Republic v Muchangi (Criminal Case 24 of 2018)
[2024] KEHC 9360 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9360 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 24 OF 2018

HM NYAGA, J

JULY 25, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

GIVEL WAWERU MUCHANGI ..... ACCUSED

JUDGMENT

1. The Accused herein Givel Waweru Muchangi was charged with two counts of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the first count were that on the 14th May,2018 at Ngondu B Area, Mosop Location, Njoro Sub-County within Nakuru County he murdered Mary Wanjiku Mureithi.

3. The particulars of the second count were that on the 14th May, 2018 at Ngondu B area, Mosop Location, Njoro Sub-County within Nakuru County he murdered Francis Mureithi Waweru.

4. The accused denied the charges and the prosecution called 7 witnesses in support of the charges against him.

DIVISION - Prosecution case

5. PW1 was Elizabeth Wambui. She testified that the accused was employed by her parents as a farm hand. That on 14th May,2018, she went to visit her parents. When she got there, she saw cows in the shamba. She went to the accused's house and she found it locked. She went back to the shamba and on the way, she met some young men who helped her take the cows to the shed. She asked them whether they had seen the accused and they told her they had not. She went with them to the accused's house, knocked the door but there was no response. Another man who wanted to buy charcoal came and she told them to break the window to the accused's house. The window was broken the young and old man shouted "uuiwii wameuana!". They screamed and neighbors came. She called her brother James and

informed him about the incident. When they moved closer to the house, she noticed the accused and deceased persons had covered themselves and there was blood all over. She also noted that the accused was still breathing. When they uncovered them, they noted that the accused had stab wounds on the neck. She later learnt that the bodies were of the deceased persons herein. Police officers came to the scene immediately and one took the accused to the hospital while the others one took the bodies away.

6. PW2 was James Muiruri Karanja, a brother to PW1. He said when he received a call from PW1 he went home immediately. He found police at the scene and upon introducing himself to them, they let him in. He saw the accused's wife and child lying on the ground, dead. The accused's wife had injuries on her face while blood was oozing out of the child's brain. The accused was lying next to them, unconscious.

7. It was his testimony that the accused used to work for his aged parents and lived with them in the same compound.

8. PW3 was Wilfred Ndirangu Macharia an uncle to Mary Wanjiku (the deceased). He identified the bodies of the deceased persons before post mortem examination was conducted. He said the Mary's body had stab wounds on the head and face while child's body had a blunt injury to the skull.

9. PW4 was P.C Sanga Thunje based at DCI Kigumo. He testified that on 14th May,2018 at around noon, he received a call from Head of DCI, regarding a murder case in Rongai. He went to the scene where he found the OCS, Njoro and Administration Police officers. He said at the scene, there was small house with two rooms situated in a big compound. The incident happened in a house which was locked. When they opened the door to the said house, he saw two bodies, one of a woman and a child, and the accused lying next to them, injured. He noted that the woman was lying with a child tied behind her back with a Lesso. He found a Jembe, a blood stained knife, checked shirt, blue short and white nylon.

10. The witness further testified that investigations revealed that the accused was working as a farm hand in that homestead and that the woman was the accused's wife while the child was the accused's child. He added that after post mortem examination was conducted, he took an exhibit Memo and sent them to the government analyst and later, he received the report. Thereafter, he charged the accused with the offence herein.

11. On cross examination, he stated that he did not take any finger prints. He confirmed Paul Muchemi's statement indicated that he pushed the door open and found people dead and a broken stool. He confirmed he did not dust the stool for fingerprints. He stated that he did not interview the owners of the home as they were elderly. He also said he did not know who inflicted the injuries on the accused. He added the owners of the home had a kitchen which was 10 meters away from the accused's house. He confirmed no one witnessed the incident. He said the investigations showed the accused committed the offence as he was found inside the room and there was no other person present at the time.

