' Mess where they took some drinks before going to New Maroon Club at King'ong'o shopping centre for a similar mission. The accused said that the club is normally patronised by Prison warders. Later on the two went for lunch at the house of PW1 at Tetu and at around 4.00pm they went drinking at Viceroy Bar in Nyeri town where PW1 joined them. Around midnight the three went to the house of the deceased at the prison quarters. It was later that the accused and deceased disagreed on sleeping at deceased's house due to the presence of PW1. They all left the house and deceased and accused went out of the prison compound joining the Kiganjo-Nyeri road. The accused said the deceased and himself parted ways. the accused said he later went to PW1's house to sleep after the eventful night.
 9. The accused further stated that he was informed by his wife in the morning of 10/05/2017 that the deceased had been found dead near Mt. Kenya Bottlers Limited. He was later arrested and charged with the offence.
 10. At the close of the defence case, the counsel for the accused in his submissions contended that none of the prosecution witnesses witnessed the alleged incident and this means that the prosecution presented to the court only circumstantial evidence which could not sustain a conviction but only pointed out that the accused was the last person seen with the deceased. As such, the prosecution failed to satisfy the burden of proof in criminal cases as required by law.
 11. The defence relied on the case of *Republic Vs Tony Kipchumba* [2012] eKLR where the court set out the principles applicable as the court deals with circumstantial evidence.
 12. In this case the prosecution bears the burden of proof and are required to prove the following beyond reasonable doubt:-
 - a. That the deceased died, and that the accused unlawfully caused his death.
 - b. That the unlawful act of the accused was premeditated that it, the accused had malice aforethought.
 13. The prosecution through Dr. Muriuki PW6 produced the post-mortem report of Dr. Muthuri which stated that the deceased had stab injuries on the upper arm and a penetrating injury on the chest. The cause of death was the injury on the chest. This medical evidence is sufficient to prove the death of the deceased and its cause.



14. Regarding proof of the alleged unlawful act, the prosecution relied on circumstantial evidence of the witnesses who had seen the deceased and the accused together on the material night of 9th and 10th May 2017. It suffices to say that none of the witnesses was present when the deceased was injured.

15. 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.”

16. 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’ v 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.”

17. The evidence of PW1 was that on the material night, the accused, the deceased and herself went to the house of the deceased wanting to sleep there but when they got to the house, there was a disagreement between the accused and the deceased owing to the fact that she, PW1 was present causing them to part ways. Later, the accused and deceased went back to the deceased’s house to pick his bag containing his clothes. The witness said that the accused’s clothes were muddy when she found him on the road. The house was locked from the outside which led the accused to break into the house to gain access. The accused went to her house later and slept.



18. PW4 was on duty at the main gate on the material night. He said he saw the accused and the deceased between 2.00 and 3.00am quarrelling near the gate and that they appeared drunk. PW4 knew the deceased who was his colleague but did not know the accused. He told them to leave the compound which instruction they adhered to. The two walked towards the main road as PW1 followed them but PW4 refused her to leave the prison compound. She later called a taxi driver who picked her at the gate. At the time the accused person came for his bag from the deceased's house, PW4 said that his clothes were muddy like he had fallen somewhere.
19. PW7 was on duty at the main gate and he corroborated the evidence of PW4 in material particulars mostly in relation to the movements of the deceased and the accused from the gate to the house of deceased and out again. He also testified that PW1 followed the two men claiming that she was with them. She was refused exit by the security personnel until she called a taxi driver to pick her from the gate.
20. The investigating officer DCI Nyeri testified as PW8 to the effect that he received a report that there was a body of a male that was found about 400 metres from the gate of Nyeri G.K prison near the Mt. Kenya Bottlers gate along Kiganjo/Nyeri road. He went to the scene with other officers from his office and found the body which had injuries on the chest and left hand. He gathered evidence on the movements of the deceased and the accused. Further he said he did not get direct evidence on the offence of murder and therefore recommended that an inquest be held.
21. 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.

22. The Nigerian Case *Achie v State* (1993) in the Nigerian case of *Ismeni v State* (2011) Kuktan JSC said of the doctrine:-

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.

23. In *R v E.C.K Lessit J* in analysis of the doctrine of the last seen with the deceased alive stated:-

Regarding the doctrine of the last seen with the deceased. I will quote from Nigeria court case *Moses Jua v the State* (2007) (PELR 0 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/her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.

