



Republic v Kitoo (Criminal Case 2 of 2018) [2024] KEHC 8621 (KLR) (15 July 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 2 OF 2018**

RK LIMO, J

JULY 15, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH KITUNGU KITOO ACCUSED

JUDGMENT

1. Joseph Kitunguu Kitoo, the accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that on 16th December 2017 at Makaani Village, Miambani Location within Kitui county, he murdered Margaret Ngambi who was his wife.
2. The accused person denied committing the offence. The prosecution presented 7 witnesses and its case is based on circumstantial evidence. The defendant on the other hand while conceding that there was an altercation between him and the deceased, maintained that it was an accident insisting that the deceased fell on a hard surface and died as a result.
3. Thomas Muthengi Musyoka (PW1) an uncle to the accused testified that on 16th December 2017 (hereinafter to be referred to as the material date) he lived near the homestead of the accused and the deceased. He testified that he was attracted to the home of the accused by screams from a woman. He stated that he went to investigate and found the accused quarrelling with the deceased while holding a stone. He stated that he calmed both of them urging them to reconcile. It was his testimony that things calmed down and the accused took a stool and went outside the home and sat down. He stated that he then left.
4. When challenged during cross-examination, the witness changed the narrative that it was the deceased who actually was holding a stone and demanding for her money from the accused.
5. Victor Musili Ngandi (PW2) a brother to the deceased testified that on the material date he was up and about doing his bar business when a boda boda operator named Mwendwa, brought her injured



sister (the deceased) to where he was. He said that he inquired from her what had happened and she reportedly told him that the accused who was her husband had hit her and kicked her in her abdomen. According to PW2, the deceased was screaming in great pain and looked restless.

He stated that he looked for a vehicle which took her to Neema Hospital in Kitui where she later on 21st December 2017, succumbed. He stated that he went and took the body to Kitui General Hospital Mortuary and later on 28th December 2017, identified her body before autopsy was done.

6. Jackline Munzi Viana (PW3) testified that the deceased was a friend and neighbor whom she had known since the year 2000. She stated that she was headed home from work on the material day when she met the deceased sitting on the side of the road. She stated that the deceased told her that she was hurt on her stomach and also asked her to take her to her brother, PW2. The witness stated that she called for a boda boda and the three went to PW2's place of work. She proceeded that upon arriving at PW2's, the deceased started vomiting and when PW2 inquired what had happened to the deceased, the deceased informed him that she had been beaten by the accused.

In cross examination, the witness testified that the deceased did not inform her that she had been beaten by her husband. She also stated that she did not know whether the deceased had come from a women's conference.

7. Mwendwa Mutonya (PW4), a boda boda operator testified that Jackline Munzi (PW3) called him on phone and asked him to ferry her and deceased to the brother of the deceased. He confirmed that he took the deceased to her brother who arranged for other means of transport to take the deceased for treatment. He stated that he later learnt that the deceased succumbed to the injuries she had sustained. He recalled seeing the deceased vomit after he had carried her to where her brother was.
8. CIP Linus Kimoboi (PW5), the OCS Kitui Police Station testified on behalf of Inspector Munene who was the Investigating Officer in the case but had since passed on. He told this court that the late Investigating Officer had recorded that the investigation carried out indicated that the accused engaged in a fight with the deceased and in the process hurt the deceased inflicting her with injuries from which she later succumbed after 5 days from the incident. He added that the accused took off after the incident but was arrested in January 2018. He testified that the fight between the accused and his wife, arose from a quarrel of Kshs. 1,500/= which the accused owed the deceased.
9. Dr. Kitheka Kelvin (PW7), from Kitui Referral Hospital testified on behalf of Dr. Kiatu who conducted the post-mortem on the body of the deceased, made a report but had since left for further studies in Dar-es-salam, Tanzania. He told this court that having worked with the said doctor for 2 years previously, he was familiar with his handwriting as well as his signature. He proceeded to give the findings noted in his report which were as follows:

- i. That the appearance of head and neck greenish and brownish.
- ii. That the thorax and abdomen had descended and that the abdomen was hard and non-mobile.
- iii. That internally, the digestive system had greenish and brown fluid in the peritoneal cavity, malted intestine with gut contents and that the liver was whitish.
- iv. The gut was perforated in the small intestine, jejunum.
- v. The doctor opined that the cause of death was severe peritonitis secondary to perforated gut due to blunt abdominal trauma. He tendered the postmortem report as PEX1.



10. When placed in his defence, Joseph Kitunguu the accused herein testified on oath that the deceased had asked for Kshs. 30,000/= for business which he says he gave her. He stated that the deceased after a while went back to him for more money and he told her that he was unable to raise the same.

According to the accused, the deceased became upset and they quarreled because the deceased accused him of giving out money to another wife. He stated that the deceased picked a stone and aimed at him before running out and that as she ran she fell on some bricks outside their home. He denied chasing her adding that the wife had just returned home from a seminar.

11. He stated that after the incident he left home and went away till 3rd January 2018, when the Area chief called him and informed him that he had harmed his wife.
12. On cross-examination, he maintained that the deceased fell on some bricks outside his house and that even after falling, the wife went back to the house and made tea for him. He stated that he left for Mwingi on 17th December 2017 after the altercation and never called his wife after the incident.
13. This court has considered the prosecution and the defence case.
14. The accused person is charged with the offence of murder which is defined under Section 203 of the *Penal Code* as;

when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Pursuant to Section 203 of the *Penal Code*, the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or commission of the two accused persons. Secondly, that in killing the deceased the two accused persons did so actuated by either express or implied malice aforethought.

