



**Republic v Mugo (Criminal Case 2 of 2020)
[2024] KEHC 11854 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 2 OF 2020
CM KARIUKI, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARGARET MUKAMI MUGO ACCUSED

JUDGMENT

1. Margaret Mukami Mugo, the Accused person herein, was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offense are that on 2nd February 2020 at Gathanje Trading Centre, Gathanje Sub-Location, Nyandarua County, the Accused murdered Simon Wambugu Muriithi, the Deceased herein.
2. The prosecution called six witnesses in total. Consequently, the Accused was placed on her defense, and they all gave sworn testimony and did not call any witnesses. The prosecution’s case was as follows:-
3. PW1 John Mathenge gave sworn testimony that he knew the Accused and that she used to sell them alcohol at Kwa Ngara. He stated that Simon Wambugu Muriithi Deceased used to work with him carrying trees. He asserted that on 2/2/2020, he met the Deceased, and they worked up to 5 p.m. They then went to the market, got money, and went to Mwihoko Bar to buy alcohol. He stated that he had his Kshs. 30/- but paid him with a cigarette. He said that he had gone to Mwereri Bar and returned to Mwihoko Bar.
4. It was his testimony that he went home and went to Mwihoko Bar owner for some work. He learned that the Deceased fell sick and went to see him at the hospital. He found him in a motor vehicle, and he was taken to the center and then Nyahururu later heard he had died.
5. Upon cross-examination, he confirmed that the Deceased went to Mwereri at 7 p.m. and that Mwihoko to Mwereri is about 50m.



6. PW2 Peter Mbutu Murigi testified that he knew the Accused as the owner of Mwereri Bar and knew the Deceased because he was his younger brother. He stated that on 2/2/2020 at 9 p.m., he was called to collect his brother by a guard of a neighboring bar. He went to the scene and found him lying on the veranda of Mwereri bar, and he was not talking. He took him home, called his mother, and was later taken to hospital. Later, they got a report that he had died.
7. It was his testimony that he appeared drunk at about 9 p.m. and asserted that he was also intoxicated. He averred that he had an injury on the top side of his head, and blood was oozing. He stated that he did not know what had happened to him, who injured him, where he had been attacked, nor the reason.
8. On cross-examination, PW2 asserted that the injury was at the top of the head. He averred that it was late and dispensaries close early and that from the scene to their home was about 2km.
9. PW3 Lucy Waruguru stated that she was the Accused's neighbor for many years and that the Deceased was her husband. She testified that on the material night, her husband was brought home by his brother. He was talking, and there was blood oozing from his head. It was late at night so they decided to take him to hospital the next day. They were told to buy medicine to neutralize alcohol, but later in the evening, they were told he had died. She confirmed that she did not know what had caused the injuries but that when he was brought home, he was drunk.
10. Upon cross-examination, she asserted that the Deceased was brought home around midnight and that it took 30 minutes to reach the scene at Mwereri Bar. PW3 averred that when the Deceased was brought home, he was snoring and sleepy.
11. PW4 Francis Muriithi Mwangi, an officer at Kingongo G.K Prisons and the Deceased's uncle, gave sworn testimony that on 7/2/2020, he witnessed the Deceased's post-mortem in Nyahururu. He saw that the body had several injuries on the right side of the head, a swollen right eye, and the upper limbs had bruises and lacerations. Stabs were visible on the back, and he had bruises. The right leg toes had bruises, and inside his head, there were fractures of the skull. His brain was filled with clotted blood. He averred that, according to the doctor, his death was caused by head injuries.
12. PW4 asserted that he did not know who killed the Deceased, but he heard that the Accused did it. He produced the post mortem report as P. Exhibit 1
13. PW5 Anthony Karanja Mwangi from Gathanji village stated that he knew both the Accused and Deceased as they were his neighbors. He testified that the Accused was the owner of a local bar and that on the material night at about 9 pm, he was working as a watchman at Kwa Ngara Market when he saw a drunkard, the Deceased, who had entered the Accused's bar. He heard a voice telling him to go away, and then the Accused threw him out of the bar, and he fell on the left side of his body. The Deceased rose and returned to the bar, and then he heard the Accused repeating that she had told him to go away.
14. It was his testimony that the Accused threw him out again, and he fell, his backside hitting the tiles. PW5 pointed out that he was about 50m away. He did not hear any voice from him. He asserted that it was about 9 pm, there were lighting bulbs outside of the clubs, and that he saw the Accused throwing the Deceased down. Further, the Deceased's brother was in the club where he was working, so he went inside and informed him about what was happening. The brother went to see him, and the following day, he heard that the Deceased was taken to the hospital, and later, he heard that he had died.
15. Upon cross-examination, PW5 stated that he was working in Kwa Ngara Market, which has 3 bars. He confirmed he was working at Utalii Bar as a watchman, where he used to sleep. He reiterated that on the material night, he was outside the bar, which is about 50 meters away from the scene, when he heard the Accused shouting. He averred that there was music in the Accused's bar and that the Deceased fell



