



**Republic v Kikwai (Criminal Case 21 of 2015)
[2024] KEHC 12373 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE 21 OF 2015
JK SERGON, J
OCTOBER 17, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BERNARD KIPKORIR KIKWAI ACCUSED

JUDGMENT

1. The accused person herein is charged with murder contrary to section 203 as read with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that, the accused on the 20th day of October, 2015 at Kipkelion Township, Kipkelion District within Kericho County, jointly with others not before court murdered Duncan Kilo.
3. The accused pleaded not guilty to the charge and the prosecution called nine witnesses to prove its case.
4. Christopher Wanyama (Pw. 1) stated that he knew the deceased, Duncan Kilo, the deceased was his brother. Pw. 1 testified that on 20/10/2015 at about 10:45 pm, he was at home when he heard Rose Awinja a neighbour calling out, she informed him that his brother had been severely injured by Bernard. Pw. 1 stated that they went to the scene and he found his brother lying in the middle of the road and that he and some good Samaritans took Duncan to Kipkelion Sub District Hospital for medical treatment. Pw. 1 testified that the deceased succumbed before he was treated, the deceased had been stabbed on the neck. Pw. 1 stated that they went to the police station to report the incident and thereafter police officers from Kipkelion apprehended Tembur and Bernard the (accused). Pw. 1 testified that he accompanied the police officers effecting the arrests and that Bernard had resisted arrest. Pw. 1 testified that when a scuffle ensued he ran away and hid in the forest and that he was later informed that Inspector Korir had been stabbed. Pw. 1 stated that he recorded a statement at the police station. On cross examination, Pw. 1 confirmed that on the material day, he and Rose Awinja arrived



- at the scene and found the deceased lying in the middle of the road, he had been stabbed on the neck and had lost a lot of blood. Pw. 1 confirmed that the deceased succumbed while awaiting treatment. Pw. 1 confirmed that he did not know the relationship between Tembur and Bernard, who lived in the reserve whereas they lived in town.
5. Hilary Kiprotich Tembur (Pw. 2) stated he knew both the deceased and accused. Pw. 2 testified that on 20/10/2015 he went to a nearby shop to buy soap and he was there with the shop attendant when he heard the voices of the deceased and the accused, the two were having an altercation. Pw. 2 testified that soon after he went home and at about 2:00 am he heard people knocking, they were police officers who informed him that someone had been killed and asked him if he was a witness. Pw. 2 testified that the police officers arrested him and told him that they wanted him to take them to Bernard's house, a neighbour in the village. Pw. 2 testified that Bernard resisted arrest, a scuffle ensued and the Inspector effecting the arrest was stabbed. Pw. 2 stated that Bernard was apprehended and that they accompanied Inspector Kirui to Siloam Hospital. Pw. 2 stated that he recorded his statement at Kipkelion Police Station. On cross examination, Pw. 2 confirmed that on the material day he heard the voices of the accused and deceased who were well known to him, they were embroiled in an heated argument. Pw. 2 confirmed that the police arrested him later that night and that he took the police officers to Bernard's house. Pw. 2 confirmed that he was in police custody for 5 days.
 6. Musa Wanyande (Pw.3) testified that on 21/10/2015 while accompanied by his brother Christopher Wanyama and Police Constable Kirui they went to Kericho District Mortuary for the post mortem of his brother Duncan Kilo, the deceased. Pw. 3 stated that he identified the body of the deceased and witnessed the post mortem. Pw. 3 stated that the doctor performing the post mortem told them that the cause of death was a stab wound.
 7. Dr. Kibos Ezekiel (Pw. 4) a Doctor at Kericho District Hospital stated that he was aware that he was in court to represent Dr. Rono who was no longer working at the said Hospital. Pw. 4 stated that he worked with Dr. Rono for two years and was therefore able to read his handwriting and recognised his signature. Pw. 4 stated that the autopsy on the body of the deceased was conducted on 21/10/2015 and the doctor formed the opinion that the cause of death was a stab wound to the left of the neck resulting in excessive haemorrhage and produced the post mortem report as PExh.1.
 8. Eric Wainaina (Pw. 5) an Administration Police Constable attached to the Kipkelion Sub County Headquarters force no. 24xxxx stated that on 20/10/2015 while on duty at the the IEBC Offices, he was informed that he was required to change duties and join a contingent to officers drawn from the Kenya Police Service from Kipkelion Police Station in pursuit of a suspect who had committed a murder within Kipkelion Township. Pw. 5 stated that they arrested a young man called Tembur, who had been on a shopping errand at the town centre near the scene of the murder. Pw. 5 stated that they asked him to show them the homestead of the suspect, Bernard Kipkorir Kikwai. Pw. 5 stated that while they were attempting to apprehend the accused, there was a scuffle and Inspector Kirui was stabbed. Pw. 5 stated they recovered the knife used to stab Inspector Kirui, it was a short knife with a wooden handle and steel blade, Pw. 5 produced the knife and the same was marked as PMFI 2. Pw. 5 stated that he assisted in subduing the suspect, arresting and handcuffing him. On cross examination, Pw. 5 confirmed that he witnessed the scuffle between Inspector Kirui and the suspect, he subdued the suspect and recovered the knife which was used to stab Inspector Kirui and produced the said knife as an exhibit.
 9. Phillip Kirui (Pw.6) an inspector of administration police. Pw. 6 stated that on 20/10/2015 at around 11:50 PM, he was on patrol in Kipkelion Sub County when he received a distress call that someone had been stabbed and required assistance with transportation to hospital and that he subsequently succumbed. Pw. 6 stated that he went back to Kipkelion Police Station and there were eyewitnesses to the murder, who offered up names of suspects among them Bernard Kipkorir Kikwai (the accused) and