24. In the case of *Republic v Elizabeth Anyango Ojwang* [2018] eKLR the court considered the case of *Anajn Kumar Saruma v State of Assam*, Criminal Appeal No. 560 of 2014 and stated as follows:-

The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence...There must be something more establishing connectivity between the accused and the crime...It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

25. Upon analysis of the evidence on record, I am of the view that the key witnesses herein are PW4, PW5 and PW7 who actually interacted with the deceased, the accused and PW1 in the material night. The evidence of PW4 and PW7 who were on night shift at the road gate from 1.00-6.00am was that the accused and the deceased came to the gate quarrelling. When the guards told them to move away, from there, the two men went outside the gate and started walking towards Maron Bar/Coca cola side along Nyeri/Kiganjo road. The accused was to be seen passing near the prison gate alone later and passed on the main road. At that time waiting for accused and the deceased at the gate having been refused to get out of the gate unless she obtained means to use to go home.
26. As the accused was passing by the gate on the main road, PW1 identified him then PW4 called him out loud to come to where PW1 was but he did not respond. This prompted PW1 to call for a taxi to follow the accused who was walking towards Nyeri town. She promised to come back to the gate if she failed to find him and to go to her house with him if he was found. PW4 said PW1 did not return to the gate until 6.00am when she came with the accused after alighting from a matatu. The accused asked to be allowed to go to the house of the deceased to pick his bag because he was travelling the following day.
27. On his way back from the deceased's house, the accused was asked by PW4 and PW7 where deceased was. He replied that he had left him sleeping in his house. This was proved untrue by the evidence of PW5 a neighbour of the deceased who testified that the accused went to his house at around 6.00am and asked him whether he had the key to the house of the deceased. When PW5 replied in the negative, the accused went to the house of the deceased and forced the door open. This is how the accused accessed the house and picked his bag.
28. PW4 and PW7 said that they asked the accused again where he had left the deceased and he replied that he had left him sleeping in his house. This was untrue as the body of the deceased was found 400 metres from the prison gate around the same time that morning. In his defence the accused did not say he left the deceased sleeping in his house. He said that the deceased walked on the opposite side of the road after they left the prison gate but they shortly after parted ways. In other words, he did not know where the deceased went or what happened to him.
29. The accused also said that he was given the key to deceased's house to pick his bag by a neighbour who was a prison warden but PW5 the neighbour of deceased had said he told the accused that he did not have the key to deceased's house. PW1 the girlfriend of the accused confirmed that the accused and herself found the house of the deceased locked from outside with a padlock and that accused broke



- into the house. This evidence corroborates that of PW5 that he did not give the accused his own key and that he heard the accused forcing the door open. The accused in his defence tried to explain that the key he was given could not open the door and thus he forced it open.
30. The evidence of PW1, PW4, PW5 and PW7 was to the effect that the accused and the deceased were quarrelling as they approached the gate. PW1 testified that the two men had disagreed over spending the night in the house of the deceased whereas the accused was opposed to the idea. The accused in his defence confirmed he had disagreed with the deceased on the very reason PW1 gave. From the evidence of the three witnesses which is confirmed by the defence, the accused and the deceased were not in harmony with each other as they left the prison gate and walked to the road going towards Kiganjo. There is a great probability that this disagreement progressed into a quarrel and eventually into a violent confrontation whereas the two men fought at the scene with the deceased being subdued.
 31. The evidence of PW1, PW4, PW5 and PW7 was that when the accused returned to the gate, his clothes were wet and muddy. This leads to the conclusion that during the fight or violent confrontation between the two men, the accused fell down and his clothes became muddy. In his defence, the accused did not explain or defend the said occurrence.
 32. PW8 testified that the deceased's body was found lying beside the same road the accused the deceased walked along around 3.00-4.00 am the same morning. This was at the gate of Mt Kenya bottlers Limited also known as Coca-Cola which is the direction PW4 and PW7 on duty at the gate described was walked by the deceased and the accused before they lost sight of them. It was about two hours later that the accused came for his bag from the house of the deceased and lied to PW4 and PW7 the guards at the main gate that he had left the deceased sleeping in the house.
 33. Dr. Muthuri (PW6) of Nyeri Provincial Hospital certified the cause of death as the penetrating chest injury caused by sharp force trauma.
 34. It is my considered view, the prosecution have firmly established the circumstances from which the inference of guilty can be pointing the guilty to no other person than the accused. The circumstances described herein cumulatively form a complete chain of events that the accused was the only person apart from PW1 who actively interacted with the deceased up to the point and place of his death that was only 400 metres from the prison gate. These inculpatory facts lead to the conclusion that the accused caused the unlawful act that ended the life of the deceased herein.
 35. I hereby find that it has been proved that the accused was responsible for the unlawful act that caused the death of the deceased.
 36. As regards malice aforethought, it is not in doubt from the evidence of the prosecution and the defence that the deceased and the accused spent the day together enjoying drinks in about three clubs from 10.0am on 9th May 2017 about twenty (20) hours. This journey of friendly interaction of the two relatives started at 10.00am but ended tragically at around 4.00am on 10th May 2017. The tragic end was as a result of a quarrel between the two men that was triggered by the presence of PW1 in the company of the two men.
 37. Having spent the whole day and the better part of the night drinking alcohol, there is a great probability that the alcohol may have contributed to occurrence of uncontrolled emotions. It is noted that the injury inflicted on the deceased are very severe and seemed to have caused his death almost immediately. However, the influence of the drink had its part to play in the judgment of the accused and the deceased in my view.



38. The prosecution did not adduce any evidence to demonstrate that the killing of the deceased was premeditated. Coupled with the foregoing observations of this court based squarely on the evidence, it is my considered view that malice aforethought has not been established.
39. Consequently, it is my finding that the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) has not been proved. The accused is hereby convicted with the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#).
40. It is hereby so ordered.

DELIVERED, 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.