- outside her bar. He did not know who else was in the bar, but where the Deceased fell, he could only see him and the Accused. He also stated that there was no music in the bar where he was working, but there were customers.
16. PW6 Nicholas Ndirangu from Gathanji, the Deceased's and Accused's neighbor, testified that he did not know of any relationship between the Accused and the Deceased. Still, he saw the Deceased in the Accused's bar. He stated that on the material night, he went to the Accused's bar, and while entering, the Deceased was behind him. He then heard the Accused harassing the Deceased, asking him why he had come to her bar drunk and why he was not drinking at her bar. The Accused then threw the Deceased outside the bar. She pushed him out.
 17. PW6 testified that the Deceased entered the bar again, and the Accused pushed him out, and they went outside the bar. It was stated that the Accused told him, "Utatoka kwa bar yangu." The Accused came back with the sleeves of a jacket with blood stains. He asserted that he could see if there was an electric bulb on the veranda.
 18. It was his testimony that she removed the jacket and put it in water. She then went out and came pulling the Deceased, but he was unconscious. He was bleeding on his head, and she laid him on a long seat. PW6 averred that he saw her washing away blood from the veranda. Then she called the Deceased's brother, telling him to come pick up his brother. She then washed her bloody jacket. He also stated that he did not see the Accused hitting the Deceased.
 19. On cross-examination, PW6 confirmed that there were over five people in the bar, but he could not identify any. He stated that he was not drunk and that there were steps outside the bar's doorsteps. He saw the Deceased's head bleeding, but he could not identify where the injury was located. He also saw blood on the Accused's jacket sleeves and that the Accused brought him from outside the bar and called Deceased's brother. He asserted that he did not see people outside the bar, that the Accused and Deceased were out for about 2 minutes, and did not hear any noise.
 20. Defence Hearing
 21. DW 1 Margaret Mukami wa Mugo, the Accused, gave sworn testimony that on 2/2/2020, she was at her place of work in Mwereri bar when the Deceased came and held the curtain, and he fell facing upward. She was told that there was somebody who had fallen and she called his brother via phone to come and pick up his brother as he was very drunk. She stated that from the way he was talking, she knew he was intoxicated and that he was using abusive language.
 22. DW1 averred that when the brother came, they took him to a seat inside the bar, and he was asked whether they should go home. He said they should take him home, and he was taken by a motorcycle. She asserted that the Deceased was talking at all times and that he was bleeding on the backside of his head. She then closed the bar and slept, and on the next day, she went to hospital as she was unwell. She then learned that the Deceased had died, and later, police officers arrested her, and she was told that she had killed the Deceased. She stated that the Deceased was her neighbor and that she never had any grudge against him or his family. She testified that he had been taking alcohol at his sister's bar, according to what he told his brother.
 23. On cross-examination, she stated that the Deceased never entered her bar and that there was a curtain at the bar's door. She wrote in her statement that the Deceased failed to step on the stairs and lost his balance. The Deceased fell at about 10 p.m., and his brother was not present when he fell.
 24. The prosecution's Written Submissions were not available in the file at the time of drafting this judgment.



