



REPUBLIC OF KENYA



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**Republic v Mithamo & 3 others (Criminal Case 1 of 2019)
[2023] KEHC 615 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 1 OF 2019
LM NJUGUNA, J
FEBRUARY 8, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARYANNE WANJIRU MITHAMO 1ST ACCUSED

ELEANOR NTINYARI NTEERE 2ND ACCUSED

JAMES GITARI MBOANI 3RD ACCUSED

BEATRICE ARUT EPUSKOU 4TH ACCUSED

JUDGMENT

1. Maryanne Wanjiru Mithamo, Eleanor Ntinyari Nteere and James Gitari Mboani the accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that: On October 20, 2013 at Embu Main GK Prison in Embu West Sub County within Embu County jointly murdered Wilson Waweru Mbugi. Upon arraignment in court, they pleaded not guilty and a plea of not guilty was entered. The case proceeded for trial wherein the prosecution called 11 witnesses in support of its case. Before I delve into analyzing the evidence that was adduced in this case, I wish to state that the 4th accused passed on in the course of the trial.
2. PW 1 Nicholas Mbugi Githune, testified that the deceased was his son. That the 1st accused person is known to him for many years as he worked with his father at the Bank. He didn't know the other accused persons. On October 20, 2013 at 0845pm while at home he received a phone call from his daughter who informed him that the deceased had died. Within 30 minutes, he made his way to Embu Main Prison but was denied entry. That after a short while he saw a Police Land Rover which he followed to the mortuary where he saw the body of the deceased. He stated that he was not able to see the injuries since the deceased was dressed in the prisons uniform but he saw blood stains. The following day on October 21, 2013, he went to the prisons compound and found prisoners digging



- the place where his son was allegedly killed. It was his testimony that the daughter was informed by the 1st accused that the deceased had shot himself. He said they enjoyed a happy relationship between them and that at no point did he refuse to give the deceased land.
3. PW 2 Cpl Geoffrey Gitau, stated that he knew the deceased as they had worked together for about 3 years; equally, he knew all the accused persons because they worked together in the same station. That on October 20, 2013 while on duty as the guard commander on the men's side, he received a report from the 1st accused person who told him that she had heard a gunshot and she had taken cover with other officers. That he didn't hear the sound as he was counter-checking the inmate accommodations. He woke up the duty officer Sgt Ochieng who was sleeping and in the company of the 1st accused they searched the compound of the women prison and they found the body of the deceased lying with the stomach down and the G3 rifle protruding from outside while the muzzle was under the body. That he picked the rifle from the deceased and that he saw the 2nd, 3rd and 4th accused persons amongst other prison officers in the compound as they were on duty that night. The body was photographed by the scenes of crime officers and taken to the mortuary.
 4. PW 3 Sgt Stephen Ochieng Odhiambo, stated that he knew the deceased as he worked with him at Embu prison as well as the accused persons. That on the fateful night, he was the duty officer in-charge of the night shift and his work was to confirm the number and names of officers who were deployed, take the number of prisoners and generally remain in-charge of the night shift. At around 8pm while at the male prison, he heard a gunshot from outside the prison. PW2 who was the guard commander and himself decided to go outside where they had deployed their officers and while on their way out they met the 1st accused who was coming to report what had happened. She told them that P.C Waweru had fired his gun and his whereabouts were unknown. After a search at the women prison, they found the body of the missing officer lying on the ground with his firearm protruding at the back between his legs. PW2 took the gun from the deceased and they noticed blood on the muzzle of the gun. He informed the officer in-charge Mr. Onyango about the incident and also called the security officer on duty who called the police who came and took away the body.
 5. PW4 Erick Mbundi, a registered clinical psychiatrist, testified that on January 10, 2019 he conducted mental assessments on the 1st, 2nd, 3rd and 4th accused persons and he found them fit to stand trial.
 6. PW5 Zablon Nthiga Mulingi, testified that in the year 2014, he was working at Embu main prison as an armourer and was in-charge of the armoury register. He stated that the register captures the type of weapon given, serial number, place allocated duty, service number, name and signature, time out, time in and the holder's return signature date and time of return and the armourer's signature. It was his testimony that on October 20, 2013 at 1900hrs he issued a G3 Rifle Serial Number 92003198 with 20 rounds of ammunition to the deceased herein whose Service Number was 34992 and that he signed for the aforesaid firearm. That the firearm was not returned to the store since a report was made on the same date to the effect that the deceased had shot himself and the firearm was taken for analysis by officers from Itabua police station. It was his evidence that he also issued; a G3 rifle S.No. 6738590 with 20 rounds of ammunition to Mr. James Mboani Service No. 24321 at 1900hrs, who returned the same on October 21, 2013 at 0710hrs with 20 rounds of ammunitions; he also issued guns to the other 3 accused persons with 20 rounds each, they all returned them with the same number of ammunition as initially issued. In cross examination he stated that there was no evidence of the three guns issued to the accused persons having been fired.
 7. PW6 PC. Murimi Musabi, testified that on October 20, 2013 he was detailed by the OCS Itabua Police Station CI Wambugu to attend to a scene of suicide at Embu prison. He found a constable who was identified as Wilson Waweru Ngugi, the deceased herein, lying dead and a few meters from him was



