



REPUBLIC OF KENYA



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**Republic v Kendagor (Criminal Case 78 of 2013)  
[2024] KEHC 3659 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 78 OF 2013  
RN NYAKUNDI, J  
APRIL 16, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENJAMIN KENDAGOR ..... ACCUSED**

**JUDGMENT**

1. The accused person namely Benjamin Kendagor was 1.10.2013 charged in this court with offence of murder contrary to Section 203 as read with 204 of the *Penal Code*. The particulars of the offence read as follows:

Bendanjamin Kendagor Kipkemboi on the night of 29<sup>th</sup>/30<sup>th</sup> day of September, 2013 at Matete trading centre in Matete District within Kakamega County, murdered Vincent Kiptabut Chelelgo.

2. When the accused was arraigned in court he pleaded not guilty. The state was under the Constitutional mandate under Art. 50 (2) (a) of the *Constitution* to disprove his innocence beyond reasonable doubt. In this respect 9 witnesses were summoned to tender evidence to prove every ingredient of the offence of murder as the evidence is the only legal tool applied to discharge the burden of proof of beyond reasonable doubt in a criminal trial for the court to make a finding as to the guilty of an accused person.

**The Case For The Prosecution**

3. PW1: Wilson Rono Cheptinga testified that he was the owner of m/v registration no KBV 189Z and that he employed the deceased as the driver. He permitted the deceased to transport passion fruits to Uganda for a customer. On 30<sup>th</sup> September 2013 he was notified that the deceased had been killed in Matete area. He immediately went there and confirmed it to be true. He saw the body of the deceased in one of the rooms in a lodging facility. The body was only dressed in underpants and appeared to have sustained bruises around the neck with blood oozing from the left ear. He informed the deceased's



relatives of the death. Lastly, he informed the court that he had permitted the deceased to hire any person he desired as a turn boy.

4. PW2: Nixon Andrew Kundu Khaemba testified that he was an administration police officer. On the night of 29-30<sup>th</sup> September 2013 at approximately 2100HRS he booked himself into a room in Bomas Boarding & Lodging. At around 0115Hrs, he heard someone screaming from the adjacent room saying, “ananiua! ananiua! ananiua!” He also heard commotion from that room and he decided to call his colleagues from Matete AP Camp. Three responded and when they went to room no 1, they found it bolted from inside. They then knocked on the door the occupant took about 5 minutes to respond. He denied that screams had emanated from the room and when asked to wake his colleague up, he was unable to. They then discovered that the other occupant in the room was dead and caused the arrest of the accused. Lastly, he identified the accused in court as the occupant in the room where the deceased was found dead. They recovered items from the room that they believed to be exhibits relevant to the case.
5. PW3: Henry Wandera testified that he was one of the officers who responded to the distress call by PW2. He informed the court that when they got to Bomas Boarding & Lodging, they met up with PW2, went to Room No 1 together with the watchman. When they found the door bolted from inside and knocked on the door, the accused who was an occupant of that room took time before he opening the door. Inside the room, they also found a body of a man that had been covered with a sheet. That man was dead and therefore they arrested the accused. He identified exhibits that were recovered at the scene.
6. PW4: Shadrack Chepchieng identified the body of the deceased, his brother, at Webuye District Hospital Mortuary and witnessed the post-mortem examination.
7. PW5: IP Peter Chege’s testimony was the same as that one of PW3 in that they responded to a distress call from their colleague and found a dead body inside room no 1 at Bomas Boarding & Lodging. They also arrested the accused person who was inside the room and recovered exhibits.
8. PW6: Jackson Nyongus Bartiran Similarly identified the body of the deceased, his son, before a post-mortem examination was done.
9. PW7: PC Michael Cherutich similarly testified that he witnessed the post-mortem examination.
10. PW8: DR. E.M Vilembwa testified that he conducted a post-mortem examination on the body of the deceased. The general appearance of the body showed that there was a linear bruising on the anterior neck with spokes wounds with wire-like marks and facial cyanosis. All this led him to the conclusion that the cause of death was due to cardiorespiratory arrest secondary to asphyxia from strangulation.
11. PW9: CPL Paul Limo testified that he was the I/O who was tasked to investigate the matter. On 30<sup>th</sup> September 2013 at around 0800HRS he went to Bomas Boarding & Lodging, specifically room no 1, where he’d been informed a murder had occurred. They found the body of the deceased dressed only in vest and underpants. The body had bruises on the neck and blood oozing from the left ear. His investigations revealed that the accused and the deceased had shared that same room. A witness heard screams for help coming from the room and notified the police. His investigations further revealed that the accused had locked himself in the same room where the body was found. He took into possession as exhibits a piece of wire, gloves, black leather jacket, white vest torn on the shoulder, shirt with torn buttons, pair of white shoes, cash money Kshs. 11,850, black trouser, belt, phone and its charger and jungle green jacket. All these were produced as Exhibits in the matter. He was convinced that the accused committed the crime because he was the only person in the room at the time the deceased was strangled to death.



