



REPUBLIC OF KENYA



Republic v K (Criminal Case 7 of 2017) [2023] KEHC 20558 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 7 OF 2017**

JN ONYIEGO, J

JULY 14, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

CMK ACCUSED

JUDGMENT

1. The accused herein was charged with the offence of murder contrary to section 203 as read with Section 204 of the *penal code*. Particulars are that in between the night of 22nd August 2017 and morning of 23rd August 2017 at [particulars Withheld] trading centre in Taveta sub-county within Taita Taveta county, murdered GMK and EPK. Upon returning a plea of not guilty, the matter proceeded to full trial with the prosecution calling 8 witnesses.
2. Brief facts of the case are that, on the 22nd August 2017, GMM(pw5), wife to the accused and mother to the deceased children was in their rental house within [particulars Withheld] market with her children G (deceased), E (also deceased) and her young daughter when accused arrived at about 7.30 pm. After serving the accused with food, accused turned violent thereby shouting at her. That she showered her two boys the deceased herein and made them to sleep as she asked accused to give her money to go and buy food.
3. It was her testimony that after accused gave her kshs 200 while shouting at her, she became apprehensive and jittery of going back to the house due to fear of being beaten by the accused as he always did. With her young baby(daughter) on her back, she proceeded to the house of Anne Mumbua (pw1) her friend and former neighbor in another plot from where they had shifted to the plot they were staying at the material time. She however left the other children (deceased) sleeping with their father the accused in the same house.
4. It was at the home of Ann(pw1) that she disclosed that she had quarreled with the accused hence sought accommodation to sleep till the following day. After spending the night at Ann's place, she woke up



- the following day and proceeded to the hotel of another friend within the market while still afraid of going back to the house. It was while at the market that she asked her friend whether she had seen her children. That the friend informed her that she had seen them that morning and that she had given them milk.
5. It was at this point that she decided to go home and on the way she met one mutunga who asked her where she had been yet her husband was looking for her. On reaching home, she found their house secured with a door latch from inside which she opened from outside through an opening made to lock and unlock the padlock.
 6. That upon entry, she called out for her children but without response. That when checked for them at their sleeping point at the front part of the room, she found them covered with a mattress. When she uncovered the same, she saw her children cut on their necks while lying on a mattress soaked with blood and a knife lying next to them. According to her, her children had been slaughtered. After screaming, people responded including the area chief and later the police who took photographs and carried the bodies away. She told the court that her life with the deceased was full of violence, hatred, quarreling and fights all through.
 7. Pw1 Ann Mumbua a friend to Pw5 GM confirmed that her friend G spent the night of 22nd and 23rd August 2017 at her house after she fled her house due to the quarrel between her and the husband (accused). She further confirmed that on the morning of 23rd August 2017, pw5 left for her house and later she heard that her friend's children had been killed by their father.
 8. PMK (pw2) father in-law to the accused and father to pw5, received information from N brother to the accused who informed him that accused had killed his children. When he visited his daughter, she told him what had happened. He later attended the postmortem examination conducted upon the two boys and saw how their necks were slit (cut open). He merely identified the bodies for identification. He went further to state that the relationship between the accused and his daughter was toxic such that no amount of intervention could salvage it and that he had warned his daughter severally against their marriage but she never listened.
 9. Pw4, Chief inspector David Kalii scenes of crime personnel, visited the scene and took photographs of the deceased children then lying on a mattress thus reflecting their throats cut open. He produced the photographs as evidence.
 10. Pw6 fidelis Mkango the land lady to the accused and pw5 merely stated that the relationship between the accused person and pw5 was full of violence throughout their stay in her plot.
 11. Pw3, Doctor Charity Gacheri conducted postmortem examination on the two bodies and confirmed that the two bodies had their necks (throat) slit open and the cause of death was deep cut throat wound. That wind pipes were completely severed.
 12. Pw7 George Lawrence Ogunda government chemist analyst did examine the blood stains on the knife recovered from next to the bodies of the deceased children Marked Exh.A, Blood stained piece of mattress exh.B, blood stained jeans trouser Exh.C, blood sample of G, E and accused marked Exh D,E,and F respectively and blood sample of accused on cotton wool Exh G. Of significance, after DNA profiling, the blood sample of G matched the blood sample found in the trouser of the accused (exh C). That the DNA profile of all the children matched those of the deceased meaning the two were his biological children.
 13. Pw8 Corpral Robert Kariuki investigated the case. He also visited the scene of crime where he found two bodies lying in a pool of blood on a mattress with their throats cut open. He also recovered a



blood stained knife lying next to the bodies. He later arrested the accused who had surrendered at the police station for fear of being attacked by members of the public. Finally, he processed the accused and preferred the charges before court.

