Republic v Malunju (Criminal Case 4 of 2019)
[2025] KEHC 677 (KLR) (29 January 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL CASE 4 OF 2019

DKN MAGARE, J

JANUARY 29, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

AMBROSE MZERA MALUNJU ..... ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars were that on 27/1/2019 at Golini location, in Matuga Sub-County within Kwale County, murdered Renson Mwasingo Mwangemi. He was arraigned before Hon. Lady Justice Njoki Mwangi on 5/2/2019. He took plea later on 20/2/2019, where a plea of not guilty was entered. The matter commenced hearing promptly on 17/10/2019.

2. PW1 Agnes Julia Ndelah testified that she lived in Jeza A. She stated that the deceased was her husband while the accused was a neighbour. It was her evidence that on 27/1/2019, she received information that the deceased had been beaten. She continued that she went to the place where the deceased was. She found that the deceased had been beaten and the face was swollen. She inquired from the deceased who told her that it was the accused who beat him.

3. The witness stated that she found the deceased sitting on a stone and continuously bleeding from the mouth. It was her testimony that she could almost not recognize him. It was her evidence that Joyce and Anjali were present. They called a taxi to take the husband to the hospital. The taxi took them to the police station and later to Kwale Hospital. She recalled that at the police station, the police gave the reports, an OB No. 12/27/1/2019.

4. It was her further testimony that upon arriving at Kwale District Hospital, the deceased was treated and put on a drip, later transferred to Msambweni District Hospital. The witness continued that the deceased told her that the accused shone a torch in the deceased's face. The deceased enquired why the

torch was being shone on him, and the accused beat the deceased. According to her, Joyce (PW2) and (PW4) were present. The deceased died at noon while undergoing treatment. Later, on 29/1/2019, a post-mortem was carried out at Msambweni District Hospital.

5. On cross-examination, she stated that she was called at 6.00 am that the husband was beside the road. She stated that the deceased had not spent the night at home on the night of 26.1.2019. According to her, she had separated from the deceased that very fateful evening. It was surprising that the police did not find this strange that the separation occurred and the deceased's death occurred swiftly, less than 12 hours later. She stated that the husband was at home and brought flour and he used to come and see his children. The witness and the deceased had disagreed as the deceased used to drink heavily. According to her, the husband was beside the road and could not talk much. She did not have a grudge against the deceased and did not know whether there was a grudge against the accused.

6. PW2 was Joyce Talu Kimari, a resident of Jeza A village. She was a niece to the deceased. She testified that on 27/1/2019 she was going to her grandmother's house. She was called by Bibi ya Hussein, to go and see her uncle who was bleeding. She went and saw the deceased, who was beside the road, bleeding. According to her, the deceased told the witness that he was beaten by Ambrose. The deceased stated that Ambrose shone a torch on him and on being asked, Ambrose beat him.

7. With the forgoing, she dashed to PW1's house to tell her of the unfolding events. A cab was called to take the deceased to the police station and hospital. They went to the police to report, and the deceased was later taken to Kwale Hospital. The deceased was transferred to Msambweni Hospital where he died at noon.

8. On cross examination, PW2 stated that the deceased was not living with PW1. She did not ask anything more about the fight. On re-examination, she stated that the deceased stated that a fight ensued when the accused shone a torch on the deceased's eyes.

9. PW3 Judith Bibi Mwasingo is the deceased's daughter. She also knew the deceased. He was a resident of Jeza A. She testified that PW2 called her to say that her father, [the deceased], was injured. She was informed that the family and the deceased were at Kwale Police Station but were going to Kwale District Hospital. She went to the Kwale Hospital and saw her father at the hospital. He bent his head with blood oozing. He was saying that he was in pain. He could barely talk. He died while undergoing treatment at Msambweni Hospital. A post-mortem was carried out, which revealed serious injuries to the ribs, which were broken. On cross-examination, she stated that she did not get an opportunity to talk to the deceased.

