Republic v Kemboi (Criminal Case E014 of 2017)
[2024] KEHC 5790 (KLR) (16 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E014 OF 2017

RN NYAKUNDI, J

MAY 16, 2024

BETWEEN

REPUBLIC ..... STATE

AND

GEOFFREY KIBET KEMBOI ..... ACCUSED

JUDGMENT

1. The accused person herein, Geoffrey Kibet Kemboi 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 the 17th day of February, 2017 at Kapsinedent village, Tinderet location within Nandi County, murdered Ian Kipchumba (hereinafter referred to as the deceased). The accused entered a plea of not guilty and the lead counsel Mr. Mark Mugun for the state summoned 7 witnesses to discharge the burden of proof of beyond reasonable doubt as founded in Section 107(1), 108 and 109 of the *Evidence Act*. The accused person in this trial was represented by legal Counsel Mr. Nyachiro in terms of Art 50(2) (h) of *the Constitution*.

The summary of the prosecution case

2. In the present case, PW1 Lucy Bii told the court that she is the accused's grandmother and that on 17th February, 2017 at about 5:00PM the accused called her to his home where she found the deceased covered with a blanket in the accused's bed. On uncovering the deceased, the body had no life and on further observations PW1 stated that the victim's legs had hot water burnt injuries. There were no other odd marks on the body. According to PW1 on inquiry from the accused she was informed that he had prepared hot bathing water and the deceased walked into it. The incident was reported to the police and on investigations the accused was charged with the offence of killing his child.

3. PW2 Benard Kipkurui whose home was near to the scene testified that he is an uncle to the accused and that on 17th February, 2017 at around 5:30PM he heard screams which were emanating from the

accused's house and on arrival at the deceased's home he found the accused's wife was the one who was screaming. He further testified that the accused informed him that the child had gotten into hot water and that is how he sustained the burnt wounds. He also told the court that at the time he did not see the deceased but later on when he accompanied the police, he saw that the deceased had sustained burnt wounds on his legs. PW2 was later to be asked by the police to record a witness statement which he has relied on to narrate the events of the material day,

4. PW3, Stanley Kipkorir testified that he is the accused's father and that on 17th February, 2017 at around 6:00PM he was called by the sister and when he got home, he met his mother who told him to check on the deceased. On entering the accused's home, he saw the deceased who had marks on his body as though he had been beaten and the child was not breathing. He also told the court the deceased's legs were burnt with water from above the ankles downwards.

5. PW4 No. 3921 CPL Samuel Ongeri told the court that on 17th February, 2017 at 8:00PM he was at Songhor police when he received news regarding the said incident. PW4 testified that on arriving at the scene of the murder he saw the accused sitting near the deceased's body having a head injury. PW4 told the court that he had a torch and there was a lantern lamp in the accused's house. PW4 further testified that he found the deceased's body in bed covered with a blanket and upon removing the said blanket he saw that the deceased's legs were burnt with hot water and the body was swollen. He further testified that the deceased's belly had marks indicating that something hot had been placed in the fire then used it to burn his belly. According to the testimony of PW4 he tried to trace the weapon used to burn the victim and ultimately, he came into possession of a metallic rod which was produced as Exhibit 1. Thereafter PW4 and other police officers in the presence of the mother took the body and at the same time effected an arrest of the accused person to answer to the charge of murder. In his quest to document the scene, PW4 presented before court a sketch plan as to the surroundings where the fatal injuries were inflicted. It was also observed by PW4 that the kitchen fire was near where the body was found and the murder weapon was under the bed in the same room. In addition to the above evidence, PW4 also who witnessed the post mortem examination of the deceased at St. Vincent Mission Hospital Muhoroni was allowed to submit the post mortem report as exhibit 3 as documentary evidence for the prosecution.

6. PW5, Durence Chepkorir testified that the accused was her husband whom they got married in December, 2016 and in February, 2017 both of them cohabited together as husband and wife. PW5 went further to state before this court that on 17th February, 2017 she left farm activities and went home to make lunch for her family. That time she was in company of the accused and the deceased. That lunch according to PW5 was prepared and in a short while she left for their grandmother's home under instructions of the accused to go and pick some maize leaving behind the deceased with the father. Incidentally in the words of PW5, the accused was not the biological father of the deceased. On her way home from the grandmother's house PW5 told the court that she met with the accused person who appeared quiet and annoyed. She tried to inquire what was the problem but there was no answer from the accused. It did not take long as they sat down together next to a tea farm, the accused person confessed as having burnt their house. There was nothing about the deceased's condition. Notwithstanding that explanation, PW5 eventually arrived home only to hear of some screams from the paternal grandmother to the accused. She dropped everything else, rushed home only to find the deceased on his bed already having succumbed to death out of the burnt wounds from the hot water which had been poured over his body. PW5 on further observation noticed that the deceased had burnt wounds to the back and belly inflicted with a hot device. The police had been informed of the incident and on arrival they arrested the accused and carried the body to St. Vincent Hospital Muhoroni for a Post mortem examination. In the testimony of PW5 at the time when she left home for the grandmother's house, the deceased was in good health with no evidence of any burnt injuries

or any other serious harm to his body. As the mother to the deceased, she recorded a witness statement to the police on the circumstantial evidence on how the deceased met his death.

