



**Republic v Koskei & 2 others (Criminal Case 27 of 2019)  
[2024] KEHC 11867 (KLR) (Crim) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11867 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL CASE 27 OF 2019**

**JK SERGON, J  
OCTOBER 3, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BERNARD KOSKEI ..... 1<sup>ST</sup> ACCUSED**

**WILSON K RONO ALIAS MBERIA ..... 2<sup>ND</sup> ACCUSED**

**BERNARD K LANGAT ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein are charged with murder contrary to section 203 as read with Section 204 of the Penal Code.
2. The Particulars of the offence are that on the 2nd day of July, 2019 at Jambo Kenya Training Centre in Kipkelion Sub-County within Kericho County the accused Persons namely: Bernard Koskei, Wilson K. Rono alias Mberia and Bernard K. Langat jointly murdered Justus Too alias Titus Too.
3. The accused persons pleaded not guilty to the charge and the prosecution called ten witnesses to testify to prove its case.
4. Hillary Cheruiyot Kurgat (Pw. 1) stated that he works at a bar and that he knew the 1st and 2nd accused persons, and he did not know the 3rd accused person. Pw. 1 stated that he knew Justus Too, the deceased. Pw. 1 testified that on the material day he was at the bar selling alcohol when the accused persons and the deceased came to the bar for drinks and they drank until 11PM and that when he told them it was past time they left the bar. Pw. 1 testified that the following day, he heard that Justus Too had been killed and that he did not know who had killed the deceased.



5. Hellen Chepngetich Rono (Pw.2) identified the accused persons and stated that the deceased was her son. She testified that on the material day Vicky, a friend to the deceased called her severally enquiring on the whereabouts of the deceased. She testified that at about midnight she heard some commotion and when she went to the scene she stumbled upon the body of the deceased, with several injuries on the head, left hand and the neck.
6. She testified that the body of the deceased was lying on the Kericho-Londiani Road and also stated that at the crime scene there were several people including the accused persons. PW.2 said that she waited for the police to come and take the body of the deceased.
7. On cross examination, Pw.2 stated that the 1st and 3rd accused were friends of the deceased. Pw. 2 also confirmed that she recorded her statement at the police station.
8. Pw. 2 said that the 1st and 2nd accused were at the scene of crime and that she heard people saying that the deceased was killed. However, she said she did not know who had killed the deceased. Pw. 2 stated that she had been informed by Vicky that the deceased was with the accused on the material night.
9. Hillary Towett (Pw.3) identified the 1st accused and stated that he knew the deceased. Pw. 3 stated that he does not know the 2nd and 3rd accused. Pw. 3 testified that on 2/7/2019, he was at a club drinking in the company of Festus, Bernard Koskei, the 1st accused and that the deceased came to their table and started drinking beer.
10. Pw. 3 stated that at about 8PM the deceased took his phone and called his wife and told her to save his number. Pw. 3 stated that the deceased did not have a phone.
11. Pw. 3 stated that at about 9PM he left and went home and that the following morning when he went to the Trading Centre, he heard that Justus had died. Pw. 3 stated that the wife of the deceased told him that Justus had been murdered.
12. On cross examination, Pw. 3 confirmed that on the material night, he was with the 1st accused and the deceased at the club and that he left and went home. Pw. 3 confirmed that he did not know the 2nd and 3rd accused persons.
13. Festus Kipchirchir (Pw.4) identified the 1st and the 2nd accused, he stated that he knew the deceased and that he did not know the 3rd accused. Pw. 4 testified that on 2/7/2019, he went to the bar owned by Eunice and found the 1st and 2nd accused, the deceased and another person he did not know having drinks and that at about 10PM, they left in a probox whereas he went home on foot after the bar owner said that they wanted to close the bar.
14. Pw. 4 stated that on the following day, he was told that Titus had been murdered near Jambo Kenya Bar and that there were riots at the scene. On cross examination, Pw. 4 confirmed that on the material night, he was with the 1st, 2nd accused, the deceased and another person he did not know having drinks and that at about 10 PM they left in a probox registration number KBP 062H.
15. Pw. 4 confirmed that he did not know who murdered the deceased and that he did not know the 3rd accused and could not recall seeing him on the material night.
16. Diana Chemutai (Pw.5) identified the 1st, 2nd and 3rd accused. She stated that she knew Titus Too alias Justus Too the deceased. She recalled that on 2/7/2019 she was working at Jambo Kenya Bar and that at around 11PM she received a call from a probox driver who informed her that someone was lying on the road.