10. PW4 Ajali Omar Mwindia testified that she lived in Jeza A in Kwale County. She knew the deceased as Baba Judy. She stated that on 27/1/2019, at 7 pm she was in her house as she was preparing to go to Mombasa. She went to visit her parents. She met her sister Halima sitting outside the house. While in the compound, she saw people gathered, and she approached the scene. She found PW1 seated down at the place where tiles are made. She could not identify the deceased as his face was on his lap and was swollen. The deceased is said to have told PW1 that it was Ambrose who beat him. She called PW3 to inform her and called the village chairman to report. She was later told the deceased had died.

11. On cross-examination, she stated that she recorded her statement on 29.1.2019. Her recorded statement indicated that he was seriously beaten. She disowned the statement and noted that a statement regarding Ambrose was not recorded.

12. PW5 Jumanne Mwakibonje Makoti testified that he was a village elder in Jeza A village for 10 years. He knew both the deceased and the accused. He was called by Mwanahamisi Mwangemi. Later he was called by PW4, that the deceased had been beaten. He advised her to take the deceased to the police

station. He went to the police station and saw the vehicle with the deceased and PW2. The deceased told him that he had been beaten by Ambrose. The vehicle proceeded to Kwale Hospital. He stated that the accused was not at the police station. He stated in his statement that Ambrose Mzera beat the deceased. He stated that what he stated in court was correct.

13. After some lull, PW6 testified on 29/7/2021. Railton Kelly Mwakana Mwangemi, a step brother to the deceased testified that he identified the body at Msambweni District Hospital.

14. PW7 (indicated as PW6) was Cpl. David Barmo. He stated that on 22/1/2019 he was on duty. The date is 5 days before the incident. He was called to the report and enquiries office. He received a report that members of the public were lynching a suspect. He went there and stopped the lynching by talking to the mob, some of whom he knew. He inquired and was told that the suspect had assaulted the deceased who was at Msambweni hospital. The suspect was treated and taken to the cells awaiting investigation of the assault. The victim later died, and as a result, the DCI Matuga Sub-county took over. He stated that he came across the suspect at 4.00 pm after being informed of the beating. There was no one who was arrested for assault on the accused.

15. PW8 (indicated as 7) Kenneth Mwanganga Nguta testified that he is a chicken farmer. On 27/1/2019 at 8.00 am, he was getting ready to go to church. He was called by Evelyne Chao. She explained that they needed assistance to take the deceased in his car. The deceased had his face swollen. He carried the deceased with wife and children in his vehicle to the police station.

16. Some members were waiting for a P3 as others went to the hospital. The wife, son, and daughter went with the injured person to Kwale Hospital. After some time, he went back to the hospital and found the deceased had been taken to Msambweni. Later, Evelyne Chao informed him the deceased had died during daytime. The call was before noon and 2 pm. He inquired and was told that Ambrose was the one who beat the deceased. He had not recorded that the deceased was beaten by the accused.

17. I took over the matter after the transfer of the trial court. Parties complied with directions under Section 200(3) as read with Section 201(2) of the Criminal Procedure Code. The sections provide as follows:

    200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard, and the succeeding magistrate shall inform the accused person of that right.

    201(2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.

18. This was after the Presiding Judge gave directions that the matter proceeds before me. The next witness was PW9, Mzungu Ndaro Juma. He states that he lives at Jeza A, and is a secondary school Deputy Principal. On 27/1/2019 at 8.30 am, he went to buy credit and was told that his tenant, the accused, was being sought over a person who was assaulted. A person came and went to the accused's house and shouted why the accused killed his father. The accused was picked up from the house and handed over to the police. On cross-examination, he stated he did not know who killed the deceased. He stated that the accused had not had any issues since 2014.