## The Defence Case

12. Similarly, after careful analysis of the evidence by the prosecution it was established under Section 306 of the *CPC* that the accused person has a case to answer. He elected to give a sworn statement of defence comprising of the following elements. That he did not commit the offence of murder against the deceased as alleged by the prosecution witnesses. It was the accused defence that he was not even within the vicinity of the murder incident. He however recalled that the deceased was a driver of motor vehicle No. KBV 189Z which was used to transport cargo between Kampala and Kenya. That on the material day in company of the deceased, they stopped at Marete trading center and they looked for a place to sleep. On that material day states, the accused that the watchman showed them various rooms which they would have an option to make a choice before formal booking is done. Thereafter, they left the lodging in such of food in another hotel. On arrival they ordered the food from that hotel which was about 120m from where they booked the rooms to spent a night. In essence they shared the social evening together with the deceased before they parted ways to their respective rooms. The accused also recalls that on or about 10 pm he saw the deceased in company of a lady but eventually gave no details as to what transpired with the lady and the deceased. There was nothing unusual until 3 am when some people banged the door with an order for them to open it. The accused made the 1<sup>st</sup> move to open the door and the people introduced themselves as administrative police officers that is when he was accused of killing his colleague. That is how he ended up being indicted for the offence of murder.
13. At the close of the prosecution and defence case, it is appreciated that Mr. Mark Mugun the senior prosecution counsel favoured the court with his written submissions on the various perspectives of the case as navigated by the state and the 9 witnesses summoned on there behalf pursuant to Section 107 (1) & 108 of the *Evidence Act*. The learned counsel for the defence Mr. Omboto also filed his submissions on behalf of the accused reiterating that the prosecution has failed to discharge the burden of proof of beyond reasonable doubt to enable this court make a finding of guilty which will lead to a conviction of the accused person.

## Analysis And Determination

14. Speaking of proof of beyond reasonable doubt, this court must bear in mind the guidelines by the Court of Appeal *Anthony Ndegwa Ngari v Republic* [2014] eKLR, for cases of murder, the Republic is supposed to prove each of the following ingredients beyond reasonable doubt:
  - i. The fact of death;
  - ii. The fact that deceased's death was caused by an unlawful act or omission;
  - iii. That the accused committed the unlawful act which caused the death of deceased; and
  - iv. That the accused had malice aforethought
15. It is trite that the burden of proof never shifts from the prosecution to the accused person. I find solace in the following authorities which are profoundly laid the foundation as to what are the key characteristics envisaged in law on the matter of burden and standard of proof of beyond reasonable doubt.

“The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which



can be dismissed with a sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In *Andrea Obonyo & Ors Vs Republic* (1962) EA 542, the court stated as follows:

“as to the standard of proof required in criminal cases Denning L.J. had this to say in *Bater Vs Bater* (1950) 2 ALL ER 458 at 459:

“It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.”

16. It is against background I have proceed to examine the evidence in totality to establish whether each ingredient for the offence of murder has been proved beyond reasonable doubt

a. The fact of death

It is the evidence of PW1 that in the year 2013 he had employed the deceased as a driver, driving his vehicle KBV 189Z carrying goods between Eldoret and Kampala. On 29.9.2013 PW1 told the court that the driver now deceased spent a night at Matete center. Apparently PW1 had no problem for he was assured by the driver that all was well in securing the goods and the motor vehicle. Incidentally, PW1 never heard from the driver until the 30.9.2013 when a police officer from Lumakanda police station telephoned him to convey the tragic news that his driver had been killed. According to PW1 on arriving at Lumakanda police station he was taken to the scene where he saw the body of the deceased with bruises on the back. This testimony by PW1 was also corroborated by the medical evidence of PW8 who gave evidence on the post-mortem examination report involving the deceased Vincent Kiptabut whose body was identified by Shadrack Chepchieng and Jackson Bartiram. This evidence is in line with the principles in *Nyambanga vs Republic* (1990-1994) EA 462, *Ndiba Vs R* (1981) KLR, *Ekai vs R* (1981) KLR. It is my finding therefore, that from PW1 evidence as supported by PW8 bearing the details of the post-mortem report the deceased is dead, therefore the prosecution discharging the burden of proof beyond reasonable doubt.

### **Whether the death of the deceased was caused unlawfully?**

17. In Art. 26 of the [Constitution](#) it reads as follows:

1. Every person has the right to life.
2. ....
3. A person shall not be deprived of life intentionally. Except to the extent authorised by this Constitution or other written law. Such excusable or permissible death consists of the following:
  - i. Death caused accidentally.
  - ii. Death occasioned in defence of life property.
  - iii. Death which is carried out in the execution of a lawful sentence.
  - iv. Death that is occasioned as a result of extreme and immediate provocation.

