Republic v Taragon (Criminal Case 13 of 2017) [2024] KEHC 1165 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE 13 OF 2017

AC MRIMA, J

FEBRUARY 13, 2024

BETWEEN

REPUBLIC .... STATE

AND

TITUS KWEMOI TARAGON .... ACCUSED

JUDGMENT

1. The accused herein, Titus Kwemoi Taragon, 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 on 17th June 2017 at Kapsang village in Kitale West Sub-County within Trans Nzoia County, he murdered Raphael Chemisto Ndiwa (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 was partly conducted before Hon. Chemitei, J where the first witness testified. The second to the fifth witnesses testified before Hon. Kimaru, J (as he then was). The rest of the evidence was recorded before yours truly. 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.
3. The accused gave a sworn testimony and called a witness.

The trial:

4. The prosecution lined up six witnesses to prove the information against the accused. Its case was that on the fateful evening, at around 7: 00pm, the accused while wearing a marvin which covered the forehead and carrying a gun wrapped in rags, went to the deceased's home, knocked the door to the house where the deceased, his wife and daughter were in, entered and shot the deceased in full glare of the two. That was the evidence of the wife to the deceased, one Beatrice Chemayiek (PW2) and the daughter one Sophia Cheptoo (PW3). They both testified to knowing the accused who was their neighbour and a relative.

5. PW2 and PW3 further affirmed that when the accused shot the deceased, PW2 held the accused and a scuffle ensued. PW3 separated them and the accused managed to leave the house and immediately the two screamed. PW2 also went out of the house only to see the accused who asked them why they were screaming. Another scuffle arose between the two and again, PW3, separated them. The accused then fled.

6. Neighbours gathered in answer to the screams from the home of the deceased and saw what had happened. The police were informed and they collected the body later that night.

7. PW5, one No. 81358 PC John Owino, then attached at the Kitale DCI offices was assigned to investigate the case. He recorded statements from witnesses. The accused was then arrested on 22nd June 2017 by a contingent of police officers including No. 50585 Cpl. James Rutto who testified as PW4.

8. An identification parade was conducted by PW6 one No. 236341 Insp. Willy Busienei on 26th June 2017. Both PW2 and PW3 positively identified the accused from the parades.

9. A post mortem examination on the body of the deceased was conducted at the Kiminini Cottage Hospital Mortuary on 28th June, 2017 by one Dr. Musita Patrick (not a witness). It was Dr. Alex Barasa who testified as PW1 and who produced the post mortem report on behalf of his colleague.

10. The body was identified by James Kiriongi and Richard Naibei prior to the autopsy. None of them testified as the identity of the deceased was not in issue in the case.

11. According to the Post Mortem Report, the deceased was fairly nourished and fairly built. The body had been embalmed. Externally, there was severe conjunctival parlor and lingual parlor. The body had two bullet entries from a single gunshot. The first entry was on the right mid-arm which ran through the bicep muscles and exited on the midial aspect of the mid-arm. The second entry was on the lateral aspect of the chest wall between the 3rd and 4th ribs with an exit on the left aspect of the chest wall. The bullet fractured the 4th and 5th ribs on the right and the 4th, 5th and 6th ribs on the left. The sternum was also fractured and the myocardium was ruptured. About 4 litres of blood had collected in the haemothorax and a lung had collapsed.

12. The cause of the death was opined as severe penetrating ballistic chest trauma (Gunshot wound). The Post Mortem Report which had been prepared during the autopsy was produced in evidence.

13. On completion of investigations, PW5 recommended that the accused be charged with the information of murder. He was taken for mental assessment on 27th June, 2017 where he was found fit to stand trial. He was arraigned before Court for plea-taking on 28th June, 2017.

14. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.

15. In his sworn testimony, the accused raised an alibi. While affirming that he was a neighbour and a cousin to the deceased, he nevertheless, stated that on the material evening he was not at his home as he had visited his brother one Kenneth Kirui Taragon (testified as DW1) in Togbor village, which was around 20 kms away, and that he spent there. DW1 corroborated the accused's evidence.

16. After close of the defence case, the parties were directed to file written submissions. However, it was only the State which complied.

17. The prosecution posited that it had discharged its burden of proof to the required standard to establish that the accused murdered the deceased. It urged this Court to find the accused culpable as charged.

