Republic v Bett & another (Criminal Case 55 of 2018)
[2025] KEHC 6977 (KLR) (28 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 55 OF 2018

SM MOHOCHI, J

MAY 28, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

EVANS KIPYEGON BETT ..... 1ST ACCUSED

DANIEL KIPKETER LANGAT ..... 2ND ACCUSED

JUDGMENT

1. Joseph K. Korir aged 46 was murdered on the night of 28th -29th June 2018, his body was discovered in his farm in a maize plantation the brutal attack resulted in serious head injuries and the cause was attributed to "fatal head injury secondary to blunt force trauma. The deceased was subjected to beatings as is evidenced with exhibits 2(a-g) of particular significance was exhibit 2c depicting two fencing poles uprooted and laying a few meters from the body. The evidence was silent on the import, however the same might have been the weapons used in the fatal attack.

2. This Court is persuaded that the deceased was killed and Caroline Chepkurgat PW2 confirmed that the deceased was a few hours earlier when she sold him alcohol before he left and that he was tipsy and not drunk when he left.

3. However, this Court is extremely troubled and concerned by this case, the manner in which the prosecution case was presented leading one to conclude lack of seriousness transcending investigations, review, decision to charge and ultimate prosecution. The doubts emanating in this murder case is akin to a fishing net with an array of doubts that are palpable to the extent of questioning why the charges were preferred under the circumstances.

4. Another unique feature of this case was that the investigating officer was never called to testify.

5. The accused, Evans Kipyegon Bett and Daniel Kipketer Lagat were arrested sometimes around November-December of 2018 and charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The Particulars are that on the on the 28th Day of 2018 at Belbur Village in Gicheha Sub-location in Rongai Sub-County, Nakuru County murdered Joseph Korir.

6. The accused pleaded "not-guilty" to the charges and the prosecution called thirteen (10) witnesses to establish a prima facie case against the accused. The Court found that the prosecution had established a prima facie case against the accused's and placed them to their defence. The accused's elected to give sworn evidence without calling any witnesses.

Prosecution's Case.

7. PW1, Beatrice Wambui Gikaru, the deceased's wife recalled discovering the deceased body in the early morning of the 29th June 2018 and that the deceased had failed to return home the previous night.

8. She alluded to a land dispute between the deceased and the family of the accused's which had since been settled by the chief and elders.

9. Of significance was her testimony that upon raising alarm "unspecified neighbors suspected the three brothers owing to the previous land dispute.

10. PW2,Caroline Chepkurgat a neighbor recalled seeing the deceased few hours earlier when she sold him alcohol before he left and that he was tipsy and not drunk when he left.

11. Of significance was that, the deceased had busaa worth ksh 150/- and left at alone around 8.pm headed to a neighbor place, the neighbor was named as "Lucy"

12. That the following morning at 7.00am she responded to the alarm raised went to the scene and saw the body of the deceased.

13. Sher never knew what happened to the deceased after he left her place.

14. PW3, Hilary Kibet Kirui. A neighbor testified how on the night of 28th June 2018 the deceased passed by to collect milk and vegetables only to find that they were finished, that is was raining and the deceased requested witness to escort him home to which he declined.

15. The deceased requested PW3 to remain in the kitchen until "pombe ikiisha" he would leave and that was the last time the witness saw him alive.

16. That the next morning at 10.00am while at school the teacher informed them of the discovery of the deceased body that morning. That he told his teacher of his encounter with the deceased the previous night.

17. PW4 Anna Marindany , a neighbor testified on the events of discovery of the deceased body on the morning of the 29th June 2018.

18. PW5, Susan Nyambura Mutai, testified on the events of discovery of the deceased body on the morning of the 29th June 2018.

19. PW6 Robert Mutai Rono, Son to Deceased based in Kajiado, testified how he was notified of the unfortunate incident on the 3rd July 2018 traveled back home, identified the body and witnessed the conduct of the post mortem examination.

20. PW7, Robert Siele Kipngetich, recalled that on the 28th June 2018 he was working as a security guard at Usoja Belbar Saw Mill together with a colleague Alfred brother to Daniel Kipketer Langat the 2nd

Accused and that Alfred spoke to his brother at night 11pm and wanted to leave early in the morning at 4am of which the witness asked him to wait until 6.00am.

