



**Republic v Serem (Criminal Case 68 of 2017)  
[2022] KEHC 14368 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14368 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE 68 OF 2017  
WK KORIR, J  
OCTOBER 27, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**LEONARD KIPROP SEREM ..... ACCUSED**

**JUDGMENT**

1. The accused, Leonard Kiprop Serem, faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on 5<sup>th</sup> April, 2015 at Solian Trading Centre in Koibatek Sub-County within Baringo County the accused murdered one Benson Muchiri.
2. The accused pleaded not guilty to the charge and the prosecution called six witnesses in a bid to prove his guilt. John Kipkoech, a retired Assistant Chief, testified as PW1. He stated that he knew the deceased prior to the incident but did not know the accused prior to the incident. He further stated that on 5<sup>th</sup> April, 2015 at about 8.00pm he was in his office when he received a call from Benson Kiplagat, a butchery operator within Solian Centre. He went and met the caller who informed him that one Benson Muchiri had been stabbed at Koibatek bar.
3. PW1 proceeded to the scene of crime where he found a large number of people who informed him that the victim had been taken to Mercy Hospital at Eldama Ravine town. When he interrogated the bar man, he was informed that Kipsang, Kiprop and another person were the ones who stabbed the victim. The members of the public then arrested Kemboi, Kiprop (the accused herein), Kipsang and a fourth person. They were handed over to the police officers. The Officer Commanding Station (OCS) asked the accused about the knife he had used to stab the victim after the sheath for the knife was found inside his sock. The accused told them that he had thrown the knife away. The members of the public searched for the knife and recovered it from the farm of one Barwecho. The witness identified the knife and its red sheath in Court. He stated that the knife had blood.



PW1 testified that they later received information that the victim had passed away.

4. Upon cross-examination, PW1 testified that the knife sheath was found in the left sock. The witness testified that the sheath had been recovered by the members of the public by the time the accused was taken to the Police Station. He also testified that one Kiptui is the one who recovered the knife and handed it over to the OCS. The witness reiterated that the knife had blood which had dried. PW1 stated that none of the suspects were assaulted by members of the public.
5. PW2 Sammy Kimaiyo testified that on 5<sup>th</sup> April, 2015 at about 8.15pm he received a call from one Hamisi Abubakar requesting him to go and take Muchiri to hospital as he had been stabbed. The witness stated that he knew the deceased who was his neighbour. He drove to the scene at Koibatek bar where he found the deceased lying on the floor near the door of the bar. With the assistance of those present, he put the victim in his vehicle and took him to Mercy Hospital in Eldama Ravine. When the deceased was being examined by the doctor, he noticed that the deceased had been stabbed on the upper part of the stomach. The doctor informed them that the deceased had already died. Together with Njenga the brother of the deceased, they proceeded to Eldama Ravine Police Station where they reported the incident.
6. On cross examination, PW2 testified that he did not see the person who stabbed the deceased and neither did he know the accused.
7. Josephat Kipsang Rotich testified as PW3 and recounted the statement he made to the police under inquiry. He stated that he worked as a herder for one Moses Chemilwo and later recruited the accused to work with him. On 5<sup>th</sup> April, 2015 at about 6.30pm he was in the company of the accused and one Aron Toroitich when they went to Koibatek bar at Solian Centre where they started taking alcohol. As they drank, one Kemboi came with a friend called Muchiri who is the deceased. They drank together and while at it, he noted that Kemboi was wearing a cap which resembled the one he had lost the previous day. He questioned Kemboi about the cap and Kemboi insisted that the cap was his.  
  
At about 8.30pm, he left alongside Toroitich. The accused remained behind in the bar with Kemboi and Muchiri. PW3 stated that while they were still at the shopping centre, they saw the accused run past them. Shortly thereafter, he saw a group of motorcycle riders who came and informed him that they had killed somebody. He denied killing anybody. He was arrested and taken to the shopping centre. Aron Toroitich and the accused were later taken to where he was at the shopping centre. The two had been beaten by members of the public. The people started searching them and recovered the sheath of a knife from the sock of the accused. The witness identified the sheath in Court. Police officers later arrived and took them to Eldama Ravine Police Station from where they were taken to hospital for treatment. The accused was admitted in hospital for two days.
8. Upon cross-examination, PW3 testified that they were beaten by members of the public in order to disclose who had stabbed the deceased. He stated that he was detained in custody for 14 days although he had recorded his statement under inquiry in the first week of the detention. He also stated that he was not forced to record the statement by the police.
9. PW3 further stated that at the bar he had taken about 500ml of a spirit known as “sting” and was therefore a little drunk. He also stated that the accused had taken a similar quantity of the drink while they were together. He denied seeing the deceased argue with anyone at the bar. He also stated that there was light at the place where they had been detained by the public and that he had regained soberness after being beaten by the mob. PW3 testified that the deceased and Kemboi were at the bar when they arrived.



