Republic v Kamau alias Daniel Kamau (Criminal Case E020 of 2020)
[2024] KEHC 11725 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11725 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE E020 OF 2020

AC MRIMA, J

OCTOBER 3, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

PETER THUKU KAMAU ALIAS DANIEL KAMAU ..... ACCUSED

JUDGMENT

Introduction

1. Peter Thuku Kamau alias Daniel Kamau, the accused herein, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the offence were that on the 12th day of June 2020 at Kiungani in Kiminini Sub-County within Trans-Nzoia County murdered Purity Norah; (hereinafter referred to as 'the deceased').

3. The Accused pleaded not guilty.

4. The prosecution's case was partly heard by Hon. Kimaru, J (as he then was) before Yours truly proceeded further. Upon closure, the Accused was placed on his defence.

5. A look at the trial now follows.

The Prosecution's case:

6. The prosecution called six witnesses.

7. John Wafula Wanjala testified as PW1. He was a brother to the deceased. He lived at Toll station within Kitale town. He stated that the deceased was married to the Accused and that the two lived together in Kiungani area.

8. It was his evidence that at around 10am on 12th June 2020, he was called by the Accused and asked to rush to their house in Kiungani as the deceased was in a serious condition.

9. PW1 called his other sister one Mary Kakai [testified as PW2] who also used to live within the Toll station area. On informing PW2 about what the Accused had told him, PW1 learnt that, indeed, the Accused had also called PW2 and delivered similar message.

10. PW1 and PW2 proceeded to the deceased house in Kiungani. The deceased lived with the Accused in a rental house and they occupied one of the many rooms in the house. The owner of the house also lived within the compound. PW1 was a frequent visitor and he knew the place quite well.

11. They found the door closed, but not locked. They entered inside. They found the items scattered in the room. The Television, which was mounted on the wall, was missing and the Gas cooker was also not in the room. Likewise, the accused's bag was missing.

12. The bed was separated by a curtain. PW1 called out the name of the deceased, but there was no response. He then pulled the curtain away and found the deceased lying on the bed foaming from the mouth. She was lifeless. They did not see any injuries on her.

13. PW1 and PW2 did not find the Accused at home. They were, however, well aware of the frequent disagreements between the couple. They later learnt that the Accused was arrested by the police on 27th June 2020 at Kiungani.

14. PW1 reported the matter to Kiungani Police Station. The matter was then taken over by the DCI.

15. PW6 was the investigating officer in the case. He was No. 78491 PC Zaddock Wafula. He was then attached to the DCI Kiminini Sub-County. He was one of the officers who visited the scene.

16. After processing the scene, the body was removed to Kiminini Cottage Hospital mortuary for preservation and further police action.

17. PW6 initiated investigations. He interrogated several people and recorded statements. One of them was the owner of the house where the deceased and the Accused lived. He was one James Njoroge Njogu, who testified as PW5.

18. PW5 confirmed that the deceased and Accused lived in one of the rooms and the Accused paid monthly rent of Kshs. 1,500/=. He also confirmed that he neither heard any commotion in the room occupied by the deceased and the Accused nor did any of the tenants report as much to him or at all. He was only called and informed of the death of the deceased as he was at Kamukuywa area.

19. PW6 organized for a post mortem exercise on the body of the deceased. It was conducted by Dr. Alex Barasa [not a witness] on 16th June, 2020 at the said Kiminini Cottage Hospital mortuary. The autopsy revealed that the deceased had been strangled and died from asphyxia. There was a fracture of the cricoid cartilage with airway obstruction in the respiratory system.

20. The Doctor then filled in a Post Mortem Report and duly signed and dated it. The Report was produced in evidence by Dr. Dennis Nanyingi [testified as PW4] as Dr. Barasa was reportedly unwell.

21. Albert Sumba Wepukhulu [testified as PW3], and who was a cousin to the deceased, identified the body before the autopsy was undertaken. After the autopsy, the body was released for burial.

22. From the statements recorded, PW6 marked the Accused as a person of interest in the matter. However, the Accused was nowhere within Kitale. His efforts to trace him were in vain.

23. On 17th June, 2020, PW6 wrote to Safaricom through the Police Liaison Officer for the Accused's phone history as to aid in tracing him. The Accused's phone number was 0793 769 384. The records which were received from Safaricom were produced in evidence.

