



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Rono (Criminal Case 29 of 2018)
[2023] KEHC 19170 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE 29 OF 2018**

**JK SERGON, J
JUNE 15, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD KIPNGENO RONO ACCUSED

JUDGMENT

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Particulars of the offence are that, on October 21, 2018, at Kelelwa trading center, in Bureti Sub-county within Kericho County murdered Richard Langat.
2. The accused pleaded not guilty to the charge and the prosecution called five (5) witnesses to prove its case.
3. Mercy ChepkemoI (PW1) stated that on October 21, 2018 she was at a shop buying vegetables when she heard people screaming on the other side, that she was with her friend called Faith and that when she crossed the road, the accused slapped her and then went to her friend Faith. She testified that she did not understand why the accused slapped her, that she then crossed the road and went home while the deceased went to help Faith. She stated that when she got home, she heard that deceased had died and further confirmed that at the time she was leaving for home, the deceased was with Faith. She testified that she did not witness the incident as she had already left when the deceased was killed and that the accused did not have any weapon when she saw him. She testified that she was told that the accused killed the deceased and the she knew the accused because he was his neighbor.
4. On cross-examination she stated that she was 20 years of age and confirmed that the incident happened on October 21, 2018 and that at the time of the said incidence, she was not yet 18 years of age. She stated that on that fateful day, she was at the shop at 7:30pm and that though it was already dark, she was able to see the accused however she could not recall the colour of clothes that the accused was



wearing and that it was not true that she did not see the accused since when the accused slapped her, she had a child and she ran away. She confirmed that she did not see the accused with a knife but when she got home, she heard that the accused had a knife but she did not see the accused stab the deceased. On re-examination, he confirmed that she saw the accused when he slapped her though she did not understand why the said accused slapped her.

5. Erick Langat (PW2) stated on October 21, 2023, at around 7:30pm he was at Kelelwa center seated with the deceased when the said deceased stood up and went away and that a short time later, PW2 heard screams from the side of the road where the deceased had gone to. That there were many vehicles, he saw the deceased fall down across the road after which he together with others went and held him up and found the deceased bleeding with a knife on his back. He testified that the person who accompanied him removed the said knife and gave it to him and that it was a long knife, he identified the said knife in court as MFI 1 and stated that he rushed the deceased to the Hospital with the knife by his side but they did not know who stabbed the deceased. He stated that while at the hospital, they were told that it was the accused who stabbed the deceased and that the shoes found at the scene belonged to the accused. He testified that the deceased was pronounced dead upon arrival at the Hospital and confirmed that he was not at the scene when the accused was stabbed. He testified that he did not know if the accused had disagreement with the deceased and that he saw Mercy and Faith at the center.

On cross examination he confirmed that the incident happened at 7:30pm, though it was dark he saw the people who were screaming but he had not seen the accused prior and he was not there when Richard was stabbed, that he only saw the deceased.

6. Martin Kipyegon (PW3) stated that on October 21, 2018, he was at Kelelwa center having gone there to pick his phone that he had left charging and while there he heard screams from the other side of the road, that he struggled to cross the road as there were many vehicles and when he finally managed to cross the road, he saw a girl by the name Faith Chepkirui coming towards his side whereby the said girl told him that someone was chasing her and he should go and see. He testified that when he went to check, he saw someone who had fallen down and identified him as the deceased herein, Richard Langat and saw him lying down facing upwards after which he chased the assailant but could not get him. That when he came back to the scene, he saw brown sharp shooter leather shoes at the scene and the people at the scene told him that the said shoes belonged to the accused. It was his testimony that when he went to the shopping center the following day, he was told that the accused had surrendered himself to the police. That he took the knife that was given to him by Erick to the police as well as the shoes found at the scene.

7. On cross examination, he stated that the incident happened at around 7pm, that it was not very dark and he was able to identify Faith but he could not see the people Faith was pointing at. That he only heard one person screaming, it was the voice of a woman and when he reached the scene though it was slightly dark, he was able to see the deceased when he got closer to him. He confirmed that he neither saw the accused fight with anyone nor remove a knife or shoes and that it was the people present at the scene who told him that the said shoes belonged to the accused. He confirmed that the deceased had laid down before he reached the scene and that he did not see the accused kill the deceased.

