



**Republic v Kosgei (Criminal Case 29 of 2017)  
[2023] KEHC 1519 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1519 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 29 OF 2017  
HK CHEMITEI, J  
MARCH 1, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MICHAEL KIPKEMOI KOSGEI ..... ACCUSED**

**JUDGMENT**

1. The accused person herein was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was alleged that on June 3, 2017 at Kimamoi village, Solai in Rongai Sub-County within Nakuru County murdered Gladys Jelagat Logong.
2. The accused person pleaded 'Not guilty' and the case proceeded to hearing. The prosecution called a total of 10 witnesses.
3. PW1 was Anna Chepchilat testified that on June 3, 2017 the deceased who was called Gladys, she was the accused's wife and her neighbour came to her house while drunk. That after sometime PW2 and PW3 came and they went to the kitchen to make supper. Thereafter when they were about to sleep, the accused came and asked her for tobacco. She testified on that the accused used to fight with the deceased and at that point he got into her house where he hit the deceased with a torch and pulled her outside the gate. That the deceased was very drunk and could not talk and at the gate the accused uprooted the gate post hit her on the head until the post broke. In addition, that the accused went to the store, took a stick and asked for a *panga* to cut the deceased but they did not give him.
4. PW1 testified further that the accused at the time was drunk and he said that his wife used to go and did not take care the children. That she thereafter asked her children to lift the deceased and took her to the accused house and returned back to their house.
5. That the next day at 7.00 am she met the accused at the kiosk and he told her that his wife was well but she later learnt that she had died. The police came to the accused house where they took photos



- and PW1 and the wife to Samson were called into the police vehicle and they went to Solai and they recorded statements. She identified the accused person in court. The torch, gate post, shoes, bundle of photos were marked as PMFI 1, 2, 3 and 4-6 respectively.
6. On cross examination, PW1 confirmed that she recorded her statement at the police station, that the deceased came to her house alone and that time she was also alone in the house. She stated that it was the deceased who came first to the house then her children but she however could not remember well. She also confirmed that she had written about the tobacco in her statement and that she knew that the accused and his wife used to fight but she had no evidence.
  7. She stated further that when the accused came to her he was drunk and disorderly but she however could not remember if she informed the police of the same or that the reason why the accused beat the deceased was because of leaving their children alone.
  8. PW2 was Elizabeth Cheboi. She testified that on June 3, 2017 around 8.00 pm, she was at home with her mother PW1 and PW3 when the deceased came and asked for a place to sleep, she was drunk. That thereafter the accused came and asked whether they had seen the deceased and he entered the house where he saw the deceased on the bed and pulled her and pushed her down.
  9. PW2 testified further, that the deceased started crying and the accused person pulled her to the gate while she watched her with PW1 and PW3. That the accused person hit the deceased with a torch and at the gate he pulled the gate post beat the deceased with it while asking her where the money was.
  10. PW2 went on to testify that they screamed and asked the accused to leave the deceased alone as the time she was lying down and could not stand up as she was weak. That the accused person asked them to help him take the deceased to his house which she did together with PW3. They then returned to their home and slept leaving the accused sitting on a bench outside his house.
  11. The following day in the evening she was told that deceased died. She recorded a statement at the police station. PW2 was able to identify the accused as the one before court together with the torch used by the accused to hit the deceased, the sticks/post, photographs, the deceased shoes all marked as PMFI 1, PMFI 2, PMFI 3, PMFI 4 and PMFI 5 respectively.
  12. On cross examination, she confirmed that the deceased came to their house while her, PW1 and PW3 were taking supper. She stated that PW1 never used alcohol but tobacco and that the deceased and her mother were friends. That the accused came to their house looking angry but not drunk and that the torch before court was theirs but she had not given its description to the police.
  13. PW2 went on to state that accused after he saw the deceased on the bed he pushed her down, hit her with a torch and pushed her out. After being shown the shoe marked as PMFI 3, PW2 stated that the deceased did not wear her shoes when she was pushed outside. She confirmed that the accused removed the sticks from the gate and beat the deceased with them.
  14. Upon re-examination, she testified that they met the accused outside his compound.
  15. PW3 was Lavender Jepkemoi Kipchilat. She testified that on June 3, 2017, at about 7-8.00pm she was at home together with PW1 and PW2 taking super when the deceased who was their neighbour came while drunk and she was given a bed to sleep. That the accused then arrived and he entered the house where he saw the deceased sleeping and that was when he pulled her from the bed. He took a torch and hit her on the head then pulled her to the gate and beat her on the head with dry sisal post.
  16. PW3 testified further, together with PW2 and PW1 they screamed while at that time the deceased was lying down crying and the accused left her. That the accused asked them to take the deceased to his house, he then came and sat on a bench outside together with the deceased and they left. Further, that



