



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mate (Criminal Case 20 of 2018)
[2023] KEHC 1456 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 20 OF 2018
LM NJUGUNA, J
MARCH 1, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

GILBERT MUSYOKA MATE ACCUSED

JUDGMENT

1. Gilbert Musyoka Mate, the accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars are that February 12, 2014 at Kamwimbi village, Ishiara location within Embu County jointly with another before court murdered Sospeter Njeru Njagi. The case proceeded for trial and wherein the prosecution called 11 witnesses in support of its case.
2. PW 1, Peninah Koki Wambua stated that on February 11, 2014, the deceased, the accused herein and Laban Mate were drinking beer in her pub called “Kwa Umao bar”. That they drank for some time and thereafter left at around 10.30. pm. She testified that on the following day, she saw people passing outside her pub and upon enquiring, she was told that there was a body found somewhere at Ishiara. That she later learnt that the said body was of the deceased herein.
3. PW2, Justus Njagi Nthenge testified that on February 12, 2014 while at his work place, his son, Anthony Ileri informed him that the deceased body found in river Thuci. He went to the scene and confirmed indeed the body was of the deceased herein. That he reported the same to the police who came to collect the said body. It was his evidence that there was a land dispute between him and the father to the accused person but the dispute was determined in his favour.
4. PW3, Joceline Gakire Mugo testified that on February 12, 2014 at around 1900Hrs, her son, Medamus Muturi left home to escort his brother Anthony Wachira who was heading to Mombasa. That on coming back, he told her that he had seen his father’s body, the deceased herein, in river Thuci and that



- the body had injuries on the back of the head. That she went and called her father in law who reported to the police and the body was taken to the mortuary. She was later told by PW1 that the deceased, together with one Laban Mate and the accused herein were drinking at Kareko Pub and that after the drinking spree, the trio left the pub together at 10.30 pm. She reiterated that there existed a grudge between the two families.
5. After the close of the prosecution's case, the accused was placed on his defence upon the court finding that the prosecution had established a prima face case against him.
 6. Gilbert Musyoka Mate (the accused herein) stated that on February 11, 2014, he was at his sister's place in Murang'a. That the sister sent him to Ishiara to go and buy charcoal and given that the same could not be delivered on the same day, he chose to spend the night there. He stated that the following day, he met his brother, Laban Mate, in whose company he visited Wakareko pub. That while there, they drank beer but never saw the deceased herein in the said pub. Further, that there was no bad blood between him and the deceased; he denied leaving the pub with the deceased herein on that fateful night and further denied killing him.
 7. After the close of the defence case, directions were given for both parties to file their submissions and both parties complied with the directions.
 8. The prosecution submitted that the evidence adduced by its witnesses was sufficient to prove its case beyond any reasonable doubt and that death can be proved by both direct and circumstantial evidence. It was stated that death was proved by the evidence of PW2 and PW3. That PW2 discovered the deceased's body in the river and according to him, it had multiple head injuries; and in the same breadth, PW3 also saw the deceased's motionless body with multiple head injuries. It was the prosecution's position that given that the prosecution was unable to secure the pathologist and the investigating officer to testify in its case, the same was not fatal and to support this proposition, reliance was placed on the case of *Republic v Mohammed Wanyoike & another* [2017] eKLR. Additionally, it was submitted that the circumstances leading to the death herein was as a result of assault and as such, the death was not justifiable at all. It was further submitted that through the three prosecution witnesses did not specifically spot the accused person cause the injuries on the deceased, that fact alone did not weaken the prosecution's case because a fact need not be proven by only direct evidence; the same can also be proved through circumstantial evidence. That the court in the case of *Republic v Richard Itweka Wabiti* [2020] eKLR 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.
 9. It was submitted that the accused and his brother having been the last persons to be seen with the deceased and the fact that they had unresolved dispute on that material night, there is no other conclusion than that the accused person caused the death of the deceased. That all the threads of evidence in this case when weaved together link the accused herein to the death of the deceased. Reliance was placed on the case of *Samuel Muigai Nganga v Republic* [2021] KECA 342 (KLR) where it was found that there is presumption in law where the last person seen with a deceased is fully responsible for the death of the deceased, the responsibility to rebut that presumption lies with an accused person. It was its case that an overt act such as the type of the injury caused herein clearly showed that the accused had the essential intent to kill the deceased. This court thus was urged to find that the evidence on record is sufficient to convict the accused herein for the offence of murder.
 10. The defence on the other hand submitted that the prosecution did not prove that he caused the death of the deceased herein. It was submitted that there was neither a post mortem report provided by the prosecution nor was there any evidence of death. It was his case that given that the post mortem



was not produced to determine the cause of death of the deceased herein, the same meant that the deceased could have died from natural or other causes. Reliance thus was placed *inter alia* on the cases of *Ndung'u v Republic* [1985] eKLR and *Chengo Nickson Kalama v Republic* [2015] eKLR. That the only evidence that led to him being linked to the case herein was the fact that on the material night, he left the bar at the same time as the deceased. The defence submitted that given that this case was related to HCCR 1 of 2014 where the accused therein was acquitted, the accused herein ought to be acquitted for the same reason that the prosecution did not prove its case beyond any reasonable doubt. In the end, this court was urged to acquit the accused herein.