7. PW6 Keter Kiplangat Ezekiel told the court that the deceased was his nephew and that on 27th February, 2017 he received a call from Songhor Police Station requiring him to go and identify a body at St. Vincent Mortuary Muhoroni. This was done before the pathologist would carry out the post mortem examination on the deceased body as a requirement of procedural protocols on such matters.

8. PW7 Dr. Rotich Wesley's evidence was to the effect that on 27th February, 2017 he was asked to conduct a post mortem examination upon the body of the deceased by the name Ian Kipchumba whose body was lying at St. Vincent Hospital Mortuary Muhoroni. In PW7's testimony the details of the condition of the deceased body revealed the following multiple injuries:

   Bruise forehead 3x2cm, Upper limbs: left forearm. 2 bruises; 2x4cm, and 2x3cm, Left arm 3 bruised (i) 4x1cm, (ii) 5x2cm, (iii) 4x2 cm; Right forearm. 3 bruises: (i) 2x3cm, (ii) 2x4cm, (iii) 3x3cm, Abdomen: Bruise left hypochondrial region – 6x3cm, Bruise left lumber region – 4x6cm, Lower limbs: Bruise left thigh – 16x12cm, Bruise right thigh – 16x13cm, Burn injury left thigh – 3x2cm (dry heat), Burn injuries (Scald) Dorsum of both teeth, Raptured mesenteric blood vessels, Raptured spleen, Massive peritoneal hemorrhage.

9. As a result of the post mortem examination PW7 formed the opinion that the cause of death of the deceased was massive internal bleeding to blunt abdominal trauma by a blunt object.

10. That is the background of the case for the state looked at from the legal lens of the prosecution. The permissible trajectory of this case was that the accused person was placed on his defence, the prosecution having discharged the burden of proof of a prima facie case. It is in this respect the accused person elected to give a sworn statement under the leadership of his legal counsel Mr. Nyachiro. In his defence the accused acknowledged that on the material day as a family their day started without any major events, each going out to attend to his/her specific chores. The accused person further told this court that at around 12:00pm his wife left for the grandmother's house to go and borrow some maize to be utilized at their home. It was also the testimony of the accused that he did not burn the deceased but the incident occurred when his wife went to boil some water and soon thereafter the water fell on the child found next to that scene. The neighbors responded to the screams and what followed was his arrest and being charged with an offence of murder which he did not commit at all.

11. This is the totality of the evidence which will be scrutinized, evaluated and examined to establish whether actually the accused participated in committing the offence of killing the deceased beyond reasonable doubt. The burden of proof on the state is beyond reasonable doubt. Why do we have such a burden? There are constitutional imperatives in criminal cases more specifically under the Bill of Rights being Art 22, 24, 25(a) 27, 48 and the pre-trial rights under Article 50 of *the Constitution*. The right to presumption of innocence until the contrary is proved in Art. 50(2)(a) of *the Constitution* is one of the core rights which underpins the criminal justice system that prefers to see that the guilty persons go free rather than an innocent person being convicted and sentenced to some kind of sentence. In general, it is appreciated that convicting an innocent person is a greater harm that should be avoided by evaluating closely the elements of the offence and the corresponding evidence produced by the prosecution.

12. The superior courts have pronounced themselves on this aspect of what constitutes the burden of proof of beyond reasonable doubt. As this can be seen in the case of *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR where Justice Mativo expressed himself as hereunder:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It

is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

13. The context of beyond reasonable doubt was also clarified in the cases of *Woolmington v DPP* [1935] MAC 462 and *Miller v Minister of pensions* [1947] 2 ALL ER 372 that court held at page 373:

> " That degree is well settled. It need not reach certainly, but it must carry a high degree of possibility proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so string against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course, it is possible, but not it the lease probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

14. This is a case built on circumstantial evidence. In the case of *R v Hillier* [2007] 233 A.L.R 63, *shepherd v R* [1991] LRC CRM 332 the courts observed that:

> " The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."

15. Similarly, the Court of Appeal had occasion to consider the requirements to be met before placing reliance on circumstantial evidence in *Simon Musoke v R* 1 EA 715 where it observed that:

> " In a case depending exclusively upon circumstantial evidence, he (the Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt." (See also R v Kipkering Arap Koske 16 EACA 135, Musili Tulo v R [2014] eKLR).

