



**Republic v Chelimo (Criminal Case 14 of 2017)
[2023] KEHC 21277 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 14 OF 2017**

**RB NGETICH, J
JULY 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSPHAT KOMEN CHELIMO ACCUSED

JUDGMENT

1. The accused person has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charge being that the accused on the 11th day of March, 2014 at Tulungoi Sub-location, in Baringo County, murdered Vincent Cheruiyot Limo.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 3 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. Pw 1 Michael Chebyego Kiplimo the Assistant Chief of Tuliongoi sub location testified that on 11/3/2013, at about 8.47 p.m, he was at home when he received a call from mobile phone line No.0700681131 belonging to Stanley Kiptabut Chepkoret a resident of his sub location who told him that Josphat who was also a resident of the area wanted to talk to him. He stated that he spoke with Josphat who informed him that he had killed his brother. Pw1 advised him to stay at the place he was until he got there. He went to Barrier Centre where he found Stanley, accused and other people at the place.
4. On interrogating the accused, he informed pw1 that he had killed his brother using an arrow.pw1 got a rope from the shop tied him up and he took them to the scene of the offence which was about 600 meters from the Centre on a road between where he lived and where the mother lived. At the scene, they found accused's brother Cheruiyot lying dead with an arrow on the left rib. Pw1 called the D.O., Tenges who sent police officers to the scene. They arrested the accused and the body was preserved



- until the next day when it was removed and taken with arrow still stuck on it. on cross examination, he said accused informed him he had killed the deceased. He further said the deceased was about (4) months in the area having come from Lower Solai where he had gone to live with his uncle since he was small child.
5. Pw 2 Stanley Chepkoret testified that on 11/3/2013 at around 8.00 p.m., he was at Barrier Centre when accused who was his neighbor went to him and requested for his phone so that he could call the Assistant Chief, Michael Kiplimo. He gave him the phone and asked him what he wanted to tell the chief but he said it is private matter. Accused then stepped aside and after a short while he came back and gave him the phone.
 6. He testified that shortly after the Assistant Chief came to the Centre where he bought a rope and told them that the young man had committed an offence and tied him. He stated that the accused led them into a forest, a short distance away where they found Cheruiyot Kiplimo who was Josphat's brother lying there with an arrow in the stomach. He said the deceased had stayed for 3-4 months after coming from Solai.
 7. Pw 3 No.2011310619 APC Maurice Ouma testified that in 2013, he was attached at Tenges Ap post at Tenges Division, Central sub county of Baringo and on 11/2/2013 at 10.00 p.m. at night, he was asleep at the AP Post at Tenges when he was awakened by his senior Cpl. Karati who told him that there was a body at Tulungoi sub location Barrier. He went with his colleagues to the scene where they found the body at Barrier.
 8. He said they found accused who had been tied up with a rope by the area Assistant chief. He said the Assistant chief told him that the deceased had been killed by his brother the accused. They examined the body of the deceased then arrested accused and took him to Kabarnet police station.
 9. Upon the closure of the prosecution case, the court delivered a ruling on the 24th day of October, 2022 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 Case

10. The accused gave sworn evidence in his defense and confirmed that the deceased was his brother. He said on 11.03.2013 at around 7: 00p.m, he was at home and was heading to the trading Centre to buy vegetables and while on the way, he found his brother lying down. He said he flashed a torch and saw that he had been shot with an arrow on the rib. He stated that he requested for a mobile phone and called the Assistant Chief. He said he went with Assistant Chief and other people to where the body was and the Assistant Chief called Tenges police station where they came, arrested and took him to Tenges.
11. He stated that his brother lived in Solai since 1998 to 2012 December when he came to Tenges. That he did not have a house and he left for him his house and went to his cousin. He said he left to him his house because the deceased had a wife and children and by doing that it shows he had a good relationship with the deceased.
12. On cross examination, he testified that when the police interrogated him, he explained to them what had happened and they recorded his statement on 15.03.2013. He admitted that he told the police that that the deceased came home from Solai after 15 years and he gave him his house.
13. He said his brother was to burn 20 sacks of charcoal so as to use to buy iron sheets to build his house and vacate accused's house. He admitted that they sold two plots and further admitted in cross examination



that they sold 3 plots and that he said he went to pick a panga he had given the deceased from his house. He confirmed that they bought 3 litres of busaa and drunk together.

14. The accused stated in cross examination that when he arrived home, he found the deceased had taken his cattle and 2 goats saying that he wanted them to divide the cattle and goats he had. He stated that the deceased refused to return the livestock and the deceased had arrows which he threatened to kill 10 people starting with the accused.
15. On further cross examination, he stated that the deceased tried to stab him but he grabbed the arrows and stabbed him. He confirmed that he requested for the phone from PW 2 to call the chief (PW1) and explained to the Chief what had happened. He confirmed that the chief testified in court what he had told him same as Pw 2. He confirmed that what he has told the court and what they said is correct. He admitted on cross examination that it is true he stabbed his brother with an arrow on the stomach.