21. That at 6am both of them left only to respond to the alarm and find the deceased whom he described as "Baba Jenny" dead, that Alfred and the 2nd Accused had equally responded and were at the scene.

22. The witness did not know why the accused were before Court.

23. PW8, Inspector of Police Abdi Nassir Mohasmmed Noor, he was the officer in charge of Salgaa Police Station, the arresting officer and recalled how on the morning of the 29th June 2018 at 7.30am he received a report of a dead body being found, he recorded the incident in the Occurrence book and visited the scene in the company of Corporal Joash Mashuria.

24. That he found the body lying in a maize plantation, injury on head and neck, the body was half-naked, lower part. The trouser was below the knees. Near the body were 2 fencing posts. They appeared to have been used to hit him. He called scenes of crime personnel. They took photos. They took body to Nakuru Municipality Mortuary, post mortem, cause of death was injury on head. That they learnt that, there had been domestic quarrel some years before. That they recorded statements and forwarded file to DPP. The file came back with recommendations to cover certain points. That in 2019, one young man came to his office and confessed that he had been given Kshs. 3,000/= by the 1st accused to commit the said murder.

25. The Court hastens to observe that the accused had already been charged by 2019 and as such the witness appear to have quoted a wrong year, the accused were arrested in November December 2018.

26. That, he took the 2nd accused to OCS Rongai for the confession to be recorded. From there he learnt that he had been taken for mental assessment and taken to Court.

27. The witness identified the 2nd accused Daniel Kipketer as the person who came to record confession that was recorded by Chief Inspector Sharamo Roba.

28. The witness recovered the posts produced as Exhibit 1 (a) and (b).

29. While he stated to have been the arresting officer he anchored the arrest of the two accused person upon a confession which confession was never produced in evidence, but failed to describe exactly when and where the 1st accused was arrested.

30. In fact, the arrest remains dubious to the extent that is unclear as to whether the constitutional pre-trial rights were observed including being presented before the Court as soon as reasonably possible, but not later than twenty-four hours after being arrested, unless the twenty-four hours end outside ordinary Court hours or on a day that is not an ordinary Court day (Art. 49(1)(f)).

31. The phrase 'brought before the Court as soon as reasonably possible' requires the Court to take into account the circumstances in each case. For instance, a person arrested on Friday morning ought to be presented to the Court before the end of the day, and the Court should seek an explanation from officers for any delay. The continued detention before charging an accused must be sanctioned by the Court (Section 36A, CPC), and any extension must be sought before the expiry of the twenty-four-hour period (36A (8), CPC; Milen Halefom Mezgebo v Attorney-General & 2 Others High Court at Nairobi Petition 205 of 2011). The accused should be charged on this first Court appearance, be informed of the reason for the continued detention, or be released (Art. 49(1)(g), Constitution of Kenya).

32. The entire prosecution case is silent on the arrest of the 1st Accused while in the defence case the 1st accused in evidence claims how in December while in the company of the deceased son and PW2'son

went to the Salgaa police station where he was coaxed to admit so as to be released. While the 2nd Accused narrated how at the time of the incident he had been arrested together with his two other brothers, held in police custody for two weeks brought to Court and released for want of evidence. That in November he was arrested at Salgaa police station when he went there for stamping of certain documents and transferred to the Rongai police station and her was charged thereafter.

33. PW9, Dr Antony Wainaina. a General Practitioner Doctor based at Nakuru PGH produced post mortem report Exh.4 of the autopsy done on 3rd July 2018.

34. On external examination it was noted; the body had no clothing and was an African male 46 years' good nutrition average built. The postmortem changes, the body and rigor mortis and time of death was estimated at a week:

    i. Laceration on the right orbital region 4 x 1 cm.

    ii. Laceration on behind ear 4 x 1 cm.

    iii. Laceration on the right temporal region 3 x 1 cm.

    iv. Left ear laceration on pinna 2 x 2 cm

    v. Brises on left neck region 1 x 1 cm and 2 x 1 cm no petechial, no cyanosis.

35. The cause of death was opined to be severe head injury due to multiple blunt force trauma.

36. PW10 Inspector Denis Mbogo, a scene of crime investigator stated how on the 21st June 2023 he received a mobile phone with a memory card Serial number 38842008792410 requesting he processes the photographic prints which he did.