10. PW4 Patrick Njau testified the deceased was his brother. He stated that on 6<sup>th</sup> April, 2015 he identified the body of the deceased at Mercy Hospital Eldama Ravine for the purpose of postmortem. His evidence was that he witnessed the postmortem and the doctor informed him that there was a stab wound through the diaphragm of the heart.
11. On cross-examination PW4 stated that he saw the knife that was used to stab the deceased but he could not recall whether he saw it at the police station or at the hospital.
12. Chief Inspector of Police Joseph Ouma testified as PW5. He told the Court that at the time of the incident he worked as the DCIO at Koibatek. His testimony was that upon receipt of the information of the demise of the deceased he proceeded to scene of crime at Solian Centre where he interviewed witnesses. He learned that three suspects were in custody. A blood stained knife and its casing were also handed over to him by the administration police officers who had arrested the suspect. The knife and the sheath were produced as exhibits. He forwarded the knife alongside blood samples from the deceased for analysis and he later received a report that the blood on the knife matched the deceased's blood sample.
13. PW5 further testified that his investigations revealed that the deceased and the accused were in the bar when a disagreement arose between Kipsang and Kipkemoi over a cap.  

The accused, Aron and Josephat tried to take Kipkemoi but the deceased restrained Kipkemoi from leaving the bar. Josephat and Aron left the accused. It was then that the accused stabbed the deceased as he was leaving the bar. PW5 testified that when he questioned the witnesses there was a story, which he failed to corroborate for lack of evidence at the scene, that the deceased had attacked the accused with a broken beer bottle.
14. When cross-examined by counsel for the accused, PW5 testified that he did not carry out any analysis of the blood he saw on the ground at the scene. He also stated that he did not prepare an inventory of recovered items and neither did he find any eyewitness to the stabbing. PW5 stated that Kemboi informed him that the deceased was stabbed but he was the intended target. According to PW5, the motive of the killing was the dispute with Kemboi over a cap.
15. Dr Isaa Ochola testified as PW6 and presented a postmortem report prepared by his colleague Dr Odhiambo. He stated that there were stab wounds on the stomach of the deceased which reached the heart and the liver. His colleague concluded that the cause of death was massive bleeding from the heart and liver.  

The witness produced the postmortem report as an exhibit. Upon cross-examination, the witness stated that the police had indicated that the assailant was "unknown" but this had been changed to "known" without any countersigning.
16. Placed on his defence, the accused gave unsworn testimony as DW1 and did not call any witness. He stated that on 5<sup>th</sup> April, 2015 at about 8.30pm while drinking with Kipsang and Haron at Solian Centre, a quarrel ensued between his drinking mates and others. They started throwing bottles at each other and he left the bar. After going for about 100 meters he heard people running after him. He was arrested, beaten up and returned to the bar. His drinking mates were also arrested and taken with him to the police station from where he was taken to hospital and admitted until 14<sup>th</sup> April, 2015. Upon discharge from the hospital he was taken back to the police cells. Kipsang and Haron were released and he was brought to Court and charged for murdering the deceased.
17. The prosecution filed submissions dated 10<sup>th</sup> May, 2022 and submitted that the case against the accused person had proved to the required standards. According to the prosecution, all the elements of the



charge of murder namely malice aforethought, the death of the deceased and the link of the death to the accused had been proved. The prosecution relied on the Court of Appeal case of Jacob Njuki Warui alias Wamwea Warui v Republic, Criminal Appeal No. 112 of 2002 in support of their submission that the ingredients of the offence of murder have been proved against the accused.

18. The defence filed submissions dated 23<sup>rd</sup> May, 2022. The defence submitted that the prosecution did not establish the ingredients of the charge of murder. The defence argued that none of the six prosecution witnesses gave evidence to establish the motive as to why the accused wanted to kill the deceased. In that regard, the defence relied on the case of Republic v Ismail Hussein Ibrahim [2018] eKLR in urging the Court to find that prosecution did not establish all the ingredients of murder against the accused. It was submitted that nobody saw the accused stab the deceased and there was therefore no link between the accused and the death of the deceased.
19. The defence also contended that the prosecution had not linked the accused to the alleged murder weapon. Reference was made to the case of Pius Arap Maina v Republic [2013] eKLR to submit that the Court should construe this gap in favour of the defence and find that the accused did not own the murder weapon nor did he kill the deceased.
20. It is the defence's case that the prosecution failed to call crucial witnesses thereby relying on hearsay statements which negatively impacted on the prosecution's case. Specifically, the defence argued that the prosecution ought to have called Kemboi, Benson (the butchery attendant) and the bar man who were key witnesses in the case. Counsel urged this Court to adopt the view taken in Peter Nyamu Mutithi v Republic [2021] eKLR and find that the failure to call key witnesses is fatal to the prosecution's case.
21. The defence further submitted that the evidence adduced by PW1, PW3 and PW5 was contradictory hence fatal to the prosecution case.
22. As for the report of the government analyst, the defence counsel argued that the same is misleading and should not be relied upon to link the accused to the offence. It was submitted that the DNA test result for the sheath of the knife was not produced and the sheath cannot therefore be said to have belonged to the accused.
23. Lastly, the defence submitted that the prosecution had not discharged its burden of proof against the accused. This Court was therefore urged to dismiss the prosecution case and acquit the accused.
24. From the evidence on record and the submissions of the parties, the only question for the determination of this Court is whether the prosecution has established the charge of murder and linked it to the accused.
25. The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. For a charge of murder to result in a conviction, the prosecution ought to prove that the accused person caused the death of the deceased and that in doing so he or she had malice aforethought. This statement finds support in the decision of Roba Galma Wario v Republic [2015] eKLR where the Court of Appeal held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
26. From the evidence on record, it is not disputed that the deceased met his death in a manner not authorized by the law. He died of stab wounds inflicted on him by another human being. The



