



**Republic v Gikunju (Criminal Case 13 of 2016)
[2024] KEHC 1038 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 13 OF 2016
RM MWONGO, J
FEBRUARY 7, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK MURIUKI GIKUNJU ACCUSED

RULING

1. The accused was charged with murder contrary to Section 203 as read with 204 of the [Penal Code](#). Particulars of the offence are that on the 5th July, 2016 at Kwa V trading centre in Sagana location, within Kirinyaga County, murdered his wife Phyllis Nyaguthii Karimi.
2. After hearing the prosecution case, the court has to decide whether the evidence is sufficient to raise a prima facie case to which the accused must make a defence. This is required under Section 306 (1) of the [Criminal Procedure Code](#) which provides:

“When the evidence of the witnesses for the Prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of the several or any one of the several accused committed the offence shall, after hearing, if necessary any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

3. A *prima facie* case was described in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 at 335, as follows:

“It may not be easy to define what is meant by a, “*prima facie* case”, but at least it must mean one on which a reasonable person, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.



4. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person:
 - a. The death of the deceased occurred
 - b. That the accused persons committed the unlawful act which caused the death of the deceased
 - c. That the accused had malice aforethought

Evidence of the deceased's death

5. In the present case, the death was proved by the evidence of Dr Njatha Wanjiku who testified as PW5. He performed the post-mortem and confirmed that indeed the deceased died as a result of a deep cut wound on the head occasioned by a sharp-object. When he performed the post mortem, he noted that there was a deep cut through the carotid and jugular vein caused by blows with a sharp-edged object, which caused the death.
6. PW2 Joseph Wachira, a good friend of the deceased and his wife, testified that he did not witness how the death occurred, but that he saw the deceased's body at Muranga mortuary on 5th July 2016. Finally, PW3 Geoffrey Mwangi, an uncle of the deceased, identified the deceased's body to the doctor who performed the post mortem at the mortuary.
7. There is no doubt that the deceased died, and that is not in dispute.

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

8. The prosecution submitted that the accused after the act surrendered at the Sagana Police Station on the 5th July 2016 immediately after the act. That the accused informed the Police of what he had done which the Police confirmed before he was re-arrested.
9. The evidence of PW1 was that he was informed that the deceased had been assaulted by a person well known to her. He was at his place of work when the incident happened but did not witness the incident. After hearing of the incident, he went to Sagana Police Station where he confirmed that the accused had been arrested.
10. PW2 testified that he was informed of the deceased's death. He had known the couple as husband and wife, and knew that they had a troubled marriage that centred more on property. He had indeed been embroiled in trying to solve their latest disagreement as the two had wanted to separate as late as 27th June 2016. They were unable to agree on a one-acre piece of land and a vehicle Registration No KAT 923M Toyota. In cross examination, he confirmed that he did not witness the murder, but later visited the crime scene.
11. PW 3 (Godfrey Mwangi) testified that the deceased was his niece. He identified the body on the 8th July 2016 at the Murang'a Mortuary in the company of the Police and the Doctor who performed the Post Mortem. He had known the accused as he had met him at their home during a ceremony of a child.
12. PW 4 Benson Maina Munene, testified that he knew the accused and the deceased. They lived together and were constantly quarrelling. He was engaged to resolve their dispute. He visited the scene of crime and found the deceased body cut several times. He did not see who cut the deceased.
13. In submissions the defence stated that, no eye witness was called who could have identified the accused as the perpetrator. The prosecution had not shown that the accused had any reason to want to cause the deceased harm as evidence by PW1-PW3 shows that the accused and the deceased had amicably