- the next day she saw the accused going to Majani Mingi center and later PW1 told her that the deceased had died.
17. On cross examination, she stated that she lived with her grandmother PW1 who normally does not take alcohol but tobacco. She confirmed that the sisal dry posts were at the gate and that they were many and that she did not give the description of the torch to the police. She stated further that they stood outside the accused's house and when he arrived he started looking for the key. That when they left the deceased was alright and was also talking but she was drunk.
  18. PW4 was Alice Jepchumba Kipchilat. She testified that on June 3, 2017 she was at home during day time when the children of the deceased came to her home. That they stayed there until evening when they ate dinner and her children were also there. Further, that the accused came while they were eating and asked where the deceased was but she told him she had not seen her, so he left to look for her. PW4 testified that the accused as he left looked okay and not angry but he later returned and called his children from the outside. That when she asked him if he had found the deceased he said he had not seen her and so he left.
  19. He went on to testify that the next day at around 9.00 am when she returned from the shamba she was told that the accused took his children. That she was thereafter told by someone she did not know that the accused had killed the deceased who was his wife. Thereafter the police came, took photos and they were taken to the police station where they recorded statement. PW4 testified that she did not know who killed the deceased.
  20. On cross examination she stated that she did not know who gave out her name together with her husband's to the police. She confirmed that the deceased children slept at her house, that the accused was her neighbor and he used to fight with the deceased. She stated further that she knew the accused as a good man and he also related well with the neighbours.
  21. PW5 was CPI Boaz K Limo force no 21xxxx based at Baruta AP post and he testified that on June 4, 2017 at about 8.00 am he was informed by the area chief that the accused had murdered the deceased. Together with PC Titus Kimutai they visited the scene which was the accused home and they found the deceased body lying down 30 meters from the said home. He testified further that the said body had no injuries and the accused was not around but the OCS later called and told them that the accused had been arrested at the police station. They left the deceased body at the station and escorted the accused to Solai Police Station to record statement.
  22. On cross-examination he stated that he was not the investigating officer and he had confirmed the death of the deceased but that did not confirm who killed her. He stated further that the accused surrendered to the police station but he did not tender any confession that he was the one who killed the deceased. He added that he knew the accused to be a good person, a businessman and he had no record of bad behavior.
  23. PW6 was Benjamin Kebeny. He testified that the deceased was his sister and that he went to identify her body and also witnessed the post mortem examination.
  24. PW7 was Dr Titus Mbulungu, registration number A4xxx and a pathologist at Nakuru Provisional Hospital. He testified that he conducted post mortem exercise on the body of the deceased at the Nakuru Public Mortuary on June 7, 2017 at 12 noon. He testified further that the deceased body was identified by PW6 and one Silvia Kimutai Korir. His opinion of the cause of death was severe head injury, brain contusion as a result of multiple trauma as a result of fatal assault. The report mortem report Pexh -5.



25. PW8 was Susan Wanjiru Ngugi, a Government Analyst stationed at the forensic lab. She testified that on June 15, 2017 she received items packed in a paper bag by memo form marked as Pexh 6, for analysis from Solai Police Station. That the same included exhibit (a) a plain grey jacket belonging to the accused and items (b)(1), (b)(2) and (b)(3) pieces of a broken piece of wood wrapped in paper.
26. PW8 testified further that on June 16, 2017, she received other items number 101-109 with memo form dated the even date and the same was marked as Pexh 7. They contained item (d) dried blood sample belonging to a child of the deceased by the name Jepngetich Kipkemoi and item (e) blood sample from the accused.
27. She testified on that the blood from the child was submitted upon request because the previous blood of the accused was degraded and no DNA could be obtained. The report dated August 27, 2019 was marked as Pexh 8 and the opinion there in was that the DNA profile on the jacket was that of the accused person and matched that on the broken pieces of wood and that of the deceased daughter.
28. PW9 was No 23xxxx CI James Chepchieng based at DCI Headquarters and was gazetted on January 18, 2010. He testified that he was the officer in charge Nakuru county and that on September 26, 2017 he took photos of scenes of crime. That on June 4, 2017 at 1600 hours he was requested by OCS to go to Majani Mingi within Solai and he proceeded to the scene of murder which was in Makongeni Location. Further, that he took several photographs of the general view of the area and signed the documents on September 26, 2017. He produced the same exhibits 4 (a) – (h) and certificate as exhibit 9.
29. PW10 was No 23xxxx IP Linus Lagat. He testified that he was at Solai police station when he was called by OCS concerning some murder incident within their jurisdiction. He went to the scene, found the body of the deceased and they began their investigation. That the body was lying down with injuries on the face, swollen and clotted blood on the nose and face. Also, that the body was clothed, there was an abandoned house nearby and they were told the body belonged to accused wife.
30. PW10 testified further that it looked like the body was dragged to the scene. They went to PW1 where the quarrel began and they were told that the previous day the accused arrived in the house and abused the deceased. That he took a spotlight, hit the deceased, pulled her all the way outside the compound. The said torch was produced as exhibit P1. That the accused also removed sisal roots from the gate and began beating the deceased. PW10 went on to testify that they recovered the pieces (Marura) which had blood stains which they took to the government chemist. The same was produced as exhibit P2.
31. According to PW10 they recovered a rubber shoe black in colour which belonged to the deceased, took it as exhibit P3 and the incident took place in the evening around 7pm. That PW1, her children and grandchildren took the deceased to her house which was about a kilometer away and came back home. That thereafter the accused went to his house and went ahead to assault the deceased but she managed to escape and hid in the abandoned house from the scene where her body was found.
32. PW10 testified that they recovered a grey checked jacket which belonged to the deceased and they took it to the chemist, the same was produced as exhibit 11. That they traced the accused and the deceased and they found her body in the abandoned house which was about 300m from the deceased house. They called the scenes of crime officers, took the body to the mortuary for postmortem and also the sisal poles and the pieces to the chemist for analysis. That the results from the chemist were produced. PW10 testified that the accused went to the nearby AP Post where he was arrested and they later rearrested him.
33. On cross examination, he confirmed that the deceased was found near an abandoned house and was traced in the house of PW1 who was her neighbor and brewed alcohol. He stated that he did not know