- Tembur who were living within the outskirts of Kipkelion Township. Pw. 6 stated that he mobilised his team to apprehend the suspects, they arrested Tembur, proceeded to Kikwai's homestead and cordoned off his house. Pw. 6 stated that while he was interrogating the accused, the accused stabbed him on the chest with a knife and a scuffle ensued. Pw. 6 stated that he was assisted by his colleagues to subdue and apprehend the accused. Pw. 6 identified the knife the accused used to stab him as MFI 2. Pw. 6 stated that he went to Siloam Hospital for treatment and was admitted for almost a week, he was issued with a P3 Form, marked as MFI 3 which was filled by a doctor at the facility. Pw. 6 identified the accused as the person who stabbed him.
10. Calistus Olando (Pw. 7) former OCS Kipkelion Police Station stated that on 20/10/2015 at 23:00 hrs he was at home when he received a call from an officer manning the report office, that one Christopher Wanyama had reported that his brother Duncan Kilo had been stabbed in neck and rushed to the Sub County Hospital and that soon thereafter he proceeded to the station when he received a call that the victim had passed away. Pw. 7 stated that he proceeded to the hospital, found the deceased in a pool of blood, the deceased had been stabbed on the neck and organised for transportation for the body of the deceased. Pw. 7 stated that at the police station, there was a multitude of people, they interrogated them and they offered up names of suspects. Pw. 7 stated that they were informed that the accused was with Tembur and they arrested Tembur and told him to show them the home of the suspect, where a scuffle ensued and IP Kirui was stabbed by the accused and was bleeding profusely. Pw. 7 stated that they restrained the accused and put him on the police vehicle, proceeded to Siloam Hospital where they left IP Kirui undergoing treatment, took the suspect to the police station, booked him for murder and attempted murder. Pw. 7 stated that he handed over the case to DCI Londiani to continue with investigations.
 11. Emily Okworo (Pw. 8) an analyst at government chemist stated that she was testifying on behalf of her colleague Kinyua Muturi who prepared the report and is out of the country for further studies. Pw. 8 stated that her colleague received the following items from PC Silas of Londiani Police Station; A - blood sample of the deceased, B - blood sample of Inspector Philip Kirui, C - soil sample from crime scene, D - knife with a brown handle, E - piece of metal, F1 - blue shirt belonging to Inspector Philip Kirui, F1 - green vest belonging to Inspector Philip Kirui, G - red knife sheath and H1 - black jacket belonging to Bernard Kikwai and H2 - brown trouser belonging to the suspect. The Government Chemist was to analyse the items for presence of blood stains and source of blood stains in the evidential materials. The Government Chemist made the following findings that DNA profiles from F1 - shirt and F2 - vest matched the DNA profile of Phillip Kirui; that the DNA profile generated from C - soil sample was of an unknown male and bloodstains from H2 - trouser, D - knife and E - metal rod did not generate any DNA profile. Pw. 8 reiterated that she would be producing the government chemist report as PExh. 4 and DNA analysis profile on behalf of her colleague. On cross examination, Pw. 8 confirmed that the items submitted for analysis did not match with the blood of the deceased and that of the accused. Pw. 8 confirmed that the metal and knife did not generate a DNA profile.
 12. CIP Musimi Kello (Pw. 9) a DCIO officer previously stationed at Londiani stated testified that at about 4:00 am on 21/10/2015 received a call from the OCS Kipkelion CIP Olando who informed him that someone had been stabbed, they proceeded to the crime scene at the road near a petrol station. Pw. 9 stated that at the crime scene he summoned a scene of crime officer who documented the crime scene. Pw. 9 stated that they learnt that the suspect had escaped and that some law enforcement officers had pursued him to his homestead where a scuffle ensued and IP Kirui was stabbed, he was rushed to Siloam Hospital for medical treatment as the suspect was being apprehended. Pw. 9 stated that when he visited the home of the suspect, they recovered a knife, red sheath and metal rod which were produced as exhibits. Pw. 9 stated that following thorough investigations, the accused was charged with the instant offence.