- a G3 Rifle Serial Number 92003198 with blood stains and a spent cartridge. He stated that on close observation, he noticed that the deceased had a bullet wound. He documented the scene by taking photographs which he produced as exhibits.
8. PW 7 and PW 8 did not testify as they were stood down.
 9. PW9 Dr Kevin Ombati Onyinkwa, testified that on October 22, 2013, he conducted postmortem on the body of the deceased. The face was swollen and it appeared dark; there was a bullet wound and the exit wound was on the anterior chest on the left side under the clavicle on the fifth rib. He thus formed the opinion that the cause of death was cardio respiratory arrest due to massive bleeding from the gunshot wound through the heart and the left lung. On cross examination, he stated that the entry wound was smaller than the exit wound. That it was likely that it was fired from a short distance and that there were no burns on the wounds and that the trajectory of the bullet was that the same came from down going up. He was categorical that it was highly unlikely for one to shoot himself from the back.
 10. PW10 Alex Chirchir, a senior superintendent of police and a ballistic expert based at the DCI headquarters testified that on 21.01.2014 he received some exhibits from PC Gitahi attached to Itabua police station. The exhibits were a G3 Rifle of Serial Number 92003198 marked as exhibit A; 19 rounds of ammunition marked as C (1) – (19), one spent cartridge marked as B; and a rifle magazine marked as exhibit D. The exhibits were accompanied by an exhibit memo that required 3 issues to be addressed; whether exhibit A was a firearm capable of firing and being fired , if exhibit B was fired in exhibit A and the calibre of exhibit A. His findings were that exhibit A was a G3 Rifle, the calibre of exhibit A is 7.62mm and that the exhibit has been designed to fire rounds of calibre 7.62mm. Exhibit A was found to be in good general mechanical condition and was complete with all the component parts. He formed the view that exhibit B, which was a spent cartridge was fired in exhibit A of Serial Number 92003198. On cross examination, he stated that there was dry blood on the gun and the barrel which meant that the muzzle was in contact with the body. That if the gun was fired at point blank, there would be burns and a lot of tissue would have been destroyed.
 11. PW 11 James Opiyo stated that he took over police inquest file number 4/2014 from his colleague Emmanuel Malak who had proceeded on transfer in Lamu. That by then, the inquest had been concluded and in the ruling, the court had recommended the prosecution of the three accused persons and a 4th prison warder who had since died. That on January 8, 2019, the accused persons herein were apprehended and they were processed and brought to court and charged with the offence of murder.
 12. At the close of the Prosecution's case, this Court considered the evidence tendered by the prosecution and placed the accused persons on their defence.
 13. DW1 Cpl. Maryanne Wanjiru testified that on the material night, she assigned DW3 and the deceased work at the prison compound; DW 2 at remand compound while Carol was the gatekeeper. That the deceased was supposed to work from 6.30 p.m. to 1 a.m. while DW3 from 1 a.m. to 6.30 a.m; DW2 from 6.30 p.m. to 1 a.m. while Carol from 1a.m to 6.30 a.m. She noted that everything was well and everyone had reported for work. That while at the gate lodge as she was writing, the deceased told her that she was stressed and upon asking him, he stated that he had a problem as his father had refused to give him land yet he is the one who purchased the same. She enquired whether he had shared the same with his elder sister whom she knew as their fathers had previously worked together. The deceased said that he had not talked to her but would do so thereafter. She testified that the deceased called his sister known as Rosa and after a short while, he said he felt relieved as the sister had promised to come over the following weekend so that they could talk about the same. He then left for his place of work but cocked his gun and on asking him, he said that he likes being prepared when on duty. That she left



