**Republic v Kurabu (Criminal Case 05 of 2018)**
**[2024] KEHC 10360 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10360 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARSEN**

**CRIMINAL CASE 05 OF 2018**

**RN NYAKUNDI, J**

**AUGUST 8, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**RANA SAMUEL KURABU ..... ACCUSED**

## JUDGMENT

1. The accused Rana Samuel Kurabu stand charged with offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The brief facts are that on the 10th day of February 2018 at Furaha village in Tana Delata sub-County within Tana River county unlawfully murdered Kadzo Kazungu Masha. The accused person having pleaded not guilty to the charge it was now the burden of the prosecution to proof the elements of the offence beyond reasonable doubt. To discharge that burden of proof the prosecution paraded four witnesses to adduce evidence so as to meet the threshold of a prima facie case against the accused. The senior prosecution counsel Mr. Mwangi conducted the prosecution while Mr.Nyongesa Advocate represented the Accused person.

### Case Summary For The Prosecution

2. PW1 Dr. Fadia of Malindi Sub-County hospital testified to the effect that he carried out a postmortem examination on 15/2/2018 upon the body of the deceased one Kadzo Kazungu. The examination revealed that the deceased suffered the following injuries: Externally has small bruises on the left side of the left eye above eye lid, has scar on the left breast above the nipple, and stub would on the left ... toes around 8cm penetrating up to the internal organs, packed with gauze, oozing blood has periphery cycrosis no fracture. As a result of the examination, PW1 formed the opinion that the cause of death was haemorrhagic shock due to stab wound. He presented before court the postmortem examination as an exhibit

3. PW2 was Loice Kazungu of Tana River County. She told the court that on 11/2/2018 at about 7.30pm he was with the deceased who also happened to be her mother. They were preparing the evening meals when some three people passed by whom she identified as Rana, Chengo, and Paulo. She further told the court that there were some noise within the neighborhood and when they went to check they found Rana with a walking stick speaking in a high voice. That same Rana came to the scene where the deceased was and proceeded to inflict stab wounds. Immediately after the stabbing the deceased fell down on the ground and arrangements were made to escort her to the hospital where she passed on while undergoing treatment.

4. PW3 Kazungu Kagenge who is a palm wine tapper gave evidence to the effect that on 10/2/2018 he had gone to Mama Zidi to take some alcohol. He was in company of Mtawali and also later joined by Rana the accused in this proceedings. On Rana inquiring whether he could be served with some alcoholic drinks, the owner of the place informed him there was no more alcohol to sell. That is when Mama Zidi told him to leave but he resisted and insisted on staying within the premises. There was further the testimony of PW3 that the same Rana even started throwing blows at him causing some kind of commotion. It was after a short while PW3 confirmed that he heard some screams and on rushing back to the scene found PW2 and the deceased on the ground with multiple injuries that is when he learnt that one Rana had stabbed the deceased inflicting fatal injuries as confirmed by PW1 during the postmortem examination.

5. PW4 was P/C Odanga of Garsen police station. He told the court that on 11/2/2018 at about 3.40pm he was with other police officers when they proceeded to a murder scene at Furaha village in Tana Delta sub-County. The crime had been committed on the 10/2/2018 involving the accused and the deceased. According to PW4 investigations carried out showed that the stab wounds were inflicted by the accused who on committing the crime took flight from the area but was later pursued by the police to effect an arrest. With the testimony of these witnesses the prosecution closed its case and the court found that the accused person has a case to answer. He was reminded of his constitutional rights to remain silent, give a sworn or unsworn statement, right to call any witnesses in support of his defence. Having so appreciated the protocols of the proceedings the accused person elected to give a sworn statement in rebuttal to the prosecution case. On this appointed day the accused denied that he is the one who stabbed the deceased. He alleged that the entire episode is a fabrication by the prosecution witnesses to have him imprisoned of an offence he did not commit. After that testimony the accused closed his defence and it was now the turn of this court to make a determination on whether the prosecution has established all the elements of the offence as provided for in Section 203 of the Penal Code. It has been held severally that for the prosecution to discharge its burden it must proof the elements of the offence to the required standard which is always proof of beyond reasonable doubt. The accused bears no burden of proof to disapprove his innocence except in exceptional circumstances usually defined in Section 111 of the *Evidence Act*. As a threshold issue the court in *Woolmingto – V-DPP* (1935) AC 462 AT PP 487 Viscount Sankey, L had this to say " "But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception ..... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained ..... It is not the Law of England to say as was said in the summing up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse

the homicide altogether by showing that it was a pure accident also in the case of *Miller-V- Ministry of Pension* (1947) 2 ALL ER 372 at 373 Denniing J Buttressed the point as regards the burden of proof required when he stated as follows:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond 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 possible, but not in the least 9 probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

6. The offence facing the accused is that of murder contrary to Section 203 which provides that any person who with Malice aforethought causes the death of another person by an unlawful Act or omission shall be guilty of murder. For the accused person to be found guilty of murder therefore, the prosecution must establish or prove through evidence, that the accused person by an unlawful act or omission, caused the death of the deceased person and that they did so with malice aforethought. As regards proof of availability of malice aforethought section 206 of the *Penal Code* gives the following guidelines: -

> " Malice aforethought shall be deemed to be established by evidence proving any of the following circumstances-
>
> ( a) An intention to cause the death of or to do grievous harm to any person, whether such 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 such 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) ..... "

