



**Republic v Muyiakha (Criminal Case 30 of 2019)
[2024] KEHC 9331 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 30 OF 2019
SC CHIRCHIR, J
JULY 18, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

STANLEY EBUKU MUYIAKHA ACCUSED

JUDGMENT

1. Stanley Ubuku Muyiakha (the accused) was charged with murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars were that, on 17th May, 2019 at Ishireno Village, Virhembe Sub-Location, Shibuye East Sub-County within Kakamega County, murdered Cosmas Arikawa Luyiakha (Deceased).
3. The accused denied the charges and the matter went to full trial.

The prosecution’s case

4. PW1 was the mother to both the accused and the deceased. She told the court that on the material date, she was harvesting vegetables when the accused came to her and told her to go towards the stream. She went to the direction indicated and found that she deceased had died. The accused never told her anything. she never witnessed the incident.
5. PW3 was the village elder. At around 4.00 pm 17th May 2019 someone called him and informed him that there was a fight and the deceased had died, as a result. Later the accused went to him and requested for help to take the deceased to hospital. The accused told him he had fought with the deceased and the deceased had been badly injured. He took the accused to the Assistant chief and later accompanied the police to pick the deceased’s body. He further stated that he noticed that the deceased had blood in his mouth and on the head.



6. PW4 was the chairman of “nyumba kumi” at Ishereno. At about 4 pm the accused went to him. He did not look fine. He appeared to have been in a brawl. He told PW4 that he fought with the deceased over a cow that had been released by the deceased to his maize farm. He later received a call from the deceased’s family, the caller informed him that the deceased had died. He later accompanied the police and saw the deceased. He identified the accused in court.
7. PW5 was the pathologist, he presented an autopsy report done on the deceased’s body on 21/5/2019. Alfred Luyiakha and Christopher Mbayi identified the body. On examination , he found that the deceased’s body had extensive bruises on the left- middle side of the head, both cheeks, back of the head, both arms and forearms. The brain was swollen. He formed the opinion that the cause of death was severe head injury secondary to blunt force trauma following assault.
8. PW6 was Chief- inspector Alvin Matara attached to Shinyalu police station. On the material date at 17.40 hours he received a call from the chief of Virembe Sub-location Maritim Likawa. She informed him about the incident. He and one of his colleague started off for the scene to the scene, but diverted to the Chief’s office, upon being informed that the suspect had been taken there.
9. He took the suspect to the police station. The accused narrated to him what transpired between him and the deceased.
10. On cross-examination he told the court that he was an arresting officer. He never witnessed the incident. He identified the accused in the dock.
11. PW7 was the Investigating Officer Detective Athman Ali, previously based at Kakamega East. He told the court that on 17th may 2019 at about 5 pm, they got a distress call from the Assistant Chief of Virembe Sub-Location informing them about a murder incident at the said sub-location.
12. They went to the scene and found deceased body in a maize farm. His colleagues IP Obae recovered the murder weapon, a stick. It was blood stained.
13. On Cross-examination he stated that he never recorded statements. He stated that the deceased’s mother and other witnesses testified to have seen the accused attack the deceased.
14. His investigation established that there was a fight between the accused and the deceased and that there was bad blood between the two, due to family issues.

Defence case.

15. At the conclusion of the prosecution’s case the accused was put on his defence. The accused gave a sworn statement. He told the court that on the material date, he had gone to give water to the cows. He found the cows feeding on maize crop and the deceased lying face down. That he called him twice, but he did not respond; that he looked unwell. He went and called his mother and they both went back to the scene. Upon his mother checking the deceased, she instructed him to go and call “nyumba kumi” . He went to the village elder and the elder escorted him to the Assistant Chiefs Office from where he was arrested. He never went back to the scene. He told the court that the deceased was his brother and denied killing him.
16. At Cross-Examination he told the court that he did not think of taking the deceased to hospital but later stated that he went to the village Elder, he was going to get assistance to take his brother to hospital. He admitted that he was the only one arrested. The accused closed his case.
17. None of the parties filed submissions.



Determination

18. I have considered the evidence tendered and exhibits relied on. Section 203 of the penal code, under which the deceased has been charged, provides as follows: “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
19. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the Court of Appeal expounded on the elements of murder. It stated as follows:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”
20. To secure a conviction, the prosecution must prove each of the above elements beyond reasonable doubt. I will therefore proceed to consider whether each of the elements have been proved.