- for the guard room and while there, she heard a gunshot and took cover. She sought for reinforcement through a text message to Senior Sergeant Faith but she did not respond; a lot of staff members gathered and immediately they embarked on a search mission which led to the discovery of the body of the deceased. According to her, the rifle was on top of the deceased. She denied using deceased's gun to kill him and further stated that there was no ceremonial parade during the burial in honour of the deceased as he committed suicide. On cross examination, she confirmed that all the accused persons were armed on the material night but the 3rd accused had sought for permission to go for supper when the incident happened.
14. DW2 Eleanor Ntinyari testified that on the material day, they were on duty with DW1 as the guard commander and he was detailed to work around the wards that night. That while talking on the phone, he heard a gunshot and he took cover. He later called the gate keeper who informed him about the incident. That PW2 and PW3 with other people came and upon knocking the gate, DW1 opened and they went to check what had happened and it was then that they found the body of the deceased about 50 m from the main gate. He denied killing the deceased.
 15. DW3 Cpl. James Gitari Mboani stated that he was to relieve the deceased at 1.00 a.m and he sought permission from DW1 to go have supper from a canteen outside the women prison. That while there, he heard the gunshot, took cover but later saw people going down from the main prison and he followed them. They found the deceased lying on the side and his gun on his chest. That the officer in charge of the main prison called Itabua Police Station and the police came and collected the body of the deceased. He denied killing the deceased.
 16. The defence closed their case and the court gave directions on filing of submissions and wherein all the parties complied with the directions.
 17. The prosecution submitted that it proved all the necessary ingredients of the offence of murder. It was further submitted that the murder of the deceased by the accused persons was proved beyond any reasonable doubt and prayed that they be convicted in accordance with the law. Reliance was placed on the case of *Republic Vs Stephen Sila Wambua* [2017]. That the post mortem report challenged the hypothesis of suicide from the moment the deceased's body was discovered through public inquest number 4 of 2014; that the absence of gun powder residue on the wound led the doctor to conclude that the bullet was not shot at point blank but rather from a close range. That the accused persons were placed at the scene of crime through their evidence and further that, it was immaterial that the rifle used for murder was used by one person, all who were present had one goal in mind and that is to cause grievous harm to the deceased. This court was therefore urged to find the accused persons guilty of the offence herein.
 18. The defence submitted that the prosecution failed to prove the case against them beyond any reasonable doubt and therefore, urged this court to acquit them. That the prosecution failed to prove malice aforethought on the part of the accused persons for there was no evidence tendered to prove the same. The defence inter alia relied on the cases of *Libambula v Republic* (2003) KLR and *Joseph Kimani Njau Vs Republic* 2014 eKLR. It was also submitted that it was practically impossible for the accused persons to jointly pull the trigger that killed the deceased. Reliance was placed on section 21 of the *Penal Code* and further on the case of *Njoroge Vs Republic* 1983 KLR 197 and *Republic Vs Cheya* 1973 EA. That, the evidence as exhibited on the record did not prove beyond reasonable doubt that the accused persons committed the offence herein as the same was riddled with contradictions. The defence submitted that it is not for the accused persons to prove their innocence and therefore, this court was urged to acquit the accused persons herein.



19. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the Evidence Act Cap 80 of the Laws of Kenya. The degree/standard of proof is always that of “beyond any reasonable doubt” [See Miller Vs Minister of Pensions [1947] 2 ALL ER 372 – 373].
20. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In Anthony Ndegwa Ngari Vs Republic [2014] eKLR, the elements of the offence of murder were listed as:
 - i. the death of the deceased occurred;
 - ii. that the accused committed the unlawful act which caused the death of the deceased; and
 - iii. that the accused had malice aforethought.
21. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
22. On whether the death of the deceased occurred, it is not in doubt that the deceased herein died. All the prosecution witnesses except PW7 and PW8 and even the accused persons testified that indeed they saw the body of the deceased. In the same breadth, PW9 who performed autopsy on the body of the deceased stated that the death was as a result of cardio respiratory arrest due to massive bleeding from the gunshot wound.
23. As to whether the death was caused by unlawful act, under Article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See Sharm Pal Singh [1962] EA 13 and Daniel Nzioka Mbuti & Another Vs Republic (*supra*)].
24. It is quite evident from the several pieces of evidence above and as confirmed by PW9 who carried out the post mortem that the deceased met his death as a result of cardio respiratory arrest due to massive bleeding from the gunshot wound and therefore, the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
25. As to whether the accused persons committed the unlawful act which caused the death of the deceased, having perused the prosecution’s evidence as presented before the court, it is noted that no prosecution witness directly saw the accused persons or any of them shoot the deceased. However, it was the evidence by the prosecution witnesses that the deceased herein was in possession of a fire arm. PW 5 testified that he was the person in charge of the armoury register and that on 20.10.2013 at 1900hrs he issued a G3 Rifle Serial Number 92003198 with 20 rounds of ammunition to the deceased whose Service Number was 34992. Further, he stated that he also issued a G3 rifle Serial Number 6738590 with 20 rounds to Service No. 24321 1900hrs Mr. James Mboani, who returned the same on 21.10.2013 at 0710hrs with 20 rounds; he also issued guns to the other three accused persons with 20 rounds for each of them and all returned them with the same number of ammunition as initially issued.
26. In this case, the prosecution witnesses clearly narrated what transpired on the night of the October 20, 2013. According to the defence, the theory of the deceased having shot himself was advanced and it was contended that he was responsible for his own death. This hypothesis was challenged by the post mortem report which was produced by PW 9. He stated that on examination, the entry wound was on the mid-line of the lower back around the level of the 12th thoracic vertebrae while the exit wound was