7. In order for the prosecution to prove its case against the accused person, it must be established through evidence that the accused person had the requisite intention to cause the death of the deceased or to do grievous harm. This is usually established by way of direct or circumstantial evidence. In the matter at hand, the prosecution has relied on the evidence of PW2 who was the star witness on the events surrounding of the murder which occurred on the 10/2/2018 at Furaha village. It is apparent that PW2 was in company of the deceased when the accused stabbed her inflicting physical injuries as demonstrated by the pathologist in the postmortem dated 15/2/2018. It is prudent also at this moment for this court to appreciate the testimony given by PW3 Kazungu Kadenge which collaborated the evidence of PW2 to prove beyond reasonable doubt that the accused was at the scene of the crime not as an innocent bystander but as perpetrator of the crime. The accused person in his defence denied any blameworthiness with regard to the death of the deceased. However, the evidence by the prosecution on identification of the accused was positive with no errors of mistaken identity. That on the material day he participated in occasioning the death of the deceased as the principal assailant. Time and time again courts have emphasized on the yardstick to be applied when it comes to visual identification of a suspect to a crime under investigation and finally one whose proceedings are ongoing before a court of law.

8. In the case of *R vs- Turnbull and Others* (1976) 3 ALL ER 459 an English case Lord Widgery C.J had this to say:- "First wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reasons for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be. How long did the witness have the accused under observations" At what distance "In what light was the observation impended in any way, as for example by passing traffic or a press of people, had he any special reasons for remembering the accused. How long elapsed between original observation and the subsequent identification to the police. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

9. In the instant case PW2 and PW3 testified that the accused person is not a stranger prior to the occurrence of the incident on the 10/2/2018. From the evidence PW2 & PW3 even identified the accused person by name and on that fateful night he had not covered his face or any part of the body which will obstruct PW2 & PW3 to positively come to a conclusion on the impressions made to the physical attributes of the accused to place at the scene of the crime. The two witnesses besides knowing the accused as one of the neighbors also interacted with him before he finally took a step to inflict fatal injuries to the deceased. Ideally in this case, the defence never controverted identification evidence as to his description and being known by the witnesses as stated in the prosecution case.

10. In dealing with this case based on the foregoing, I am satisfied that the accused person caused the death of the deceased and in doing so, the manner in which the killing was committed fell within the scope of an unlawful acts or omissions perpetuated through the dangerous weapon in his possession.

    Having also analyzed and appraised the evidence for the prosecution, this form of homicide was one which was committed actuated with malice aforethought by the accused person. First and foremost there was no justification, provocation, or excuse, or otherwise which could have necessitated the use of unreasonable force of inflicting grievous harm against the deceased by stabbing her severally. To reinforce this the deceased himself was not armed with any weapon, devise, instrument, or taken any measures against the accused to warrant termination of her right to life guaranteed in Art. 26 of the *constitution*. I don't think she expected the loss of her life or to be attacked by the accused at that very moment. Having caused the death of the deceased, the deceased took flight from the scene without caring as what will happen to the deceased out of the injuries inflicted without justification or excuse. I find that all the circumstances, point to the fact by the accused person had carefully planned to commit the murder against the deceased and no mitigation on the part of the defence which can rule out malice aforethought.

11. Consequently, I find that the prosecution has proved the charge of murder against the accused, I find him guilty and I convict him of the offence contrary to Section 203 as read with 204 of the *Penal Code*.

**Sentence**

12. Rana Samuel Kurabu was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* chapter 63 of the Laws of Kenya. The particulars of the offence are that on the 10th day of February 2018 at Furaha village in Tana Delata Sub-County within Tana River County unlawfully murdered Kadzo Kazungu Masha. The accused person having pleaded not guilty

to the charge compelled the prosecution to discharge its burden of proof to the required standard of beyond reasonable doubt.

13. As highlighted in my judgment, it became apparent that PW2 was in company of the deceased when the accused stabbed her inflicting physical injuries as demonstrated by the pathologist in the postmortem dated 15.2.2018. there is no justification, provocation, or excuse, or otherwise which could have necessitated the use of unreasonable force of inflicting grievous harm against the deceased by stabbing her severally.

14. I have considered the objectives of sentencing as stipulated in the *Judiciary Sentencing Guideline* and as summarized in the *Francis Muruatetu & Anther vs Republic* [2017] eKLR decision, which guidelines and principles are relevant in so far as sentencing in murder cases is concerned. In the *Francis Muruatetu case*, the Supreme Court guided as follows, both in the Original Petition and in the Directions given on 6/7/2021 while providing clarity on the judgment that had applied the principle that mandatory sentences were unconstitutional in as far as they deprived the trial courts of the discretion to mete out appropriate sentences having regard to the circumstances of each case and also denied the accused persons the opportunity to mitigate.

> "vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;
>
> (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) The manner in which the offence was committed on the victim;
>
> (g) The physical and psychological effect of the offence on the victim's family;
>
> (h) Remorsefulness of the offender;
>
> (i) The possibility of reform and social re-adaptation of the offender;
>
> (j) Any other factor that the Court considers relevant.
>
> ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the *Penal Code* before the decision in Muruatetu.

12. The objectives of sentencing as provided in the *2023 Judiciary of Kenya Sentencing Policy Guidelines*:

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."

16. Having paid due regard to the mitigation circumstances as pleaded 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. Having said that, the logical conclusion is to have the accused person sentenced to 10 years' imprisonment. The sentence shall run from 11.2.2018 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:

Mr. Mukongo for the DPP

Accused

**R. NYAKUNDI**