12. PW5 was Kipngetich Bernard, the Government Analyst. He testified that he received the following items from PC Joseph Njogu;Item 1- Blood samples from the Accused.Item II- Finger Nails chippings from Mary Wanjiru(Deceased)Item III- Finger nails from Francis Waweru (Deceased)Item IV- A KnifeItem V- A JembeItem VI- A checked Shirt.Item VII- A Multi colored lessoItem VIII- A Shirt short sleeved.Item IX- A White Nylon SackItem X- Long Sleeved Light Short Shirt.

13. He said upon examination, it was established that Items 9, 10 and 5 were moderately stained with human blood; Items 10,7,4 and 8 were heavily stained with human blood; Blood stain on Item 8 did not generate any DNA Profile; the DNA profile generated from item 10 and five matched the DNA generated from the finger nail chippings of Mary Wanjiku (Deceased); and the DNA profile generated from the Lesso (Item 7) , Items 6, 9 and 4 matched the DNA profile generated from the sample of Givel Waweru. She produced the Exhibit Memo and the report as P EX.9A & B respectively.

14. On cross examination, she stated that ideally the use of polythene bags is discouraged and the use of new envelopes encouraged because they are sterile. She said bags used should be sterile to avoid cross contamination. It was her evidence that the items brought were separately packed but some were in a nylon bag. She said nylon bags tend to offer some degree of aeration but not polythene bags. She agreed that there were chances of cross-contamination. She confirmed that none of the items contained the DNA profile for Francis Muriithi (deceased) and item 8 did not generate any DNA Profile but it was blood stained. She said Item 7(Lesso) did not have DNA of deceased persons.

15. PW6 was Veronicah Kamau, Senior Assistant Chief from Ogilgei Location, Ngata Division. She testified that on 14th May,2018 at around 10.00 am she received a report from the village headman that there were bodies of a woman and a child in the home of Gaitha. She proceeded there in company of the chief one Mr. Yegon. Upon arrival, she saw a woman carrying a baby on her back. Both were dead. She also saw a man lying next to them, and he had an injury on his neck and abdomen. She called the O.C.S Njoro Police Station, who came to the scene, processed it and took the man to the hospital.

16. On cross examination, the witness said that the owner of the homestead one Mr. Gaithi is now deceased. She said she had not received any report of a domestic quarrel.

17. PW7 was one P.C. Wycliff Mwausi Mulanda attached to Njoro Police Station. He testified that on 14th May,2018 at around 11.00 pm, he accompanied P.C Barasa to the scene. Upon arrival, they found a huge crowd who directed them to the house in the compound. He said that house was tiny and the door was locked from inside. They broke the door and saw 2 bodies lying on the floor. Next to the bodies was a person who was unconscious. He noted that the two bodies were that of a woman and a child who was tied to her back with a lesso. He also noted that the woman had injuries on the head, while the child had multiple cuts. The man had injuries on his abdomen and neck, and next to him there was blood stained knife and a jembe. They rushed the man to Njoro Sub- County Hospital while the bodies were taken to the mortuary.

18. By a ruling dated 8th February, 2024 accused person was found to have a case to answer and accordingly put on his defence. The accused, through his advocate elected not to adduce any evidence. They also chose not to submit. The prosecuting state counsel did not make any submissions either.

Analysis and Determination

19. It is trite that the burden of proof in criminal cases rests entirely on the prosecution and never shifts to the accused. The accused person has no burden to prove his innocence. He is presumed innocent until proven guilty. In Republic vs Stanley Muthike Tiire [2018] eKLR the court stated that issue: -

> "It is the law in Kenya as entrenched in the Constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The Evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus: "Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."
>
> 20. As to what constitutes the burden of proof beyond reasonable doubt the case of Miller vs Minister of Pensions [1947] 2 ALL ER 372 – 373 provides as follows;
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> "That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a 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 doubt but nothing short of that will suffice."

