



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ekwara (Criminal Case E044 of 2021)
[2023] KEHC 21201 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E044 OF 2021
AC MRIMA, J
AUGUST 3, 2023**

BETWEEN

REPUBLIC STATE

AND

BONIFACE EKWARA ALIAS NABII ACCUSED

JUDGMENT

Introduction

1. The accused herein, Boniface Ekwara alias Nabii, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on diverse dates between October 29, 2021 and November 5, 2021 at Mabonde Location in Kiminini Sub-County within Trans Nzoia County, he murdered Esther Chemutai (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned before this Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution’s case was conducted before Hon. Kimaru, J (as he then was). After the close of the prosecution’s case, this Court found that a *prima facie* case had been established to, and placed the accused on his defence.
3. The accused gave a sworn testimony and did not call any witnesses. The accused’s defence was taken by yours truly.

The trial:

4. The prosecution line up six witnesses to prove the information against the accused. Its case was that in the raining evening of October 29, 2021, PW3, one Michael Wekesa Khisa, was at his home. His house neighboured that of the accused and deceased who lived as husband and wife. They did not have children.



5. Suddenly, PW3 heard noises coming from the accused's house.
6. There was also another neighbour to the accused and deceased. She was Naomi Waithera who testified as PW4.
7. PW3 and PW4 recalled that the accused and deceased often fought because they both used to indulge in alcohol drinking.
8. After the rains stopped, PW3 walked to the accused's house to investigate what had been happening. He found the deceased naked. The couple was fighting. Although unable to shield the deceased as she was unclothed, PW3 pleaded with the accused not to continue assaulting her. This caught the attention of PW4 who was relaxing on her sofa. PW4 then joined PW3 where they both tried talking to the accused to stop assaulting the deceased.
9. PW3 and PW4 stated that the accused hit the deceased with a broom on the chest and abdomen and also kicked her on the buttocks. The accused was heard saying that he wanted to kill the deceased. The accused then slapped the deceased and as a result, fell down.
10. The deceased continuously pleaded for vindication from the accused which was not forthcoming. Thereafter the accused locked the house.
11. After that incident, PW3 observed the accused coming to the house and leaving. The accused ensured that the house was locked every time he left.
12. PW3 further stated that between the period of October 30, 2021 and November 5, 2021, he did not see the deceased.
13. On her part, PW4 stated that she last saw the deceased on October 30, 2021 brewing alcohol which she used to sell to customers at their home. PW4 also saw the deceased on November 1, 2021 at her home. She was still alive. Later at 1:00 p.m., on the said date, the deceased was seen lying with her face covered outside her house. PW4 was under the pretext that the deceased had passed out as she was drunk. Later in the night hours, at around 8:00 p.m., her child informed her that the deceased was still lying outside the house. That was the last time PW4 saw the deceased.
14. On November 5, 2021, PW3, while off duty, noticed the presence of flies and a foul smell emanating from the accused's house. He informed PW4 and, in turn, they reported to Nyumba Kumi and the village elders. Similarly, the report was made at Waumini Police Post.
15. Members of the Nyumba Kumi and two village elders [who were PW2 (Francis Wafula Omukada) and PW5 (Peter Makokha)] proceeded to the accused's house. The accused was not at home but was later traced by members of public and brought to the house. The door to the house was broken.
16. Upon gaining entry, members of the public found the body of the deceased. This instigated a mob justice attack on the accused.
17. The investigating officer was No. 2558643 PC Dickson Nzuki. He testified as PW6. He recalled that on the same day, the November 5, 2021, he proceeded with his colleagues to the home of the accused where they found him lying down supine at the entrance to his house. The accused had been rescued by police officers from the angry members of public.
18. PW6 entered inside the house. He found the deceased's decomposed remains on a mattress on the floor. She was half covered. The scene was processed and later transferred the body to the mortuary. He also picked the accused whom he took to the Kitale County Referral Hospital where he was admitted. On release, PW6 booked the accused at the Kitale Police Station.



19. Witness statements were recorded as the investigations proceeded.
20. A post mortem examination was conducted at Kitale County Referral Hospital Mortuary on November 17, 2021 by PW1 Dr. Alex Barasa. PW2 and PW5 identified the body of the deceased.
21. Although the deceased's nutrition was wasted, her physique was normal. PW1 observed the body of the deceased. It was cold and stiff with 20% decomposition estimated to have taken place for a fortnight.
22. Externally, the deceased had multiple bruises on her face, which PW1 opined that such injuries were caused by a blunt object or small sharp object. PW1 also noted that the deceased had cyanosis on her finger nails.
23. Internally, the respiratory system suffered an upper airway obstruction with fractured cricoid cartilage. There was also an inflamed gastric lining.
24. PW1 formed the opinion that the deceased died as a result of strangulation from assault. He filled in the Post Mortem Report which he produced in evidence.
25. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.
26. In his sworn testimony, the accused recalled that he had differed with his wife, the deceased, and they fought in their house.
27. He also stated that it did not rain on October 29, 2021 as alleged by the prosecution. He noted that when he returned home in the evening of October 29, 2021, he found that the deceased was drunk and had not cooked any food for him. He went to take supper at a nearby hotel.
28. He also confirmed that PW3 and PW4 indeed witnessed his assault on the deceased. He, however, stated that this was the first time he was physically violent to her. The accused further stated that

