



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Barmiris (Criminal Case 8 of 2018)  
[2023] KEHC 20916 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE 8 OF 2018**

**RB NGETICH, J**

**JULY 24, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EVANS BARMIRIS ..... ACCUSED**

**JUDGMENT**

1. The accused EB has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars being that the accused on the 3<sup>rd</sup> day of June, 2018, at [Particulars withheld] village in Baringo North sub-county within Baringo County, murdered PJB.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial with the prosecution summoned a total of 4 witnesses in support of the charge preferred against the accused.

**Prosecution's Evidence**

3. Pw1 Benson Amdany the Chief of Simo location testified that on the May 29, 2018, on the May 29, 2018 he was the Assistant Chief for Kasisit sub-location then and he was at the Chief's office in Simunon when he got a phone call from sergeant Wilson Chesang informing him that somebody had beaten up his wife. He went to the scene where he met Sgt. Chesero, two other police officers, one Mildred and Julius Kandie. At the scene was the deceased who in a serious condition.
4. He testified that he organized for a taxi and the deceased was taken to Kabartonjo health centre where he was referred to Kabarnet Hospital. He said he saw the deceased who had blood on her head and the accused was present and was helping in carrying the deceased. He said the deceased succumbed to injuries.
5. Pw2 Simon Kiptoo Chelimo testified that on the 29.5.18, he was at Muchongoi when he received a call from a public health officer from Kasisit informing him that a lady had been beaten until she was



- unconscious. He stated that the house was occupied by a worker and his son. He went to Kasisit on May 30, 2018 and on enquiring from his son and worker, he learnt that the lady was the wife of his neighbor E. He said the lady had gone to work as a casual labourer in his farm.
6. Pw 3 Wilson Chesaro Sgt No 88067036 who works at Kasisit police post testified that on 29.5.18, he was at Kasisit police post and at about 1:00 pm he was at the Centre at Kasisit when the accused came and found him seated and informed him that he had a matter to tell him. He stated that he got him from the group of people and took him aside and the accused told him that he had found his wife at somebody's house, the house of Simon PW2, and that it appeared as if the lady had a relationship with the said mzee's son called Kemboi. He said the deceased said he had beaten the wife at the house and left her unconscious.
  7. Pw3 called his colleague one Mildred Kibet and they went with the accused to the house and as they neared the house, they saw mzee's son, Kemboi in the compound but run away on seeing them. He said they found two young men one being Gilbert who said that they had been called by Kemboi to come and help him. He stated that he entered the house and found the lady lying on her back in the sitting room with injuries on the mouth and there was blood all over the house. He said he called Julius Kandie a police officer and had also informed the chief of the occurrence. He said the police went and arrested the accused as he had reported that he had beaten his wife.
  8. He said they carried the lady using a blanket and on reaching a hill, they found the chief who assisted them get a taxi which took the deceased to Kabartonjo Hospital where he got first aid and was found to be in critical condition and transferred to Kabarnet hospital.
  9. He stated that they went to Kabarnet police station as the medical staff took the deceased to the hospital; she was referred to Eldoret Moi Teaching and Referral Hospital where she succumbed to injuries.
  10. Pw4 PC Jackson Kariuki No 75116 who was stationed at Kabartonjo police base at the material time testified that on 29.5.18, AP sergeant Wilson Chesaro accompanied by APC James Kandie found him at Kabartonjo report office where they reported that one EB had gone to their station at Kasisit and reported that he had beaten his wife and left her unconscious. He testified that he recorded their report and later on June 3, 2018, he received a phone call from Moi teaching and referral Hospital that the victim had died of head injuries. He visited the scene of crime and re-arrested the accused on May 30, 2018 from the AP officers who had gone to the Base with him. He testified that the deceased was taken to hospital on May 29, 2018 and he did not visit the deceased in hospital. He said on interrogation, the accused said he had been living with the deceased as husband and wife and had warned his wife not to go to that home where he worked as casual laborer. He charged the accused with murder.
  11. When the matter came up for further hearing of the prosecution's case on the January 25, 2023, the prosecution counsel informed the court that they had one doctor ready to proceed online but they agreed with defence counsel to produce the postmortem report by consent and which report was produced and marked as exhibit. The close of the prosecution's case.
  12. Upon the closure of the prosecution case, the court delivered a ruling on the 20<sup>th</sup> day of April, 2023 finding that the prosecution had established a prima facie case against the accused and he was placed on his defence in accordance with Section 306(2) of the [criminal procedure code](#).

