



**Republic v Kurgat (Criminal Case 20 of 2014)
[2024] KEHC 2387 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 20 OF 2014
RN NYAKUNDI, J
MARCH 8, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

TITUS KIBIWOT KURGAT ACCUSED

JUDGMENT

1. The accused person Titus Kibiwot Kurgat 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 allege that Titus Kibiwot Kurgat on the 8th day of February 2014 at Kaptarakwa village in Keiyo South district within Elgeyo Marakwet County Murdered G K K.
2. The accused having pleaded not guilty to the charge it became necessary for the prosecution to adduce evidence to prove the charge against the accused person beyond reasonable doubt. That is in line with Art. 50 (2) (a) of the *Constitution*. The essence of it being that the burden of proof always lies with the prosecution and it never shifts to the accused at any one time save for limited exceptional circumstances as stipulated in Section 111 of the *Evidence Act*. To discharge that burden, the prosecution paraded the following witnesses:
3. PW1 was L C aged 15 years old as at the time of the testimony and a resident of Tot told the court that on 8.2.2014 at around 11pm there was a circumcision ceremony at home. The ceremony was attended by relatives and friends, after a while she went to sleep living the family members and friends to continue enjoying the ceremony. However, in the middle of the night she has some noise and going to check she found that it was a quarrel between Kibiwot the accused and her uncle G. There were separated but that conflict did not seem to have ended as the accused left the homestead only to come back armed with a piece of wood which he used to hit the deceased on the head. As a consequence, the deceased fell down as the relatives went for his rescue by taking him to Kaptarakwa hospital where he was to be refereed to Moi Teaching and Referral Hospital. In a short while they received information



that the deceased had succumbed to death. In cross-examination she told the court that on the material day and time she saw the accused attack the deceased on the head while armed with a piece of wood.

4. PW2 was B K testified under oath that on 8.2.2014 that he was one of the relatives who attended the circumcision ceremony at the home of the deceased. The ceremony went on as usual in the course of the celebration a fight erupted between the accused and the deceased despite the fact that they were brothers by birth. As the fight escalated PW2 told the court that he went out of the house and by use of electricity light he witnessed the scuffle. What emerged was the accused hitting the deceased on the head culminating into massive bleeding. That is when arrangement were made to rush him to the hospital where he was admitted but eventually reports came in that he passed on while undergoing treatment.
5. PW3 was Evans Kipkurui who told the court that on 8.2.2014 he was part of the invitees attending the circumcision ceremony at the home of the deceased. As the event went by PW3 heard the deceased and the accused making noise outside the house both being already intoxicated from the alcoholic drinks they were taking at the ceremony. In addition, PW3 went on to confirm to the court that the fight did not stop despite the intervention by the relatives and other invited guests. That same night he had screams from PW1 to the effect that “Baba ameuiliwa”. When PW3 went to check he found the deceased on the ground lying unconscious he was rushed to the hospital treated discharge to recuperate at home but his condition got worse culminating him to be returned to the hospital for further management. It is during this second visit to the hospital that the deceased passed on while undergoing treatment.
6. PW4 was Dr. David Chumba of Moi Teaching and Referral Hospital who apparently stated in court that on 24.2.2014 he was asked by the police to conduct a post-mortem examination on the body of the deceased G K. The body was identified to PW4 by PW5 A K K. According to PW4 the examination revealed the following injuries as having been sustained by the deceased:

-Stitched wound on the head.

-Depressed skull fracture on the frontal part of the skull.

-Epidural and subdural haemorrhage

-Linear fracture extending to the base of the skull.

From these findings PW4 opined that the deceased died of severe head injuries caused by a blunt object.

7. At the close of the prosecution case on analysis of the evidence a *prima facie* case was established in favour of the prosecution culminating into the accused person being placed on his defence under Section 306 as read with Section 307 of the CPC.
8. In brief the accused person gave a narration on the event of the 8.2.2014 involving the circumcision ceremony in which he was invited as one of the relatives to the deceased. It is a fact that the deceased is a brother to the accused person. In the words of the accused the celebration proceeds in earnest involving about 30 guests who partook assorted alcoholic drinks which resulted in high intoxication. Apparently the accused told the court that he was also drunk. He also acknowledged the PW1, PW2, PW3 were also in attendance. In the accused own testimony at the end of it all he left the homestead for his home only to be informed in the morning by the mother of the deceased that he had been taken ill and is admitted at Kaptarakwa district hospital. He was later to be transferred to Moi Teaching and Referral Hospital. He denied ever beating the deceased as alleged by the prosecution witnesses. In fact, he describes the whole episode as rivalry between his stepmother over a land dispute. Essentially the accuses stood his grounds that any such evidence implicating him with the death of the deceased is false.
9. After considering both the prosecution and defence case the parties were invited to file their respective written submissions.