37. The witness produced Exhibit2 (a-g) a certificate of electronic evidence as Exh 3(s).

38. The witness indicated that the phone belonged to a police officer whose name was never disclosed.

39. The Exhibit forwarding memo by one Sgt Samwel Maina was never produced in evidence. The chain of custody of the evidence remains suspect and dubious.

40. At the close of the prosecution's case the Court found the accused with a case to answer and they were placed to their defence.

41. The accused elected to tender sworn evidence without calling any witnesses.

Accused's Defence Case.

42. That he was accompanied by a son of the accused by the name Robert to the police station in December, 2018 as at the time, himself as well as the son of the deceased were being considered suspects. Notably he was just about 18 years old at the time.

43. He further stated that, having been persuaded by 4 police officers, he was compelled to make some sort of confession, and since the 2nd accused person was reporting to the same police station on the same day and he saw him, he found him to be the easiest target since he was already a suspect given the suspicion already at the neighborhood on account of a previous land tussle.

44. He confirmed being good friends with a son of the deceased, that he would eat and spend nights at the house of the deceased, and even attended the same church.

45. He stated that upon reaching the police station, they were put in separate rooms and awaited for a while before he was taken to another room and interrogated by 4 police officers, and that he was scared of them. He stated that the police officers told him that they would release him if he confessed.

46. Upon further cross examination he stated that, his mother did not go to the police station, and only came a few days later.

Accused's Submissions.

47. The accused through counsel submitted that the prosecution has not established a prima facie case. The collective testimonies failed to provide direct evidence linking the accused to the murder. That much of the evidence is circumstantial, speculative and based on hearsay.

48. Counsel contended that the cause of death does not alone implicate the accused. That no evidence was provided to refute the assertion that intruders were responsible for the victim's death. Additionally, there was no proof of ownership of the alleged weapon nor were fingerprints obtained to substantiate the claim.

49. It was also submitted that, the prosecution's reliance on past domestic disputes is insufficient to prove intention to kill or cause grievous bodily harm. That the presence of food in the deceased's mouth suggests a normal interaction prior to the incident contradict the notion pf premeditation.

50. Counsel further submitted that, the forensic evidence was inconclusive in that it does not link the accused directly to the crime and further does not establish the accused direct involvement.

51. Reliance was placed on Miller v. Minister of Pensions [1947] 2 ALL ER where the standard of proof was set. Further refence was made to R.T. Bhatt vs Republic [2021] eKLR. It was argued that the circumstances presented are not enough to exclude reasonable hypothesis of innocence.

Analysis and Determination.

52. I have considered the evidence presented and the sole question to be determined is whether the prosecution has established its case beyond reasonable doubt. The accused is charged with murder under Section 203 as read with Section 204 of the *Penal Code*.

53. Murder is an offence of specific intention. The prosecution is tasked with the duty to established that there was a death, the death of the deceased was caused by the accused, actuated by malice and was premeditated.

54. The two sections provide that: -

> " 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
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> 204. Any person who is convicted of murder shall be sentenced to death."

55. There is no dispute of the deceased's death. This was confirmed by PW7 who produced the post mortem report EXh1 conducted by Dr. Wainaina who carried out the post mortem on the deceased's body and reached a conclusion that the cause of death was severe head injury due to multiple blunt force trauma to the head in keeping with hematoma. Further and PW1 to PW12 all confirmed seeing the body of the deceased lifeless. This element was proved beyond reasonable doubt.

56. The second element to be proved is whether the death of the deceased was caused by an unlawful act or omission. The deceased had serious head injuries attributed to blunt force trauma. Such a death is

unnatural and the same can thus be attributable to an unlawful act or omission. I am persuaded that the deceased death was as a result of an unlawful act or omission.

57. The third element to be proved is whether the accused committed the unlawful act or omission that caused the death of the deceased. None of the prosecution witnesses actually saw the 1st or 2nd Accused kill the deceased they all came to the scene after the fact. The case is therefore based on circumstantial evidence.

58. The Court of Appeal in Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi v Republic [2018] KECA 743 (KLR) discussed circumstantial evidence and the tests to be applied before circumstantial evidence can be used to sustain a conviction.