- separated. The evidence by the father that there had been a report to the police on assault could have been proven by extracts from the OB of the police station, but none were produced.
14. Further, the defence submitted that the arresting officers and investigating officers did not testify and no exhibits from the scene of crime were presented as evidence. The murder weapon was never recovered and there is no direct link of the crime to the accused.
 15. All prosecution witnesses testified that they did not witness the accused killing the deceased. Further, he was not found at the scene of crime. The allegation that the accused surrendered himself to the police after admitting to the crime was not proved as the investigating officer did not testify.
 16. According to the defence, in the absence of any eye-witness to the murder to testify there was no basis to link the death of the deceased to the accused.
 17. The prosecution's submissions were essentially: That the Death of the deceased was proved by the Doctor who performed the Post-Mortem and confirmed that indeed the deceased died as a result of a deep cut wound on the head occasioned by a sharp-object; That PW 3, Godfrey Mwangi, witnessed the Post-Mortem on the 8th July 2016 at the Murang'a Hospital Mortuary; That the proof that the accused caused the death of the deceased can be proved from the fact that the accused after the act surrendered at the Sagana Police Station on the 5th July 2016 immediately after the act. He informed the Police of what he had done which the Police confirmed before he was re-arrested.
 18. As proof that the accused had malice aforethought, the prosecution submitted: That the choice of weapon used in assaulting the deceased, the force used to inflict the injury and the timing that the accused occasioned the injury points the fury, anger and knowledge that the accused wanted to maximize the opportunity to eliminate the deceased at whatever cost. From the evidence on record, the deceased suffered deep cut wound on the head occasioned by a sharp object.

Whether the accused can be said to have had malice aforethought

19. From the evidence on record, the deceased suffered deep cut wounds on the head occasioned by a sharp object. There is no evidence on record as to how she sustained those injuries. There may be suspicion based on the evidence of PW2, Joseph Wachira, that the accused and deceased had had a troubled marriage. A troubled marriage cannot suffice as evidence of commission of murder, as no evidence was adduced to link the accused with the offence.
20. Malice aforethought was defined in *Nzuki v Republic* [1993] KLR 171 where the Court of Appeal 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:

 - a. Intention to cause death
 - b. Intention to cause grievous harm
 - c. Where the accused know that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. ”
21. It was for the state to prove these elements of malice aforethought. The defence submitted that the prosecution failed to do so.
22. With regard to the evidence that should have been availed, it is clear that the state was unable to avail even the investigating officer in the case to testify.



23. On this point, it was held in the case of *Edwin Wafula Keya v Republic Court of Appeal* [2005] eKLR, as follows:

“In our view failure to call all or any of the three Police Officers who arrested the Appellant some two months after the offence left an unbridgeable gap in the prosecution's case and the Appellant must have the benefit of that gap”.

24. In addition to the failure of the arresting officers and investigating officers to testify, no exhibits from the scene of crime were presented as evidence. The murder weapon was never recovered and there is no direct link of the crime to the accused. It is trite that gaps in the prosecution's case raise serious doubts as to the involvement of the accused. In any such case, the benefit of the doubts must be given to the accused.

25. In the case of *Republic v Martin Thigunku* [2021] eKLR Gitari J held as follows:

“Considering the entirety of the evidence on record as highlighted herein above, I am of the view that the accused person has no case to answer as none of the witnesses tendered sufficient evidence to implicate the accused person herein in the unfortunate murder of the deceased. Suspicion cannot form a basis for a conviction, no matter how strong.”

Conclusion and Disposition

26. Having considered the testimonies of the five prosecution witnesses tendered the question is whether the evidence tendered establishes a prima facie case against the accused, or whether the accused has a case to answer. The obvious and clear answer from the foregoing analysis, is no.

27. Accordingly, there being no case to answer, I direct that the accused shall be set at liberty unless otherwise lawfully held.

28. This file is hereby closed.

29. Orders accordingly.

DATED AT KERUGOYA THIS 7TH DAY OF FEBRUARY, 2024

R MWONGO JUDGE

Delivered in the presence of:

1. Fredrick Muriuki Gikunju the Accused in Person
2. Kimata holding brief for Ombachi for the Accused
3. Mamba for the State
4. Murage, Court Assistant