- whether the deceased was taking alcohol there or whether she was drunk but it was possible but he was told that she was drunk. That he however did not know whether the accused was drunk or not.
34. PW10 stated further that the spotlight was used to hit the deceased but they did not find blood stains nor finger prints on the spotlight. He went on to state that no witness was found who saw the deceased leaving her house to where she was found dead.
  35. Upon re-examination he testified that he had been given information by those they found at the scene and the witnesses.
  36. When put to his defence the accused person gave sworn testimony and testified that the deceased was his wife of 10 years and had 3 children aged 7 years, 4 years and 3 years respectively by then. That on June 3, 2017, he was working at Sisal Farm (Majani Mingi Company) and he was with the deceased that night. Thereafter they woke up he gave her Kshs 1,000 and went to work and when he arrived home at 8pm he did not find her as well as the children.
  37. The accused testified further that he went to his neighbour PW4 to enquire and his children were there but were already sleeping. He went back home and slept and after a while he heard someone knocking the door. It was Kosgei who was a neighbor and he told him that they had brought the deceased who was drunk. That it was at 11pm and he was told that the deceased was on the road and had refused to come home. The accused told them to go back and he went to sleep. The following morning on 4<sup>th</sup>, he went where the children were and took them and one of the kids went to school.
  38. The accused went on to state that he met Samson and upon enquiring he was told that the deceased had been found beside the road near his grandmother's house and was in bad state. That one could not hear what the deceased was saying and so they looked for a car but when he came back she had died. According to the accused the deceased was suffering from Asthma. That accused testified that the deceased used to take alcohol and she did not want them to know.
  39. The accused testified further that the accused took care of the kids very well and he had not seen her differ with anybody and that she was found in a rocky place. That he had never threatened the deceased and that the grey jacket belonged to her.
  40. On cross examination, he stated that he took alcohol and so did the deceased but he was not drunk on the material day. That PW1 was his neighbor but he did not know PW2 or PW3 and that the said witnesses lied to the court. He stated further that he did not hold any panga and that they had not quarreled before or on the material day so the witnesses had lied. That nobody else has been accused of assaulting the deceased as she had not differed with anybody.
  41. Upon re-examination, that accused testified that though he took alcohol there had never been a case against him and that when the deceased took alcohol she became abusive.
  42. The court directed the parties to file written submissions which they have complied.

### **Prosecution Submissions**

43. The prosecution submitted that when the accused was put to his defence, he denied the testimony made by the witnesses but there was overwhelming scientific evidence which implicated him. That the evidence by the accused was flimsy and unable to shake the cogent evidence tendered by its witnesses. Further, that his evidence could not salvage him as an innocent person as his mother and children came before the court to testify what he had done. In addition, that the accused walked to the neighbour's house and attacked the deceased.



44. The prosecution submitted further that it had undeniably proved the ingredients of murder and that the killing of the deceased was never a mistake but the same was a well calculated move. That the accused had also not shown any remorse when trying to defend himself and it urged the court to proceed and convict the accused.