19. PW 10 was CP Stephen Muli of Moi International Airport DCI. He stated that on 28/1/200, he was at Matuga DCI when he was assigned to take over the case reported via OB 41/27/1/2019 by Agnes Ndela, PW1. He stated, quite wrongly that the accused was arrested at the scene. PW9 had indicated that the accused was arrested while at his rental house in PW9's rentals. They recorded statements from witnesses, 6 of whom, had said that they talked to the deceased. The matter was hitherto reported vide OB 12/27/1/2019. He sought to produce photos which were objected to except 2. I upheld the

objection as the photos were not relevant, and they were not served on defence advocates. The 2 photos were produced as exhibits 1 and 2. The witness wrote a letter to Scene of Crime Msambweni who received the photo exhibits.

20. On cross-examination, he stated that he went to the scene the same day. On checking his notes, he stated that it was at 1820 hours, though photos were taken earlier. He stated that the accused and the deceased were not neighbours. It was his testimony that he arrested the accused on account of what people said since no one witnessed the incident. His investigation showed that the deceased and the wife were living together. It was his evidence that the accused had not been beaten, though he was not there when the accused was being beaten. PW1 had not told PW10 that they were living apart.

21. Dr. Hassan Mwadoma gave evidence and produced a postmortem report as Exhibit 5. He gave the extensive nature of injuries. The deceased was hit with a blunt object on the head and face. The time of death was not ascertained at the time of carrying the post-mortem due to rigor mortis. He stated that a fall could cause the death.

22. I found the accused with a case to answer. The accused gave unsworn evidence. He stated that the deceased was a drunkard, but he had not seen the deceased on the material day.

Submissions

23. The Prosecution filed submissions dated 25.10.2024. It was submitted that circumstantial evidence was the basis of proving the offence as there was no direct witness who saw the accused kill the deceased.

24. The prosecution also relied on the case of Moses Wanjala Nagira vs Republic (2016) eKLR to submit that the facts revealed a dying declaration which was admissible in evidence as an exception to the rule against admissibility of hearsay evidence.

25. Based on the application of the dying declaration, the prosecution submitted that PW1, PW2, PW3 and PW5 all heard the deceased prior to his death that he was beaten by the accused after the accused had shone a touch on his face. The deceased identified the Accused by recognition. Reliance was placed on Reuben Taabu Anjoroni & 2 Others vs Republic (1980) eKLR.

26. It was also submitted for the prosecution that malice aforethought as required under Section 203 of the Penal Code was proved beyond reasonable doubt.

27. On the part of the accused person, submissions dated 18.10.2024 were filed. It was submitted for the Accused that the alleged dying declarations were not uttered spontaneously by the declarant and their reliability was questionable.

28. Further, it was submitted that a dying declaration ought to be sufficiently corroborated. Reliance was placed inter alia on James Irungu Muthini & Another vs Republic 92009) eKLR to submit that the alleged dying declaration was also not corroborated by other independent evidence.

29. In conclusion, it was the submission of the Accused person that the prosecution had not discharged its burden under Section 107 of the *Evidence Act* by proving the case against the accused person beyond reasonable doubt.

Analysis

30. The evidence tendered was neither direct nor circumstantial. PW1 lied on oath that they were not living together with the deceased and that they separated that very day. She also led the police down a garden path on two aspects. First that someone was being subjected to mob justice. PW6 was categorical that the police arrested the accused from his house. There was no evidence that the accused ever met the

deceased. Indeed, the only independent witness was categorical that he only heard rumours, but not from the deceased, that Ambrose was beating him.

31. The widow was not truthful. She left a lot of gaping holes that could not be covered. If the duo separated that evening, then there can be no history of the husband coming home and bringing flour and seeing children as a routine. The only thing that could have occurred was the separation on the fateful night. The witness did not find it useful to tell the police that very fact. PW10 was unequivocal that separation did not arise. If the deceased came that evening and brought flour, the witness was surely under a duty to state how the deceased left the house. This is crucial given that she was the last person seen with the deceased, alive. The testimony on record suffices. Though alive in the morning, the deceased was in good health when he brought flour and saw children. The deceased was not so happy and in good health in the morning.

