Republic v Bundi (Criminal Case 16 of 2015)
[2023] KEHC 20730 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 16 OF 2015

HM NYAGA, J

JULY 20, 2023

BETWEEN

REPUBLIC ..... PROSECUTION

AND

EDWIN OSIRI BUNDI ..... ACCUSED

JUDGMENT

1. The accused herein Edwin Osiri Bundi is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* particulars being that on March 7, 2015 at Kaptembwo Estate in Nakuru Township within Nakuru County, he unlawfully killed Josphat Mungele Livoi.

2. The accused person pleaded not guilty to the charge and the matter went into full trial. The prosecution's case was heard by my sister Judge Maureen A Odero and I took over the matter at the Defence stage.

3. The prosecution's case was as follows: PW1 Elizabeth Omwonje testified that on March 7, 2015 she was at home. At around 8pm she went to the latrine and on returning to the house she saw accused who was dressed in a black short and had no shirt. She entered her house and the Accused followed her and pushed her to the bed. She screamed and neighbours came and the accused ran away with her phone and money. She said the deceased pursued the accused and demanded that he return the phone and Ksh.2000/= but the accused became violent. She also demanded for her phone. The accused slapped her and she fell down. The deceased got hold of the accused and the accused picked a piece of wood, hit the deceased and he fell down. She continued to confront the accused as neighbours attended to the deceased. Thereafter she proceeded to the Police station in company of a watchman. When they came back they found deceased was unable to walk to his house and he slept in her Kitchen. The next day the deceased was unable to wake up and she called his father who came and took him to the hospital. She stated that they then took the accused to the police station where he was locked up. The following day she went to the hospital to check on the deceased and he found him unconscious. The next day she

received the news that the deceased had passed away. She said the deceased died 3 days after the fateful night. That when the accused attacked her there were lights and she was able to see him clearly. She knew the accused who was her neighbour.

4. In cross examination, she said the incident happened at 7 pm and that houses in the plot she resided in were in the middle while the latrine was at the edge. She said the deceased was her worker though he did not live in their plot. That after she screamed neighbours came and they all went to the accused person's house to demand for her said items. She said the deceased was not drunk and that she did not sell alcohol in her stall. She stated that the accused attempted to rape her but confirmed that he had not been charged with attempted rape. She testified that the deceased was unable to walk and the accused and other neighbours carried him into the kitchen. She said the accused person's house is 5 meters away from her Kitchen.

5. PW2 Robert Livol, father of the deceased testified that on March 8, 2015 at 7.00 am he received a call from his daughter Joyce Dolema that the deceased had been beaten and injured badly. He rushed to scene where he found the deceased in a bad state. That he could not talk or walk and the neighbours apprised him that he had been hit by a neighbour. He hired a taxi and took him to Mother Kevin Clinic where he was treated but his condition did not improve and on March 10, 2015 at 1.00 am he died. He attended the post-mortem examination on the body of the deceased that was performed at Evans Sunrise Mortuary. He saw a bruise on the back of his skull and blood in the brain.

6. In cross examination, he said he did not establish the owner of the house where he found the deceased as his only concern was to save his life and that he found the deceased lying outside a house where there was a crowd. He learned the deceased had been attacked inside that plot and the person who did that had been arrested.

7. PW3 DR Titus Ngulungi a pathologist based at Provincial General Hospital Nakuru conducted an autopsy on the body of the deceased at Evans Sunrise Hospital on March 16, 2015. He said the body was identified by PW2 and Lucy Livol. He noted features of hypnosis and pallor bruises on the head, neck, back, chest and limbs. Internally, he noted 3 bruises at the right temporal region measuring 50 x 50 mm, occipital measuring 40 x 40 and chest measuring 100 x 50 mm. He also noted the deceased's lungs had collapsed and were congested, portal small intestine and left abdominal hematoma depressing the brain. He formed the opinion that the cause of death was head injury attended by left subdural hematoma and raised up due to blunt force trauma in keeping with homicide. He produced the Post Mortem Report as Exhibit 1.

8. During cross examination, he stated that the lungs had collapsed due to pressure of the head and that the injuries were unlikely to have been caused by a fall as there were multiple injuries to the head.

9. PW4 No. 67540 PC George Ocheil, was the investigating officer in this case. He recalled that on March 7, 2013 he noted a case in the OB where a man had been assaulted at night by an unknown person and had been taken to the Hospital. He went to the scene at Hanicap where he found 3 witnesses who volunteered to record statements. He collected the piece of wood which had been used to hit the deceased then proceeded to Mother Kevin Hospital to check on the victim. He said the victim was unconscious and unresponsive and that on March 8, 2015, the accused was taken to the police station by the members of the Public. That PW1 told him that at 1 am she went out for a short call and on her way back to her house the accused confronted her with an intention to rape her. The accused threw her onto the bed, they struggled and she raised an alarm. The deceased and other neighbours responded and the accused ran back to his house. That the public pursued him and they demanded that he return a techno mobile phone and Ksh 2000/= but the accused refused to return the said items and a confrontation ensued whereby the accused picked a piece of wood and hit the deceased on the

left side of the head, he fell down and was rushed to the hospital. He produced the piece of wood as an Exhibit.

10. In cross examination, he confirmed the accused was not charged with attempted rape. He said he went to the scene on the fateful day and recovered the piece of wood outside the accused person's house. He said it was an ordinary piece of wood. He did not find the accused at the scene when he visited and did not recover a phone or any money from him.

11. The prosecution then closed its case and vide a ruling of October 14, 2019, the court found the accused person had a case to answer and placed him on his defence. He opted to give sworn testimony and did not call any witness.

