



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Moses (Criminal Case 10 of 2018)
[2023] KEHC 19139 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 10 OF 2018
LM NJUGUNA, J
JUNE 14, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BENSON NJERU MOSES 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](#) and the particulars of the said offence being that on December 31, 2014 at Gacaveri Village, Gikiiro sub location, Mbita location in Mbeere South Sub County within Embu County murdered Philemone Ireri Mutemi.
2. Upon arraignment, he pleaded not guilty and a plea of not guilty was entered. The case proceeded for trial and wherein the prosecution called a total of eight (8) witnesses who testified in support of its case.
3. PW1, Geoffrey Mwaniki Njiru testified that on December 31, 2014 at around 7.00 pm while selling wares at his shop, the deceased and the accused person started exchanging bitter words when after a short while, the deceased shouted that he had been stabbed. That upon going out, he found the deceased bleeding and he tied the wound. He stated that the deceased was bending while holding his stomach and he called the brothers and sisters of the deceased to take him to hospital. As they rushed the deceased to the hospital, the deceased informed them that the accused herein was responsible for his injury. On cross examination, he stated that the deceased was stabbed in 2014 but later died in 2017.
4. PW2, Esborn Nyaga Mutemi testified that on the fateful date, he received a report from his brother Josephat Mutware informing him that the deceased had been stabbed by the accused person. That he later heard that the deceased was hospitalised but was later discharged before he got sick again and thereafter passed on. He identified the accused person to whom he said was his younger uncle and further that, they sat as a family and wherein it was agreed that they forgive each other.



5. PW3, Elikanda Njeri Nyaga testified that on January 29, 2017, she was called by a gentleman called Levis Muchoki who informed her to go and check on the deceased. That he went and found the deceased lying on the road but was still alive. He stated that at the scene, he found family members and other people and as they were preparing to take the deceased to the hospital, the deceased died. That post mortem was conducted and results showed that the deceased died of stab wound for which he had been admitted for two weeks but later on discharged.
6. PW4, Moses Mwaniki Mutemi testified that on December 31, 2014, the accused stabbed the deceased with a knife. That while at Gacaveri Shopping Centre, he saw the accused come and as he was drunk, he asked who among them would not like to see the following year and at that time, he just saw the deceased fall down. That the deceased also said that the accused person stabbed him and thereafter ran away from the scene. He stated that together with PW1, they looked for a vehicle which took the deceased to hospital after PW1 had tied the deceased's wounds.
7. PW5, Justa Ndegi testified that on the material day, the deceased told him that he was leaving for the shop. That she was later called by PW6 who informed him that the deceased had been stabbed by the accused herein; and upon going to the hospital at Kavondore, she found the deceased being offered first aid. It was her evidence that the deceased was referred to Embu Hospital but since she had a small child, she did not make it to Embu Hospital. It was her evidence that the deceased was admitted for medical care but after three weeks, he was discharged. That from the date the deceased was stabbed, he kept on complaining of pain on the part of the stomach which was stabbed.
8. PW8, Joseph Njeru Mutemi stated that on December 31, 2014 while at Gacaveri Shopping Centre together with the deceased herein who is his brother, while waiting to be served, he heard the accused person ask who wouldn't want to see the new year. That the deceased responded by saying that all of them wanted to see it but all over a sudden, he saw the deceased holding his stomach while saying that he had been stabbed. It was his evidence that PW1 covered the deceased wound with a leso but, the accused person took off. That they took the deceased to Kavondori Police Station where they reported before taking him to Embu Level Five Hospital. He stated that after the deceased had been discharged, he continued to complain of pain.
9. PW7, Sarah Muyoma stated that she was the investigating officer having taken over from Corporal Salat. She stated that she was called by the OC crime who handed over the file to her, in which the accused person had been charged with the offence of causing grievous bodily harm. She was later informed by the father to the complainant that the complainant had died on January 29, 2017. She testified that she started tracing witnesses to get information and the deceased's brother came forward with a copy of a post mortem report, burial permit and an O.B Number in which it had been reported that the deceased died of natural causes. That she neither arrested the accused person nor recovered any exhibits from the person who gave her the post mortem. She reiterated that the police did not have the original post mortem report for the reason that the same was done at the request of the family. On cross examination, she stated that she made a copy of the burial permit and a copy of the post mortem report and placed the same on the file and further that, she was not aware who conducted the rest of investigations as she was transferred.
10. PW8, Dr Rosemary Wangari Kamau stated that post mortem in this case was done by Dr Phyllis Muhonja and that she formed the view that the deceased died as a result of acute gastritis; possible chemical injury intestinal with acute peritonitis in post exlap with adhesions.
11. After the close of prosecution's case, the court gave directions that parties do file their respective submissions and wherein the prosecution chose to rely on the evidence on the record. The accused person submitted that the prosecution failed to prove the elements of the offence of murder in that;