17. Pw. 5 stated that she informed her boss Kennedy who went to the scene and called the police. Pw. 5 testified that she too went to the scene and found the police were there and that there were riots.
18. Pw.5 stated that the deceased had sustained severe injuries and that she did not see any of the accused at the scene. Pw. 5 stated that she recorded her statement at the police station.
19. On cross examination, Pw. 5 confirmed that on the material night at about 11 PM she was still working and doing stock taking at Jambo Kenya Bar when she received a call from a probox driver, who hails from their home area informing her that there was a body lying on the roadside. Pw. 5 said she visited to the scene and remained there until the body was removed.
20. Pw. 5 stated that next to the body of the deceased there was a mobile phone which was recovered by the police. Pw. 5 confirmed that she recorded her statement with the police and that she did not know who killed the deceased and the events leading to the demise of the deceased.
21. Kennedy Langat (Pw. 6) identified the accused and stated that he knew Titus alias Justus Too who frequented his bar. Pw. 6 the owner of Jambo Kenya Bar, recalled that on 2/7/2019 he was working at Jambo Kenya Bar and that he retired for the night and that during the night one of his workers called him and informed him that there was a probox driver who called her and informed her that there was someone who had been killed on the road.
22. He testified that thereafter that he went to the scene, informed the police about the incident and that he remained at the scene until the DCI Officers stationed at Kipkelion and the Crime Scenes Officer arrived at the scene.
23. Pw. 6 stated that while at the scene, he observed the body of the deceased and noted that the deceased sustained severe injuries and that he did not see any of the accused persons that night. On cross examination, Pw.6 stated that he knew the accused and the deceased who were his friends and frequented his bar. Pw. 6 stated that there are many vehicles that pass by the road where the deceased's body was found. Pw. 6 stated that he was at the scene for several hours and that the DCIO recovered a phone at the crime scene. Pw. 6 stated that he does not know who killed the deceased.
24. Dr. Wesley Rono (Pw.7) produced the post mortem report dated 8/7/2019 on behalf of his colleague Dr. Ngulungu who performed the autopsy. Pw. 7 stated that he was present when the post mortem was conducted on the deceased and that the finding on the cause of death was multiple injuries involving head, chest and neck, stab wounds and features of manual strangulation.
25. On cross examination, Pw. 7 stated that the death was immediate because of the severity of the injuries the deceased had sustained, however, he could not tell the events that led to the demise of the deceased. Pw.7 maintained that the post mortem report was conclusive on the cause of death.
26. Police Sergeant Mulongo Taji (Pw.8) a duly gazetted scene of crimes officer testified in court as to how the crime scene was secured, processed and photographs taken. Pw. 8 stated that on 3/7/2019 at around midnight he received a call from Mr. Chitibwa a DCIO based at Kipkelion, who informed him that he had a crime scene involving a suspected murder within his jurisdiction and requested him to process the scene.
27. Pw. 8 testified that he prepared and proceeded to the crime scene as instructed which was past Jambo Kenya Trading Center along Londiani. Pw. 8 stated that at the crime scene he found the body of the deceased who had sustained several injuries to wit stab wounds that indicated he had been attacked.
28. Pw. 8 stated that he took several photos at the crime scene. Pw. 8 stated that the following day he went to Kipkelion Police Station to process motor vehicle registration no. KBP 062H a probox suspected to