18. In the cases of *Rex Vs Mimbi s/o Ipopo* (1946), *Benson Ngunyi Nundu Vs R* CACRA No. 17 (1984) the cause of death in homicide cases is proven by way of medical evidence. Some of the causation issues



the court has to bear in mind are those defined in Section 213 of the Penal Code which captures the letter and the spirit of the court as follows:

“The death need not be caused by the immediate act of the accused. Section 213 of the Penal Code defines causing death to include acts which are not the immediate or sole cause of the death. The accused would be held responsible for another person’s death although his act is not the immediate or sole cause under the following circumstances:

- a. He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which caused his death.
- (b). He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living.
- (c). He by actual or threatened violence causes such other person to perform an act which caused the death of such person, such as act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is caused.
- (d). He by any act hastens the death of a person suffering whole death under any disease or injury which apart from such an act or omission would have caused the death and
- (e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or other persons.

19. Nowhere is this scope of Section 213 of the Penal Code is better explained than the persuasive case of *S Vs Pistorious* (2016) SACR 431 (SCA) in which the court articulated the concept of dolus eventualis in murder cases as follows:

“In the of murder, there are principally two forms of dolus which arise dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore “gambling” as it were with the life of the person against whom the act is directed. It therefore consists of two parts. (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that he person must act “reckless” as to the consequences (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that he possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute necessary criminal intent”.

20. In ensuing evidence from the circumstantial evidence of PW1, PW2, PW3, PW5, PW6, PW7 and PW8, they all point to a chain of events tailored at establishing that the deceased’s death was unlawfully caused on the night of 29<sup>th</sup>/30<sup>th</sup> September 2019 at Matete trading centre. The corroboration evidence is clearly captured in the post-mortem report dated the 2<sup>nd</sup> of October 2013. In the testimony of PW8, the pathologist Dr. Edward opined that the cause of death was cardiorespiratory arrest due to asphyxia



from strangulation arising out of the post-mortem examination carried out on the 2<sup>nd</sup> October 2013. What is the effect of that evidence? It is to draw the inference from the principles in the case of *Abanga alias Onyango v Republic* Cr. App No.32 of 1990 where the Court held that “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- a. The circumstances, from which an inference of guilt is sought to be drawn, must cogently and firmly be established.
- b. Those circumstances should be of a tendency unerringly pointing towards guilt of the accused.
- c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

In *Sawe v Republic* (2003) KLR 364 the Court of Appeal amplified on the above thus “In order to justify circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of the circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the Prosecution. It is burden which never shifts to the accused.”

21. In the instant case before me, there is no other hypothesis to make sense on how the deceased met his death save that his death was unlawfully caused. The defence statement is inconsistent with that of the Prosecution witnesses leaving the element being proved beyond reasonable doubt.

22. It is trite that with regard to murder, contrary to section 203 of the *Penal Code*, the Prosecution must prove the element of malice aforethought beyond reasonable doubt as defined in section 206 of the *Penal Code* in the following manner-

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. An intention to cause 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 flight or escape from custody of any person who has committed or attempted to commit a felony.

23. Malice aforethought as embodied in case law demonstrated in *Rex v Tubere s/o Ochen* (1945)12 EACA 63 denotes that it can be inferred taking into account the weapon used, the manner in which it is used, the part of the body injured, the conduct of the offender, before and after the commission of the offence. In the case of *Abanga supra* the Court of Appeal also observed that the fact that the brutal killing was well calculated and planned by the Appellant, the trial Court would be within the confines of section 206 of the *Penal Code* that the killing against the deceased manifested malice aforethought.

24. The Prosecution witness PW1 told the Court that he was the owner of m/v registration no. KBV 189Z and that he had employed the deceased as the driver. The vehicle used to operate between Uganda -



Kenya highways transporting fruits. He recalled that on the material day on the 30<sup>th</sup> September 2013, he was notified that the deceased had been killed in Matete area where they had taken a room for the night with the accused person. He rushed to the scene and indeed confirmed the deceased body was in one of the rooms in that lodging but appeared to have sustained injuries around the neck with blood oozing from the left ear. It was further the testimony of PW2, Nixon Khaemba that he worked as an Administration Police Officer and on the night of 29<sup>th</sup>/30<sup>th</sup> September 2013, he booked himself into a room in Bomas Boarding and Lodging. It was at that night he heard screams from the adjacent rooms shouting in Swahili '*unaniua, unaniua, unaniua!*'

In responding to the scene, he confirmed that the door to the room was locked and on further inquiry, the deceased body was discovered having succumbed to death. The accused person who was with deceased became the first suspect and an arrest was effected for him to answer the allegations on the death of the deceased. This matter became a Police case obviously as narrated by PW3, PW4, PW5 and PW7.