32. The doctrine of last seen is not alien to our jurisdiction. In R Vs ECK, Lessit J in her analysis of the doctrine of the last seen with the deceased alive, stated:

> Regarding the doctrine of the last seen with the deceased, I will quote from the Nigeria: Court case of Moses Jua Vs the state (2007) (PELR – CA/11 42/2006.
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> The court while considering the last seen doctrine held: -
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> > " Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased."

33. The court should also consider corroboration on allegations of the last seen person. In the case of Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh, JT 2006 (4) SC 16 the Court held:

> " That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration."

34. The above cases accord with Section 111(1) of the *Evidence Act* which states that:

> " (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him. Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: -Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt to the guilt of the accused person in respect of that offence."

35. It was surprising that the witness did not note the irony in her evidence that the separation was on the night but could not know whether the deceased stayed with his brother-in-law for being a drunkard. Undoubtedly, the deceased could not be staying with someone between the evening of 26.1.2019, when the separation occurred, and 27.1.2019, when his badly beaten self was discovered. The deceased was reportedly found in pain and could not talk much. The deceased was just found a 6-minute walk from his house and 15 minutes from the Accused's house. It is not plausible that the deceased was beaten elsewhere. The most plausible explanation could only be given by the witness PW1, but it was not.

36. The story of separation is simply false. The deceased must have been beaten in his own house and deposited by the roadside. The deceased does not appear to have been in a state to speak. I do not believe for a minute that he stated who beat him. To make matters worse, the alleged statement does not amount to a dying declaration. The deceased had already left his repair shop, 25 minutes away, and brought flour. The witness was hazy about how and when the deceased left the house.

37. On the other hand, PW2, Joyce Talu was PW1's niece, being PW2's mother's first-born sister. Bibi ya Hussein reportedly informed her of the incident. She went to the place where the deceased was and found him badly beaten. The deceased told her that it was Ambrose who beat him. They reported the matter to the police and went to hospital. She did not hear the deceased telling PW1 about the incident, whereas PW1 had maintained that PW2 was there. She stated that she knew the deceased was not with PW1, and she did not know where the deceased stayed. How could she not know when separation only occurred the very night? The issue of a fight, which is crucial, was elicited only in re-examination. Evidence on record was that the accused was not injured at all. That rules out having been beaten or fought with the deceased.

38. PW3 Judith Bibi Mwasingo, the daughter of the deceased, stated that the deceased could barely talk. The witness did not have an opportunity to talk to the deceased. Her information only came from Joyce, PW2. PW3 was a more believable witness. She only gave evidence of her participation. She stated that the parents were separated, but she knew where the father carried on business. From her evidence, it is clear that the separation occurred long before the fateful night. The only troubling question was why PW1 and PW2 did not find this information to be useful to give to the police.

39. PW4 was dealing with the matter long after the incident. His evidence was from PW1, not from the deceased. He disowned his statement. The alleged statement that the deceased lifted his head and told him that Ambrose beat him was conveniently forgotten, only to be remembered at the trial. Such evidence is not credit worth. The witness did not even know that at the time of his alleged finding of the parties at 7 pm, the deceased was long dead.

40. PW5's evidence was inadmissible hearsay. He also gave a different version of his statement. Initially indicating that the information was from the deceased only to attribute it to PW1.

41. PW6, Railton Kelly Mwakana, a stepbrother, only witnessed a postmortem. PW7 Corporal David Barmao, testified that on 22.1.2019, he was on duty at Kwale sub-county hospital as a driver, where he had taken a prisoner. He received a report that there was a report of attempts to lynch a suspect near Kwale High School. He went there and recovered the suspect, who members of the public had arrested. He stated that the members of the public told him that the deceased was assaulted. This incident was said to have happened at 4 pm. The suspect was said to be the accused. He stated that the accused had called him on phone to save him from the lynching.