Submissions on Behalf of the Prosecution

10. Learned prosecution counsel Emma Okok submitted that all three substantive elements to prove the offence of murder beyond reasonable doubt were all established by the five witnesses who testified on behalf of the state. She went further to contend that the defence narrative did not controvert any of the probative evidence given by the prosecution witnesses. It was learned prosecution counsel's contention that the prosecution having discharged the burden of proof of beyond reasonable doubt, the court should be at liberty to find the accused guilty and convict him for the offence of murder contrary to section 203 of the *penal code*.

Submission by the Defence on Behalf of the Accused

11. Mr. Miyianda learned counsel for the accused took a different trajectory by discrediting the veracity of the five witnesses in proving the elements of the offence beyond reasonable doubt. He took offence with the testimony of PW1, PW2, PW3 and PW4 as to their consistency both measured from the examination in chief and cross-examination by the defence. He was of the view that the contradictions are of such a nature that they are fatal to the prosecution case. Learned counsel was more emphatic that the identification evidence of the accused person was non-responsive. In this respect he placed reliance on the principles in the cases of *Wamunga Vs. Republic* (1989) KLR and *Turnbull & others Vs Republic* (1976) ALL E.R. 549. In addition, learned counsel contended that malice aforethought is a key ingredient in homicide cases as defined in Section 206 of the *Penal Code* was never demonstrated from the evidence of the prosecution witnesses. The best if any argued learned counsel may be a case of manslaughter contrary to Section 202 of the *penal code*. He therefore, urged this court that in absence of a formidable case the benefit of doubt be resolved in favour of the accused person.

Evaluation of Evidence and Determination

12. It is trite now for centuries more categorically since the promulgation of the common law the prosecution bears the burden of proof of proving the guilty of the accused person beyond reasonable doubt. The *Evidence Act* Section 107, 108 & 109 alludes to this legal position. There has been no burden to be shared or to be shouldered by the accused person. In Art. 50 2 (a) of the *Constitution* it is crystal clear that every accused person has a right to be presumed innocent until the contrary is proved. That burden of proof stays with the state at all times from indictment, trial and conclusion of the proceedings on the charge facing the accused person. The approach on this burden of proof was restated in the case of *Woolmington Vs DPP* (1935) AC 462 at pp 487 Viscount Sankey had this to say;

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England to say as was said in the summing up in the present case, if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident...”



In the case of *Miller Vs. Ministry of Pensions* (1947) 2 ALL ER 372 at 373 Denning, J stated that:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing of that will suffice.”

13. In murder cases the following elements must be proved by the state beyond reasonable doubt
 1. That the deceased died
 2. That his death was unlawful
 3. That in causing death the accused had malice aforethought.
 4. That the evidence on record is capable of positively identifying and placing him at the scene of the murder.
14. In so far as element no. 1 is concerned its deducible from PW4 & PW5 that the deceased person G K K is dead. According to PW4 upon conducting the post-mortem examination on 24.2.2014 the following injuries were inflicted against the deceased;
 - Stitched wound on the head.
 - Depressed skull fracture on the frontal part of the skull.
 - Epidural and subdural haemorrhage
 - Linear fracture extending to the base of the skull.
15. In his opinion the cause of death was severe head injury due to blunt trauma. The evidence by the prosecution is consonant with the principles in *Rex Vs Sirasi Bachumira* (1936) 3 EACA, *Nyambanga Vs Republic* (1990-1994) EA 462, *Ndiba Vs Republic* (1981) KLR 103, *Republic Vs Felix Nthiwa Munyao Lakha and Keiwua JJA*, *Republic Vs Cheya and another* (1973) EA 500, *Republic Vs Samson Kenei & another* (CACRA 33 of 2004), *Kishanto ole Siololo Vs Republic* CACRA 70.
16. The medical evidence in the form of a post-mortem report clearly establishes that the deceased did not die from natural causes or accident related injuries. It would not be farfetched to make a finding that he prosecution evidence is credible to discharge the burden of proof of the death of the deceased and proximate cause being injury inflicted by a third party. The defence case never disputed the death of the deceased or the fact that the injuries so sustained were inflicted on the 8.2.2014.
17. For the accused to be found guilty of murder, the prosecution is under a higher duty to establish and prove through evidence availability of malice aforethought. Section 206 of the *Penal Code* gives the following definitions and manifestations;

“malice aforethought shall be deemed to be established by evidence proving any of the following circumstances.”