13. Section 211 of the *Criminal Procedure Code* was complied with, the accused person opted to give a sworn statement.
14. Bernard Kipkorir Langat (Dw. 1) stated that he was aware that he was in court to give his defence as he had been falsely accused of killing the deceased and that he did not know Duncan Kilo. Dw. 1 narrated that on 20/10/2015 he was at Kipkelion, he had gone to purchase fuel (diesel) for maize shelling and soon thereafter he went home and fell asleep and that at about 1:00am police officers came to his house and ordered him to open the door. Dw. 1 testified that he was apprehended and that when they got to the police station he was informed that he was in police custody because he had murdered Kilo. Dw. 1 testified that he was held in police custody for 4 days before he was arraigned in court. On cross examination, Dw. 1 confirmed that he went to Kipkelion Trading Centre to purchase fuel for the maize shelling machine that belonged to his brother. Dw. 1 stated that he did not know any of the witnesses who testified save for Tembur and that on the material day they met at a nearby shop where he had gone to buy soap. Dw. 1 stated that he did not quarrel with Duncan Kilo, the deceased. Dw. 1 confirmed that Tembur was the one who brought law enforcement officers to his home. Dw. 1 confirmed that during his arrest there was a scuffle, he handled a knife which injured one of the police officers and that he was subsequently charged with resisting arrest and injuring a police officer. On re-examination, Dw. 1 stated that he was charged with stabbing a police officer, they settled out of court and the case was withdrawn.
15. At the close of the defence case, Mr. Mutai Learned Counsel made oral submissions on behalf of the accused person. The Learned Counsel submitted that the prosecution failed to establish its case beyond reasonable doubt. The Learned Counsel argued that the accused and the deceased were strangers and hence the lack of malice aforethought. The Learned Counsel argued that there was no eyewitness who saw the deceased quarrel or fight with the deceased and that the only mistake on the part of the accused was that he was in the vicinity, at a petrol station which was about 10 metres from the bar.
16. Mr. Musyoki the Learned Prosecutor maintained that the prosecution had proven its case against the accused beyond reasonable doubt. The Learned Prosecutor stated that there was proof that the deceased died as a result of the unlawful actions of the accused, they met at Kipkelion Centre a confrontation ensued and the accused removed a knife and stabbed the accused to death. The Learned Prosecutor stated the accused had resisted arrest and stabbed one of the law enforcement officers effecting the arrest.
17. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.
18. The offence of murder is provided for in section 203 of the Penal Code that provides as follows;

