



**Republic v Bett (Criminal Case 11 of 2020)
[2023] KEHC 27650 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 27650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE 11 OF 2020**

**RL KORIR, J
APRIL 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PATRICK KIPKEMOI BETT ACCUSED

JUDGMENT

1. Patrick Kipkemoi Bett (Accused) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 14th May, 2020 at Kimawait Location in Sotik Sub-County within Bomet County he murdered Kevin Kipng'eno.
2. The Accused took plea on 3rd November, 2020 and denied the charge leading to this trial in which the Prosecution called seven witnesses.
3. At the close of the Prosecution's case, the court ruled that the Prosecution had established a prima facie case against the Accused.
4. Put on his defence, the Accused gave a sworn statement and did not call any witnesses.

The Law.

5. Section 203 and 206 of the *Penal Code* carry the following ingredients of murder:-
 - i. The fact of death of deceased
 - ii. The cause of such death
 - iii. The fact that the death resulted from the unlawful act or omission on the part of the accused.
 - iv. That in causing such death, the accused acted with malice aforethought.



6. For a charge of murder to be sustained, the Prosecution must prove each of the ingredients above beyond reasonable doubt. In the celebrated case of *Miller Vs. Ministry of Pensions*, (1947) 2 ALL ER 372, Lord Denning succinctly explained this standard of proof in the following terms:-

“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 a 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 probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

7. It follows therefore that the issues for determination in a murder case must invariably fall within the ingredients of the offence, with the court being ever so mindful that the burden of proof remains with the Prosecution throughout the case and does not shift to the Accused. (See *Dickson Mwangi Munene and Another Vs. Republic*, (2014)eKLR)

Death of the deceased.

8. There was no doubt that Kevin Kipngeno died on 14th May, 2020. His father Antony Kipn’getich Rono (PW5) told the court that the deceased died on the material date and that he attended the post-mortem examination on 20th May, 2020. The autopsy was conducted by Dr. Doreen Langat who filled the post-mortem report. Indeed, there was no contest that the deceased died on 14th May, 2020.

Cause of Death.

9. The Prosecution called the evidence of the deceased’s relatives who told the court that there was a fight between the Accused and the deceased in which the deceased was stabbed. That the deceased was declared dead on arrival at Kapkatet Sub-County Hospital.
10. A post-mortem examination on the body of the deceased was conducted by Dr. Doreen Langat at Kapkatet Sub-County Hospital mortuary on 20th May, 2020. She observed that the deceased aged approximately 18 years, had blood stained clothes. He had bruises on the right elbow joint, penetrating wound on the left lumbar region measuring 4 cms in length; and blood clots in the abdominal chest. Internally, she found massive blood clots in the abdominal cavity, cuts on the colon, left kidney and liver. She formed the opinion that the cause of death was penetrating abdominal trauma.
11. The post-mortem report was produced by Dr. Kakili Richard (PW6) who testified on behalf of Dr. Doreen Langat who was his professional colleague and whose signature and writing he could attest to. He summarized the post-mortem findings as cut wound on the cardiovascular system, cut wound on the digestive column, cut vessels to the left kidney and disfigured liver and blood clots.
12. Dr. Kakili testified that the cause of death was penetrating stab wounds. He produced the post-mortem report as Prosecution Exhibit No. 8.
13. I accepted the findings of the pathologist on the cause of death. I had no reason to doubt the professional opinion. Indeed, it accorded with the evidence of PW1, PW2 and PW4 that the deceased had been stabbed. I therefore find that the cause of death was penetrating abdominal stab wounds. This was not a natural death and therefore it was unlawful.



Whether the Accused was linked to the unlawful death of the deceased.