### **Accused's Defence**

13. The accused gave sworn evidence in his defense. He denied killing the deceased on June 3, 2018. He testified that on May 29, 2018, he was at home working and the deceased who was his wife had gone to



do some casual work in a neighbor's home and at 11:00a.m, he realized the work he was doing required a wheelbarrow and he went to a neighbour to borrow but he did not find that neighbor and went to Kasisit trading Centre and after 30 minutes he received a call that a young man by the name Silas Kemboi Kiptoo was seen pulling his wife to a house; that the young man insisted that he should go there. The accused said he decided to go to the Assistant Chief but did not find anyone.

14. He testified that on coming back, he met a police officer called Sergeant Chesaro who asked him what he wanted and he answered that he wanted the Assistant Chief since he had received a call and had suspected something bad had happened. That Sergeant then called his colleague called Mildred Kibet and asked him to join him accompany the accused to his home. He stated that they went home at around 2p.m and on reaching some metres to the home, there was a young man standing outside and another one came from the house, that the two ran away. That the one who came from the house is called Gilbert and Silas was last to come out of the house and ran away.
15. He said they entered the house and found the deceased lying down, nose bleeding and unconscious. That Mildred covered her with her skirt and she left the scene to check on her children but the accused remained with Sergeant Chesaro who then called APC Kandie to inform him of the incident and sked him to come. They took the deceased to Kabartonjo Hospital where first aid was done and she was referred to Kabarnet Referral Hospital and while on the way Sergeant Chesaro asked him to alight and go to Kabartonjo Police Station. He was charged with the offence of assault and after one week he was charged with the offence of murder. He denied reporting at Kasisit Ap Camp that he had beaten the deceased. He denied recording a statement at the Kabartonjo police station. He questioned why Silas was not arrested and he never testified in court. He said he was told Silas was with the deceased in the house and they confirmed. He denied beating the deceased.

### **Submissions**

16. The defence counsel filed written submissions dated March 20, 2022 and submit that for the prosecution to secure a conviction on the charge of murder, they have to prove three ingredients against an accused person being the death of the deceased occurred, that the accused committed the unlawful act which caused the death of the deceased and the accused had malice aforethought.
17. The accused submits that the deceased met her death at MTRH after she succumbed to head injuries. From the postmortem report produced as exhibit 1, the doctor's opinion on cause of death was multiple injuries due to blunt force trauma consistent with assault.
18. On the proof that the accused committed the unlawful act which caused the deceased death, the accused submits that the prosecution has failed to connect the accused to the unlawful act of causing the death of the deceased. That in cross examination Pw1 stated that he met the police carrying the deceased, he did not go to the scene and did not know what had happened.
19. Counsel further submits that none of the prosecution witnesses witnessed the incident; that the only witness who was present was Kemboi the owner of the house who was not called to testify. That Pw2's testimony and in cross examination was just hearsay; further, on cross examination, Pw3 the arresting officer stated that when they approached the house, Kemboi ran away and hid in the shamba and said Kemboi had a relationship with the deceased.
20. Further that Pw 4 the investigations officer arrested the accused, released and re-arrested him on 3/6/2018; that he visited the scene on May 30, 2018 where other workers were present but were not interrogated. He submitted that there were poor investigations in this case. That no one has been directly linked to the death of the deceased and the only evidence tendered is that she was assaulted by



the accused but none saw it happen. That the accused was not interrogated as to how he assaulted the deceased; how he inflicted the injuries, the weapon used, force.

21. The accused submits that the P3 form was neither filled nor treatment chits produced to lead to the conclusive determination of the other injuries sustained by the deceased before she died. That the postmortem produced indicates that the deceased had multiple defence injuries on the upper limbs and the digestive system. That the investigations were shambolic. No extracts were taken from the accused and Kemboi to ascertain whether Kemboi was connected with the offence; he was not arrested or interrogated.
22. As to whether the accused had malice aforethought, counsel submits that the ingredients for the offence of murder have not been proved and defence should not be called to clarify the doubts or the gaps in the prosecution's case; that the accused has not been linked to the offence of murder and on the analysis of facts, the law and the evidence tendered by the prosecution witnesses, the judge will safely set the accused at liberty.