14. On his unsworn testimony, accused denied the offence. He stated that in the evening of 22nd August 2017, he left his place of work and went home after taking two bottles of beer at a near-by bar. On arrival at home, he gave his wife cash to go and buy food. That his wife never returned that night. He further stated that he slept till morning when he sent his two boys (now deceased) to buy milk for tea. That he later left for his shamba and when he went back home, he found his children dead. That out of shock he went to report the incident at the police station where he was arrested.
15. After the close of the defence case, parties agreed to file submissions which for some reason never got into the file until 4th July 2023.

Prosecution's submissions

16. The state represented by Mr. Sirima filed its submissions on 4th July 2023 basically reciting the evidence tendered before the court. Learned counsel submitted that there was no dispute that the deceased died out of cuts in their throats which was an unlawful act. Regarding the person who caused the injuries that led to the death of the two children, Mr Sirima relied on the evidence of pw5 wife to the accused who left the children with their father for the night and when she went back the following day found the children slaughtered. Counsel contended that the only person whom evidence places at the scene of the murder is the accused. That his long trouser was stained with blood of one of the deceased children a fact he could not explain.
17. As regards the existence of malice aforethought, counsel submitted that from the nature of the injuries occasioned and weapon used, the intention to kill can be inferred hence malice aforethought is established. To buttress his submission, counsel relied on the holding in the case of *Ru Stephen Sila Wambua Mathbeka*(2017)e KLR where the court held that malice aforethought can be inferred from the nature of the weapon used, part of the body targeted, manner in which the weapon was used and the conduct of the accused before, during and after the offence. In that regard, counsel urged the court to find that malice aforethought is clear from the weapon used to cut the neck of the children hence the intention to kill.

Accused's submissions

18. Through Muthami advocate, accused filed his submissions dated 26th July 2022 but placed in the court file on 4th July 2023. Counsel restated the evidence tendered before the court thus submitting that there was no eye witness who saw the accused kill his children. Counsel submitted that since the premises occupied by the accused had other tenants, they would have heard the commotion in his house. That there is a lot of doubt as to where and when the children were murdered.
19. Learned counsel submitted that the conduct of the accused in reporting the incident is not consistent with a guilty person. Regarding the recovery of the blood stained knife, counsel submitted that there was no proof that he was the one who had and used the knife in question.
20. Concerning the recovery of the jeans of the accused the day after recovery of the knife and removal of the body from the scene, it was counsel's submission that the same was deliberately stained with blood so as to fix the accused.



Analysis and determination

21. Accused person herein is charged with the offence of murder contrary to section 203 as read with section 204 of the [penal code](#). Section 203 provides as follows;

“Murder

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

(Section 204). Punishment of murder

Any person convicted of murder shall be sentenced to death”

22. Malice aforethought is also defined under section 206 of the [penal code](#) as follows;

“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 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.

23. I have considered the evidence on record, testimony by various witnesses and submissions by both parties. Issues that emerge for determination are; whether the death of the deceased was caused by an unlawful act; secondly, who committed the unlawful act which caused the death of the deceased and thirdly; whether there was malice aforethought. See [Chiragu & another vs Republic](#) (criminal appeal 104 of 2018(2021)KECA342(KLR)(Crim) where the court held that;

“ the prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act”

24. It is trite law that the onerous duty to prove a criminal charge against an accused person squarely lies with the prosecution. The burden of proof does not shift; See [Seketoleko v Republic](#) (1967) EA.531, [Kiilu and another v Republic](#) (2005) e KLR and [Peter Wafula Juma and 2 others vs Republic](#) (2014) e KLR where the court held that;

“As I have already stated, the expression “burden of proof” entails two distinct concepts; “legal burden of proof” and “evidential burden”. The two are different, and understanding the distinct application of each is essential. It is also important to understand the position



of the law on burden of proof in criminal cases and civil cases; there is a marked difference especially on the legal burden of proof. We shall deduce that difference in the application of the legal burden from the sources I am going to quote below.

Legal burden of proof; does it shift?

According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues”.