### **Accused Submissions**

45. The accused in his submission identified one major issue for determination by the court that is whether the prosecution had proved its cases beyond reasonable doubt. The accused submitted on the three ingredients which the prosecution ought to prove beyond reasonable doubt in order to sustain the charge of murder and warrant a conviction against the him which include proof of death, that the death was caused by the voluntary and unlawful act of the accused person and that the accused person had the intention to kill the deceased that is malice aforethought.
46. On the question whether the accused caused the death of the deceased with malice aforethought he submitted that there would not have been any apparent reason why he would have wanted the death of the deceased who was his wife and mother of their children. That however, the accused person from the circumstances of the case appeared to have been provoked and angered by the deceased's action of constantly neglecting their children and engaging in a drinking spree.
47. Therefore, it was the accused person's argument that the defence of provocation was available to him and the present offence against him should be reduced to manslaughter. He placed reliance on section 208(1) of the Penal Code Cap 63 Laws of Kenya, the cases of Rex v Brown as quoted in the case of Maurice M Kenyatta v Republic CR Appeal No 144 of 2000 and R v Whitefield [1976] 63 CR Appeal.
48. In conclusion, the accused submitted that the burden on the prosecution to prove malice aforethought had not been discharged and thus the charge of murder could not stand. He urged the court that he be acquitted as the prosecution had not proved its case to the required standard of beyond reasonable doubt such to warrant a conviction.

### **Analysis and Determination**

49. I have looked at the evidence on record and duly considered the submissions before this court. This court has a duty to weigh and evaluate the evidence as placed before it by the prosecution to establish whether the offense against the accused has been proved beyond reasonable doubt. The burden of proof to tender evidence to disapprove the innocence of an accused person is always cast upon the prosecution.
50. This is well illustrated under Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya which provides:
- “(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exists. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
51. In addition, Lord Denning dealt with the onus of proof in criminal cases in the case of Miller v Minister of Pensions (1947) 2All ER 372 where he stated:

“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 a doubt. The Law would fail to protect community if it admitted fanciful possibilities to deplete the course of justice. If



the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible but not in the least probable; the case is proved beyond reasonable doubt but nothing short of that will suffice.”

52. It is also trite law that the accused person is presumed innocent until the contrary is proved as clearly provided for under Article 50 (2) (a) of the *Constitution of Kenya, 2010*. Therefore, the prosecution bears the burden to prove that the offence was committed and the culprit is the accused person in the dock. The evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like fanciful and suspicious possibilities.

53. In the instant suit, it is not in dispute that the accused person has been charged with the offence of murder contrary to section 203 of the *Penal Code*. The said section provides as follows:

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

54. This definition was well captured in the case of *Republic v Andrew Omwenga* [2009] eKLR where the Court stated:

“It is clear from this definition that for an accused person convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder 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.”

55. The first ingredient of death of the deceased and the cause of death was proved by the post-mortem report both produced in court by PW7 as Pexh5 and it was PW7’s testimony that the cause of death was severe head injury, brain contusion as a result of multiple trauma.

56. On the second ingredient, where the prosecution is required to prove beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased the prosecution in proving the same relied on the testimony of PW1, PW2 and PW3 who testified that they witness the accused person assaulting the deceased by first hitting her on the head using a torch and later a gate post.

57. Further, PW7 stated that the cause of death was severe head injury, brain contusion as a result of multiple trauma as a result of fatal assault. Also, the forensic report produced as Pexh 9 by PW confirmed that the DNA generated from the blood stains from the pieces of wood produced as Pexh 2 matched that of the deceased.

58. The accused on his defence denied the said allegations and he testified that after leaving PW4’s house where his children were and after failing to find the deceased there, he went back to the house and slept. The accused however failed to call any evidence in support of his defense.



59. Lastly on the third ingredient, the offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the Penal Code evidence proves any one or more of the following circumstances:
- “(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.”
60. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under section 202 Penal Code which is punishable under section 205 Penal Code by a term of imprisonment extending up to life. This is what the accused submitted and it was admittedly his prayer that the court should hold that the offence ought to be reduced to manslaughter.
61. Looking at the way the accused went to the home of pw1 where the deceased was lying or sleeping after he was so drunk that she was unable to go home, this court is not convinced that the accused did not wish to fatally injure his wife.
62. More importantly after being taken home he continued to assault her despite being defenceless and as a matter of fact dragged her outside his house to an abandoned house near the road where she was found the following morning. This was probably to conceal the fact that the deceased met her death in her house but instead elsewhere.
63. There is no evidence that she was suffering from asthma as the accused would want the court to believe. His intention which he knew was unlawful was to seriously injure her despite pleas from PW1, 2 and 3.
64. In the premises, this was clearly a premeditated plan and there was malice aforethought. The whole incident was to punish the deceased whom he had given some money and probably used it in her alcohol adventure.
65. The prosecution in the premises has proved its case beyond any reasonable doubt and I proceed to convict the accused appropriately under section 204 of the penal code as read with section 332 (2) of the criminal procedure code.

**DATED SIGNED AND DELIVERED ON 1<sup>ST</sup> MARCH 2023 AT NAKURU VIA VIDEO LINK.**

**H. K. CHEMITEI.**

**JUDGE**