15. Flowing from the above provisions these three elements that need to be proved for conviction in a charge of murder to be sustained. They are:
- The death of the deceased and its cause.
 - That the accused committed the unlawful act that caused the death (actus reus) and
 - That the accused had malice/aforethought (mens rea)

(a) The death of the deceased and its cause

16. There is no dispute of the deceased’s death. The court was informed that the deceased succumbed while undergoing treatment at Neema hospital on 21st December 2017. Dr. Kiatu conducted a post mortem on the body of the deceased on 28th December 2017 and Dr Kelvin Kitheka PW6 who had worked with Dr Kiatu and was conversant with his handwriting and signature produced the post mortem report dated 28th December 2017 as PEXH 1. The cause of death as per PEXH 1 was due to severe peritonitis secondary to perforated gut due to blunt abdominal trauma. The prosecution proved the death of the deceased and the cause of the death beyond reasonable doubt.

(b) Whether the accused committed the unlawful act that caused the death of the deceased (actus reus)

17. The prosecution’s case on this element hinges in circumstantial evidence. PW1 testified that he was alerted by screams or noise from the house of the accused and when he went there to find out, he found that the accused and his wife were quarreling and both looking agitated. He stated that the accused was holding a stone but he managed to calm both of them down. Though he later changed and stated that it was the deceased who was holding a stone, what emerges clearly given the defence



own testimony is that the accused and the deceased quarreled and the same led to an altercation and though the accused maintains that the deceased fell down, the medical evidence tendered by the doctor (PW7) clearly shows the injuries suffered could not have possibly be caused by a fall.

18. Moreover, the conduct of the accused after the incident indicates that he fled from the scene after assaulting his wife. How else could he go away and fail to call his wife until he was called out by the Area Chief in January the following year? This court finds that the surrounding circumstances of this case as laid out by the evidence tendered points to the accused as the person who caused the injuries from which the deceased later died.
19. In *Abamad Abolfathi Mohammed & Another -vs- Republic* [2018] eKLR the court of Appeal set out the test to be applied when considering whether circumstantial evidence is sufficient to sustain a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- 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 the guilt of the Subject;
- 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.”

20. Applying the above principles this court finds that it is not disputed that the accused and the deceased had an altercation over money. This fact has been conceded by the accused person. The evidence of PW1 gives an insight of what he found out at the house of the deceased when he heard screams. He found a charged environment with both the accused and the deceased looking quite agitated. It is instructive to note that PW1 left both the accused and deceased alone when he left. The injuries sustained was majorly on the stomach. The extent of the injuries shows that the injuries were not caused by an accidental fall as alleged by the accused but inflicted on her with some force that caused descended abdomen and perforated gut. The accused inflicted those injuries on his wife.
21. The above finding is strengthened by the evidence of PW2 who was a brother of the deceased. He stated that the deceased talked to him and died 4 days thereafter.

He testified that the deceased told him that she had been hit by the accused on the abdomen. PW3 stated that the deceased told her that she was hurt on her stomach and the witness heard the deceased telling her brother PW2, that it was the accused who had beaten her. The statement of the deceased to her brother PW2 amounted to a dying declaration in my view. Section 33 (a) of the *Evidence Act* (Cap 80) states that:-



33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—
- (a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”
22. The statement by the deceased amounted to a dying declaration, and even though she only told her brother PW2 that it was the accused who hurt her, she had also told PW3 that she was hurt on her stomach. She also told her brother that it was the accused who hurt her in the presence of PW3 and PW4. So, three people heard her say that it was the accused who hurt her. She did not mention any fall.
23. The accused in his defence stated that the deceased aimed a stone at him and ran out of the house and fell on some bricks but that in my view did not make sense because for one, the accused does not state if he was hit by the stone and if he suffered any injury.

Secondly, a fall in on the ground even if one falls on some rocks facing down would perhaps have injuries to the face and not stomach because naturally one would use the hands instinctively to protect himself/herself from the fall. The narrative given by the accused does not make sense in light of the gravity of the injuries sustained by the deceased.

(c) Mens Rea

24. This court finds that the circumstantial evidence tendered coupled with the dying declaration proves the element of actus reus as against the accused beyond reasonable doubt.
25. The evidence tendered before this court indicates that the deceased and the accused were engaged in a squabble over money which certainly led to a fight. It is not very clear from the evidence tendered if the accused harboured ill motives against his wife but at times ill motive can be inferred from the actions of the accused given the nature of injuries.

Section 206 of the [Penal Code](#) provides circumstances from which malice aforethought may be inferred. They are:

- 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



26. The Court of Appeal also in the case of *N M W v Republic* [2018] eKLR stated that in determining whether the accused person had malice aforethought, the court must take the surrounding evidence into account. The appellate court held as follows;

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit V. Uganda*, Cr. App. No. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

27. This court has evaluated the evidence tendered and on the overall, this court finds that there is no clear evidence that the accused intended to either cause grievous harm or death to his wife. He might have acted out of anger and this court is prepared to give him the benefit of doubt to that extent.

In the end, this court finds that while the evidence tendered cannot sustain a case of murder, certainly it sustains a case of manslaughter against the accused as I have no doubt in my mind that he inflicted the injuries from which his wife later succumbed to. He is therefore convicted of a lesser charge of manslaughter contrary to Section 202 of the *Penal Code*.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF JULY 2024.

HON. JUSTICE R. LIMO

JUDGE

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