25. Accused's Written Submissions
26. The Accused person's counsel submitted that this honorable court is called upon to determine the following issues: -Whether Simon Wambugu Muriithi is Deceased Whether the Accused caused the death of the Deceased Whether there was malice aforethought
27. On issue no.1, it was asserted that there is no doubt that Simon Wambugu Muriithi is Deceased. PW4 identified his body before the post-mortem was conducted.
28. On issue no.2, the Accused stated that the Accused person did not cause the Deceased death. They said that PW5 and PW6 testimonies were not consistent as far as the accident was concerned. They reiterated that the Accused person testified that the Accused fell while trying to get into the bar. It was contended that pw6 did not witness the Accused person do anything to the Deceased as he was inside the bar and that his testimony as to what took place outside the bar can only be speculative.
29. It was argued that the Accused did not actively cause the Deceased to fall. Even assuming she pushed the Deceased, hence causing him to fall, it has not been ascertained as the cause of his death. A post-mortem was conducted, but the report was not produced as an exhibit in this case. It was stated that from PW4's testimony, it can be hypothesized that the Deceased may have been stabbed. According to PW5's evidence, he observed that the Deceased had numerous injuries on his body that could have caused his death, and they were not acquired at Mwireri Bar.
30. The Accused argued that in the absence of the doctor's testimony as to the cause of the death, the available evidence is, at best, merely circumstantial and that the prosecution assumed that the Accused was responsible for the Deceased's death. Reliance was placed on *Sawe vs Republic* [2003] eKLR, *Ndungu v Republic* [1985] eKLR, *Chengo Nickson Kalama v Republic* [2015] eKLR
31. On whether there was malice aforethought, the Accused asserted that assuming actus reus had been established, mens rea had not been established because there was no prior ill will between the parties. The prosecution did not establish any motive for the Accused's person's action. It was stated that the Accused's actions towards the Deceased were not and could not have been actuated by malice, and there was no intention on the Accused's part to kill or to do grievous harm to the Deceased. Reliance was placed on *Republic v Ismail Hussein Ibrahim* [2018] eKLR, *Joseph Kimani Njau v Republic* [2014] eKLR
32. In conclusion, the Accused averred that the prosecution had not proved its case beyond a reasonable doubt, and for these reasons, they prayed that the Accused person be acquitted under section 215 of the criminal procedure code.
33. Analysis and Determination
34. Having considered all the evidence set out in this case by the prosecution, the defense herein, and both parties' written submissions, the issue in question is whether the prosecution proved beyond a reasonable doubt all the elements of murder against the Accused herein.
35. In *Anthony Ndegwa Ngarius vs. Republic* [2014] eKLR, the elements of the offense of murder were established 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.