21. The offence of murder is defined as follows under section 203 of the Penal Code:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

22. This definition gives rise to four (4) crucial ingredients of the offence of murder all of which the prosecution must prove beyond a reasonable doubt for its case to succeed. These are:

a. The fact of the death of the deceased.

b. The cause of such death.

c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person.

d. Proof that the said unlawful act or omission was committed with malice aforethought.

23. In that respect, I would refer to the decision in Republic vs. Mohammed Dadi Kokane & & 7 Others [2014] eKLR and Mombasa High Court Case Number 42 of 2009 Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang where the court expressed itself as hereunder:

> " The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:
>
> a) Proof of the fact as well as the cause of the death of the deceased persons.
>
> b) Proof that the death of the deceased's resulted from an unlawful act or omission on the part of the accused persons.
>
> c) Proof that such unlawful act or omission was committed with malice aforethought."

24. On whether the death of the deceased persons occurred, this is not in dispute. All the prosecution witness confirmed this fact.

25. On the cause of death, I note the post mortem examination reports were marked for identification and placed on the court record although the pathologist neither testified nor produced the said reports in evidence.

26. The fact that they were placed on record may be the reason that the prosecutor who took over the case did not notice that the documents were merely marked and not produced.

27. What then is the effect of a document marked for identification and not produced? The court in Justus Musau Wambua & another vs Republic [2020] eKLR, citing with approval the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 others [2015] eKLR held:

> " In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for

identification in its analysis of the evidence and determination of the dispute before this court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- the State (1994) 7-8- SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision."

28. The effect of documents marked for identification and not produced was considered by the Court of Appeal in Kenneth Nyaga Mwige v Austin Kiguta and Others NRB CA Civil Appeal No. 140 of 2008 [2015] eKLR where the Court observed that;

> " Guided by the decisions cited above, a document marked for idntification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

29. From these authorities, it is thus clear that the documents namely the post mortem reports cannot be relied upon as exhibits.

30. So, does the lack of the post mortem reports render a fatal blow to the prosecution case?

31. In most cases, the post mortem report is the crucial evidence that guides the court in establishing the cause of death. This is especially so where the cause of death is not obvious, like when the deceased person has no apparent injuries.

32. However, there may be exceptions to this rule. There may exist exceptional circumstances, such as those that were referred to by the court in Ndungu vs Republic (1985) eKLR. On such circumstances the court held that;

'The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision....."

33. Another illustration is as was stated in the case of Republic vs Mohammed Wanyoike & Another [2017 eKLR, where the court stated that: -

> " A postmortem is normally conducted in murder cases so as to determine the cause of death. The mere fact that a postmortem is not conducted does not mean that the cause of death cannot be determined. If robbers invade a house and in the process shoot their victim dead using a rifle and he passes on, the absence of a postmortem report cannot be a good defence if the robbers are ultimately apprehended and charged with the offence of robbery with violence or murder. A postmortem report is not a condition pre-requisite to the offence of murder."

34. Similarly, in Chengo Kalama vs Republic (2015) eklR, the Court of Appeal held as follows:

> " The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased.

35. The issue was also discussed in Republic versus Joseph Mulupi Okwiri [2018] eKLR, where the court held: -

> " The second issue for determination is whether the prosecutions failure to avail the doctor who performed the postmortem examination in this case is fatal to the prosecution's case. This question is critical for the simple reason that in a murder case, the prosecution must not only prove the fact of death but must also prove the cause of such death. In the case of Ndungu versus Republic (Supra) the Court of Appeal said that "in some cases death can be established without medical evidence." This case, taken together with Republic – versus – Cheya [1973] EA 500 were cited with approval by the Court of Appeal in Dorcas Jebet Keter & another versus Republic [2013]eKLR where the appellants were found guilty, convicted and sentenced to death for the murder of one Hillary Malakwen who was found to have been tortured and burnt to death by the appellants and their accomplices, despite the prosecutions failure to produce a postmortem report.

36. So, are there exceptional circumstances as to the cause of death that would override the failure to produce the post mortem reports?

