Republic v Makokha (Criminal Case E025 of 2021)
[2024] KEHC 403 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 403 (KLR)

FORMERLY CRIMINAL CASE NO. 8 OF 2021

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE E025 OF 2021

AC MRIMA, J

JANUARY 18, 2024

BETWEEN

REPUBLIC ..... STATE

AND

MIRIAM KAKINIA MAKOKHA ..... ACCUSED

JUDGMENT

Introduction:

1. The accused herein, Miriam Kakinia Makokha, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. The particulars of the offence were as follows: -

> On the night of 2nd day of March 2021 at Twiga Farm, in Chepchoina Location within Trans Nzoia County, the accused person murdered Silas Weke Majimbo.

3. When the accused was arraigned and charged before Court, she denied committing the offence thereby prompting the hearing of the case against her.

4. After the close of the prosecution's case, the Court found that a *prima facie case* had been established against the accused. The accused was placed on her defense. The Accused elected to give sworn testimony and called no witness.

The Prosecution's Case:

5. The Prosecution called a total of 6 witnesses.

6. Until his death, the deceased herein, Silas Weke Majimbo, was the husband to the accused. They had two young children. The deceased was also a brother to John Walubengo Majimbo who testified as PW1. A Nurse who was a tenant in the deceased's premises testified as PW2. He was one Ogla Melli. PW5 was a neighbour to the deceased. He was Evans Mundia Ndungu. Dr. Fred Mwanika testified as PW3. He conducted the post mortem examination on the body of the deceased on 11th March 2021 at the Cherangany Nursing Home mortuary.

7. An officer from the Scenes of Crime testified as PW4. He was No. 236139 IP Fredrick Simiyu Sirengo then attached to the DCI Trans Nzoia county. The investigating officer was PW6. He was No. 81xxx Cpl. Hilary Cheboi attached at Endebes Police Station.

8. It was the prosecution's case that the accused and deceased's marriage was not a smooth sail for some time. It was characterized with violence and disagreements as the accused suspected the deceased to have engaged in extra-marital affairs with other women. PW1 and PW5 vouched the foregoing marital status.

9. On the fateful day, the deceased returned home 2 weeks after disagreeing with the accused. He was accompanied by PW1. He bought meat and the accused prepared supper for the family. They ate and thereafter the deceased and PW1 watched, and talked generally about, football.

10. Suddenly, the accused told the deceased that she will one day stab him severally. The deceased asked for the reason. PW1, however, took it to be a joke. The deceased then dozed off on the sofa set. Shortly, PW1 saw the deceased falling onto the floor while bleeding profusely from an injury on the neck. According to PW1, he hurriedly held him and the accused threatened to stab him as well. A struggle ensued and PW1 successfully disarmed her after sustaining some injuries on his arm. The knife was the one used in the kitchen and it bent due to the pressure exerted on it by the accused.

11. PW1 then rushed and called PW2 to assist in administering first aid on the deceased. PW2 hurriedly responded and did so. PW1 then organized for a vehicle and they managed to take the deceased to the nearby Anderson Hospital. The deceased was attended to, but passed on later.

12. On learning that the deceased had died, PW5 whisked the accused to Twiga Police Post for fear of the villagers avenging. The accused went along with her two young children. The officers then informed Endebes Police Station of the incident.

13. PW6 was assigned to investigate the case.

14. In the morning of 3rd March 2021, PW6 while in company of PW4 and other officers visited the scene and the mortuary where the deceased's body was held. PW4 processed the scene at the home of the deceased while PW6 recovered the knife which was the alleged murder weapon. At the mortuary, PW4 and PW6 observed the body of the deceased. They both noted a sharp wound on the neck below the Adams apple. PW4 took several photographs at the scene and the mortuary. PW6 then transferred the body to Cherangani Nursing Home mortuary where an autopsy was conducted on 11th March 2021 by PW3.

15. PW3 observed the body externally. It was covered with blood on the upper trunk and upper limbs. There was a bruise on the right hand. There was a deep penetrating wound on the middle aspect of the neck just below the Adams apple, but above the sternum notch. Internally, the wound on the neck had pierced the trachea and the two vessels behind the sternum were severed leading to heavy bleeding.

16. The cause of death was opined to be cardiac arrest from a combination of cardiac tamponade and hypovolemic shock due to bleeding from the neck injury. PW3 filled in and signed the Post Mortem Report. No samples were collected for further tests.

17. On completion of the investigations, PW6 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information dated 19th March, 2021. The accused was accordingly charged.

18. PW6 eventually produced all the items he gathered in the course of the investigations as exhibits in the matter whereas PW3 produced the Post Mortem Report as an exhibit.

19. After close of the Prosecution's case, the Court found that the accused had a case to answer. She was placed on her defence.

The Defence:

20. The accused elected to give sworn testimony without calling any witness.

21. The accused described in great detailed how she met the deceased while in Form 3 and decided to drop schooling to be married. She narrated how their married was characterized by violence and how the deceased had abandoned the family for other women. That, she, single-handedly, catered for the family.

22. On the events on fateful night, the accused contended that PW1 did not witness what transpired between herself and the deceased since he had gone to his room to sleep after taking supper. The accused described how the deceased chased her out of the house with her children that night and that she resisted. A fracas ensued and the deceased went out briefly. On returned, there was a further confrontation and the two fought. That, she pushed the deceased, who was seemingly drunk, and he fell on the floor. She only realized that the deceased was injured by their kitchen knife which she had placed outside the house together the utensils the family had used that night.