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

In *Republic v Andrew Omwenga* [2009] eKLR the court held:

" It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder 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 the 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.”

19. The accused persons in this case were charged with the offence of murder contrary to section 203 of the *Penal Code* which defines murder as the unlawful killing of a person or persons with malice aforethought.

(a) Death and Cause of Death

20. In this case the death of the deceased person is not disputed, several prosecution witnesses testified that on the material day the body of the deceased was found at the crime scene. Pw. 4 stated that the autopsy on the body of the deceased was conducted on 21/10/2015 and the doctor formed the opinion that the cause of death was a stab wound to the left of the neck resulting in excessive haemorrhage and produced the post mortem report as PExh.1 which report was adopted by this court.

(b) Whether the Accused Committed the Unlawful Act which Caused the Death of the Deceased

21. There were no eyewitnesses who saw the deceased quarrel or fight with the deceased and seemingly the only mistake on the part of the accused was that he was in the vicinity of the crime scene. Pw. 2 testified that on the material day he was out on an errand when he heard the voices of the accused and deceased who were well known to him, they were embroiled in an heated argument and that he went home soon thereafter, he did not see the accused stab the deceased. Pw. 1 testified that on the material day he was at home when he heard Rose Awinja, a neighbour calling out, she informed him that his brother, the deceased, had been severely injured by Bernard. Pw. 1 testified that the deceased succumbed while awaiting for treatment at a medical facility. This court finds that the prosecution did not avail crucial witnesses; such as Rose Awinja who had informed Pw. 1 that the accused had inflicted fatal injuries on the deceased resulting in his demise. This Court considered the testimony of Pw. 8 a Government Chemist who confirmed that the items submitted for analysis did not match with the blood of the deceased and that of the accused and further that the metal and knife recovered during arrest of the accused did not generate any DNA profile. This court is cognisant of the fact that forensic analysis does not create a nexus between the accused and the deceased. This Court therefore finds that the prosecution did not prove that the accused committed the unlawful act which caused the death of the deceased.

(c) Whether the Accused Person had Malice Aforethought.

22. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the *Penal Code* provides circumstances from which malice aforethought may be inferred. They are: "
- (a) An intention to cause 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 intention to commit a felony;
 - (d) ..."



Having considered the brief facts of this case and witness accounts, there was no motive on the part of the accused, thereby negating the element of malice aforethought.

23. This court therefore finds that in the absence of cogent evidence by the prosecution indicating that the accused stabbed the deceased, resulting in his untimely demise, this court is duty bound to acquit the accused of the instant offence. It will be a travesty of justice to convict the accused on insufficient evidence availed by the prosecution. I am in concurrence with the sentiments of Mrima J. in *JOO v Republic* [2015] eKLR when he held thus:

" It is not lost to this court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled, proof beyond reasonable doubt hence this case cannot be an exception. This court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."

Consequently, it is my finding that the evidence adduced by the prosecution against the accused has not met the threshold of proof. I find the prosecution has not proved the charge of murder against the accused herein beyond any reasonable doubt. I therefore find the accused namely:- Bernard Kipkorir Kikwai not guilty of the charge of murder and is hereby acquitted. He should be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 17TH DAY OF OCTOBER, 2024.

J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Prosecutor – Musyoki

Accused – Present in Person

Kiletyen holding brief for J. K. Mutai for the Accused

