



**Republic v Ekai (Criminal Case 31 of 2019)
[2024] KEHC 96 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 96 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 31 OF 2019
AC MRIMA, J
JANUARY 17, 2024**

BETWEEN

REPUBLIC STATE

AND

JOHN EKIRU EKAI ACCUSED

JUDGMENT

1. The accused herein, John Ekiru Ekai was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence were that in the night of 7th/8th day of November 2019 at Lessos Centre, Kwanza Sub-county within Trans Nzoia County, the accused person murdered Peter Ekaru (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned before this Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution’s case began before Hon. Kimaru, J (as he then was) where five out of the seven witnesses testified before the Learned Judge. The rest of the evidence was recorded before yours truly.
3. After the close of the prosecution’s case, this Court found that a prima facie case had been established to, and placed the accused on his defence.
4. The accused gave a sworn testimony and did not call any witness.

The trial:

5. The prosecution called seven witnesses in its bid to establish the charges drawn against the accused. PW1 was an eye-witness who testified to how the accused stabbed the deceased with a knife. He was one Obadiah Webuge. PW2 was a village elder who got information of the incident from PW1 by a call. He proceeded to the nearby Lessos Police Post and reported the matter. PW3 and PW5 were police officers attached to Lessos Police Post who responded to PW2’s call and rushed to the scene which was at the



Lessos Centre. They found the deceased lying down and a group of people assaulting the accused who was the alleged offender. They rescued the accused and took him to the Police Post. They also informed PW6, then serving at the DCI offices at the Kwanza who later visited the scene with officers including those from the Scenes of Crimes. The scene was processed and collected the body. The accused was also transferred to Kitale Police Station. PW6 became the investigating officer. No recoveries were made.

6. PW7 was the mother to the deceased. She testified on how she received the news of the death of her son.
7. PW6 continued with investigations by recording witness statements and pieced the evidence together. He organized for, and an autopsy was conducted. It was PW4 who identified the body of the deceased before the autopsy. PW6 subsequently charged the accused with the present offence.
8. After evaluating the evidence adduced by the prosecution, this Court determined that the accused had a case to answer. He gave a sworn testimony.
9. In his evidence, the accused denied killing his deceased. He contended that he did not know where the deceased died since he had been arrested by the police before the alleged death of the deceased. He maintained that he did not know why he was arrested.
10. He called upon this Court to acquit him of the charge.
11. Parties were thereafter directed to file their respective rival written submissions. The prosecution filed its submissions dated 19th June, 2023 in support of the charge. The defence seems not to have filed any submissions since the record has none.

Analysis:

12. 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 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.
13. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased and its cause:

14. 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).
15. In this case, the death of the deceased is not in doubt. It was proved by all the prosecution witnesses. PW6 even removed the body to the mortuary and later witnessed an autopsy conducted on the body of the deceased. PW4 identified the body before the autopsy was conducted.
16. Although in this case the Post Mortem Report was not produced, nevertheless, the prosecution managed to prove the death of the deceased.
17. The question now which begs for an answer is whether the cause of the death of the deceased was also established in the absence of medical evidence.



18. As stated above, the Post Mortem Report was not produced. It seems there was no effort made, or at least the record is silent, to avail the doctor who conducted the autopsy to testify. Alternatively, any other doctor who knew the doctor who conducted the autopsy and was familiar with the colleague's hand writing would have produced the report in accordance with the Evidence Act, Cap. 80 of the Laws of Kenya.
19. There was also another way of handling the matter. PW6 would have equally attempted to produce the report as an exhibit unless the defence opposed. Such an attempt was not made. Lastly, the prosecution could have sought for an adjournment to avail the doctor since the record did not have a 'last-adjournment-order'.
20. The result was that the Post Mortem Report was not produced and there was neither an explanation as to why the witness did not attend Court nor why other avenues were not considered to avail the report in Court.
21. In such circumstances, the presumption that had the witness testified, the testimony may have been adverse to the prosecution, therefore, arises. (See *Bukenya & Others versus Uganda* (1972) E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku versus Republic* (1985) KLR 412).
22. The general practice adopted by trial Courts when ascertaining the death of a deceased and its cause is to take medical evidence mostly through a Post Mortem Form.
23. The Court of Appeal in *Ndungu vs. Republic* (1985) eKLR succinctly pronounced itself on the issue as under: -

.....where a body is available and the body has been examined, a post mortem must be produced, the trial Court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstance inexplicable and was unhelpful to the prosecution and to the Judge.

24. Having said so, this Court remains well aware that there are exceptional instances where a Court may apply the principle that in some cases, the cause of death can be established without medical evidence.
25. The Court of Appeal in *Ndungu vs. Republic case* (supra) in disagreeing with the Tanzanian decision in *Republic vs. Cheya & Another* [1973] E.A. 500 which held that the absence of medical evidence as to the death of the deceased in that instant case was not fatal as the prosecution could rely on other factors in evidence, rendered itself as follows: -

.....The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by



the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision.....

26. Later, in 2015 the same Court re-affirmed the above in *Chengo Nickson Kalama v Republic* [2015] eKLR where it held: -

.... The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a postmortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt.

27. Turning to the matter at hand, PW4 testified that he identified the body before the autopsy was conducted. PW6 stated a post mortem examination of the body of the deceased was conducted and the findings were that the deceased died from a penetrating chest trauma and that a Post Mortem Report was prepared.
28. Whereas the temptation to find that the deceased died out of the stab on the chest is high on one hand, on the other hand, there lingers a serious doubt as to why the Post Mortem Report was not produced and whether it was truly the stab that caused the death since it is possible for one to be stabbed, but to die of other causes including natural ones. Such instances may arise where the stab does not interfere with any internal organs.
29. On a careful assessment of the evidence herein, this Court finds and hold that this case is not among those which the principle that in some cases, the cause of death can be established without medical evidence can apply.
30. This Court now finds and hold that the cause of death of the deceased in this case was not established.
31. Having found as such, this Court returns the verdict that since it is not known how the deceased met his death, dealing with the rest of the issues will not add any value. Therefore, it can only be prudent that the matter ends here.

Disposition:

32. The accused is, therefore, found not guilty of the murder of the deceased.
33. Consequently, the accused is hereby acquitted pursuant to section 322(1) of the *Criminal Procedure Code*. He is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2024.



A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Bisonga, Learned Counsel for the Accused.

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