14. A conviction would not ensue unless the Prosecution proved beyond reasonable doubt that it was the Accused and no one else who caused the unlawful death of the deceased. The evidence must clearly link the Accused to the death of the deceased.
15. In this case, evidence of identification was given by several witnesses.
16. Hellen Chepkemoi (PW1) was the deceased's wife. She testified that the Accused was her brother-in-law. She recalled that she had gone to pluck tea and returned home at around 4 pm on 14th May, 2020 when she found the house locked and her husband Kevin having gone with the key. That she went to her sister's place and her sister informed her that Kevin was looking for her and had issued a threat that he would kill her. Hellen decided to run away but sneaked back to the house around 7pm and it was then that she learnt that Kevin had been stabbed by Patrick. PW1 identified a masai sword (MF1-1), red jacket (MF1-2), pair of gumboots (MFI-3) as all belonging to the deceased who was her husband.
17. Richard Rotich (PW2) was the Chief of Kimawait location. He knew both the Accused and the deceased as members of his location. He testified that on 14th May, 2020 at around 8 pm he heard some people fighting and on checking found Patrick Kipkemoi and Kevin Kipngeno and the two ran away when he approached them. That when he caught up with them he escorted Kevin Kipngeno to his home and then went home. Around 9.30 pm, he heard screams and was also called by Ronald Kibet and Vincent Tanui who informed him that Kevin had been stabbed. He (PW2) found Kevin at the scene and called one Robert Korir who had a probox vehicle to rush him to Kapkatet hospital. That he was later informed by the deceased's family that Kevin had been declared dead on arrival at the hospital.
18. PW2 testified that he mobilized village elders and Nyumba Kumi to mount a search for the suspect in the neighbourhood and they found him in one of the homes. They collected a knife (MF1 1) and some clothes about 4 metres from the Accused's home.
19. PW3 Donald Bett was the Accused's brother and neighbour to the deceased. He testified that Kevin (deceased) entered his (PW3's) home and asked him where Kipkemoi (Accused) was. That shortly, Kipkemoi Patrick entered and Kevin told him "ni wewe natafuta" (It's you I am looking for). That Kevin told him 'come we fight' and pulled out a knife. That PW3's wife told them not to fight and Kevin left while Patrick remained behind and had supper with them after which he (PW3) escorted Patrick to his house. That shortly, they heard screams from Patrick's house but when they rushed there they did not find him.
20. PW3 further testified that shortly Patrick emerged from the shamba saying the he had killed Kevin. The family alerted neighbours and the Chief. Kevin was rushed to hospital while Patrick disappeared. PW3 told the court that later in the night the chief and Nyumba Kumi went to his house looking for Patrick. They found him at their father's house within the family homestead.
21. From the evidence above, it was clear to the court that the incident happened at right between 7 pm and 9pm which made the conditions of identification unfavourable. According to PW1 she got home around 7pm and later learnt the deceased had been stabbed. According to PW2 he found the Accused and deceased fighting around 8pm and later heard screams around 9.30 pm. PW3 said that he got home around 7 pm, left to go and shell maize and when he got back home the deceased arrived looking for the Accused and shortly the Accused also arrived.



22. In the case of *Cleophas Wamunga vs. Republic* (1989) eKLR, the Court of Appeal sounded the caution in dealing with evidence of visual identification as follows:-
- “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 wholly depends or to a great extent on the correctness of more identifications 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.”
23. In this case, I have carefully tested the identifying evidence. PW2’s evidence was that he found the Accused and deceased fighting and when he approached them they first ran away and on following them, he caught up with them and escorted Kevin (deceased) to his home before heading to his own home. PW2 was the local Chief and the protagonists were local residents. His evidence that he saw them fighting was credible. These are people he knew and therefore could not have mistaken their identities. The fact that he escorted Kevin (deceased) to his home further shows that he knew him very well to have known his home.
24. The defence submitted that no one saw the Accused stab the deceased and that this raised doubt on the identification of the Accused. That the evidence of identification was purely circumstantial. That the prosecution evidence showed that it was the Accused who was the aggressor and therefore if he was stabbed by the accused, then the Accused must have acted in self- defense.
25. The evidence that the deceased and the Accused fought that night was corroborated by PW3 who shed further light on their respective identities. PW3 Donald Bett testified that the Accused (Patrick) was his brother while the deceased (Kevin) was his neighbor. He testified that Kevin entered his (PW3’s) house looking for Patrick. That shortly Patrick entered the same house and they challenged themselves to a duel but Kevin was told to leave by PW3’s wife who shut the door after him. That later however PW3 and his wife heard screams from Patrick’s house and on rushing there, they did not find Patrick who shortly appeared saying he had killed Kevin and he was at the shamba. When they went to the shamba, they found Kevin who asked to be taken to the hospital.
26. The testimony of PW3 puts to rest any doubt on the identification of the Accused as the assailant. Even though the incident took place at night, he knew the Accused (Patrick) because he was his brother. Patrick entered PW3’s house where he even had a meal. PW3 and his wife took time interacting with him and they conversed. It is my view that PW3 could not have mistaken him even in darkness. Further, according to PW3, Patrick emerged from the shamba and told PW3 and their other relatives including their mother and PW3’s wife that he had killed Kevin. PW3 further stated that they found Kevin at the shamba near the Accused’s house and Kevin asked to be taken to the hospital.
27. The statement made by the Accused to his brother PW3 that he had killed Kevin was a confession voluntarily made meaning of Section 26 of the *Evidence Act*.
28. I find the statement incriminating and also believable. It has a ring of truth because when the family members went to the shamba, they found Kevin (deceased) lying on the ground injured and his request was to be taken to the hospital. He was in the shamba which was the same place where the Accused said he had killed him in. He was however still alive but injured and his request was to be taken to hospital.
29. As contended by the defence, no one saw the Accused stab the deceased. That might well be true. However, as shown above, the circumstantial evidence pointing to his guilt was overwhelming. The



Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR, held with respect to circumstantial evidence that:-

“.....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....”