11. 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 prove is always that of “beyond any reasonable doubts” [See was *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].

12. In the instant case, the accused person is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. Murder is defined as

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

The elements of murder and which the prosecution ought to prove are;

- a. the death of the deceased occurred
- b. the death was caused by unlawful acts;
- c. that the accused committed the unlawful act which caused the death of the deceased; and
- d. that the accused had malice aforethought.

(See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).

13. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.

14. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. The defence argued that given that the prosecution did not produce the post mortem report, the same was fatal to its case. In the cases of *Republic v Cheya* (1973) EA 500 and in *Chengo Nickson Katama v Republic* [2015] eKLR reports of the postmortem examination was not produced despite the fact that the postmortem was conducted. Further, due to the fact that the deceased had been in several hospitals, the same led the court to doubt whether death could have been as a result of the injuries sustained during the attack or by other cause.

15. What I gather from these decisions is that there are circumstances where death of a person may be proved without expert evidence. This is the hint I get from the Court of Appeal’s pronouncement that the *Cheya* decision

“does not illustrate the proper application of the principle that in some cases death can be established without medical evidence.”

What this statement suggests is that there exists a principle to the effect that in certain instances one does not need medical evidence to prove death except that the Cheya judgment was not the appropriate decision in which this principle was illustrated. The point was made even clearer when the court proceeded to cite cases such as cardio injuries arising from stab wounds, shattered skulls or



disappearance of a person as instances where the cause of death is so obvious that the absence of medical evidence or, to be specific, the post-mortem report, may not necessarily be fatal to the prosecution's case. That notwithstanding, in the case herein, PW1, PW2 and PW3 testified that indeed, the deceased died and further, PW2 and PW3 testified that the deceased had multiple head injuries; as such death was proven.

16. As to whether the death was caused by unlawful acts, 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 [Guzambizi Wesonga v Republic](#) [1948] 15 EACA 63]. PW1, PW2 and PW3 testified that the deceased body had multiple head injuries. As such, 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.
17. As to whether the accused person committed the unlawful act which caused the death of the deceased, from the evidence on record and as already stated, no witness saw the accused kill the deceased. The prosecution relied on circumstantial evidence basing the same on the allegation that the accused and his brother Laban Mate were the last people to be seen with the deceased and that they had unresolved land dispute on the night the deceased was killed. The prosecution submitted that all the threads of evidence in this case when weaved together links the accused herein with the death of the deceased. From the evidence adduced before this court, it is not in dispute that investigations were not carried out and if the same was done, then the outcome of the same was never presented before this court. As such, the allegations herein cannot be verified. Further, no witness testified that indeed the accused herein was responsible for the death or was ever seen with the deceased herein.
18. Reviewing the testimony of PW1 who stated that the deceased, the accused herein and Laban Mate were drinking in her pub; and that they drank for some time and thereafter left at around 10.30. pm. It was her evidence that they left the five of them. The other witnesses evidence was not of much help to the prosecution case as already recounted above. In such a scenario, can the said doctrine apply in the case herein?
19. In the case of [Ramreddy Rajesbkhanna Reddy & another v State of Andhra Pradesh](#), JT 2006 (4) SC 16 for instance the court held:

“That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

20. In the case of [Abamad Abolfathi Mohammed and another v Republic](#) [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence.....Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R Vs Taylor, Weaver and Donovan [1928] Cr App R 21: -

“It has 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 evidence to say that it is circumstantial.”



21. Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities. See *Abanga alias Onyango v Republic* CR App No 32 of 1990 (UR) in which it was held that:

“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 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.”

22. In this case, the only evidence tending to link the accused herein to the crime is the fact that it was stated by PW1 that the deceased, the accused herein, and Laban Mate were drinking in the same pub the previous night and thereafter left together at around 10.30 pm. Apart from this, there is no other evidence either direct or circumstantial that links the accused herein to the alleged death of the deceased. It is not clear to this court why the accused person and his brother Laban Mate were the only ones who were charged with the murder of the deceased and who the other people who left the bar with the deceased were and/or why they were also not charged.

23. That being the case, it therefore follows that the prosecution did not prove that the accused person herein was the one who caused the death of the deceased, despite having succeeded in establishing the death 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.

24. From the foregoing, the upshot of this judgment is that the Accused person herein is acquitted of the charge of murder.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