24. The Accused was, at one time, traced to Kamunyeki village in Nakuru. The records, however, indicated that the accused's phone was off from 12th June to 16th June 2020.

25. PW6 kept a close watch on the Accused's movements. On 26th June 2020, the Accused returned to Kitale. On 27th June 2020, PW6 managed to arrest the accused in Kiungani area.

26. After due processing, the Accused was formally charged before Court. A full trial was conducted.

27. On the basis of the foregoing, the Court found that the Accused had a case to answer and he was placed on his defence.

28. The Accused gave a sworn defence without calling any witness.

29. He stated that he was indeed married to the deceased and that they lived in Kiungani. He also stated that he was in the Scrap metal business alongside his wife, the deceased. He also confirmed that his phone number was 0793 769 384.

30. The Accused recalled that in the morning of 12th June 2020, he left Kitale to sell some scrap metals in Nakuru. That, it was the deceased who assisted him with the luggage to Kitale town where he boarded a Nakuru bound bus.

31. According to the Accused, he left his wife alive in Kitale as he went to Nakuru and that he did not call anyone to tell them of his wife's ailment. He dismissed the evidence of PW1 and PW2 as untruthful and fabricated.

32. The Accused further stated that after selling his wares in Nakuru, he proceeded to see his brother in Lanet and when he did not find him, he proceeded to his rural home where he stayed until he was called by PW6 who informed him that he had scrap metal to sell in Kitale. The Accused then travelled to Kitale only to be arrested by PW6 on allegations that he had killed his wife.

33. The Accused testified that it was PW6 who informed him of the death of his wife and that PW6 demanded money for his release which he declined, thereby being falsely charged.

34. It was the Accused's contention that since they lived in a house which had no ceiling board, then had there been any commotion in their room, their neighbours would have heard of such. He recalled that none of the witnesses testified of any commotion.

35. The Accused urged this Court to acquit him accordingly.

36. At the close of the cases, parties were directed to file and exchange written submissions. Whereas the State filed its submissions dated 29th January 2024, the Defence did not.

37. The arguments in the submissions and authorities cited shall be dealt with in the analysis section of this judgment.

Analysis:

38. There is only one issue that arises for determination in this case. It is whether the Prosecution proved the charge of Murder beyond reasonable doubt against the Accused.

39. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients.

40. 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 and its cause;

    (b) that the accused committed the unlawful act which caused the death of the deceased; and

    (c) that the accused had malice aforethought.

41. This Court will deal with the above elements in seriatim.

Death and its cause:

42. There is no doubt that deceased died. The fact was attested to by all the prosecution witnesses.

43. As to the cause of death, PW4 produced the Post Mortem Report which was filled after the autopsy was conducted. The Doctor in his professional assessment, deduced that the deceased died as a result of asphyxia due to strangulation.

44. The Accused did not controvert the cause of the deceased's death and there was no other contradictory evidence.

45. This Court, therefore, conclusively forms a finding that the prosecution rightly so proved the death of the deceased and its cause.

Who caused the death?

46. The second element of the offence of murder requires proof that the accused committed the unlawful act which caused the death of the deceased.

47. In this case, there was no eye witness. None of the witnesses testified seeing the Accused assault or kill the deceased.

48. The upshot is that the matter now revolves on circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, 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 congently 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.

49. The foregone 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.

50. 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.'

51. 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.....

52. Later, the Court of Appeal in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR had this to say on circumstantial evidence: -

> .... However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:
>
> > It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial....

53. Returning to the case at hand, the evidence advanced by PW1 was corroborated by PW2. They were allegedly both called by the Accused and told to rush to the home of the Accused to see the deceased who was ailing. They both proceeded there, only to see the deceased dead and the Accused nowhere to be seen.

54. The Accused specifically denied the evidence of PW1 and PW2 and alleged that they had fabricated the evidence and as such, they were untruthful witnesses.

55. This Court has carefully considered the entire body of evidence. Whereas the Accused denied the evidence of PW1 and PW2, he did not deny that he owned and used phone number 0793 769 384.