- a. An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not;
 - b. Knowledge that the act or omission caused death will probably cause the death of or grievous harm to some person, whether such 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.
18. In order for the state to prove its case against the accused persons, it must therefore, be established that the accused persons had the requisite intention to cause the death of the deceased or to do him grievous harm. This can be established by direct or indirect evidence (circumstances evidence).
19. How do we go about analysing this evidence to establish malice aforethought? The correct approach is set out in the following passage from a comparative perspective in the case of *Mosephi and others Vs R LAC* (1980-1984) 57 and *Sithole vs S* (2012) ZASCA in which the court made the following observations;
- “The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understating and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of a evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”
20. In the matter at hand, the prosecution has relied on direct evidence of PW1 who was at the scene when the accused person attacked the deceased while armed with a piece of wood injuring him on the head. This evidence was so corroborated with that of PW2 who also happened to be at the scene of the incident. In addition, the circumstantial evidence of PW3 is also relevant in so far as the attack and proximate cause of the deceased’s death. In the case of *R Vs Taylor* (1928) 21 CR. APP 20 the court had this to say:
- “circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”
21. I further, make a finding that the testimony of the prosecution witnesses is such that the corroboration does exist in so far as PW2 & PW3 are concerned as to the facts and circumstances adduced in evidence which corroborate the truth of the story told by PW1



which points out that the accused person is the one responsible for the crime charged. Furthermore, the post-mortem examination carried out by PW4 shows that the deceased suffered multiple injuries to the head suffering a depressed skull fracture. In his analysis PW4 opined that the cause of death was severe head injuries caused by a blunt object. The common denominator of the kind of blunt object as stated by PW1 to be a piece of wood.

22. All in all, the evidence before this court is to the effect that the accused action is not excusable or justified in so far as the evidence adduced by the prosecution witnesses is concerned which points directly to the participation of the accused in inflicting the unlawful injuries upon the deceased. In the instant case, even the application of Section 207 as read with 208 of the [penal code](#) would not come to the aid of the accused person. The conditions required of Section 207 and 208 hereof were not present in this particular case which is a question of fact to be laid down by the defence. The accused person had no legal right to arm himself with a piece of wood and to proceed with it to assault the deceased on the most vulnerable part of his body.
23. It is therefore, the court's finding that the prosecution has proved beyond reasonable doubt that the accused person with malice aforethought caused the death of G K K. I therefore find the accused guilty as charged and convict him of the offence of murder contrary to Section 203 as punishable under Section 204 of the [Penal Code](#).

Sentence

24. In sentencing the convict, the court is guided by the principles in [Francis K. Muruatetu Vs R](#) (2017) eKLR and the [sentencing policy guidelines](#) of the judiciary 2023. In all cases the purposes for which a court may impose a sentence on an offender are as follows: -
 - a. To ensure that the offender is adequately punished for the offence.
 - b. To prevent crime by deterring the offender and other persons' form committing similar offences.
 - c. To protect the community from the offender.
 - d. To promote the rehabilitation of the offender.
 - e. To make the offender accountable for his or her actions.
 - f. To denounce the conduct of the offender.
 - g. To recognise the harm done to the victim of the crime and the community.
25. The catch words for the court were profoundly stated in the persuasive case of *S Vs Malgas* (2001) 1 SACR 469 (SCA) in the following passage: -

That all factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role, none is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measures against the composite yardstick (substantial and compelling) and must be such as cumulatively justify a departure from the standard response that the Legislature has ordained.”
26. The mitigating factors to be taken into account in sentencing the convict as submitted by Mr. Miyienda include the following:



- a. Duration of the case. That the convict since his arrest has spent about 8 years in remand custody.
 - b. Age of the convict. That the convict is aged 37 years and is a family man with 3 children currently in class 1 & 4 and other 5 children of his brother E K respectively.
 - c. The aspect of reconciliation. That during the period under review both families have performed Nandi customary rituals to promote victim offender mediation.
 - d. That the convict is remorseful and regrets the circumstance of the offence.
27. In the same breadth the court was favoured with a pre-sentence report dated 11.12.2023. From the interviews carried out by the probation officer the following recommendations was arrived at:
- That the offender does not pose any danger or risk should he be released on a supervised non-custodial sentence since he was out on bond for a long period and did not cause disturbance in the family. However due to bitterness expressed by the victim's family and the unwillingness of the offender's kin to reach a reconciliation and the fact that the offender does not take responsibility to offence, we recommend to the honourable court to deal with him in any manner it may deem appropriate.
28. In determining the appropriate sentence, I have given special consideration to the mitigation and aggravating factors of the offence. The court also gives reasonable consideration to the fact that the deceased suffered fatal injuries which were not excusable or justified as stipulated in Section 17 on self-defence or provocation in Section 207 & 208 of the *Penal Code*. The convict in this case to the best of his ability did not attempt to prevent or limit the serious harm from taking effect. To denounce the unlawful conduct, this is not a suitable case for non-custodial sentence. There is need to promote a sense of responsibility in the convict and acknowledgement of the harm done to the deceased, his family and to the community. The focus of this sentence would be therefore custodial in nature despite the strong submissions on mitigation by learned counsel Mr. Miyiinda. As far as the 8 years spent in remand custody is concerned, the court is bound by Section 333 (2) of the *CPC* to give credit to the sum total of the period to be imposed as punishment against the convict.
29. Having considered all the aspects above the following sentence is imposed.
- i. The convict is to serve 18 years imprisonment but with a credit of 8 years due to the period spent in remand custody, the actual sentence for committal is a proportionate of 10 years.
 - ii. 14 days right of appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8th DAY OF MARCH, 2024

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R. NYAKUNDI

JUDGE