> " However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a Court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in R v. Taylor, Weaver & Donovan [1928] CR. App. R. 21:
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> "It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial." (See also Musili Tulo v. Republic Cr. App. No. 30 of 2013).
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> Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v Republic, Cr. App No. 32 of 1990 this Court set out the conditions as follows:
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> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." (See also Sawe v. Republic (supra) and *GMI v. Republic, Cr. Ap. No. 308 of 2011*.
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> In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

59. The take away is that circumstantial evidence has to overwhelmingly point to the guilt of an accused person. It must also rule out any other reasonable speculation other than that of guilt of the accused. Finally, the circumstantial evidence must also exclude co-existing circumstances which would be prone to destroy or diminish such a speculation.

60. In this regard the only Circumstantial evidence construct was a land dispute preexisting that had been resolved years earlier, the said aspect was never fortified in any way and the same remains conjecture. The witnesses neighbor that identified this suspicion were never called to testify.

61. The "Lucy" where the deceased was lastly reportedly headed was never called to testify.

62. No Confession was tendered in evidence and from the evidence, the burden of proof beyond reasonable doubt is therefore on the state to ensure that sufficient evidence is demonstrated before a guilty verdict can be returned an accused person. The standard is not about suspicions. This is because criminal proceedings end up in loss of liberty, punishment, thus highly limiting freedoms. As such, Justice Nyakundi expressed himself in Republic v Daniel Charo Katana [2021] eKLR as follows;

> " It is therefore trite that the state should prove its case so strongly that the evidence leaves the trial Court with the highest degree of certitude based on such evidence. It is to be noted that the concept of reasonable doubt in our criminal justice system is not based upon a sympathy or a whim or prejudice or caprice or sentimentality, jelly fish of a Judge or Magistrate seeking to convict or acquit another human being of the commission of the offence. It is an approach to hold the state to the highest standard of discharging its burden of proof in criminal cases beyond reasonable doubt. It is not a conjecture or a fanciful doubt. It is based on admissible and material evidence to dissuade the trial Court from acquitting an accused person."

63. The final element to be proved by the prosecution is whether the accused's had malice aforethought when they killed the deceased. The prosecution never tendered any evidence on malice aforethought.

64. Malice aforethought is in reference to the accused's intention or criminal liability under Section 206 of the *Penal Code*.

65. Section 206 of the *Penal Code* provides that:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. An intent to commit a felony;

d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

66. In considering whether there was malice the Court of Appeal in Victor Owich Mbogo v Republic [2020] eKLR cited the case of R vs Tubere S/O Ochen [1945] 12 EACA 63 where the Court set out the perquisites for establishing malice aforethought thus;

> " To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident".

67. Similarly, the Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, held as follows:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed....."

68. In restating the reasoning in Victor Owich Mbogo v Republic (supra) the Court held thus: -

> "No doubt malice aforethought was established in the present case when the appellant viciously struck the deceased on his neck and head with a panga thereby severing his spinal cord at the neck. By so doing, he must have known that he would grievously injure the deceased or worse still, kill him. As such, we are indeed satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the appellant, conclusively established malice afore thought."

69. The serious fatal head injury would not have been inflicted with any other intention other than to kill the deceased. Compounded with the manner in which the body of the deceased was found. To this end I am persuaded that the prosecution has not proved beyond reasonable doubt presence of malice aforethought.

70. This Court however notes that in the absence of direct or indirect, primary or secondary evidence implicating the 1st Accused or 2nd Accused person then such a malice aforethought construct becomes academic. While the deceased might have been murdered, there exists no shred of evidence implicating the 1st or the 2nd Accused persons.

71. This Court under Section 119 of the *Evidence Act* can make a presumption the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

72. In this instance the failure to call the investigating officer was a further manifestation of the shoddy investigations conducted.

73. Based on the evidence presented the doubt manifest is sufficient to any rational person in dissatisfaction that the prosecution proved beyond reasonable doubt that Evans Kipyegon Bett and Daniel Kipketer Langat unlawfully caused the death of deceased.

74. I therefore find, that the prosecution has failed to prove the charge of murder beyond reasonable doubt and hereby find the accused not guilty of murder of the deceased herein. In conclusion, I do find that the prosecution has failed to prove the charge of murder against Evans Kipyegon Bett and Daniel Kipketer Langat beyond reasonable doubt.

75. Evans Kipyegon Bett and Daniel Kipketer Langat are found Not Guilty of the offence of Murder and consequently I hereby acquit them under Section 215 of the *Criminal Procedure Code*.

76. They shall forthwith be set free, unless otherwise lawfully held.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 28TH DAY OF MAY 2025

MOHOCHI S.M.

JUDGE