Republic v Katana & another (Criminal Case 08 of 2017) [2024] KEHC 10351 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE 08 OF 2017

RN NYAKUNDI, J

AUGUST 8, 2024

BETWEEN

REPUBLIC .... PROSECUTOR

AND

GONA FONDO KATANA .... 1ST ACCUSED

LENNOX KAZUNGU .... 2ND ACCUSED

JUDGMENT

Representation:

Mr. Mwangi for the State

1. The accused persons jointly faced a charge of murder under section 203 as read with section 204 of the penal code. The brief particulars of the charge are that on 5th of May, 2017 at Chumani within Kilifi county jointly with others not before court murdered Changawa Katana Nzoa. Each of the accused pleaded guilty to the offence as framed in the charge sheet calling upon the prosecution to discharge the burden of proof of beyond reasonable doubt as premised in Section 107 (1), 108 and 109 of the *Evidence Act*. It is trite in Article 50 (2) (a) of *the Constitution* that every accused person has a right to be presumed innocent until the contrary is proved. In answer to this right the prosecution elicited evidence from the following witnesses to prove the following elements for the offence of murder beyond reasonable doubt.

    i. That the death of a human being by the name Changawa Katana Nzao occurred.

    ii. That the death was caused unlawfully.

    iii. That death was caused with malice aforethought.

    iv. That the accused persons participated in the crime.

2. On the first ingredient it is without dispute that the deceased Changawa Katana is dead. Her body was picked from the road side and taken to Kilifi county Hospital Mortuary. The police according to PW8 Corporal Ambrose Wambua commenced investigations to establish culpability of the accused persons. IN the postmortem report produced as exhibit 8 confirms the death of the deceased and Dr. Daisy Juma opined that the cause of death was server head injury.

3. As for the second element of the death being unlawfully caused the prosecution tendered evidence from PW1 David Kazungu who told the court that on the material day the grandmother sent him to go to the field to check on the cows. On arrival he saw a person he referred to as Mastori who gave him 10 shillings to go and purchase biscuits and cigarettes. When he left for the shop PW1 stated that Mastori and the grandmother remained at that farm. On his return journey back from the shop PW1 testified that he only managed to find Mastori without his grandmother at that scene. On inquiry from Mastori he was informed that the grandmother had gone to Chumani. He decided to go home and even at that homestead the grandmother was missing and he was never to see her until the recovery of the body on the roadside. He identified Mastori as the 2nd accused before this court. Further in support of this ingredient PW2 Samwel Karisa alluded to the fact that on 5th May 2017 while at Chumani centre he heard screams and on rushing to the scene he saw a body which had been crashed by a car tyre. Thereafter he took steps to call in the police from Ngerenya police post. PW2 recalled being assisted by the 1st accused to place the body of the deceased in a police vehicle. According to PW3 Katana Nzao on the 5th of May 2017 he received a telephone call detailing on the traffic accident of a woman who had been knocked down at Chumani. He was later to be directed to the Kilifi county hospital mortuary where he observed that the victim has suffered severe head injuries, and bruises on the hands and legs. In line with the duty vested with the prosecution to proof existence of the fact of murder contrary to Section 203 of the Penal Code PW4 Johnson Mukanga was also summoned and gave evidence as follows: That following the death of his father their remained some outstanding family issues among the 6 wives. PW4 further narrated on issues torching on the character of the 1st Accused Gona Fondo. He alleged that from the investigations it revealed that the 1st Accused had committed some crimes and his current residence was one of him seeking fugitive from being arrested by the police. PW4 further stated that he was to learn of the incident involving the deceased who was said to have been knocked by a motor vehicle. He neither witnessed the accident nor had any knowledge as how the deceased met his death. Next witness to be called by the prosecution was PW5 Karisa Katana. According to PW5 he told the court that although he did not witness the killing of the deceased, accused had issued threats to commit the offence against the deceased. In the evidence of PW6 Gabriel Nzau he knew the deceased as his step mother and the 1st accused at one time made a claim that he was a son of their brother who had passed away. PW6 also recalled that in 2016 the deceased complained that the 1st accused had threatened her and called her a witch. It happened that on the material day the 2nd accused called the deceased to go to the gracing field at Chumani. The cows were being taken care of by PW1 the grandson to the deceased.