- have been used by the accused in the commission of the offence. Pw. 8 stated that he was informed that the motor vehicle had been impounded after the suspects were apprehended and the I/O had spotted some red spots that resembled blood stains.
29. Pw. 8 stated that he took photographs of the motor vehicle and lifted swabs which were taken to the government chemist for analysis. Pw. 8 stated that on 8/7/2019 on the invitation of the I/O he attended the autopsy of the deceased at Kericho County Referral Hospital and the resident pathology conducting the autopsy noted significant injuries on the body of the deceased to wit strangulation marks and stab wounds. Pw. 8 stated that he took photos during the autopsy. PW.8 said he processed the photographs of the crime scene, the motor vehicle and the autopsy and prepared a report which he produce as exhibit PExh. 5.
  30. On cross examination Pw. 8 confirmed that he was not the first at the crime scene, however, he maintained that the crime scene had not been disturbed. Pw. 8 confirmed that the crime scene was a tarmac road, however, he maintained that it was not possible that there was a road accident as the injuries on the deceased were not consistent with a road traffic accident.
  31. Pw. 8 stated that when he dusted the motor vehicle, the suspects were in police custody and that he spotted some red stains in the motor vehicle, he lifted some samples that were taken for further analysis at the government chemist inorder to establish whether the stains were of human blood.
  32. Polycap Lutta Kweyu (Pw. 9) a Government Analyst at the government chemist stated that he had prepared a report in respect to the items received from DCIO Kipkelion and he had been requested to carry out DNA profiling to determine the presence and origin of any biological material. Pw. 9 presented his findings and stated that the swab sticks marked 'A1' - 'A4' tested positive for blood of human origin. Pw. 9 stated that he was not able to generate a DNA profile from maroon material marked 'A5' whereas the door flab marked as 'A6' was lightly stained with blood of human origin. The DNA profile generated from 'A1' and 'A6' matched the DNA profile of Wilson Kiprono, the 2nd accused.
  33. The DNA profile generated from 'A2' and 'A4' belonged to two different male persons whereas the DNA profile generated from 'A3' belonged to an unknown female. Pw. 9 stated that none of the DNA profiles generated from the swabs matched with blood samples of the deceased and that of the 1st and 3rd accused.
  34. Pw. 9 stated that he prepared a report which he produced as PExh. 6 and that the report was accompanied by an exhibit memo. On cross examination, Pw. 9 confirmed that the samples collected from the motor vehicle were human blood samples and generated different DNA profiles that matched to different people.
  35. SP Chitibwa Said (Pw. 10) the I/O in this case recalls that on 3/7/2019, he received a call from CIP Masinde who was already at the scene at the Londiani-Muhoroni Road after having been summoned by the Area Assistant Chief.
  36. Pw. 10 stated that the matter had been reported as a road traffic accident but there were no skid marks of a motor vehicle at the scene. Pw. 10 stated that at the crime scene he saw the body of the deceased, a lot of blood oozing from the body of the deceased and noted that based on the bruising on the body, the body appeared to have been dragged along the tarmac to where it was.
  37. Pw. 10 stated that he cordoned off the area and sought the services of a crime scene officer (Pw. 8). Pw. 10 stated that he recovered a techno phone at the crime scene. Pw. 10 stated that he observed stab wounds and rope marks around the neck of the deceased, hence his finding that it was murder not due a road traffic accident.