on the anterior chest on the left side under the clavicle; on the 5th rib. On cross examination, he stated that it was likely that it was fired from a short distance and that he did not see gun residue powder on the wound or burns. Further that, if the gun is placed on the body before the shooting, there may be burns. It was also his evidence that it is very unlikely for someone to shoot himself from behind. From this piece of evidence, it is clear that though the ammunition that killed the deceased emanated from the G3 rifle that was issued to him, clearly he could not have been the one who pulled the trigger. It must have been done by someone else.

27. The prosecution witnesses stated that they did not specifically see any of the accused persons causing the injuries on the deceased. It was submitted that, that fact alone does not weaken the prosecution's case because a fact need not be proven by only direct evidence but it can also be proved through circumstantial evidence which means, the prosecution is relying on the circumstantial evidence as a fall back. In the case of *Abamad Abolfathi Mohammed and Another Vs Republic* (2018) KLR the court of appeal had this to say about circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables the court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *Republic Vs Taylor, Weaver and Donovan* (1928) (Criminal Appeal R21.

Similarly in the case of *Republic Vs Richard Itweke Wabiti* (2020) eKLR the court noted that circumstantial evidence is the best form of evidence because it takes into consideration the surrounding circumstances which when examined together gives an accurate proposition of a fact. This is what the court had to say:

“It had been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from the evidence to say that it is circumstantial.”

28. In the case of *Abanga alias Onyango Vs Republic* Criminal Appeal No.32 of 1990, the 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 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.”



See also *Sawe Vs Republic* (2003) KLR and *GMI Vs Republic* Criminal Appeal No. 38 of 2011;

“In addition the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. Which principle was reiterated in the case of *Dhalay Singh Vs Republic* Criminal Appeal No. 10 of 1997.”

29. It should always be remembered that the legal burden is always on the prosecution to prove its case beyond any reasonable doubt. (See the case of *Ramanlal Trambaklal Bhatt Vs Republic* (1957) EA 332 of 334 and 335 which was cited in the case of *Republic Vs Bernard Obunga Obunga* Criminal Case number 31 of 2013 in the High Court of Kenya at Nairobi (unreported). The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. In the case of *Republic Vs Kipkering Arap Koskei and Another* (1949) 16 EACA 135 the court of Appeal for Easter Africa held:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

30. It is the prosecution’s submissions that the accused persons herein have been placed at the scene by PW 2 and PW3 who were the first to arrive at the scene. That they equally placed themselves at the scene through their evidence. It was further submitted that the first accused admitted that she held the keys to the main gate and that no one else could enter or exit the prison without her knowledge and that all the accused persons were working inside the prison on the night the offence was committed. In this regard, it is not disputed that the accused persons were all on duty in Embu Prison on the fateful night. However, the evidence available to the court is that they were not the only officers who were on duty that night. Infact, the court was told that they were around twenty (20) of them. It appears to me that the only reason the accused persons herein were charged with this offence was they were on duty on the fateful night when the deceased was shot and that they were the first ones to arrive at the scene where the body of the deceased was discovered. With all due respect to the prosecuting counsel, that piece of evidence alone has not met the tests as enunciated in the *Abanga* case (*supra*).

31. That being the case, it therefore follows that the prosecution did not prove that the accused persons herein were the ones who caused the death of the deceased; despite having succeeded in establishing the death of the deceased and the cause of the said death. Having failed to do so, it is my considered view that the prosecution failed to prove all the elements of the offence of murder.

32. From the foregoing, the upshot of this judgment is that the accused persons herein are acquitted of the charge of murder and are set at liberty unless otherwise lawfully held.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....for the 1st Accused

.....for the 2nd Accused



.....for the 3rd Accused
.....for the State