Accused's Written Submissions

16. The accused person filed written submissions dated 24th May, 2023. He did not deny that the deceased died and a postmortem report or death certificate in respect to the deceased Vincent Cheruiyot Limo was not available in the court to confirm his death. That there is not dispute that Vincent Cheruiyot Limo is death.
17. On the cause of death, counsel submits that the prosecution is bestowed with the duty of leading evidence to demonstrate the cause of death of the deceased. That the evidence of PW1, PW2 and PW3 are to the effect that upon receiving a report purportedly from the accused that Vincent Cheruiyot Limo is dead, they went to the scene with others who did not testify. At the scene, they found the body of the deceased lying dead. Their evidence is corroborative in that, the body of the deceased lay on the ground with an Arrow lodged in his body at the left side of the ribs which was also confirmed by the accused in defence.
18. Counsel submits that it is not certain as to circumstances of this case whether the said arrow wound have caused the death of the deceased because there is no doctor's report or postmortem report tabled in the court to establish exactly what led to the death of the deceased which is only a matter of speculation and suspicion.
19. That under Section 203 of the Penal Code, the prosecution is expected to tender evidence demonstrating that the death of the deceased was as a result of unlawful acts of the accused as was held in the in the case of Republic vs Silas Magongo Onzere alias Fredrick Nameme (2017) eKLR, where the court held as follows;

“Death of human being is unlawful when it is caused by another in circumstances which are not authorized or permitted by law. This legal preposition is consistent with Articles 26 of our constitution which provides for the right to life for every person. The justified expectations the law recognizes is in execution of court sentence, for the deterrence of property or defence of the life or self or any person from unlawful violence.”
20. Counsel submits that the prosecution have not been able to link the case of death of deceased to the accused or any unlawful acts or acts of omission on the part of the accused. That the only theory that PW1 seems to propagate is that the accused told him that he is the one who killed the deceased. That evidence tendered by PW1 is not admissible in court; it is hearsay and cannot be relied on. Counsel urges the court to find that the prosecution has failed to demonstrate through evidence what caused the death of the deceased, Vincent Cheruiyot Limo.



21. On proof of malice aforethought, counsel submits that malice aforethought is a very important ingredient for the offence of murder. Section 206 of the penal code clearly sets down the elements which constitute Malice aforethought. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;
 - a. An intention to cause death or cause 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, 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 have been 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 not committed or attempted to commit a felony.
22. Counsel further submits that the case of R v Tumbere S/O Ochen (1945) set down elements that determine whether malice aforethought has been established as follows: -
 - a) Nature of the weapon used
 - b) Manner in which it was used
 - c) The part of the body targeted
 - d) The nature of the injuries inflicted either single stab/wound or multiple injuries.
 - e) the conduct of the accused before, during and after the incident.
23. Defence counsel submits that the prosecution has failed to establish any of the elements that would constitute or form malice aforethought in the alleged offence as against the accused. That the alleged arrow used was not proved to have been owned and in possession of the accused; that no witness gave an account on how the purported arrow may have been used to cause the death of the deceased. That the prosecution demonstrated the body part that was targeted but was unable to lead evidence and link the act or even malice on the part of the accused in causing the harm.
24. Counsel submits that Dw1 testified that out of his own good will, he accommodated his brother and his family after they relocated to Tenges from Solai. That he was kind enough to welcome the deceased and his family to his home and did not have ill intentions towards his brother and therefore there was no malice. He denied shooting his brother using an arrow. Counsel submits that PW 1 testified that he received a call from the accused confirming that he had killed his brother. That Pw 1 did not witness the killing and there is proof that the accused intended to commit the offence.
25. That further, PW 2 confirmed that the deceased was alcoholic and would easily pick fight therefore the confrontation he had with the accused is a clear indication of one of his many abusive moments, which he may have extended elsewhere earning him the wrath of death; and submits that malice aforethought has not been established in the matter and therefore the offence does not amount to murder.
26. Counsel further submit that the prosecution did not prove their case beyond reasonable doubt as required. That the court defined what constitutes the burden of proof beyond reasonable doubt referring to the case of Miller v Minister of Pension (1947). That pursuant to section 203 of the Penal Code, the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or



commission by the accused and that in killing the accused did so actuated by either express or implied malice aforethought.