12. In his sworn testimony, the accused testified that on March 7, 2015 he was at home and had not closed the door. That the door was pushed open and he saw PW1 and 2 men. He said he owed PW1 Ksh 150/= for alcohol he had taken on credit. PW1 demanded the money and he told her he had not been paid yet. They argued and PW1 and the two men started to rough him up. He said he used to see the two men in their estate and confirmed that he lived in the same plot with PW1. He testified that the deceased told him he would have to pay or face the consequences. He pushed the deceased and he feel down and he run away. The neighbours who were attracted by the commotion intervened and told PW1 to wait until the next day. The following day he went to work. He returned at 10 am and his neighbour told him that PW1 was looking for him and advised him to go to the police station. He went to the police station where he learned that PW1 had reported a case of robbery, Rape and assault against him. He was arrested and locked up. He disputed that he hit the deceased with a piece of wood.

13. In cross examination, he confirmed that PW1, the deceased and another man went to his house. That PW1 and the deceased demanded for money from him and that they were not armed. He also confirmed the neighbours went to the scene.

14. After the close of defence case, the Parties did not file submissions.

Analysis & Determination

15. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J in *Elizabeth Waithiegeni Gatimu vs Republic* [2015] eKLR expressed himself as hereunder:

> "To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court

in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

16. Lord Denning in *Miller vs Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say: -

> " 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."

17. I have considered the evidence presented before the court both by the prosecution and the defence.

18. Section 203 of the *Penal Code* provides that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

19. The Court of Appeal in *Anthony Ndegwa Ngari vs Republic* [2014] eKLR held:

> " For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought."

20. In the instant case therefore, the question that the court must answer is whether the prosecution proved:

    a. That there was the death of the deceased and the cause of the said death

    b. That the death was caused by unlawful acts or omission.

    c. That the accused committed the unlawful act or omission which caused the death of the deceased.

    d. That the accused had malice afore thought.

21. I will now proceed to answer the above questions.

Whether there was proof of death and the cause of the said death

22. It is not in dispute as to what caused the death of the deceased. The pathologist (PW3) who conducted an autopsy on the body of the deceased confirmed the deceased died as a result of head injury attended by left subdural hematoma and raised up due to blunt force trauma in keeping with homicide.

Whether the death of the deceased was caused by an unlawful act or omissions

23. From the evidence tendered the injuries that led to the deceased's death were not self –inflicted. Clearly, they were inflicted by a third party and cannot be said to be lawful in any way. why do I say so? According to the pathologist, the deceased had three (3) bruises namely at the left temporal region, on the occipital region and to the chest.

24. The aspect of when an act causing death can be said to be lawful was recognized in *Gusambizi Wesanga vs Republic* [1948] 15 EACA 65 where the Court stated:

> " Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property."

25. The evidence before court irresistibly points to an unlawful act that led to the death of the deceased.

Whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased

26. From the evidence on record, it is clear that only PW1 saw the accused hit the deceased. Her testimony was that the accused hit the deceased on the head with a piece of wood and he fell down. The accused on his part stated that PW1, deceased and another man roughed him up but he managed to free himself by pushing the deceased who fell down and he run away.

27. The testimony of PW1 is credible, given the nature of the injuries occasioned upon the deceased. She narrated how the accused picked a piece of wood and hit the deceased on the head. That evidence was corroborated by the evidence of the pathologist(PW3) who confirmed that the injuries that led to the death of the deceased was due to blunt force trauma to the head. The pathologist clarified that the injuries were unlikely to have been caused by a fall as there were multiple injuries to the head. This discounts the accused's defence that he merely pushed the deceased away and that the deceased fell.

28. From my analysis of the prosecution and defence evidence tendered, I find the evidence adduced by the prosecution was plausible and it proved beyond reasonable doubt that the accused herein is the person who caused the injuries that led to the death of the deceased.

Whether the Accused in causing death had Malice Aforethought

29. Section 206 of the *Penal Code* provides the definition of malice aforethought; and it reads as follows;

> '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;'

30. According to the above section the ingredient of malice aforethought can be express or implied; it can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

31. In the case of *Daniel Muthee vs R* C.A No. 218 of 2005 (UR), Justices of Appeal Bosire, O'Kubasu and Onyango Otieno while considering what constitutes malice aforethought observed as follows:

> " When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death

> or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code. In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt."

32. In this instance, the injuries sustained by the deceased as described in the Post-Mortem Report were severe. However, in view of the circumstances under which the offence was committed there is no evidence that the accused had motive to cause death or grievous harm to the deceased when he unlawfully assaulted him with the fatal consequences.

33. From the evidence of PW1 who was the sole eye witness, the accused with his neighbours carried the deceased into PW1 kitchen after the incident. This is not an act expected of a person whose intention was to either kill or cause grievous harm.

34. In *Nzuki vs Republic* (1993) KLR 171, the Court of Appeal stated that malice aforethought is a term of art and emphasized that:

> 'Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:The intention to cause death;The intention to cause grievous bodily harm;Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see Hyman – v- Director of Public Prosecutions, {1975} AC 55'.

35. The court in substituting Nzuki's charge of murder with manslaughter further observed:

> 'There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.'

36. Guided by the principles set out in the above case, it is my view that there is no evidence that the Accused knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained attack on the deceased.

37. I find that *mens rea* for murder was not adequately established and proved to the required standard to sustain the charge of Murder.

38. Consequently, I find that the evidence point to the offence of Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. The accused is convicted on this offence.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Accused present