38. Pw. 10 stated that the body of the deceased was identified by his relatives and that he was tasked to establish the last moments of the deceased. Pw. 10 stated that he interrogated several witnesses including the accused persons and learnt that the accused were the last persons to be seen with the deceased while he was still alive at kwa Eunice Bar and that thereafter the deceased's body was found about 100-200 metres away and the evidence revealed that the deceased was killed and dumped at the crime scene.
- Pw. 10 stated that while conducting investigations, he searched probox motor vehicle registration no. KBP 062H found several blood stains and requested the crime scene officer to process the said motor vehicle and samples were sent to the government chemist. Pw. 10 stated he attended the autopsy and that the autopsy revealed that the deceased had stab wounds and strangulation marks among other injuries and that the pathologist formed the opinion that it was not an accident as earlier reported. Pw. 10 stated that his investigations informed the decision to charge the accused with murder.
39. On cross examination, Pw. 10 confirmed that his investigations revealed that the accused were the last persons to be seen with the deceased. Pw. 10 confirmed that he sent the samples collected from the probox motor vehicle registration no. KBP 062H to the government chemist for further analysis.
40. At the close of the prosecution's case this Court found that the accused persons had a case to answer and were put on their defence. Section 211 of the Criminal Procedure Code was complied with, the accused persons opted to give sworn statements.
41. Bernard Kosgei (Dw. 1) stated that the deceased and the accused persons are well known to him. He testified that on the material day they were at a club owned by Eunice when Justus Too, the deceased came to their table, took his glass of whisky and banged it on the table and that there was no altercation that ensued.
42. Dw. 1 stated that shortly thereafter they all left together in motor vehicle registration no. KBP 062H owned by Wilson Rono and parted ways. DW.1 stated that he received a call from the deceased's wife that the deceased had been killed and that he went to the crime scene which was at a roadblock and saw the body of the deceased lying in the middle of the road.
43. Dw.1 stated that on the following day they went to the police station to record statements with the DCIO and soon thereafter the OCS placed them under police custody, in police cells and their cell phones confiscated.
44. Dw. 1 stated that whereas they were the last people to be seen with the deceased alive, they did not murder the deceased and therefore they were wrongfully charged with the instant offence. On cross examination, Dw.1 confirmed that on the material night, the deceased was dropped off first and that when he saw the deceased's lifeless body he assumed that he was run over by a motor vehicle.
45. Wilson Kipkoech Rono (Dw. 2) stated that he knows the co-accused Bernard Koskei and Bernard K. Langat. He narrated that on the material day, he met the deceased outside Jambo Kenya Club in Barsiele in Kipkelion and that the deceased entered his car and they drove to a nearby club operated by Eunice. Dw. 2 stated that he entered the club and he found Bernard Koske and shortly Benard Langat and Justus Too, the deceased, joined them. Dw. 2 stated that when the four men left the club, they were moderately drunk.
46. Dw. 2 stated that they dropped the deceased near Jambo Kenya Club. Dw. 2 stated that they did not quarrel that day. Dw. 2 stated that he parted ways with the co-accused, however, at about 2AM he received a call and was informed that Justus Too was dead. Dw. 2 stated that the following day, he and the co-accused visited the police station, they were referred to the DCIO, they recorded statements and



that his motor vehicle, a probox was searched while they were in the cells. He stated that he suffers from bleeding gums.

47. On cross examination, Dw. 2 confirmed that on the material day, he was in the company of the deceased and co-accused at the club operated by Eunice and that they parted amicably and left the deceased along the highway. Dw. 2 stated that he did not kill Justus Too, the deceased herein.
48. Bernard K. Langat (Dw. 3) stated that on the material day, he and the co accused were at a club operated by Eunice, when Justus Too, the deceased came to their table, grabbed a glass whisky belonging to Bernard Koske and drunk its contents at a go. Dw. 3 stated that they all left the club using the probox belonging to Wilson, (deceased) who sat in the front and attempted to engage the reverse gear and Bernard Koske warned him not to do that.
49. Dw. 3 stated that they parted ways and that on the following morning he learnt of the demise of Justus Too, the deceased and he and the co accused decided to go to the police station and report the incident. On cross examination, Dw. 3 confirmed that they dropped off Justus Too, the deceased near Jambo Kenya Club and that they were the last people to be seen with the deceased while alive. On re-examination, Dw. 3 stated that they did not kill the deceased.
50. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.
51. 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.”
52. 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**

53. In this case the death of the deceased person is not disputed. Several prosecution witnesses testified that on 2/7/2019 the body of the deceased was found along the Londiani - Muhoroni Road near Jambo Kenya Bar.
54. Pw. 7 produced the post mortem report which stated that the cause of death was multiple injuries involving head, chest and neck, stab wounds and features of manual strangulation.