27. Counsel submits that Pw 1's evidence is the sole evidence that the prosecution has put across to demonstrate that accused is the one who murdered the deceased. That the prosecution has also failed to produce a postmortem report and a medical report that shows the cause of the deceased's death. That there is no documentary evidence in support of the death and the cause of the death of Vincent Cheruiyot Limo. Counsel submit that Pw 2 does not have firsthand evidence of the occurrence as he did not hear conversation between accused with the person he was calling; and information received by pw3 was second hand information and amounts to hearsay.
28. Counsel submits that the alleged offence as per the prosecution witness testimony happened at around 8:30P.M or thereabout on a public path, but surprisingly no independent eye witness was vailed by the prosecution.
29. In conclusion, defence counsel submits that the prosecution did not lead conclusive evidence to prove that the accused caused the death of his brother the deceased.

Analysis And Determination

30. What I wish to consider is whether the ingredients for the offence of murder have been proved beyond reasonable doubt. The ingredients being proof of death, proof that the death was due to an unlawful act or omission of the suspect and that the unlawful killing was with malice aforethought.
31. It is not disputed that the deceased herein died. The accused confirmed that the deceased who was his brother died on 11.03.2014. Pw 1 the area assistant Chief, Pw 2 and pw3 found the deceased lying death in a footpath in the forest with an arrow piercing through his body through the ribs.
32. On who caused the death of the deceased, there is no eye witness but prosecution relied on circumstantial evidence to link the accused to the murder.
33. The issue for determination is whether it is the accused who caused the death of the deceased with malice aforethought. Circumstantial evidence can form a basis of conviction. For the court to rely on circumstantial evidence to convict, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. It is evidence that relies on an inference to connect it to a conclusion of fact. The circumstantial evidence can be from facts, events, observation from which the court will draw conclusions and inferences of guilt of an accused person. The prosecution bears the burden to prove the facts upon which the court will rely on to draw an inference of guilt. In SAWE -V- REP [2003] KLR 364 the Court of Appeal held:-

- “ 1. 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 hypotheses than that of his guilt.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.



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7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.” The evidence must be strong and go beyond mere suspicion.

34. The evidence which was tendered before this court is that on the 11.03.2013, at around 8:00 p.m, the accused went to Barrier Centre where he met Pw 2 and requested for his phone to talk to the area Assistant Chief. That Pw 2 handed over the phone to the accused who stepped aside and spoke with the assistant Chief. Pw1 during his testimony in court testified that he received a call from the line of PW 2 who informed him that one Josphat wanted to confirm that accused informed him that he had killed his brother on visiting the scene he found the deceased herein who is accused’s brother dead with an arrow stick on his left rib. His testimony was confirmed by Pw3.
35. Although the accused denied at first during his defense in court that he killed the deceased, he admitted in cross examination that he stabbed the deceased with an arrow. He stated that when he arrived home, he found the deceased with arrows threatening to kill 10 people starting with the accused. He admitted that he took the arrow form the deceased and killed him with it.
36. The prosecution witnesses testified that they found the deceased lying on the ground with an arrow stuck on his ribs. The circumstantial evidence tendered before this court point to the accused as the only person who inflicted the injuries on the deceased and went to report the matter to assistant chief; he further led the team to the scene of crime where the body of the deceased was found. The conduct of the accused immediately after the incident, clearly show beyond any reasonable doubts that he was the one who caused the death of deceased. He admitted the act to area chief through the phone that he had killed his brother with an arrow and during cross examination he admitted that he had killed the deceased using the arrow.
37. These utterances by the accused are confessions. The witnesses gave evidence of what they perceived. Section 63 of the *Evidence Act* Cap 80 provides that – “All facts except the contents of a document maybe proved by oral evidence. Section 63(1) of *Evidence Act* define direct evidence as follows:-
- “(1) Direct evidence means
- (a) With reference to a fact which could be seen, the evidence of a witness who says he saw.
 - (b) With reference to a fact which could be heard, the evidence of a witness who says he heard it.
 - (c) With reference to a fact which could be perceived by any other sense or in any other manner a witness who says he perceived it, by that sense or that manner...”
38. In the instant case, the witness said what the accused person told him. He called and reported having killed his brother, the question is whether that amount to confession. Sections 25A and 26 of the *Evidence Act* provides:-