56. PW1 and PW2 stated that despite knowing the Accused's number and having saved it as such in their respective phones, they also recognized the Accused's voice when he called them as they were quite familiar with it.

57. The manner in which a trial Court is to handle evidence on voice identification is now well settled. Extreme care is peremptory to ensure that the following conditions are met, which conditions were discussed by the Court of Appeal in Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR as follows, that:

    a. It was the accused person's voice;

    b. The witness was familiar with it and recognized it;

    c. The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

58. The Court of Appeal had also previously held in Karani vs. R (1985) KLR 290 and Choge vs. R (1985) KLR 1 that just few words like 'break her legs' sufficed.

59. PW1 and PW2 satisfied the above conditions. They were familiar and readily recognized the Accused's voice having talked over the phone with the Accused previously and that they were not mistaken on what the Accused said. They also acted on the Accused's instructions.

60. This Court heard the witnesses testify. It observed their demeanours. The record has no adverse remarks on any of the witnesses. They were, hence, truthful witnesses.

61. This Court, therefore, finds and hold that it was the Accused who called PW1 and PW2 and told them to urgently proceed to see the deceased who was ailing. PW1 and PW2 rushed to only find the deceased dead. This Court also wonders how the Accused knew that the deceased was unwell if he had no hand in what the deceased went through.

62. There is also the issue of the whereabouts of the Accused from 12th June to 27th June 2020. What was stated by the Accused seems to be problematic. If it were true that the Accused had left the deceased alive in Kitale as he proceeded to Nakuru, how come that the Accused did not seek to know the well being of his wife for a whole two weeks. Had he attempted to do so, then he would have learnt of the demise of his wife. He cared not to do so.

63. The Accused also vehemently insisted during his cross-examination that he was arrested on 12th June 2020 and not 27th June 2020. To this Court, that insistence defeats logic. How possible is it for the Accused to allege that he travelled to Nakuru on the very 12th June 2020, proceeded to see his brother in Lanet and then went to his rural home and only returned to Kitale when he was called by PW6, on one hand, and on the other hand, to insist that he was arrested on the same 12th June 2020. The Accused is guilty of approbating and reprobating.

64. The Accused, therefore, comes out as an untruthful person. He seems to use every trick in the book to run away from the truth. As such, his testimony is of very low probative value, if any. Equally, his defence cannot hold.

65. Therefore, on this Court's prudent assessment of the facts and the application of the law, it is hereby found and held that the totality of the prosecution's evidence primarily points to the guilt of the accused. There was no any explanation upon any other reasonable hypothesis than that of the guilt of the accused. In other words, there were no other co-existing circumstances which weakened the chain of circumstances relied on in inferring the guilt of the accused.

66. In the end, this Court finds and hold that it was the Accused who committed the unlawful act which caused the death of the deceased.

Malice aforethought?

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

68. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

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

70. 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).

71. 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.

72. On the conduct of the deceased before, during and after the attack, it is on record that the Accused and the deceased used to differ frequently. When the Accused strangled the deceased, he disappeared to Nakuru and put his phone off for a couple of days; he also did not care to find the well being of his wife and only returned to Kitale for business.

73. The Accused purposed to kill the deceased. He strangled and broke her neck as he also suffocated her.

74. The neck and the respiratory system are such critical parts of the human anatomy. It goes beyond any peradventure that once the organs are subjected to serious injuries, then death was eminent. Inflicting such injuries on someone can only be intentional. The rationale was apparent that it was to deprive the deceased of her life.

75. The manner of execution of the mission was very deliberate and targeted. The accused aimed and broke the neck and blocked the respiratory airways.

76. By considering the cumulative actions of the accused in the manner he executed the killing and his conduct before and after the unlawful act, it is without any shred of doubt that the accused purposed to kill the deceased.

77. The prosecution, therefore, proved malice aforethought in this case.

Disposition:

78. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

79. Having said as much, the State proved all the ingredients of the offence of Murder.

80. As such, the Accused, Peter Thuku Kamau alias Daniel Kamau, is found guilty of murdering his wife Purity Norah.

81. The accused is accordingly convicted of Murder pursuant to Section 322(2) of the Criminal Procedure Code.

82. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Miss. Rutto, Learned Counsel for the Accused.

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

Chemosop/Duke – Court Assistants.