23. The accused vehemently denied stabbing the deceased either as alleged or at all. According to her, it seemed the deceased had picked the knife with an intention of injuring her, but he ended up injuring himself. It was her contention that the injury was self-inflicted. She contended that in the course of the fight, she raised alarm and the neighbours responded to her rescue.

24. After the close of the defence case, parties were directed to file their respective rival written submissions. Mr. Kimani, Learned Counsel for the accused file submissions dated 19th June 2023. He contended that the prosecution failed to the information against the accused and called for dismissal of the charge and that the accused be set at liberty.

25. The Prosecution on the other hand presented its written submissions dated 9th May, 2023. It submitted that the State had established a case to the required standard of proof, being beyond reasonable doubt, against the accused. It urged the Court to find the accused guilty as charged.

Analysis:

26. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

    (a) The death of the deceased occurred and its cause;

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice aforethought.

27. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The Death of the Deceased and its Cause:

28. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).

29. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased stabbed, wounded, bleeding and rushed to hospital where he was pronounced dead. Some witnessed a Post Mortem examination conducted on the lifeless body of the deceased. The body was later released to its relatives and was subsequently buried.

30. The second way in which the death of the deceased was proved was through the evidence of PW3, a Medical Doctor who conducted the autopsy on the body of the deceased.

31. PW3 observed a litany of injuries both externally and internally. He concluded that the deceased died as a result of a cardiac arrest from a combination of cardiac tamponade and hypovolemic shock due to bleeding from the neck injury.

32. This Court, therefore, finds and hold that the death of the deceased in this case and its cause were both sufficiently proved to the required standard.

Whether The Accused Committed the Unlawful Act Which Caused the Death of the Deceased:

33. There was a dispute on who was at the scene where the deceased sustained the fatal injuries. According to the accused, PW1 had left their room after taking supper. To PW1, he was still therein as he conversed with the deceased when the deceased was injured.

34. This Court has carefully considered the entire body of evidence. PW2 was one of the tenants in the house. He heard screams from one of the rooms in the house, but did not bother as he was watching news. He could not recall where the screams came from. He was then called out by PW1 to assist the deceased who had been injured.

35. None of the witnesses testified to any quarrel between the deceased and the accused on the fateful night. Those in the house were only called out after the ordeal. Had it been true that the deceased, while drunk, vehemently chased away the accused with her children, went out and collected a knife, returned and a vicious fight ensued, then the neighbours would have heard the commotion and attested to that more so since the ordeal took place at around 9pm, a time when many had not yet retired to their beds.

36. This Court finds it difficult to agree with the accused on how the deceased sustained the injuries. The testimony by PW1 seems to be more believable. It was consistent and truthful. This Court hereby finds and hold that PW1's evidence was credible and of high probative value. The evidence of the accused was doubtful and unbelievable. As such, this Court finds that the deceased sustained the injuries in line with the evidence of PW1.

37. In arriving at that finding, this Court is alive to the fact that PW1's evidence was of a sole identifying witness, but nevertheless it withstood all the tests thereto as laid in various decisions. For instance, the Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -

13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi vs Republic* [1986] KLR 198:

    1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

    2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

    3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

    4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. the issue is whether this was actually done. In *Mailanyi v Republic* (*supra*), the Court emphasized that:

> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

38. In *R -vs- Turnbull & Others* (1973) 3 All ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone

whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

39. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal stated as under: -

> .... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

40. In *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

41. As stated earlier, the above buttresses the evidence by PW1. The Court hereby declines the invitation to go by the defence tendered by the accused. The defence did not, therefore, in any way whatsoever challenge the prosecution evidence. The defence did not create any doubt at all, leave alone a reasonable one, on the prosecution's case. The defence is, hence, for rejection.

42. In sum, this Court finds and hold that the death of deceased was caused by the accused who inflicted the fatal wound on the deceased's neck using a knife. The evidence of the prosecution stands out well corroborated and deliberate as to the truthfulness of those facts.

Whether There Was Malice Aforethought:

43. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.

44. Section 206 of the *Penal Code* defines 'malice aforethought' as follows: -

> 206. 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 to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

45. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

46. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

> Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

47. In the case of *Nzuki vs. Republic* (*supra*), the accused had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to there having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed as follows: -

> There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

48. This Court will now juxtapose the above with the facts in the case.

49. The accused was not aware that the deceased was returning home after leaving a couple of weeks after a disagreement. Despite the history of animosity, there was no evidence that the accused planned to kill the deceased. The accused even prepared food for the family and they all ate together. If anything, the accused's tempers must have cooled down within the period the deceased was away.

50. The attack on the deceased by the accused was, hence, spontaneous. There is no explanation as to why the accused stabbed the deceased.

51. By applying the subjective test in *Joseph Kimani Njau vs Republic case* (*supra*), this Court is unable to find malice aforethought in the circumstances of this matter. Whereas the accused caused the fatal injuries, there is no proof of malice to the required standard. The killing only amounted to manslaughter.

52. The foregoing analysis does not, therefore, support a conviction in respect of the information of murder. The accused is, hence, found not guilty of the murder of the deceased.

53. However, it is apparent that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.

54. In view of the provisions of Section 179(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya and given the state of the evidence on record and as analyzed hereinbefore, this Court finds the accused guilty of the offence of Manslaughter contrary to Section 202 of the *Penal Code* and she is accordingly convicted.

55. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 18TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Kimani, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.