- i. The Accused was charged with the offense of murder. The elements of murder referred to above are: -
 - ii. The fact of the death of the Deceased;
 - iii. the cause of that death, that an unlawful act or omission occasioned the death;
 - iv. the Accused had malice aforethought when he unlawfully killed the Deceased.
36. In the instant case, the first ingredient is not in doubt. The fact of the Deceased death was confirmed by PW4, who witnessed the Deceased's post-mortem.
37. The second ingredient that the prosecution has to establish beyond a reasonable doubt is whether the Accused committed the unlawful act that led to the Deceased person's death. According to the prosecution's evidence, two eyewitnesses testified to what happened to the Deceased before his death and what may have caused his death.
38. PW5, who was familiar with both the Accused and the Deceased as they were all neighbors and a watchman at Kwa Ngara Market, which was located close to the Accused's bar, i.e., Mwereri Bar, testified that he saw the Deceased entering the Accused's bar. He stated that he was drunk when he saw him. He then heard a voice telling the Deceased to go away and saw the Accused throwing him out of the bar, and he fell, landing on the left side of his body.
39. It was his testimony that the Deceased rose and went back to the bar, but the Accused threw him out again, and he fell. He asserted that it was about 9 pm, and there were lighting bulbs outside of the clubs so he could see clearly what was happening. He also stated that he informed the Deceased's brother, who was inside the club where he was working, what he had seen happening to his brother.
40. During cross-examination, PW5 reiterated that on the material night, he was outside the bar, which is about 50 meters away from the scene, when he heard the Accused shouting. He averred that there was music in the Accused's bar and that the Deceased fell outside her bar. He did not know who else was in the bar or where the Deceased fell, but he could only see him and the Accused. He also stated that there was no music in the bar where he was working, but there were customers.
41. The second eye witness was PW6, who is also the Deceased's and Accused's neighbor. He testified that on the material night, he went to the Accused's bar, and while entering, the Deceased was behind him. He then heard the Accused harassing the Deceased, asking him why he had come to her bar drunk and why he was not drinking at her bar. The Accused then threw the Deceased outside the bar. She pushed him out. PW6 testified that the Deceased entered the bar again, and the Accused pushed him out, and they went outside the bar. It was stated that the Accused told him, "Utatoka kwa bar yangu." The Accused came back with the sleeves of a jacket with blood stains. He asserted that he could see if there was an electric bulb on the veranda.
42. It was his testimony that she removed the jacket and put it in water. She then went out and came pulling the Deceased, but he was unconscious. He was bleeding on his head, and she laid him on a long seat. PW6 averred that he saw her washing away blood from the veranda. Then she called the Deceased's brother, telling him to come pick up his brother. She then washed her bloody jacket. He also stated that he did not see the Accused hitting the Deceased.
43. On cross-examination, PW6 confirmed that there were over five people in the bar, but he could not identify any. He stated that he was not drunk and that there were steps outside the bar's doorsteps. He saw the Deceased's head bleeding, but he could not identify where the injury was located. He also saw blood on the Accused's jacket sleeves and that the Accused brought him from outside the bar and



- called Deceased's brother. He asserted that he did not see people outside the bar, that the Accused and Deceased were out for about 2 minutes, and that he did not hear any noise.
44. Furthermore, PW1 confirmed that on the material night, the Deceased had left him to go to Mwereri Bar, which is the Accused's bar. The Accused also confirmed that the Deceased had been at her bar, although her account of what occurred was different from PW5 and PW6's testimonies.
45. Disappointingly, despite an autopsy having been conducted on the Deceased body, the doctor who conducted the Deceased's post-mortem did not testify in this case. Further, the investigating officer did not testify as well. Notwithstanding, PW4, who was present when the post-mortem was conducted, asserted that the Deceased's body had several injuries on the right side of the head, swollen right eye, and the upper limbs had bruises and lacerations, stabs were visible on the back, and had bruises. The right leg toes had bruises, and inside his head, there were fractures of the skull. His brain was filled with clotted blood. He averred that, according to the doctor, his death was caused by head injuries.
46. The law places the burden of proving a criminal case on the prosecution, which must prove the offense charged beyond a reasonable doubt before the Accused can be convicted. In a murder trial like this one, the prosecution must prove that the Accused person caused the Deceased's death before the court through an unlawful act or omission and that the Accused person had intended that death. The doctor and the investigating officer did not testify in this case. The reasons for this are clearly encapsulated in the court's record. The same was caused by the prosecution's failure to avail these key witnesses despite being granted several adjournments by this court.
47. Additionally, and as captured in my ruling dated 28th September 2023, the prosecution was granted a last adjournment as the matter is old and has been delayed mainly by the trial, i.e., the prosecution's failure to avail all witnesses since 2020. The trial was given a window to bring any witness they deemed fit during the ruling date and convince the court to re-open the case if the court found the Accused had a case to answer and put on her defense.
48. Obviously, the prosecution did not provide any witnesses or any explanation as to why these key witnesses were not available. From the record, the prosecution's pattern of not availing witnesses and seeking adjournments is evident. It is unconscionable that the prosecution did not lay a basis in regard to the production of the post-mortem report and why the doctor was not present to produce it.
49. While discussing the fact that failure to call crucial witnesses was fatal to the prosecution case, Lesiit, J (as she then was) in *Republic vs. Cliff Macharia Njeri* [2017] eKLR stated that:-
- “The issue for determination is whether the prosecution failed to call crucial witnesses because it is only on such basis that an adverse inference can be made against the prosecution case. The principles to consider in determining the issue of crucial witnesses were dealt with in the leading case of *Bukenya and Others v Uganda* 1972 EA 549 Lutta Ag. Vice President held:
- i. “The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
 - ii. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”