30. Further, and as stated by the Court of Appeal in *Musili Tulo –VR* [2014]eKLR “circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”
31. As already shown by the evidence, the offence occurred in the night. There was evidence the Accused and the deceased had been seen fighting earlier in the evening. That the deceased had gone to the Accused’s brother’s house looking for the Accused while armed. Evidence of the continuing fight and quarrel provides circumstantial evidence pointing to the Accused as the person who stabbed the deceased. Besides, and as already stated, the Accused made an admission to his brother(PW3) and other relatives that he had killed the deceased.
32. There was also evidence of the recovery of the deceased’s blood –stained clothes at the scene which was outside the Accused’s house. PW1 the deceased’s wife identified a red jacket (MF1 2) and pair of gumboots (MF1 3) found at the scene as belonging to her deceased husband. The Chief Richard Rotich (PW2) identified the exhibits found 4 metres from the Accused’s home being MF1 2, MF1 3, MF1 4, MF1 5 and MF1 6. These were the deceased’s clothes. He also identified a knife (MF1 1) and a torch MF 1 7 which were recovered from the scene and which belonged to the deceased.
33. The recovery of the deceased’s clothing, knife and torch from outside the Accused’s house provides further circumstantial evidence linking him to the death of the deceased. The exhibits lend corroboration to the Accused’s own admission to his brother (PW3) that he had killed the deceased.
34. I am satisfied from my analysis of the Prosecution evidence that it was the Accused who stabbed the deceased leading to the deceased’s death. The circumstantial evidence clearly met the standard set out by the predecessor of the Court of Appeal in the celebrated case of *R. V. Kipkering Arap Koske & another* 16 EACA 135 thus:-
 - 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; and,
 - iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and none else”



35. My examination of the circumstantial evidence rules out any possibility that someone else was involved. In other words, I have found no other co- existing circumstances as per the caution set by the Court of Appeal in *Musoke V. R* [1958] E.A 715 that:-

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”

36. It is my finding that the Prosecution proved the identification of the Accused to the required legal standard. He is the one who stabbed the deceased causing his death. Needless to state the death was unlawful.

The Accused’s defence.

37. The Accused stated in his sworn defence that he did not stab the Accused. He stated that the deceased woke him up at around 11pm on the material night and when he opened his door, he saw the deceased armed with a knife. That when he saw him with a knife, he (Accused) ran away. Cross-examined, the Accused stated that the Accused ran away and he heard sound of a falling. The Accused also stated that the deceased did not attack him. He admitted that PW3 was his brother and PW4 was his mother and that she had escorted him to his house on the material night.

38. I considered the Accused’s defence. While denying that he stabbed the deceased, he makes several material admissions. He admits that he had an encounter with the deceased on the material night; that his mother (PW4) escorted him to his house and that the deceased did show up in his (Accused’s) house on the material night.

39. I have considered the Accused’s defence against the Prosecution’s evidence. It is a mere denial and does not cast any doubt on the Prosecution’s case that he was the one who stabbed the deceased leading to his death, which I have already found proven.

Whether the Accused acted with malice aforethought.

40. Section 206 of the *Penal Code* provides:-

“206. Malice aforethought shall be deemed to be established by evidence proving 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.”



41. In the case of *Roba Galma Wario vs. Republic* [2015] eKLR the court held as follows:-

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

42. The Prosecution submitted that the Accused intended to cause grievous harm and death to the deceased. While acknowledging that the deceased was the initial aggressor, the Prosecution stated that the Accused had been restrained and escorted to his house and was expected to have cooled down. That his later pursuit of the deceased and vicious stab meant that he had the intention to kill him.

43. The defence did not file final submissions despite being granted time extension by the court.

44. I have considered whether the Accused had a premeditated plan to kill the deceased. There was evidence that the deceased and the Accused had fought earlier in the evening but had gone their separate ways after the Chief (PW3) cautioned them. The deceased later sought out the Accused in the Accused’s brother’s house and were again separated. They seem to have renewed their fight later in the night at or around the Accused’s home. The Accused stabbed the deceased at his (Accused’s) shamba four metres away from the house.

45. Under those circumstances, it appears that the deceased must have followed the Accused to his home. However, the fact that the deceased was found at the Accused’s shamba would suggest that he was going away. It is not clear who began the attack at that point. What is clear was that the Accused’s attack on the deceased was vicious. According to the pathologist, the deceased suffered multiple cuts. He had a cut wound on the artery, column, kidney, left kidney and liver. The multiple deep cuts demonstrated excessive force and possibly a desire to harm or kill.

46. The evidence creates a strong suspicion that the Accused intended to kill the deceased. He may also have acted in self-defense since it was the deceased that followed him to his home where they continued the fight. As the law demands, I grant the Accused the benefit of the doubt on the ingredient of mensrea.

47. In the circumstances, I find that the Prosecution has not proven the element of mensrea beyond reasonable doubt. I apply the provision of Section 179(2) of the [Criminal Procedure Code](#) to substitute the charge of murder with that of manslaughter.

48. I find the Accused guilty of the offence of manslaughter Contrary to Section 202 as read with Section 205 of the [Penal Code](#). He is accordingly convicted under Section 215 of the [Criminal Procedure Code](#).

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 24TH DAY OF APRIL, 2023.

R. LAGAT-KORIR

JUDGE

Judgement delivered virtually in the presence of the Accused, Mr. Mwangangi holding brief for Njeru for the State, Mr. Ruto holding brief for Mr. Leteipa for the Accused. Siele and Muriuki (Court Assistants)