Analysis:

18. 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 it's cause;

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

    (c) that the accused had malice aforethought.

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

The death and its cause:

20. 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).

21. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, PW2 and PW3 vouched that they saw the deceased being shot and died instantly.

22. The second way in which the death of the deceased was proved was through medical evidence through the conduct of the autopsy.

23. PW1 concluded that the cause of death of the deceased was severe penetrating ballistic chest trauma (Gunshot wound).

24. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

25. Two eye-witnesses vouched for the culpability of the accused. They were PW2 and PW3. They all knew the accused quite well who was not only their neighbour, but also their relative. They described how the assailant was dressed and how his general body features were. They also had two separate encounters with the assailant that night where, in each of them, PW2 wrestled the assailant and PW3 separated them. Further, according to PW3, the accused stood only 2 feet from her inside the house as he shot the deceased.

26. PW2 and PW3 readily gave the name of the accused as the assailant to the neighbours and the police. Further, when the accused was arrested, an identification parade was conducted where PW2 and PW3 identified him.

27. PW3 stated that the accused wore a marvin which covered the forehead. The rest of the face was uncovered. The assailant also talked to PW2 and PW3 on two occasions. At first, it was when he knocked at the door of the deceased's house. When asked whom he was, he stated that he will introduce himself inside the house. The second encounter was when he returned to silence PW2 and PW3 from screaming.

28. In giving guidance on how the issue of identification by way of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

29. 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 had the following to say on recognition: -

> … 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.

30. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error…"

31. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an

identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

32. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

33. The witnesses testified before the trial Court. The Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

34. There is no doubt the offence was committed during night time. There is as well no dispute that there was fire inside the house's fireplace and that the assailant had a torch. As well, there was no contention that the assailant and PW2 wrested inside and outside the house on separate incidents. There was also no evidence impugning the fact that PW2 and PW3 were familiar with the accused's voice.

35. PW2 and PW3 stated with precision what the accused did during the incident. That, he shot the deceased at a close range and in their presence.

36. Alongside the foregoing was the accused's alibi. The accused alleged that he had gone to collect his sheep from his friend one Robert who lived in Togbor village and he was a neighbour to his brother, DW1. That, since Robert was not at home on that afternoon, the accused then decided to spend at his brother's home, DW1, so as to be able to collect the sheep the following day.

37. It was not clear whether the accused informed Robert that he was going to collect his sheep that day. Further, the accused and DW1 did not indicate how they received the information of the deceased's death early the next day.

38. By placing the evidence by the prosecution as against the accused's alibi side by side, the prosecution's evidence seems to be credible and well corroborated. Conversely, the alibi defence appears to be an afterthought. As such, the defence is dismissed.

39. In the end, this Court finds and hold that in all probabilities, it is the accused who shot the deceased with a gun through his chest thereby inflicting the fatal injuries.

Whether there was malice aforethought:

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

41. 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.

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

43. 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 <u>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.</u> (See Hyman vs. Director of Public Prosecutions (1975) AC 55". (emphasis added).

44. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of Republic vs. Tubere s/o Ochen [1945] 12 EACA 63 as follows: -

a. The nature of the weapon used; whether lethal or not;

b. The part of the body targeted; whether vulnerable or not;

c. The manner in which the weapon is used; whether repeatedly or not;

d. The conduct of the accused before, during and after the attack.

45. In this case, the accused shot the deceased with a gun at a close range through his chest. The chest is such a critical part of the human anatomy. It houses extremely vital organs without which one cannot survive. It, therefore, goes beyond any peradventure that once the chest is perforated, then chances of injuring the delicate organs inside is eminent and that can lead to outright death. The aiming and shooting at the chest with a gun were a sure way of sending the deceased to the grave.

46. The accused must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. The accused aimed the chest; a vital and delicate organ, with all his might.

47. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.

48. The prosecution, therefore, proved malice aforethought in this case.

49. Therefore, all the ingredients of the offence of murder were proved in this case.

Disposition:

50. Deriving from the foregoing, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

51. The accused herein, Titus Kwemoi Taragon, is accordingly convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.

52. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Miss. Imainata, Learned Counsel for the Accused.

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

Chemosop/Duke – Court Assistants.