- (1) “A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.
- (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.
26. Confessions and admissions caused by inducement, threat or promise.
- A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”
39. Article 49 of *the Constitution* which provides for the rights of an arrested person and the principle in criminal justice that an accused person is presumed innocent and until proved guilty and does not bear any burden to prove his innocence. The accused has a right to remain silent and not to give incriminating evidence. Article 49(1)(a) (ii), (b) (d) of *the Constitution* provides:- “(1) An arrested person has the right—
- (a) to be informed promptly, in language that the person understands,
- (ii) the right to remain silent; and
- (b) to remain silent;
- (d) not to be compelled to make any confession or admission that could be used in evidence against the person;”
40. It must therefore be concluded that the confessions which are referred to are confession which are made by accused person to the police or to persons in authority. They do not relate to the confessions made by an accused to a private person. The safeguards under the sections is to protect rights of accused while held in custody from being forced, threatened or intimidated to admit crimes.
41. The issue of confessions made to a private person as to whether they are admissible or not were considered by the Court of Appeal in the case of *Sango & Another –v- Republic C.A. Malindi Cr. Appeal No. 1/2013* where the appellants had contended that confession to private citizens are not admissible because under Section 25 of the *Evidence Act* confessions as a general rule are not admissible. The Court of Appeal stated:
- “In our view that contention is not correct, and subject to the normal safeguards a confession to a private citizen is admissible and maybe proved in evidence against the accused person. The same argument was presented and rejected by this court in *Mary Wanjiku Gitonga – v- Republic Cr. Appeal 83/2007*. In the case the appellant in that appeal was charged with murder of her husband. The High Court admitted in evidence confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This court held firstly that the statement was admissible under Section 63 of the *Evidence Act* as direct evidence of what witness heard and secondly that



to treat such statements as in admissible would be enlaying the provision of Section 25A of the Evidence Act beyond reasonable limits.”

42. In parvin Singh Dhalay –v- Republic –Court of Appeal –The court accepted the principle that a confession can be made to a private citizen and noted that in that appeal the confession in question was made to person who were not in authority. The court further stated – Nothing in Evidence Act prohibits an accused person from voluntarily making a confession to a private citizen.

43. Peter Murphy in his book A Practical Approach to Evidence Blackstone Press 2nd Edition 1985 Page 2001 states:-

“ A confession like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the matter. Usually, confessions are made to police officers, or other Investigators as a result of interrogation but maybe equally made to the victim of an offence, a friend, or relative or any other person.”

44. From the foregoing, though confessions are not admissible unless they are made before a Magistrate or a police not below the rank of an Inspector of Police in the presence of a 3rd party of accused person, it is clear that confessions made to private persons are admissible in evidence. The court is therefore at liberty to accept the evidence and determine its credibility and whether it would rely on its just like any other evidence adduced before it.

45. The accused gave a sworn defence. He testified that day he went home and met the deceased who had arrows and was threatening to kill 10 people starting with the accused, he stated that he took the arrows from the deceased and used the arrow to kill the deceased. The defence confirms the testimony of PW-2- that the accused told him on phone that he had killed the deceased with an arrow. The accused led Pw 1, Pw 2 and other group of people to the scene of the murder where the deceased was found lying death with a arrow stab in hi rib. The accused in his defence during cross examination did not deny that he confessed to have committed the murder to PW2. He did not allege any grudge with PW-1 and it is therefore safe to rely on his testimony.

46. From the foregoing, there is consistency in evidence adduced by Pw1 and Pw2. There is no doubt that accused’s confession to Pw1 is properly corroborated and there is no doubt that he confessed to Pw1 as the confession was confirmed in his own defence.

47. On the issue of malice aforethought Section 206 of the Penal Code:- Malice aforethought shall be deemed to be established by proving any one or more of the following circumstances –

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;

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;

an intent to commit a felony;

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.

48. The accused told Pw 1 that he had killed his brother with an arrow which was confirmed when he led them to the scene where the deceased lay dead with an arrow lodged in the left ribs side of the



body. The accused stated in defence during cross examination that when he arrived home, he found the deceased had taken his cattle and 2 goats saying that he wanted them to divide the cattle and goats he had. He stated that the deceased refused to return the livestock and that the deceased had arrows which he threatened to kill 10 people starting with the accused.

49. He proceeded to state on cross examination that the deceased tried to stab him but he grabbed the arrows and stabbed him. He confirmed that he requested for the phone from PW 2 to call the chief (PW1) and explained to the Chief what had happened. He confirmed that evidence of Pw1 and Pw2 in respect of his confession is correct. He admitted on cross examination that it is true he stabbed his brother with an arrow on the stomach.
50. From the above information, it is clear that there were differences that existed between the accused and the deceased and the accused was unhappy and decided to take away the life of the brother. He picked the arrow and shot the deceased and specifically in the most sensitive area of his body. By doing this, the accused knew that his actions would injure the deceased and or even kill him.
51. The prosecution proved malice afore thought. The injuries inflicted on the deceased leaves no doubt that the person inflicting the injury intended to cause the death of the deceased.

52. D Final Orders: -

1. I find accused guilty of the offence of murder and convict him accordingly under section 203 as read with section 204 of the penal code.
2. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 24TH DAY OF JULY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo – Counsel for state.

Mr. Kiptoon for accused present.