42. The story by Corporal David Barmao, has every detail wrong. The date was 3 days before the incident. Even taking the date as 27th and not 22nd, there was no evidence of why the Accused was arrested. The evidence of PW7, who took the deceased to the hospital, and a reasonably independent witness, did

not hear any of the stories of the accused's involvement in spite of the witnesses saying the deceased said so. The story came from family members. The only word the deceased mumbled was shoes. He also did not indicate in his statement that the accused beat the deceased.

43. The evidence of PW 9 was succinct. The accused was arrested by a mob from his house. The people who arrested him did not testify based on the suspicions that the accused beat the deceased. On the other hand, Corporal Muli testified as PW10, stating that he investigated the case. PW10 said that the accused was arrested at the scene, identified by the wife, PW1. This is despite his earlier arrest by Corporal David Barmao. He knew the accused, who allegedly called him. How was he again being arrested by PW10? He stated that 6 of the witnesses said they talked to the deceased.

44. However, only PW1 and 2 indicated that piece of evidence. This was contradicted by PW3 and PW4, who noted that the father could barely speak. The witness confirmed that the accused was arrested based on hearsay. He even found that the deceased and PW1 lived together, meaning that PW1 was lying. The evidence of PW10 indicated that had he pushed a bit; he would have found that some of the witnesses were persons of interest.

45. The prosecution had a duty to prove that the three ingredients of murder charge against the accused person were proved. These ingredients were set out in the case Anthony Ndegwa Ngari v Republic [2014] eKLR. Where the court of appeal (Visram, Koome & Odek, JJ.A) stated as doth: -

> For the offence of murder, there are three elements 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 that 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. (See Nyambura & others-vs-republic, [2001] KLR 355).

46. To address the three ingredients, that is, the death mens rea and actus rea, the court is obliged to examine all the evidence to the required standards. Malice aforethought is provided for under Section 206 of the Penal Code as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-
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> 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;
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> (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;
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> (c) an intent to commit a felony;
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> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

47. There is no doubt that the deceased herein died. It is equally not in doubt that the death was unlawfully caused. The cause of death was head injury secondary to blunt force object on the head and face. The body had multiple lacerations on the face and head attained by blunt injury to the face and head. The next question is whether the accused caused the death of the deceased.

48. There was no direct evidence linking the accused to the death of the deceased. This leaves two aspects or means of establishing actus rea and mens rea. In this case, the first principle we shall address is circumstantial evidence, and the second is a dying declaration.

49. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. The Supreme Court in the case of Republic v Mohammed & another (Petition 39 of 2018) [2019] KESC 48 (KLR) (15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ) posited as follows regarding circumstantial evidence:

> " 55. The law on the definition, application, and reliability of circumstantial evidence has, for decades, been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." 6 It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence...."
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> 56. On its application, circumstantial evidence is like any other evidence. Though it finds that its probative value is reasonable and not speculative, inferences to be drawn from the facts of the case, and, in contrast to direct testimonial evidence, it is conceptualized in the circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:
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> > " ...with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ...."
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> 57. This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence "is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics."
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> 58. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing from inferences from circumstantial evidence." The court should also consider circumstantial evidence in its totality and not in piecemeal. 12 As the Privy Council stated in Teper v. R [1952] AC at p. 489 "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also, in the words of the Indian Supreme Court,

> " the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on the reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "... 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, ..."....

50. In the case of circumstantial evidence, the prosecution had the duty to fully establish the circumstances from which the conclusion of guilt is to be drawn in the first instance and, therefore, need for the trial court to ascertain that the facts sought to be relied on were proved individually. In Abanga Alia Onyango Vs Republic Criminal Appeal No. 32 of 1990, the Court of Appeal stated thus:

> It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (1)
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> i) The circumstances form which an inference of guilt is sought to be done must be cogently and firmly established.
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> ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
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> 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 accused and no one else.
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> In Deepok Sarna Vs Republic the court of Appeal stated that: -
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> > " In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.
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> > In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court

has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt."