there was no evidence linking the accused to the death of the deceased. Reliance was made on the case of *Ramanlal Trambasklal Bhatt Vs R (1957) EA* and further, on Section 215 of the Penal Code which states that a person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death. The defence therefore urged this court to acquit the accused person.

12. The prosecution proceeded to close its case and vide a ruling delivered on March 15, 2023, the accused herein was placed on his defence after the court found that the prosecution had established a prima facie case.
13. When he was put on his defence, DW1, Benson Njeru Moses testified that he did not cause the death of the deceased for reason that when the deceased was stabbed, there was no one present. It was his case that the prosecution witnesses lied under oath for the reason that he was not responsible for stabbing the deceased despite being charged at Siakago. He argued that from the time that the deceased was allegedly stabbed in the year 2014 upto the year 2017, the deceased had been doing well. He stated that the deceased died as a result of excessive drinking of alcohol.
14. I have considered the evidence presented before this court by 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 *Miller Vs Minister of Pensions [1947] 2 ALL ER 372 - 373*).
15. In the instant case the accused person is facing a charge of murder contrary to section 203 of the Penal Code. Murder is defined as

' When any person who of malice aforethought causes 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. he 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 Vs Republic [2014] eKLR*).

16. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
17. As for the death of the deceased having occurred, it is not in doubt that the deceased herein died. PW8 (Dr Rosemary Wangari Kamau testified on behalf of Dr Phyllis Muhonja that Dr Muhonja conducted post mortem on the body of the deceased. As such, the death of the deceased was thus proven.
18. As to the death having been 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 Vs Republic [1948] 15 EACA 63*). PW8 gave evidence that the deceased herein died as a result of acute gastritis; possible chemical injury intestinal with acute peritonitis in post exlap with adhesions. 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.

19. As to whether the accused committed the unlawful act which caused the death of the deceased, I have perused the prosecution's evidence as presented before the court. What was outright is the fact that the prosecution witnesses blame the accused herein for the death of the deceased. Of importance to note is the fact that the alleged stabbing was committed sometime in the year 2014 while the deceased died in the year 2017. The investigating officer testified that upon being handed over the file by the OC crime, she went through the file and wherein the accused person had been charged with the offence of causing grievous bodily harm but the deceased later died. She further testified that she started tracing witnesses to get information and the deceased's brother came forward with a copy of post mortem report, burial permit and an OB Number in which it had been reported that the deceased died of natural causes.
20. But even assuming for a moment that the accused herein was responsible for the stab wound that caused the death of the deceased, it is trite that the period taken since the accused allegedly stabbed the deceased to the time of death is overly stretched. The charges read that the accused person herein murdered the deceased sometime in December 31, 2014 while it is not disputed that the deceased died on January 29, 2017. I say so for the reason that the law creates the limitation as to time of death. Section 215 of the Penal Code states that:
 1. A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.
 2. Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done.
 3. When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased.
 4. When the cause of death is in part an unlawful act, and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the later.
21. The deceased herein died outside the period provided for under Section 215 of the Penal Code. Further, the evidence of PW8 did not support the prosecution's case on the cause of death.
22. 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 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.
23. From the foregoing, the upshot of this judgment is that the accused person herein is acquitted of the charge of murder.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