The Death of the Deceased

21. The Pathologist (PW5) told the court that he carried out an autopsy on the body of the deceased on 21.5.2019, the body was identified by Alfred Luyiakha and Christopher Mbayi Luyiakha. He formed the opinion that the cause of death was severe head injury secondary to blunt force trauma following Assault. He produced the autopsy Report (PExb 1). Thus the fact that the deceased died, and the cause of his death was proved.

Whether the deceased’s death was caused by the Accused.

22. There is no eye witness to the murder. The prosecution’s case is therefore, purely circumstantial.
23. The accused herein is accused of killing his brother. The first prosecution witness was his mother. She told the court that she was called to the scene by the accused. She went and found that the deceased had died. She did not witness the attack on the deceased. PW3 and PW4, save for the fact that they accompanied the police to the scene, the rest of their evidence was hearsay and hence inadmissible.
24. The arresting and the Investigating Officers gave evidence as per the testimonies they got, or recorded. The investigation officer of what PW1 told her was equally hearsay. Even then, while he told the court that PW1 indicated that she witnessed the Accused attacking the deceased, this contradicts PW1’s own testimony to the effect that she never witnessed the incident.
25. PW7 told the court that his colleague IP Obae recovered the murder weapon. There was no evidence showing that the weapon was taken for chemical analysis to ascertain whether the Accused’s DNA material could have been left on the alleged murder weapon.
26. In the case of *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 cited with approval in the case of *Neema Mwandoro Ndurya v. R* CRA.446/2007, the Court of Appeal described circumstances as follows:

“..... It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”



27. Before a court bases a conviction on circumstantial evidence, the said evidence must meet certain criteria. In *Abanga alias Onyango v Republic* CR. App NO. 32 of 1990(UR) the court set out the criteria as follows:
- “(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
 - (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) 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 none else.”
28. From the testimony of PW1 the accused summoned her to the scene to go and see the deceased. Logically therefore the accused saw the deceased first before his mother did. The Accused told the court that he found the deceased lying, face- down near, or in a maize plantation. PW1 on the hand stated that when she reached there she found that the deceased had died and that she did not witness the incident.
29. Should it then be concluded that since the accused was the first person to bring the report about the condition of the deceased, he was responsible for the killing? It would be convenient to conclude that way. But in his defence the Accused told the court he found the deceased already injured. His cross examination did not shake his defence, he said he went to “nyumba kumi” to seek help in taking the deceased to hospital. PW3 the village elder seen to confirm this part of his testimony.
30. The prosecution did not submit sufficient evidence to displace the accused defence that he arrived on the scene when the deceased had already been injured. In other words, the prosecution did not demonstrate that no other person, except the accused herein could have been the last person to be seen with the deceased while alive.
31. It must be remembered that for circumstantial evidence to form a basis of conviction “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 none else.” (*Abanga alias Onyango vs R- supra*)
32. The circumstances immediately following the death of the deceased must also be considered. The prosecution questioned the deceased person on why he did not see it fit to first take the deceased to hospital. His response was that his trip to the village elder was to go and get help. PW4 did confirm that the accused told him that he needed help to take the deceased to hospital. PW4 also observed that the accused did not look well and he appeared to have been involved in a fight.
33. Admittedly the Accused’s conduct of not taking the first step to take the deceased to the hospital, and his appearance, going by the testimony of PW4 cast suspicions on him. However, am not satisfied this piece of evidence is sufficient to infer guilt. Again as stated in *Abanga Onyango’s case(supra)* “ the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (Emphasis added).
34. Further in *Sawe vs Republic (2003) KLR 364* the court of Appeal while citing its earlier decision in *Mary Wanjiku Gichira s. Republic, Criminal Appeal No 17 of 1998(unreported)* stated :suspicion, however strong ca not provide a basis for inferring guilt which must be proved by evidence. Before a court can convict an accused person of an offence, it ought to be satisfied that the evidence against him



is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life”

35. I conclude by citing the court of Appeal's decision in Sawe's case(supra) where the court also held as follows:

“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.(Emphasis added)

36. I am not satisfied that the circumstances of this case point to the accused as the one who could have been the perpetrator of the crime committed against the deceased.

37. It is the duty of the prosecution to prove its case beyond reasonable doubt and where doubts do exist, the doubts must and is always resolved in favor of the Accused.

38. It is my finding therefore that the prosecution has failed to prove the charge of murder against the accused herein and he is hereby acquitted of the charge of murder pursuant to section 215 of the Criminal procedure code. He shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JULY, 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin – Court Assistant

Stantley Ebuku- The accused