50. The Court of Appeal and the High Court have dealt with the issue of failing to call witnesses. In *Issa Jomo Sewedi vs. R* (2016) eKLR, it was stated that-

“The failure to call Mary, I find, did not prejudice the appellant as he did not state what he wanted her to come and tell the court. Furthermore, failure to call all witnesses does not, in my view, prejudice the prosecution’s case as the prosecution has the discretion to call the witnesses who they deem relevant to their case. It is not the number of witnesses that proves the prosecution’s case but the quality of evidence. In the case of *Michael Kinuthia Muturi V R* CRA 51 of 2002 (NRI), the Court of Appeal stated thus: “Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient, and therefore, the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference.” In this case, I find there was sufficient evidence to sustain a conviction, and failure to call Mary’s sister to P.W. 4 does not, in my view, attract any adverse inference. There is sufficient evidence on record, and the prosecution is never required to call a particular number of witnesses to prove a fact but can decide on the witnesses to call and not to call in a matter.”

51. Accordingly, this court is left to grapple with the question of whether failure to call the doctor who conducted the postmortem to testify and the consequent inability to produce the postmortem report in evidence was fatal to the prosecution’s case. It is my considered opinion that this being a criminal murder case, there is no room left to maneuver. It is not for this court to fill up the gaps left by the prosecution.

52. It is the prosecution that bears the heavy burden of proving any unlawful act or omission on the part of the appellant. Evidently, this court is unable to confirm the cause of death from the evidence available. Although death was proved, the cause of death was not proved. The failure to call the doctor was fatal to the prosecution’s case because, under the circumstances of the instant case, the evidence presented by the prosecution is insufficient to establish the truth and may contain gaps as to the Deceased’s cause of death, which could have been filled by the doctor who was not called to testify and produce the duly filled and signed post-mortem report as an exhibit.

53. In *Ndungu vs. Republic* [1985] KLR 487, the court held that:-

“Where a body is available, and the body has been examined, a post-mortem must be produced by the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post-mortem examination is cross-examined.”

54. Moreover, in *Chengo Nickson Kalama vs. Republic* [2015] eKLR, the Court of Appeal sitting in Malindi held as follows:-

“The position then appears to be that save in very exceptional cases stated above, death and the cause thereof must be proved beyond a reasonable doubt, and that can only be achieved by the production of medical evidence and, in particular, a post-mortem examination report of the Deceased. To the extent that the same was not done in this case though available, death and its cause was therefore not proved beyond reasonable doubt....”



55. I find that the prosecution did not discharge its burden of proof in this case and that the evidence adduced in its case was barely sufficient to establish the case against the appellant. The cause of the Deceased's death remains unproven. The failure to call medical evidence in this case is an inexcusable omission and eventually proved fatal to the prosecution's case despite the court granting them numerous chances to secure the witness(es) to testify.
56. It is miserable that a life was lost, and despite charging the Accused in a case where the same could have been proved, the prosecution's conduct in prosecuting this case demonstrated negligence and lack of interest in fully prosecuting this case.
57. In the result, this court finds that the prosecution failed to prove the charge of murder against the Deceased, and therefore, I acquit the Accused and order that she be set at liberty unless otherwise lawfully held.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYANDARUA ON THIS 3RD DAY OF OCTOBER 2024.

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CHARLES KARIUKI

JUDGE