25. In the instant case, there is no doubt that the deceased herein died out of deep cut throat wounds. This fact is confirmed by the evidence of pw3 Dr. Charity Gacheri who conducted the postmortem, pw5 the mother to the children and Paul mahinda pw2 who attended the postmortem, pw4 scenes of crime and pw8 the investigating officer. Accused either does not deny the fact that his children were murdered. Was the act unlawful? Obviously the act of cutting open the necks of innocent and helpless children could not be anything else other than an unlawful act.
26. The Key question however is, who executed the unlawful act that led to the death of the children. The evidence of the prosecution is directed towards the accused while the accused pleads innocence. It is not in dispute that on the night of 22nd and 23rd August 2017 the deceased children spent the night in their house together with their father. Pw5 said that she left her house out of fear after her husband picked a quarrel with her. That she spent the night at pw1's house is not in dispute as pw1 confirmed the same.
27. What time were the children murdered? Pw5 said that when she left pw1's house in the morning of 23rd August 2017, she passed through some hotel where a friend of hers jennifer Kawata was working. That jennifer told her that she had given her children (the deceased) milk to take to her(pw5). That it was after that confirmation that she went home. This story does agree with that of the accused who in his defence said that that morning he had sent his sons to go and buy milk to prepare tea. With these two agreeing stories, it is logical to conclude that the children were not killed during the previous night but that morning.
28. Were they killed inside the house? pw4 scenes of crime and pw8 ruled out the possibility of either having been killed elsewhere and then the bodies dumped in the house or an intruder having killed them while in the house unnoticed. Their argument was that, from the amount of blood on the mattress, it could not have been possible to avoid spilling of the blood on the floor or even breaking the door from outside.
29. From the chain of events, the last person to have been left and seen with the children the whole night of 22nd August 2017 and in the morning of 23rd August 2017 was the Accused person. The recovery of the bodies from inside their house covered in their mattress full of blood with a kitchen knife next to them does not suggest even remotely that the execution was carried outside their house. The recovery of a blood stained trouser belonging to the deceased which was stained with blood which matched with the blood sample of Gabriel the first deceased herein and blood from the knife and mattress circumstantially does place the accused at the scene of murder. Although Mr. muthami laid doubt in the circumstances under which the jeans trouser was recovered a day after the recovery of the bodies,



I am least persuaded that there was foul play intended at fixing the accused. Am convinced that the recovery was not done with any malice in mind.

30. Although nobody saw the perpetrator of the cruel murder of the two children, circumstantial evidence is telling otherwise. Having held that the recovery of a blood stained trouser of the accused marching with one of the deceased's blood and that in the murder weapon(knife), it is logical to conclude that the unbroken chain of events irresistibly point a blame worthy finger towards the accused.
31. It is trite that an offence can be proved through circumstantial evidence as long as the court cautions itself that there are no other existing circumstances which would weaken or destroy the inference. See the case of *Peter Mugambi vs Republic* (2017) e KLR where the court while quoting from the locus classicus case of *Kipkering Arap Koske vs Republic*(1949)16 EACA 135 restated the cardinal principles for consideration as follows;
1. The inculpatory facts must be incompatible with the innocence of the accused.
 2. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused
 3. There must be no other existing circumstances weakening or destroying the inference
 4. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution
32. Drawing guidance from the above case-law, am persuaded that the circumstances under which the children were found death in their house where they were left in company of their father by their mother and further considering that his long trouser was tainted with blood from one of the deceased children and further compounded by the accused reporting to the police the incident after members of the public sought to kill him in revenge of what he had done, it is logical to draw an inference that he was responsible for the death of the children.
33. Was there malice a forethought? From the nature of the injuries which appear to have been occasioned by use of a weapon, and considering the degree of injuries inflicted, the intention to kill is manifest hence a reasonable inference can be drawn that the attack was pre-arranged hence the establishment of malice aforethought. It can be nothing else other the intention to kill, or to harm which act clearly falls under the definition of section 206 of the *CPC* above quoted. See *Sammy v Republic*(criminal appeal 120 of 2019)(2022) KECA4(KLR)(4 February 2022)(judgment) neutral citation(2022)KECA4(KLR) where the court of appeal held that”.

“On proof of elements of murder, as found by the trial court, the fact and cause of the deceased's death is not disputed. There is also no doubt that from the nature of injuries found on the deceased's body, whoever killed her had the requisite malice aforethought as there was a clear intention either to kill her, or to cause grievous bodily harm. Elements of malice aforethought as defined in section 206 of the *Penal Code* were satisfied”.

34. Similar position was held in the case of *Republic v Stephen Sila Wambua Matbeka*(*supra*) where malice aforethought was inferred from accused's conduct before, during and after the attack of the deceased, weapon used, part of the body targeted and manner in which the weapon was used. In the instant case, the part of the body targeted was the neck which is delicate in the human anatomy. The weapon used which was a knife was intended to cause grievous bodily harm or kill. It is therefore apparent that malice aforethought is clear on the face of it in that the accused simply wanted to eliminate his children due to his persistent quarrels or differences with his wife.



35. The defence advanced by the accused that he too was shocked to find his children dead does not add up. How come he did not raise alarm upon discovering of the brutal murder of his children. Why would members of the public want to eliminate him for killing his children. His defence is a mere denial which does not hold any water.
36. The manner and style in which the children were slaughtered like chicken or goats by a heartless human being is beyond imagination. What great sin had they committed against anybody in this world that they had to suffer a painful death like the one they were subjected to by somebody who was supposed to protect them. I have no doubt in my mind that the accused is the one who killed the children and the act of cutting their throat was actuated with total malice hence guilty of the offence of Murder contrary to section 203 as read with Section 204 of the [penal code](#).

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JULY 2023

J. N. ONYIEGO

JUDGE