4. The next event described by PW6 was in respect of a traffic accident which had occurred near Chumani centre only to be confirmed that the victim was the deceased person who was supposed to be in company of the 2nd accused. In the same trajectory PW7 Alice Mbose gave evidence confirming that the deceased was her land lady and on 5th May 2017 PW1 had to her shop to purchase biscuits and cigarettes. From her recollection PW1 had been sent by the 2nd accused. The offence in question was investigated by CPL8 Ambrose Wambua of Kilifi CID office. In PW8 narration he visited the scene, documented it by way of sketch plans, recorded witness statements and relevant evidential material leading him to conclude that the cause of death of the deceased was not a traffic accident as portrayed earlier on but pure homicide. PW8 therefore recommended that the accused persons be charged with

the offence of murder contrary to Section 203 of the Penal Code. It is the law in Kenya that murder unless accidental or authorized by law it is always unlawful. This element is intertwined between the hypothesis of accidental death given the fact that the body of the deceased was recovered along Malindi – Mombasa Highway and that of homicide. On purposive appreciation of the evidence more so that of PW1 as collaborated by PW2, PW3, PW4, PW7 the deceased presumed to have been in good health until the fairy tale circumstances set in on 5th day of May 2017 as demonstrated precisely by PW1. It is categorical from the prosecution case as traceable to PW2 & PW8 there were no skid marks at the scene where the body of the deceased was recovered to manifest a road traffic accident. Further the body as examined by Dr. Daisy Chuma on 11th of May 2017 the nature of the injuries on the body parts targeted is material to this court to make a conclusive finding that the deceased was killed elsewhere and her body dumped on the High way to cover-up the cause of death. In this case there is no doubt that the prosecution has discharged the element of the death of the deceased being unlawfully caused.

5. The next ingredient for consideration is whether in committing the offence the accused persons can be said to have had malice aforethought as defined in Section 206 of the *Penal Code*. In reference to the case of R Versus Tubere S/O Ochieng (1945) E.A.C.A the court has to assess existence of Malice aforethought from the evidence adduced taking into account the following elements. The weapon used, the part of the body targeted by the perpetrators, the conduct of the accused person before or after the crime, and the nature of the injuries inflicted to manifest that whoever injured the deceased had intended to cause death.

6. As retaliated by the Chief Justice of Connecticut a speech captured in Volume 19 Issues No 8 Yale Law Journal (1910) (https/digital.commons, law yale.edu/YLJ/V 19(issues) 4

> “ Malice, as the word is used in the indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill will or revenge existing in the mind of the stayer towards the person slain, but also cases of unlawful homicide which don’t proceed from and are not accompanied by suing such feeling. In the law or homicide, if a man intends unlawfully to kill another or do him grievous bodily harm such intention, whether accompanied or not accompanied by feeling of hatred, ill will or animosity constitutes malice.” Similarly, in *Cliff Emmanuel v Republic Supreme Court of Seychelles Cr. Case no 62 of 2017* where the court held that:
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>> “Knowledge as contrasted with intention signifies a state of mental realization in which the mind is a passive recipient of certain pleas and impressions are ensuing in it or passive before it. It is a bare state of conscious awareness of certain facts in which the human mind itself remains passive or inactive intention on the other hand connotes a state in which the mental facilities are roused in to activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. An element of knowledge is subsumed in the intention required to constitute liability for an offence. The approach to proof of intention is basically subjective while proof of knowledge is objective”.

7. When on a charge of murder, the person’s charged is shown by his conduct or words or both, that the inference can be drawn that he had the intention to kill or cause grievous bodily harm or that he knew his acts would probably result in grievous bodily harm to someone, then the requisite mens rea is

proven. The court in *Hyman vs Director of Public Prosecution* (1974) 2 ALL ER 41, the court observed as follows

> "(1) Before an act can be murder it must be aimed at someone as explained in *Director of Public Prosecution vs Smith* (1960) 3 ALL ER at 167 (1961) AC at 327, and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant.
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> (ii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits those acts deliberately and without lawful excuse, 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 defendant desires those consequences to ensure or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