37. In the instant case, the cause of death was very evident. It was by apparent extensive injuries to both deceased. The gory scene was described by the witnesses who went to the accused's house. The nature of the injuries to the deceased was described in great detail. PW2 said the deceased woman had injuries on her face which appeared like it had been caused by a sharp object while the child had blood oozing out of the brain, which is a sign of very forceful trauma to the skull. PW3 stated that the deceased woman 's body had stab wounds on the head and face while the child's body had a blunt force injury to the skull. PW4 said the two bodies had multiple injuries and were lying in a pool of blood while PW7 stated that the woman's body had injuries on the head and the child's body had multiple cuts. It is patent that these injuries were not self-inflicted and that the deaths were not as a result of natural causes. They arose from the fact that there was an external force that caused the same.

38. It is thus my finding that, given the nature of the injuries, the failure to produce the postmortem report does not render a fatal blow to the prosecution case.

39. On whether the deceased met their deaths as a result of an unlawful act or omission on the part of the accused person, the Prosecution called witnesses to prove this fact. There was no eye witness account to the events that led to the death of the deceased persons. The only available evidence is therefore circumstantial evidence.

40. In Rex vs Kipkering Arap Koske [1949] 16 EACA 135, the court held that to sustain a conviction against an accused person based on circumstantial evidence, such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. The evidence should point to the accused as having committed the offence he stood convicted of and to no other person.

41. In Sawe vs Rep [2003] KLR 364, the court expressed that:

> " In order to justify on 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 hypotheses than that of his guilt.
>
> Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
>
> The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

42. In the instant case, there is no dispute that the accused was found with the deceased persons herein inside his locked house. There is also no dispute that the accused was the husband and a father of the deceased persons respectively. The fact that the accused lived in the house where the deceased persons were found was attested to by PW1, PW2, PW4, and PW7.

43. Considering the nature of the injuries, it is reasonable to lead to presumption that it was the accused, and not anyone else, who fatally injured them. A blood stained jembe was found in the house. From the injuries seen by the witnesses, this was obviously one of the weapons used to inflict the injuries on the deceased. Also, a blood stained knife was found next to where the accused was lying.

44. From the above, I am satisfied that the evidence adduced formed a complete chain pointing irresistibly to the accused as the person who attacked the deceased persons and inflicted the injuries from which they died. I find that the accused killed both deceased persons.

45. As regards the element of malice aforethought, section 206 of the Penal Code provides that:

> " 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;..."

46. In the case of Roba Galma Wario vs. Republic [2015] eKLR the court held that:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

47. In John Mutuma Gatobu vs Republic (2015) eKLR The Court of Appeal stated;

> " Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal Code.....
>
> There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

48. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, 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 one of the following intentions, the test of which is always subjective to the actual subject;
>
> 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....."

49. In Morris Aluoch vs Republic Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of Rex vs Tubere S/O Ochen (1945) 12 EACA 63 with approval where it was in stated as follows:

> " If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late".

50. The scene as described by the witnesses was such that blood was spluttered all over the house. This was a sign of vicious violence meted on the victims.

51. Based on the above cited authority, and the multiple injuries on the deceased persons, I find the element of malice aforethought has been proven.

52. From the evidence, the accused was found with injuries on his neck and his abdomen. It was suggested by the prosecution that these were self-inflicted after he killed the deceased persons. The fact that he was found alive was sufficient to prove this theory. There is no way the deceased could have caused the injuries on him.

53. What is not in doubt is that the accused inflicted the injuries to both his wife and the child that eventually led to their death. He then tried to take his own life. This is a classic case of intended murder-suicide, but which never reached the expected conclusion, as the accused was found alive.

54. For the foregoing reasons and on the principles set out above, I find the accused guilty of murder as set out on both counts and convict him accordingly.

55. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE.

In the presence of;

Court Assistant Jeniffer/Miruya

State counsel Nancy

Accused present