prosecution, however, did not call any witness who saw the accused stab the deceased. In the absence of direct evidence from the prosecution witnesses, this Court is faced with circumstantial evidence which it must assess to ascertain whether the accused is indeed guilty of the offence. In doing so, this Court will be guided by the Court of Appeal dictum in *Joan Chebichi Sawe v Republic* [2003] eKLR that:

“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 his guilt. There must be no 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.”

27. The legal principles applicable to circumstantial evidence were also stated by the Court of Appeal in *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) as cited by the same Court in *Chiragu & another v Republic* [2021] KECA 342 (KLR) thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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.”

28. As to whether the accused had malice aforethought, I will be guided by the statement of the Court of Appeal in the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of //Chesakit v. Uganda, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

29. Although PW3 was initially arrested and treated as a suspect, his evidence ties up with that of PW1 to the effect that at the time of the arrest of the deceased he was found with the sheath of a knife inside his sock. On being asked where the knife was, he stated that he had thrown it away. Members of the public carried out a search and found the knife inside a farm. Upon analysis, the blood on the knife matched that of the deceased. The knife was found not far from the scene of crime and the only reasonable conclusion is that the knife is the weapon that was used to stab the deceased. The knife was tied to the accused by the fact that he was the one who had its sheath. Although the prosecution failed to secure the witnesses who could have seen the accused stab the deceased, the fact that the knife that was used to stab him was in the possession of the accused can only lead to the conclusion that he was the one who stabbed the deceased.

30. The accused’s defence about a fight breaking out between his drinking mates and other bar patrons becomes untenable when one considers the evidence of the investigating officer to the effect that there were no broken beer bottles at the scene. It is unfortunate that the bar attendant and one Kemboi who



was with the deceased at the time of the incident were never called as witnesses. Nevertheless, based on the evidence on record, I find myself convinced beyond reasonable doubt that it was indeed the accused who inflicted the injuries that led to the death of the deceased.

31. The accused's defence is that he did not touch the deceased.

The question as to whether there was malice aforethought will therefore have to be inferred from the other evidence on record. The pathologist testified of more than one stab wound to the heart and the liver. The knife was therefore aimed at the vital organs of the deceased. The injuries to the deceased can only lead this Court to conclude that he intended to kill the deceased when he unleashed the knife. It appears undoubtedly that the accused intended to achieve one goal which was to fatally wound the deceased. It is therefore my finding that there was malice aforethought on the part of the accused.

32. There was the submission by the defence counsel that the testimony of the prosecution witnesses was inconsistent. It goes without saying that testimony given several years after the act, as was the case in this matter, will not yield any uniformity. The most important thing is the fact that the story is consistent and paints a believable picture of what occurred. In this case, the story that came out is that the accused is the person who stabbed the deceased. The injuries led to the demise of the deceased. He is therefore the person who killed the deceased. On this issue, I rely on the holding of the Court of Appeal in *Erick Onyango Ondeng' v Republic* [2014] eKLR that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno Vs Republic* (1972) EA 32).”

33. In my considered view, the evidence on record conclusively points to the accused as the person who fatally stabbed the deceased. Even though the evidence of one Kemboi would have been important, its omission from the prosecution case cannot be said to be fatal. In deciding a case, the court must apply the law in light of prevailing circumstances. Here is a situation where a mob gets involved in collecting the evidence. In most instances, those who participate in the recovery of the murder weapon may not be willing to step forward and record statements. Although PW1 stated that he was not present when the sheath of the knife was retrieved from the accused, his evidence that the sheath was found with the accused was supported by that of PW3 who was present when the sheath was recovered.
34. In view of what is stated in this judgment, I am satisfied that the prosecution has proved the charge of murder against the accused. I therefore find the accused guilty of the murder of Benson Muchiri and I convict him under Section 322(1) of the *Criminal Procedure Code*.

**DATED AND SIGNED AT NAKURU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**W. KORIR, JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**H.K. CHEMITEI, JUDGE**