### **Analysis And Determination**

23. The ingredients for the offence of murder are proof of death, whether the death was due to an unlawful act or omission of the accused and presence of malice aforethought.
24. As to the death of the deceased, it is not disputed that the deceased died. Pw3 testified that they visited the scene and found the deceased unconscious and later succumbed to head injuries on 3.08.2018 at Moi teaching and referral Hospital. All witnesses attested to the death of the deceased which was corroborated by the production of the postmortem by consent of the parties; the accused was also confirmed the death of the deceased.
25. As to whether the accused is responsible for the death of the deceased, there was no direct evidence linking the accused to the death of the deceased. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court 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. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence.”
26. Further in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21 Lord Heward, CJ stated as follows: -

“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.”
27. 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 by this court. Suffice to mention *Abanga alias Onyango v Republic* CR App No 32 of 1990(UR) in which this court held 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 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.”

28. And in *Sawe v Republic* [2003] KLR 364, the Court of Appeal amplified on the above as follows:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

- 29. From evidence adduced by PW3 Sgt. Wilson Chesaro the accused told him that he had found his wife at somebody’s house, the house of Simon Kipchopot, and that it appeared as if the lady had a relationship with the said mzee’s son called Kemboi and that he had beaten his wife at the house and left her unconscious.
- 30. On enquiry from the two young men, he found at the scene, he learnt that they had been called by Kemboi to come and help him and on entering the house, they found the deceased lying on her back on the floor with injuries on the mouth and there was blood all over the house. He said he arrested the accused because he is the one who had reported that he had beaten his wife.
- 31. Pw4 interrogated the accused regarding the incident who narrated how they were staying with the deceased as husband and wife and had warned his wife not to go to that home where he was a casual labourer.
- 32. Although the accused denied in court being involved in the death of the deceased, he is the one who reported that he had beaten his wife after suspecting that she had an affair with one Kemboi a son of pw2; the accused led Pw3 and his colleague to the scene of crime, the house of Pw2, where the deceased was found lying dead. From evidence adduced, the accused was tipped that deceased was with his wife in his home and was angered as he suspected they had a fair and had warned her against going to the home.
- 33. I now wish to consider whether the prosecution has established malice aforethought in the killing by the accused. Malice aforethought is defined under Section 206 of the *Penal Code* which 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.
34. Evidence adduced was that the accused was unhappy with deceased working in pw2's home because he suspected that she affair with pw2's son and had warned the deceased against going to the said home on suspicion of infidelity.
35. Although the accused completely denied the offence, it is clear that he was provoked when he found the deceased in the house of Kemboi and acted in the heat of passion. Section 207 of the [Penal Code](#) provides for instances where a defence of provocation may be accepted; it provides as follows:-

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

36. In the case of *RC V Republic* (2005)2 KLR 239 the Court of Appeal in dealing with a defence of provocation stated;

“1. Under section 207 of the Penal Code, an unlawful killing in circumstances which would constitute murder would be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing was done.”

36. In applying Section 207 of the [Penal Code](#), the Court must consider all the circumstances of the case. From postmortem (EXB1) the deceased suffered multiple injuries due to blunt force trauma consistent with assault. The injuries resulted from beating. It's not clear what object was used by accused to beat the deceased.

36. Taking into consideration the totality of all the circumstances of this case I find that the accused acted in the heat of the moment when he found the deceased in the house of Kemboi whom he suspected had an affair with his wife. My finding is that the attack on the deceased was not premeditated. The element of malice aforethought has not been proved. What is clear is that the accused killed the deceased. The killing was unlawful. I therefore reduce the charge of Murder to Manslaughter contrary to Section 202 as read with Section 205 of the [Penal Code](#) of which I convict the accused accordingly.

**Final Orders:**

- 1. I hereby find the accused guilty of the offence of manslaughter and convict him accordingly contrary to section 202 as read with section 205 of [Penal Code](#).
- 2. Right of appeal 14 days.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET**

**THIS 24<sup>TH</sup> DAY OF JULY 2023.**

.....



**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Kemboi - Court Assistant.

Ms Ratemo – Counsel for state.

Accused present.

No appearance for accused.