'... it is true I killed her and locked her inside the house'
29. He was surprised that his neighbours, a large crowd, charged towards him and thoroughly beat him accusing him of killing his deceased. He would later be admitted in Hospital for three days as a result of the injuries he had sustained.
30. The accused remembered that throughout their marriage, they never bickered except for her excessive drinking. They slept in separate rooms in their matrimonial home. He was surprised to learn of her death. He was emphatic that the cause of her death was excessive drinking because she was an avid drinker. He denied committing the offence defending that he was an ardent Prophet that followed the ten commandments to the letter.
31. After close of the defence case, parties filed written submissions.
32. Through his submissions, the accused contended that the prosecution failed to discharge its burden of proof. As such, he ought to be acquitted.
33. The prosecution filed its submissions dated December 13, 2022. It countermanded that it had discharged its burden of proof to the required standard to establish that the accused murdered the deceased.



Analysis:

34. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

35. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

36. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).

37. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased dead. They include PW2 and PW5 who identified the body of the deceased prior to the autopsy being carried out by PW1.

38. The second way in which the death of the deceased was proved was through the evidence of PW1, a Medical Doctor who conducted the autopsy on the body of the deceased.

39. PW1 observed a litany of injuries on the respiratory system, gastric lining, face and fingernails. He concluded that the cause of death of the deceased was strangulation from assault.

40. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

41. In this matter, the prosecution did not bring out the date when the deceased died. However, according to the Post Mortem Report, when the autopsy was conducted on November 17, 2021, the deceased had died like 2 weeks ago. That would be around November 3, 2021.

42. That is in line with the evidence of PW4 who stated that she last saw the deceased alive on November 1, 2021.

43. The decomposed body of the deceased was found on November 5, 2021. It was PW2 whose attention was drawn by the flies around the house of the deceased and the foul smell that emanated from the house.

44. The deceased and the accused were the only occupants of their house. There were no children or any other persons who stayed with them. Apart from what the accused stated in Court that he indeed killed the deceased and locked her inside the house, a consideration of the legal principles on circumstantial evidence equally points to that position.

45. When dealing with circumstantial evidence, that is evidence where there are no eye-witnesses in proving the commission of an offence, a Court is called upon to closely examine the evidence, not only as



its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
- (ii) The 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.

46. The foregoing principles were set out in the locus classicus case of *R-vs-Kipkering arap Koske & another* (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of *GMI-vs-Republic* (2013) eKLR, *Musii Tulo vs. Republic* (2014) eKLR among many others.

47. The Court of Appeal in *Musii Tulo* (*supra*) in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R* (1958) EA 715 citing with approval *Teper v. R* (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

48. Further, the Court of Appeal in *Sawe- Vs- Republic* [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

.... 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 on. 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 is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....

49. In this case, by taking the totality of the facts of the case into account, more so that the accused was the only person who lived with the deceased and that the deceased was found decomposing in the house where the accused used to visit every day and leave, the circumstances 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.

50. This Court, therefore, finds and hold that it was the accused who unlawfully caused the death of the deceased.



Whether there was malice aforethought:

51. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.

52. Section 206 of the *Penal Code* defines 'malice aforethought' as follows: -

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.

53. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

54. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

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; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue 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 in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one 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 vs. Director of Public Prosecutions* (1975) AC 55". (Emphasis added).

55. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which



malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

56. In this case, the accused killed and locked the deceased in the house for a couple of days. He, however, used to visit the house every day, enter inside the house and then leave. It, therefore, means that the accused used to see the dead deceased every day he visited the house.
57. The accused never reported the death of the deceased to anyone. It can only be the case that the accused intended to kill the deceased, otherwise, if the killing was unintentional, then the accused would have raised alarm immediately he found the deceased either critically unwell or dead.
58. Further, the deceased died out of strangulation on the neck.
59. The neck is such a critical part of the human anatomy. It goes beyond any peradventure that once the neck is subjected to serious injuries, then death was eminent. Fracturing the cricoid cartilage on the neck and obstructing the airway could only be intentional. The rationale was apparent that it was to deprive the deceased of her life.
60. The accused must have purposed to do harm to his wife. The manner of execution of the mission was very deliberate and targeted. The accused aimed the neck; a vital and delicate organ, with all his might.
61. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.
62. The prosecution, therefore, proved malice aforethought in this case.
63. Therefore, all the ingredients of the offence of murder were proved in this case.

Disposition:

64. Deriving from the foregoing, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
65. The accused herein, Boniface Ekwara alias Nabii, is accordingly convicted of murder pursuant to Section 322(2) of the *Criminal Procedure Code*.
66. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF AUGUST, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Kimani, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants.