16. Bearing these principles in mind, I move to examine whether the elements of the offence have been proven beyond reasonable doubt. As I endeavor to analyze the value and credibility of the prosecution witnesses in this regard on the veracity of circumstantial evidence one must not lose sight of the direction given by Supreme Court of Uganda in *Kalunde Semakula v Uganda* CR Appeal No. 11 of 1994 where the Court observed as follows:

> " Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cause suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

17. To the first element which is the death of the deceased, there is no doubt that the deceased, Ian Kipchumba is dead. There is cogent evidence from the post mortem report by Dr. Wesley Rotich, PW7 that the deceased was found dead in their homestead at around 1600hrs on the 17th February, 2017. From the prosecution's circumstantial evidence adduced by PW1 to PW7 the right to life of the deceased under Art 26 of *the Constitution* was terminated in circumstances pointing to culpability by a third party. This element is therefore proved beyond reasonable doubt. The defence did not even dispute the death of the deceased in their evidence.

18. The next important element for the offence of murder is whether the death of the deceased was unlawfully caused. The relevance of this element is illuminated in Art 26(3) of *the Constitution* in the following language: "A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law." Culpable homicide is the unlawful acts of omission or commission causing the death of another human being unless it is shown that the killing was excusable or justified within the provision of our Criminal legal system. I have in mind Section 17 on self defence and Section 207 as read with 208 on the defence of provocation. The unlawful Acts are mainly to be manifested in evidence by way of a medical or autopsy report from the pathologist. For the purposes of this offence, the court must ask itself the following questions:

    a. Whether a reasonable person in the same position and circumstances of the accused would have foreseen the possibility that the deceased's death may result from his conduct;

    b. Whether the reasonable person would have taken steps to guard against this possibility;

    c. Whether the conduct of the accused differed or deviated from the conduct of a reasonable person in the circumstances

19. This was a pure case of one human being who had been entrusted with the security of the deceased but turned out to be the one to inflict acts of assault of unlawful nature both directly and indirectly which impaired the bodily integrity of the deceased. In the case of *Joseph Kimani Njau v Republic* [2014] eKLR the court of appeal stated: -

> " In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard....."

20. The *actus reus* of this offence in question of the accused is traceable from the evidence of PW1 whose testimony was to the effect that on arrival at the scene of the homicide, she found the accused covered with a blanket while lying on the accused's bed. This evidence was corroborated with that of

PW2, PW3 and PW5 as to the manner and circumstances in which the deceased sustained grievous bodily harm and never even made it to a medical facility. Her death was instant and confirmed by the pathologist PW7 in the autopsy report produced as Exhibit 3 to have been due to massive internal bleeding due to blunt abdominal trauma by a blunt object. The investigation officer PW4, visited the scene, drew a sketch plan, indicative of the position of the deceased's body of the alleged hot water and the alleged multiple injuries on both the upper and lower limbs, abdomen and the raptured mesenteric blood vessels. It is also worthy to mention that PW4 recovered a metallic rod produced as Exhibit 1, which apparently was the murder weapon used by the assailant to inflict injuries to the back and the abdomen. In responding to this evidence, the accused told the court that the deceased's injuries were as a result of some accident with no human hand involvement let alone his culpability.

21. As a consequence, circumstantial evidence principles as laid down in the cases of *R v Hillier* [2007] 233 A.L.R 63, *shepherd v R* [1991] LRC CRM 332 and *Simon Musoke v R* 1 EA 715 (*Supra*), it is enough to state that the prosecution has proved this element beyond reasonable doubt that the deceased's death was unlawfully caused contrary to the accused assertion in his defence.

22. The core element in homicide cases under Section 203 of the *Penal Code* is the manifestation of malice aforethought. Section 206 of the *Penal Code*. These provisions defines malice aforethought that: -

> " Malice aforethought 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 flight or escape from custody of any person who has committed or attempted to commit a felony."
>
> Additionally, in the case of In *Daniel Muthee v Rep*. CA NO. 218 OF 2005 (UR), Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:
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> "When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."

23. If the evidence by the prosecution constituting the testimonies of PW1, PW2, PW3 and PW5 is anything to go by, holistically they support they support the narrative of an accused person who premeditated and intended the result of causing the death of his own son. The thought process contemplated to achieve a particular outcome is deducible from the testimony of PW5, the wife and the mother to the deceased. The pieces of evidence captured in her testimony including the circumstances when she came from the farm, prepared a meal for both the deceased and the accused person. In the