8. PC Paul Oguta No. 63xxx (PW4) stated that he was currently attached at DCI Headquarters in Nairobi but was previously attached to DCI Bureti Investigations. He recalled that on October 22, 2018, he was at the Police Station when the accused person was brought by two Police Officers from Roret who reported that the accused had stabbed the deceased the previous night with a knife and the deceased had been rushed to the Hospital but pronounced dead on arrival. He testified that he went to the scene of murder and was shown the place where the deceased had been stabbed and that a knife was brought to him and he took possession of it. It was his testimony that he took the knife to



- the Government Analyst in Kisumu together with the blood sample from the deceased and the blood tested positive. He produced the knife as PExhbt-1. He stated that the post-mortem was performed and the cause of death established and that he then processed the accused person and he was charged in court after he was taken for psychiatrist for assessment.
9. On cross examination he confirmed that he was the Investigating Officer in the case, that he first met the accused when he was brought to the station on October 22, 2018 though he could not recall the exact time, the accused was well dressed but he could not identify the cloths he was wearing. It was his testimony that the accused was wearing cloths that were blood stained and that the said accused was caught in the bush while trying to escape hence he had no chance to change the clothes. He stated that he did not take the accused fingerprint for examination to ascertain whether he held the knife and he did not ascertain whether there were other fingerprints on the knife. He testified on cross examination that there were eye witnesses at the scene, that the knife was found at the scene since the accused ran away and left the knife at the scene. He stated that he took the accused to the psychiatrist to ascertain his mental status and that he neither knew that the accused was a student at Eldoret National Polytechnic nor did he go back to Eldoret to ascertain whether the accused was a student and that the said accused was seen at the scene at Kelelwa where the murder occurred.
 10. On re-examination, he explained that the purpose of taking the knife for examination was to ascertain whether the blood stains were of the deceased person and that the accused person was brought by two Police Officers from Roret. That the said officers were not present at the scene where the incident occurred but there were eye witnesses.
 11. Dr. Mutai Kiplangat Titus (PW5). He stated that he was working at Sotik Sub-county as the Medical Officer of Health, that he was in court to represent Dr. Esau Langat who performed the post-mortem but had gone to Nairobi for further studies and that they had studied with the said Dr. Esau Langat at the University of Nairobi. He testified that he had the post-mortem examination for the deceased who was stabbed while trying to rescue a girlfriend and that the post-mortem was performed at AIC Litein Hospital on October 29, 2018 at 2pm. He stated that externally, the deceased had no clothes, the body was stiff and there was a stab wound on the back of the chest and that the said wound penetrated the scapula bone behind the shoulder. On internal appearance, it was his testimony that the chest cavity was opened, there was 300ml of blood on the left lung but all the other internal organs were normal. The opinion formed from the post-mortem was that the deceased died due to Hemopneumothorax secondary to penetrating stab injury secondary to assault. He produced the post-mortem Report as PExhbt-2.
 12. On cross examination he stated that he confirmed that the Post-mortem was performed at AIC Litein Hospital by Dr. Esau Langat who was away in school and had requested PW5 to represent him in court and that he was familiar with his handwriting since he had worked with him at Bomet County. On re-examination he confirmed that he had worked with Dr. Esau Langat and was conversant with his handwriting and signature.
 13. When the accused was placed on his defence, he elected to give an unsworn testimony with no witnesses to call. In his defence, the Accused denied committing the offence of murder and stated that on that fateful day he was asleep at home in Kelelwa village when he heard a knock at his door at around 10.00pm and when he opened the door, he saw three people one of them was his neighbor and the other two were policemen. He stated that he was spending the night with one Victor Kiprono who is now deceased. That they forcefully entered his house, arrested and handcuffed him and took him to Roret Police Station where he was kept in custody. It was his testimony that he was taken to Litein Police station the following day and that his mother is the one who told him that he was a suspect in the deceased murder when the said mother visited him at the police station. That he was taken back



to the custody and forced to sign the pre-prepared statement. He testified that he was taken to court the following day and that is when he learnt of the charges preferred against him and that there was no identification parade done.

14. At the close of the case the prosecution chose not to put in any submission but the defence submitted orally.
15. The Defence submitted that the particular constituting murder that is *mens rea* and *actus reus* were not proved as the prosecution did not prove malice aforethought and therefore the accused should be set free. The Defence further submitted that there was no nexus between the death of the deceased and the accused as there was no eye witness who identified the accused commit the offence.
16. It was the Defence's submission that the evidence of PW2 is not reliable as he said that he saw the deceased bleeding but did not see the person who stabbed the deceased while PW3 said that he only heard screams, saw a fallen man and found some shoes but did not know the owner of the shoes. That PW3 said he did not see the person who knifed the deceased. He also submitted that the only witness the accused had passed away.

The Only Issue for Consideration Is Whether the Prosecution Proved Its' Case Against the Accused Beyond Reasonable Doubt.