8. There are two basic forms of evidence admitted by this court relevant to prosecution case. One is the direct evidence of PW1 who stated that on 5th May, 2017 he was in the company of the 2nd accused and his grandmother herein after referred as the deceased. The specific elements of PW1 testimony was to the effect that on arrival at the grazing field the 2nd accused send him to the shop to purchase biscuits and cigarettes. On his return journey he expected to find both the deceased and the 2nd accused but unfortunately he was informed by the 2nd accused that she had gone to Chumani. The other particular set of the circumstances that leads to the appropriate inference being drawn against the 2nd accused comes from the testimony of PW2, PW3, PW5, PW6, PW7& PW8. In a nutshell no witness saw the accused persons execute the act of murder but the 2nd accused was the last person seen with the deceased alive and just before her body was discovered along Malindi-Mombasa Highway. It also helps to state that PW2 told the court that as the police arrived at the scene the 1st accused assisted in putting the body in the police vehicle. Essentially, from the postmortem report, accidental death was ruled out by the pathologist giving effect to the inference that the deceased was killed elsewhere and the recovery of the body along Malindi-Mombasa Highway was a cover-up by the perpetrators of the crime. It is therefore prudent for this court to conclude that by the nature of the injuries inflicted upon the deceased has shown in the postmortem report that the killing was unlawful and actuated with malice aforethought. From the facts of this case and by the surrounding circumstances, which have been subjected to intense examination, it is precisely accurate that malice aforethought flows appropriately on the gravity of injuries, vulnerable parts of the body targeted and the weapons which may have been used though no recovery was made by the police. The pieces of circumstantial evidence given by the 2nd accused are incapable of exonerating him as the offender to the murder charge. Why do I say so? On the fateful day, the 2nd accused was with the deceased and PW1 before he dispatched him to go and buy some cigarrates and biscuits in PW7's shop. Just a few minutes thereafter, PW1 went back to the same scene expecting to find both the deceased and the 2nd accused. As fate would have it the deceased was nowhere to be seen and the 2nd accused claimed that she had gone to Chumani. It did not take long before that narrative was rendered negative by virtue of the deceased body found lying along Malindi –Mombasa Highway. The disputed cause of death was laid to rest by the investigating officer and the pathologist postmortem report. So in this case, malice aforethought is deemed to be manifested by the circumstantial evidence emerging from the time when the deceased was last seen alive and a few minutes later her body discovered with multiple serious injuries. Undoubtedly analysis of the evidence by the prosecution which was not controverted by the defence directs me with no hesitation to hold that malice aforethought is proved beyond reasonable doubt.

9. The one-million-dollar question to be answered by the state is who actually killed the deceased? This charge of murder against the accused person is based on visual identification. The guidelines be adopted to the facts of this case are to be found in *Cleophas Otineo Wamunga Versus Republic* (1989) KLR 424. The court correctly stated in this regard

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J in the Well-known case of *R. VS Turnbull* (1976) 3 ALL ER 549 at page 552 where he said recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes mad."
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> > "Although a fact may be proved by the testimony of a single witness. This does not lessen the need for testing with the greatest care the evidence of such single witness respecting identification." This is particularly so where the conditions are not conducive to proper identification or where condition favoring a correct identification are difficult. "

10. Participation of the accused persons is based on circumstantial evidence. None of the witnesses saw the accused persons commit the act of killing the deceased. There is however overwhelming circumstantial evidence on record, in the conduct of the 2nd accused person. There is scarce evidence pointing towards the direction of the level of participation of the 1st accused person. The chain of events which places the 2nd accused at the scene of the crime came from PW1 as the star witness to this offence. The facts which surround the 2nd accused are that he was the last person to be seen with the deceased before she met her death. The 2nd accused for reasons unknown created an assignment for PW1 to leave the scene and go the shop operated by PW1 to procure biscuits and cigarettes. When PW1 delivered the items the deceased was missing but the accused happened to be present but in absence of the other person who later became the deceased. The time span between the point of time when the deceased and the accused were last seen alive, and when the former was found dead, is so short that the chance of any person except the accused being the initiator of the murder, becomes impossible. In this indictment, the time gap of the deceased seen together and her being found dead, is an important factor which cannot be ignored by this court. As the time gap is so short when PW1 left the deceased and the 2nd accused together, and on inquiry by PW1, the 2nd accused claiming that the deceased had gone to Chumani is profound and in support of the last seen together theory to make a finding of culpability without any hesitation. In the persuasive case of *Anjam Kumar Sharma V/s State of Assam* (2017) (6) SCALE 556 following principle of law, in this regard, has been enunciated: -

> " The las seen 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”

11. There is no successful plea from the 2nd accused to create a reasonable doubt that he is not the person who created and planned the death of the deceased. The threshold of proof of beyond reasonable doubt has been discharged by the prosecution in so far as the elements of the offence are concerned and the last seen concept having played a vital role to complete the puzzle. When it comes to the 1st accused as briefly stated by the prosecution the entry of his name was in two scenarios. First that the members of the local area who included PW2, PW3, PW4, PW5 in the entire case dwelt on his adverse character of criminality and that he had issued threats to kill the deceased. Secondly, PW2 stated in court that when the police arrived at the road side to pick the body of the deceased it was the 1st accused who assisted them to place the body in the police vehicle. It is well settled that the entire case of the prosecution is based on the circumstantial evidence which postulates two-fold requirements: -

    i. Every link in the chain of the circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt.