same vein, the accused instructed PW5 to go and collect some maize from his grandmother leaving behind the deceased in good health and in company of the accused person. There is no evidence that she suspected any foul play but, on her return, back to her house, in very suspicious circumstances she met with the accused along the road who seemed to be struggling from some emotional issues. It is on record that PW5 and the accused decided to have a conversation for him to disclose what happened in the short span of time she had left for the grandmother's house to collect the maize. The best answer she received from the accused was that she has burnt the house with no mention of the whereabouts of their son, the deceased in this case. What happened thereafter from the testimony of PW5, PW1 and PW3 was astonishing because the deceased was found lying on the bed covered with a blanket and on further uncovering his body he had suffered multiple injuries from the head, upper and lower limbs and the abdomen as confirmed by PW7 in the post mortem report. The intention in all its forms involved the accused's state of mind of instructing the wife PW5 to leave the crime scene so that he can commit the offence without an eye witness. This state of mind was accompanied with pre-meditation. This was not a crime committed at a spur of the moment. The circumstances under which the murder was committed against his own child by the accused shows that the murder was premeditated and there were no exceptional circumstances to bring the case within the rubric of Sections 17 or 207 and 208 of the *Penal Code*. The inference to be drawn from the accused conduct before, during and after committing the offence, the weapon used, the manner in which it was used, and the parts of the body of the deceased targeted for infliction of serious harm is in consonant with the guidelines in *Rex v Tubere s/o of Ochen* 1945 12 EACA 63. What was manifested in all these violent and aggressive behavior of the accused is the element of malice aforethought. Therefore, he had the intention to kill or cause grievous harm against the deceased. There was no middle ground of his unlawful conduct to exonerate him from the element of malice aforethought. It is also important to restate that the evidence by the prosecution does demonstrate that this is not a case of accidental fall of the victim inside the hot water container but a well calculated intention to occasion his death by virtue of the recovery of the metallic rod associated with the grievous harm inflicted against the deceased. In the language of the investigating officer, the metallic rod was recovered at the scene with specific markings of that rod having been used to inflict multiple injuries to the various limbs of the deceased.

24. There is no doubt that this is a homicide which comprises unlawful attack of an innocent child which resulted in his death and accompanied with malice aforethought in executing it.

25. The last question for this court to answer is whether the accused person participated in causing the injuries that led to the aforesaid death of the deceased. It is settled law in our jurisdiction that the following principles remain to be the measure of testing identification evidence either by a single witness or evidence of more than one witness in placing the accused at the scene. In the case of *Wamunga v Republic* [1989] KLR 424 the Court of Appeal stated thus:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

26. Similarly, the same court in *Anjononi and others v Republic* [1980] KLR stated as follows:

> " ..... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

27. In my own evaluation of the evidence, I find this to be a straight forward case in which PW5, the wife placed the accused at the scene of the crime. This was a case of recognition rather than identification. It is more satisfactory for reason that the witness was his own wife, the cohabited together since 2017 and lived as one family prior to the incident. However, with profound respect to the accused, certain pieces of his evidence on the surrounding circumstances leading to the death of their own child is consistent with that of the prosecution's evidence. The brief rejoinder to the case of the prosecution determined with the facts and circumstances logically lead to one conclusion that the accused was the principal perpetrator and there was no intervening factor which set in to occasion the death of the deceased. This case being purely circumstantial as to the actual commission of the crime, the law postulates first, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. Second, all the circumstances must be consistent only with the guilt of the accused. This homicide as advanced by the prosecution evidence brings to the fore the doctrine of last seen theory to establish that no one else was involved in this murder except the accused person. These are the elements of the doctrine as stated in the case of *Bodha v State of Jammu and Kashmir*, [2002] 8 SCC 45, the formulation of the law is as follows:

> " The last scene theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

28. By way of background, from the testimony of PW5, the main question therefore is whether during the time lag when the accused instructed PW5 to leave the house to go and collect some maize from the grandmother's house leaving them behind with the deceased, there was a possibility of a third person entering the house boiling the water, looking for a metallic rod to use it in inflicting fatal injuries against the deceased. In all circumstances by the evidence tendered by the prosecution, there is no iota of a stranger having entered that house to commit the crime as it appears to be the narrative being developed by the accused person. That possibility is very minimal, ostensibly because there is an admitted fact from the accused that he burned the house while PW5 was away in his grandmother's homestead. Admittedly, he never mentioned anything to do with the deceased in the cause of that conversation with PW5. An important circumstance in this case from PW1, PW2, PW3, PW4 and PW5 is the fact that the body of the deceased was laying on the bed covered with a blanket with multiple injuries. The lapse of time between the point when the accused was last seen left in company of the deceased by PW5 and the time when she came back to her home and encountering the accused outside that scene of the crime without the presence of the deceased speaks volumes as to his involvement as that span of time extremely minimal.

29. Having gone through the material evidence of both the prosecution and the defence, I am of the view and reasonably so that the strength of the prosecution's case is of such a nature to hold the accused culpable for the homicide contrary to Section 203 of the penal code to find him guilty and an order of conviction for a charge proved beyond reasonable doubt.

DATED AND SIGNED AT ELDORET THIS 16TH DAY OF MAY, 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of

The Accused person.