#### **b. Whether the accused committed the unlawful act which caused the death of the deceased.**

55. There were several prosecution witnesses who testified that on the material night they arrived at the crime scene and found the body of the deceased lying on a tarmac road, the deceased had sustained several fatal injuries and was bleeding profusely. However, there is no single witness who saw the accused persons accosting the accused or gave an account as to the events that led to the demise of the deceased.



56. Pw. 1, Pw. 3 and Pw. 4 testified that on the material day, the accused and the deceased were having drinks at kwa Eunice Bar and that at about 11 PM they left together in a probox motor vehicle registration no. KBP 062H. The accused in their defence conceded that they were friends with the deceased, they frequently had drinks together and that on the material night, they had drinks with the deceased at kwa Eunice Bar and no altercation ensued.
57. The accused conceded that they were the last persons to see the deceased alive and that they parted ways amicably, they dropped the deceased near Jambo Kenya Bar.
58. The accused in their defence stated that on the following day when they went to record their statement at the police station, they were apprehended and the probox motor vehicle Registration No. KBP 062H impounded and they were charged with the instant offence. The accused were adamant that they did not murder the deceased.
59. This court has considered the prosecution accounts of Pw. 8 a crime scene officer who testified that he processed and lifted swabs from probox motor vehicle registration no. KBP 062H, which was impounded after the accused were apprehended. Pw. 8 stated that the said motor vehicle had stains that bore semblance with blood stains and that these samples were taken to the government chemist for further analysis.
60. Pw. 9 a government chemist testified that none of the DNA profiles generated from the swabs lifted from probox motor vehicle registration no. KBP 062H matched with blood samples of the deceased and that of the 1st and 3rd accused. This finding is inconsistent with the I/O s finding that the said vehicle was used to commit the offence, several prosecution witnesses testified that based on their observations at the crime scene, the deceased had sustained severe injuries to wit stab wounds and bled profusely.
61. Pw. 9 a government chemist stated that the DNA profile generated from swabs 'A1' and 'A6' matched the DNA profile of Wilson Kiprono, the 2nd accused, the registered owner of probox motor vehicle registration no. KBP 062H. The 2nd accused while mounting his defence had stated that he suffered bleeding gums. Pw. 9 also stated that there were other swabs collected from the motor vehicle which were human blood samples and generated different DNA profiles that matched to different people.
62. This Court has considered that there is no direct or circumstantial evidence that links the accused persons to the unlawful act which caused the death of the deceased.

#### **Whether the Accused Person had Malice Aforethought.**

63. 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; © An intention to commit a felony; (d)..."
64. Having considered the facts of this case, the accused and the deceased were friends who frequently had drinks together and they therefore did not have any motive to murder the deceased.



- 65. I have considered the prosecution's case, the accused persons' defence and the evidence herein. I find that the prosecution has not discharged the evidentiary burden to the required standard and proven their case against the accused persons beyond reasonable doubt.
- 66. In the case of Philip Nzaka Watu v Republic [2006] eKLR, it was held that in order to find conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt.
- 67. There are no witnesses placing the accused at the scene of crime and neither are there witness accounts that indicate that it is the accused persons who assaulted the deceased leading to his demise.
- 68. This court concurs with the sentiments of the court in JOO v Republic [2015] eKLR, Mrima, J. held that; "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 any 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."
- 69. The Court of Appeal stated in Pius Arap Maina v Republic [2013] eKLR, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts, must be given in favour of the accused.
- 70. Accordingly, I find that the prosecution did not prove its case against the accused persons. In the premises, I find the accused person namely; Bernard Kosgei, Wilson Kipkoech Rono and Bernard K. Langat not guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused persons are hereby acquitted and I direct that they be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 3RD DAY OF OCTOBER, 2024**

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**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant – Ruttoh

Prosecutor - Musyoki

Accused 1 – Present in Prison

2 – Present in Prison

3 – Present in Person

No appearance for Ochieng for the accused