51. As earlier stated herein, PW1 lied on oath that they were not living together with the deceased because they had separated that very day. She also misled the police that there was someone being subjected to mob justice. Whereas this was the case, PW6 was categorical that the police arrested the accused from his house. There was no evidence that the accused ever met the deceased. The only independent witness was categorical that he only heard rumours but not from the deceased, that Ambrose was beating him.

52. The doctrine of last seen, which means that the law presumes that the person last seen with a deceased bears full responsibility for his death, has been succinctly explained in the Supreme Court of Nigeria in the case of Haruna vs AG of Federation (2012) LPELR-SC.72/2010, (Pp. 30-31, paras. F-B) it was held that:

> The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.

53. The doctrine was further addressed by the Court of Appeal in the case of *Kimani vs Republic (Criminal Appeal 41 of 2022)* [2023] KECA 1390 (KLR) which held that:

> " The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened."

54. Therefore, I hold and find that there was no direct or circumstantial evidence unequivocal that the accused was the person last seen with the deceased. The only person who was with the deceased was PW1, who knew what transpired from the evening of 26.1.2019 and 27.1.2019 in the morning. In the case of Dida Ali Mohammed vs R Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR) it was held that:

> Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death...As to when the deceased left the appellant's home and up to where the latter escorted her are maters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the *Evidence Act*, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased." And in the case of Moingo & Another v. Republic [2022] KECA 6 (KLR) this Court reiterated that: The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the

court is justified in drawing an inference that the accused killed the deceased)."See also *Ngeno vs Republic (Criminal Appeal 24 of 2016*) [2024] KECA 757 (KLR).

55. The widow, PW1, was not truthful. She left a lot of gaping holes that could not be covered. Her story was at variance with the rest of the witnesses and there was attempt to fill holes that were apparent in the prosecution's case. It must, however, be recalled that contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit witnesses. In the case of Richard Munene v Republic [2018] eKLR, the Court of Appeal stated that: -

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused."

56. Therefore, as actus reus was not proved on the part of the Appellant, no mens rea could have been established. Malice aforethought can be proved or inferred from the circumstances of the case. Each case will turn on its facts. In Republic v Josephine Mbatha Kimonyi & another [2021] eKLR, Justice, D. K. Kemei stated as doth: -

> The Court of Appeal in the case of Nzuki -V- Republic (1993) KLR stated:
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> " Malice aforethought is a term of art and emphasized that:-
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> 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-
>
> a. The intention to cause death.
>
> b. The intention to cause grievous bodily harm.
>
> c. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from these acts and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts."
>
> Malice aforethought can be inferred from the circumstances of the case. In Republic -V- Tubere S/O Ochen (1945) E.A C.A. 63, the court stated that malice aforethought can be inferred from the following factors: -
>
> a. The nature of the weapon used.
>
> b. The part of the body targeted
>
> c. The manner of killing or in which the weapon was used.
>
> d. The conduct of the accused, before, during and after the attack.

57. In this matter, the killing was ruthless enough to conclude that the action was premeditated. However, the question remains whether there were circumstances and evidence that the actus reus was by the Accused. The court must then carefully summarize the evidence and reach its conclusions as to the guilt of the accused within the required standards. The court must remember that the incidence and burden of proof in criminal matters do not shift to the accused.

58. In his defence, the accused gave unsworn evidence. He stated that he knew the deceased was a cobbler. His family had sent him away. The accused gave the deceased some work, but the deceased did not do it on the said date; he did not see the deceased. Even his landlord, PW9, did not see the deceased.