    ii. All the circumstances must be consistent pointing only towards guilt of the accused

12. When it comes to the participation of the 1st accused in the killing of the deceased the links of the chain are incomplete to place him squarely at the scene of the murder. It is the duty of the prosecution to prove beyond reasonable doubt that it is the accused that caused the unlawful death of the deceased. This is done by either direct or circumstantial evidence. Unfortunately, from the evidence of the prosecution witnesses, it is clear that none of them saw the 1st accused kill the deceased or any existence of circumstantial evidence that he jointly acted in concert with the 2nd accused to cause the death of the deceased. I find the evidence against the 1st accused not compelling to warrant a verdict of guilty for the offence of murder contrary to Section 203 of the Penal Code. This is in contrast with the 2nd accused who was placed at the scene by PW1 and the final result of it the charge against him stands proven beyond reasonable doubt for this court to enter plea of guilty and subsequent conviction for the offence of murder contrary to Section 203 of the penal code. Sentencing verdict on 20th September, 2023. It is expected on the part of the accused person to submit on mitigation and the state on aggravating factors. As for the 1st accused, by the above finding, this court takes the liberty to acquit him of the offence and is hereby set free unless otherwise lawfully held.

Sentencing

13. The 2nd accused persons faced a charge of murder contrary to section 203 as read with section 204 of the *Penal Code* chapter 63 of the Laws of Kenya.

14. The brief particulars of the charge are that on 5th May, 2017 at Chumani within Kilifi county jointly with others not before court murdered Changawa Katana Nzoa. Each of the accused pleaded not guilty to the offence as framed in the charge sheet calling upon the prosecution to discharge the burden of proof beyond reasonable doubt. At the end of the trial, the 2nd accused was found guilty whereas the 1st accused person was found not guilty vide this court’s judgment dated 4th September, 2023.

15. In the instant case, the 2nd accused person was convicted mainly because he was the last person seen with the deceased the 2nd accused for reasons unknown created a mission for PW1 to leave the scene and go to the shop operated by PW1 to procure cigarettes and biscuits. When PW1 delivered the items the deceased was missing but the accused happened to be present in absence of the other expected person who later became the deceased

16. The Supreme Court decision in *Francis Muruatetu & Anther vs Republic* [2017] eKLR , the justices of the Supreme Court, affirming the decision of the Court of Appeal in Godfrey Ngotho Mutiso v R C.A. No. 17 of 2008, and the High Court in *Joseph Kaberia Kahinga and Others v The Attorney General* [2006] eKLR of stated thus:

> "We are in agreement and affirm the court of Appeal decision in Mutiso that whilst *the constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offenders' version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death penalty. If mitigation reveals an untold degree of brutality and callousness...'
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> 'If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused criminal culpability. Further imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict...'
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> 'The mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* is hereby declared unconstitutional. For avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution*...'"

17. The factors applicable as set out in the aforementioned case are:

    a. Age of the offender

    b. Being a first offender

    c. Whether the offender pleaded guilty

    d. Character and record of the offender

    e. Commission of the offence in response to gender-based violence

    f. Remorsefulness of the offender

    g. The possibility of reform and social re-adaptation of the offender

18. I have taken into consideration all the factors necessary in accessing the appropriate sentence to mete the accused person in this case as set out in the above case. Similarly, I have considered the objectives of sentencing as provided in the 2023 Judiciary of Kenya Sentencing Policy Guidelines. These are:

    a. Retribution: To punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

c. Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding citizen.

d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

e. Community protection: to protect the community by incapacitating the offender.

f. Denunciation: To communicate the community's condemnation of the criminal conduct."

19. I have considered the mitigation circumstances advanced by the accused person. Failure to consider the same is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty. I have equally examined the aggravating factors resulting to the offence in question. Having said that, the logical conclusion is to have the accused person sentenced to 10 years' imprisonment. The sentence shall run from the date of arrest in consonance with the provisions of Section 333(2) of the *Criminal Procedure Code*.

DATED AND SIGNED AT ELDORET THIS 8TH DAY OF AUGUST, 2024

In the Presence of

Accused

Mr. Mwangi for the State

..

R. NYAKUNDI

JUDGE