17. The offence of murder is provided for in Section 203 of the [Penal Code](#) that provides:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. The Court of Appeal in [Joseph Gitbua Njuguna v Republic](#) [2016] eKLR outlined the ingredients of the offence of murder and stated that:

“Under section 203 of the [Penal Code](#), any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See [Milton Kabulit & 4 others v Republic](#) [2015] eKLR.”

a. Death and Cause of Death

19. On this issue PW1 testified that she was told that the accused killed the deceased. PW2 testified that when he held the deceased, he found the deceased bleeding with a knife on his back. PW4 testified that the two Police Officers from Roret who brought the accused person reported that the accused had stabbed the deceased the previous night with a knife and the deceased had been rushed to the Hospital but pronounced dead on arrival. PW4 also testified that he took the knife to the government analyst in Kisumu together with the blood sample from the deceased and the blood tested positive. PW5 on the other hand stated that the Post-mortem report indicated that the deceased had a stab wound on the back of the chest and that the said wound penetrated the scapula bone behind the shoulder. PW5 further testified that the opinion formed from the post-mortem was that the deceased died due to Hemopneumothorax secondary to penetrating stab injury secondary to Assault. To that end, the Prosecution has proved beyond reasonable doubt that the deceased died due to an unlawful act of assault.



b. Whether the Accused Caused the Death of the Deceased

20. None of the prosecution witnesses actually saw the accused kill the deceased. In essence, the prosecution case was based on circumstantial evidence.

21. The Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction in the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR where it stated as follows:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this 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 Subject; (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. PW1 testified that she was told that the accused killed the deceased. PW2 testified that while at the hospital, they were told that it was the accused who stabbed the deceased and that the shoes found at the scene belonged to the accused. PW3 on the other hand testified that he saw brown sharp shooter leather shoes at the scene and the people at the scene told him that the said shoes belonged to the accused.

23. All the prosecution witnesses testified that the accused was not at the scene of crime, in fact PW3 testified that when he went to the shopping center the following day, he was told that the accused had surrendered himself to the police. PW4 also testified that the accused was wearing clothes that were blood stained and that the said accused was caught in the bush while trying to escape hence he had no chance to change the clothes. He further testified on cross-examination that there were eye witnesses at the scene and that the knife was found at the scene since the accused ran away and left the knife at the scene.

24. PW1 testified that he left after the accused slapped her, the said accused went after her friend Faith and that the deceased went to help Faith. PW1 further testified that when she left for home the deceased was with Faith. PW3 on the other hand testified that he saw a girl by the name Faith Chepkirui coming towards his side whereby the said girl told him that someone was chasing her and he should go and see after which PW3 chased the assailant but could not get him.

25. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide any explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the accused herein has a duty to give an explanation of how the deceased met his death.

26. In the circumstances of this case, the accused’s defence failed to offer any explanation as to how the deceased might have met his death. His defense amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased’s death.



27. Whether the Accused Person had Malice Aforethought.

28. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the Penal Code provides circumstances from which malice aforethought may be inferred. They are:

- (a) An intention to caused 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 cause; (c) An intention to commit a felony; (d) ...

29. In determining whether the accused persons had malice aforethought, the court must take the surrounding evidence into account as was held by the Court of Appeal in N M W v Republic [2018] eKLR when it relied on the case of Bonaya Tutu Ipu & another vs. Republic [2015] eKLR:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v. Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

30. PW1 testified that the deceased had gone to help Faith after the accused went after the said Faith. PW2 also testified that he was seated with the deceased when the said deceased stood up and went away and that a short time later, PW2 heard screams from the side of the road where the deceased had gone to. PW2 further testified that he did not know if the accused had disagreement with the deceased and that he saw Mercy and Faith at the center. PW3 on the other hand testified that he saw a girl by the name Faith Chepkirui coming towards his side whereby the said girl told him that someone was chasing her and he should go and see after which PW3 chased the assailant but could not get him. PW4 testified that the accused was caught in the bush while trying to escape.

31. It is apparent from the evidence presented that the accused stabbed the deceased once with a knife. It would appear the fight between the accused and the deceased was spontaneous. It is difficult in the circumstances to conclude that the accused had malice. The element of malice aforethought was not established. Therefore, the offence of murder was not proved against the accused. However, the evidence establishes the offence of Manslaughter. Consequently, the accused namely: - Bernard Kipng'eno Rono is convicted of the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code

DATED, SIGNED AND DELIVERED AT KERICHO THIS 15TH DAY OF JUNE, 2023.

.....

J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh



Kefa holding brief for Kirui Kipyegon for the Accused