59. Thus, it meant that the burden of proof lay on the state to prove their case. The accused did not have any burden of proving his innocence. Most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

60. It must be remembered and borne in mind that the accused enters these proceedings presumed to be innocent. That presumption of innocence in the case of R vs. Lifchus {1997}3 SCR 320, the Supreme Court of Canada explained the standard of proof as doth:

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

61. The legal burden is the burden of proof which remains constant throughout a trial as stated in Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

62. Brennan J addressed the standard of proof required in such cases, in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64, that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

63. From the totality of the evidence, nothing places the accused at the scene of murder. Having discredited the evidence of PW1 and PW2. The evidence of PW2 was doubtful. The question of whether the deceased was staying with PW1 was concealed by the daughters, PW2 and PW3. The evidence was tweaked, especially on the place where the deceased was staying, in order to exonerate PW1 as the potential perpetrator of the crime. She did a bad job of having the deceased outside their house, a 6-minute walk away. The evidence from the duo, which they quickly told others led to the near death of the accused. The hearsay by the witnesses was not corroborated.

64. The evidence did not meet the standard of a dying declaration. The Court of Appeal [Omolo, Githinji JJ A & Onyango-Otieno Ag JA) in David Agwata Achira v Republic [2003] eKLR, stated as follows regarding a dying declaration.

The law on dying declarations in Kenya was laid down in the case of Pius Jasunga s/o Akumu v R (1954) 21 EACA 331 which was cited with approval in the case of Okale v Republic [1965] EA 556 relied on by the appellants counsel. The case Okale v R (supra) was in turn followed in Aluta v Republic [1985] KLR 543 where it was held at page 547 paragraphs 5-10 thus:

> " In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination unless there is satisfactory corroboration".

65. The principles governing dying declarations were considered extensively by Maina J in the case of Republic v Leonida Mongina Kebane [2021] eKLR. Further, Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR enunciated the said principles as doth:

> Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly, by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):

> " The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

66. The good judge discussed those principles as enunciated succinctly in the case of Moses Wanjala Ngaira V Republic [2019] eKLR where it was held inter alia:-

19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from Choge v Republic [1985] KLR 1, citing the predecessor of this Court in Pius Jasanga s/o Akumu R (1954) 21 EACA 331.

> " In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.
>
> In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (Republic v Muyovya bin Msuma (1939) 6 EACA 128. See also Republic v Premanda (1925) 52 Cal 987.)
>
> The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:
>
> > " The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred

> under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).
>
> It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171)."

See also R v Eligu s/o Odel (1943) 10 EACA 90, Okethi Okalo v Republic [1965] EA 555, Aluta v Republic [1985] KLR 543, and Kihara v Republic [1986] KLR 473.

> 20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence."

67. The accused was not shown to have been there or in any way interacted with the deceased. The hearsay started by PW1 and PW2 was the basis for the arrest. The witnesses recanted the very statements they recorded when evidence was fresh. The statements attributed to the deceased did not meet the status of a dying declaration.

68. In the case of Sawe V Republic [2003] eKLR the Court of Appeal stated:-

> "In order to justify a conviction 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 upon. 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 remain with the prosecution. It is a burden which never shift to the party accused."

69. The said words were not spoken by the deceased in a way that he anticipated his death. They were also not shown to have been made in circumstances that amount to dying declaration. The totality of the evidence is that the state fell far short of the standard required in murder trials. The prosecution was unable to prove that the accused committed the offence. In the circumstances, I find that the offence of murder contrary to Section 203 as read with 204 of the Penal Code was not proved beyond reasonable doubt. The case against the accused fails and is accordingly dismissed.

Determination

70. The upshot of the foregoing is that I make the following orders:

    a. The prosecution failed to prove the offence of murder contrary to Section 203 as read with 204 of the Penal Code against the accused. The case is dismissed.

    b. The Accused is released forthwith unless otherwise lawfully held.

    c. The bond is returned to the depositor and the surety discharged.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JANUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Ms. Nyawinda for the State

Mr. Wameyo/Ochani for the Accused

Court Assistant – Jedidah

M. D. KIZITO, J.