25. From a comparative law perspective, akin to our own jurisprudence, given our common law heritage, the Court in *DPP v Smith* (1960)3 All ER 161,167, Lord Viscount Kilmuir stated that

“.. it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his action, ie, was a man capable of forming an intent, not insane within the M’Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such kind that grievous bodily harm was the natural or probable result. The only test available for this is what the ordinary responsible man would, in all circumstances of the case, have contemplated as the natural and probable result”.

26. It was established by the Prosecution that the accused person and the deceased were last seen together at Bomas Boarding & Lodging, apparently in the same room. The screams on that material time and day were heard by the neighbouring occupant. The Prosecution evidence from PW1, PW2, PW3 & PW9 when pieced together, points positively to the accused person as the one last seen with the deceased at the scene of crime. The accused was therefore expected to offer some explanation to that overwhelming evidence as to when and under what circumstances he had parted with the company of the deceased on the very night his body was discovered having succumbed to the fatal injuries. It is settled law under section 107(1), 108 &109 of the *Evidence Act* that the burden to prove the guilt of the accused is obvious on the Prosecution. However, in view of section 111 of the *Evidence Act*, when any fact is within the knowledge of any person, the burden of proving that fact is upon him/her to discharge it with preponderance of evidence. In the instant case, it is noted that the doctrine of last seen together theory as a typology of proving the case beyond reasonable doubt has been discharged by the Prosecution. The accused person unfortunately in his defence has certainly failed to throw any light on the facts which are proved by the Prosecution to be within his special knowledge to provide additional link in the chain of circumstances required to be proved against him. The propounded evidence by the Prosecution on the last seen together is very strong as against the defence offered by the accused person. Incidentally, though not on the actual murder itself, there is direct evidence to the occurrence of this death upon the deceased and in the same singular circumstances, places the accused at the scene. The fact that the accused and the deceased were seen together is never doubtful. That upon recovery of the deceased’s body in the same room hired by themselves to spend a night, the following injuries were noticeable; anterior neck transverse, linear bruise marks with spokes creating barbed wire like marks. As a result of the examination, the pathologist PW8- Dr. Edward, formed the opinion that the cause of death was cardiovascular arrest secondary to asphyxia from strangulation. In this background, the



version of the Prosecution sustains on how the deceased met his death upon recovery of his body at Bomas Boarding & Lodging at Matete trading centre. As to the death of the deceased, the case rests on circumstantial evidence and every link in the chain by the nine Prosecution witnesses, establishes that whoever killed the deceased had malice aforethought. This is more strengthened when one bears in mind the principles in *Rex v Tubere* case *supra* and the multiple injuries consistent with the provisions of section 206 (a)&(b) of the Penal Code. The facts of this case are in tandem with the decision of the Supreme Court of India in *Sharad Birdichand Sharda v State of Maharashtra* (1984)4 SCC 116 where the Court enunciated as under;

“The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his right of presumption of innocence under Article 50(2)(a) of the Constitution.(underlined emphasis mine.)

27. In the factual matrix of this case, as explained by PW1, PW2, PW3 & PW9, their circumstantial evidence is of such a nature that there is no lapse of time when the accused and the deceased retired to go to the room and when the deceased was found dead. The differentia minimal as to the date, time and location is extremely thin so as to exclude the possibility of any other intervening hand or event which could have contributed to the death of the deceased. The prima facie evidence from the Prosecution rules out any other hands or persons to have been involved in the death of the deceased.

There is clarity of evidence by the prosecution that the accused person based on circumstantial evidence was the last person to be seen with the deceased and the deceased body was later retrieved within the same timeline from the hotel room where they had spent a night. The inevitable conclusion by this court there is no reason to look for identification elsewhere to place the accused at the scene of the murder. For the last seen evidence irresistibly points to the guilty the accused person to have inflicted the fatal injuries.

28. Given the strength of the Prosecution case, and in light of the aforesaid discussion, I am convinced and truly so, that the standard and burden of proof of beyond reasonable doubt in line with the principles in *Woolmington v DPP* (1935) MAC 462 has been discharged fully in so far as the element of death of the deceased, the unlawfulness of that death, the existence of malice aforethought and positive identification as against the accused person. As a consequence, I find him guilty and convict him of the offence of murder contrary to section 203 as punishable under section 204 of the Penal Code.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF APRIL 2024**

**R. NYAKUNDI**

**JUDGE**

In the Presence of

Mr. Omboto Advocate for the Accused

Mr. Mugun for ODPP

Accused.



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