



**Republic v Bett (Criminal Case 26 of 2023)
[2024] KEHC 1965 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL CASE 26 OF 2023
RB NGETICH, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

WILBERFORCE KOSGEI BETT ACCUSED

JUDGMENT

1. The accused Wilberforce Kosgei Bett has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charge being that the accused person on the 3rd day of October, 2014 at Kisorobi village, Seguton Location within Koibatek Sub- County of Baringo County, murdered Joseph Kibet Chepkwony.
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 4 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. PW 1 Dennis Kipkurui testified that on 3rd October, 2014, at 6:00 a.m, he was at his grandfather’s home at Kisorobi village where he went to make tea for his grandfather as usual. He said his father woke up and asked for tea but he informed him the tea was not ready. He said the grandfather carried a panga and went toward the river promising to go back for tea later. When he went out, he saw the accused who was carrying a piece of wood a meter long following the same path his grandfather used. He later saw accused come back to his house carrying the same panga his grandfather had. Pw1 said he proceeded to school.
4. He testified that when he arrived from school at 12.40 pm, he did not find his grandfather and he also realized that his grandfather had not taken tea. He later learnt from his cousin that his grandfather was lying on the ground with his neck tied by a belt to tree branch. He rushed to the scene and found that his grandfather was lying on the ground with his neck tied using his belt to a tree branch. He screamed for



- help and his uncle Nicholas and villagers went to the scene. He said police later arrived, asked accused where he got the panga his grandfather had and arrested him and took the body of his grandfather in a land drover. He stated that they lived in the same house with his grandfather and his mother Ann who is mentally challenged. He further testified that the relationship between accused and the deceased was not good as they kept disagreeing and the accused would tell the deceased that he would kill him.
5. PW2 Alfred Kipkoech Bett who is a son to the deceased and a brother to the accused testified that on 3rd October, 2014 at 7:30 am, he went to his father's house and found his sister Ann Chemutai and shortly he saw the accused coming from his house carrying his father's panga. He went to do casual work until 10:00 am when he tried to call his father but his phone was off. He continued working up to about 12:00 noon. He saw a missed call from his sister in law and went home. On reaching home, he saw people going towards the river. He learned from his niece Chepkirui daughter that their father had been killed near the river. He found his father lying on the ground with his neck tied using his belt and was flat on the ground bleeding from the mouth and with an injury on the right front of head. He said he moved aside and found Wilberforce with a panga. He said on asking accused where he got their father's panga, he said he found it at the scene. He reported at Timboroa police station and on coming back, he found the body had been taken by police. He said accused is his elder brother and had no grudge with him before the incident but he constantly quarreled with his father and had told him that he would kill him.
 6. PW3 Nicholas Kiplagat Bett a son to the deceased and a brother to accused testified that on the 3rd October, 2014, he was asleep at home and at 6:00 a.m., the deceased went to his house to ask for phone battery and he gave him through the window and while giving him the battery, he saw his father had a panga in his hand. He said he headed to where grass was and it was his last time to see him. At 9.00 a.m, he went to Kapsoit Primary School and on the way about 400 meters from his home, he met the accused tilling in a neighbor's land. Later while in school, a neighbor called him asking if accused had disagreed with his father Wilberforce and later a school committee member informed him that his father had committed suicide. He was later informed that accused was suspected for killing his father.
 7. He said he went to the scene and found his father's body in their farm laying facing down and neck tied with a belt to a tree branch. Upon him asking where accused was, he appeared from the crowd and said his father had stress and had committed suicide. He said accused wanted his father's property. He further stated that accused had a mark on his face above the eye and when the deceased's body was removed, he saw accused's hammer on the grass a few meters away from the body. He removed it from the scene, kept in the house and later gave it to police from Timboroa police station. Later together with his uncle Jeremiah Chepkwony, they identified the deceased's body to the doctor and witnessed postmortem done on the deceased's body.
 8. Pw4 Jane Chepkoech Tanui testified that on the 3rd October, 2014, she was in Mercy Hospital taking care of her mother when she received a call from her father at 6: 30 a.m. asking how her mother was doing and inquired of the Hospital Bill and that when she called him at 9 a.m. and later at 3 p.m., she could not reach him. Later a neighbor sent her money to come home and on reaching home at 6p.m, she learnt from her daughter that her father had been killed by accused. She said the accused had been quarrelling with the deceased over land.
 9. The prosecution informed the court that the investigating officer had failed to avail the remaining witnesses despite this matter having been pending in court for about 9 years. she said the investigating officer failed to give reasons for failure to avail the remaining 6 witnesses. The defence counsel opposed adjournment on ground that the accused has been in court for long. The court noted that this matter has been pending for over 9 years and declined to adjourn hearing. The prosecution closed their case with evidence on record.



10. By ruling delivered ruling on the 30th day of November, 2023, the court found that prima facie case had been established to warrant accused be placed on his defence.

Accused's Defence Case

11. The accused gave a sworn statement. He denied killing the deceased who was his father on the 3rd October, 2014. He testified that on 2nd October, 2014 at 4 p.m, he was coming from Kisorobi shopping centre with his wife and passed a short cut through a neighbour Michael's farm when he saw his father the deceased come from the opposite direction. He said he crossed the fence to his father's land to pave way for his father to pass. He said his mother was admitted in Eldama Ravine Hospital and his dad appeared disturbed. He said he told his father to follow up with the issue of his mother in hospital so that the bill does not rise and that he then left and went home.
12. He further stated he went to remove iron sheet from the house and his father saw him and just passed. He said he slept and the next morning, he went to a neighbour to Benard to collect a debt for work done and went to Cherotich's farm where he worked upto 2:00 p.m then he heard his sister Chemutai screaming. He said he went to check what was happening and on crossing the river, he saw a crowd and the deceased neck tied to a tree branch. He said he was shocked. He said his brother Nicholus called the police from Timboroa police station who came and interrogated people but did not interrogate him immediately. He said his brother mentioned him when police asked who had conflict with the deceased. He said he did not talk to his father in the morning and further denied seeing James Kutto in the morning. He stated that the hammer said to have been found near the scene was his but it was not at the scene. He said it was brought from where he was building which is about 200M away and he was present when the hammer was taken and then they went for a panga. He stated that the police had not arrived when the hummer was brought and the people who were at the scene did not suspect him but this issue came up later. He stated that he was taken to the police station and interrogated and he remained in the cells for 14 days and another 14 days. He stated that there is no proof that he was involved in the offence and prayed to be released.
13. Both the prosecution and defence opted not to file written submissions.

Analysis And Determination

14. Section 203 of the penal code provide the three ingredients for the offence of murder as follows: -
 - a. proof of death,
 - b. proof that death was due to an unlawful act or omission was on the part of the suspect and
 - c. that the unlawful killing was with malice aforethought.
15. From the evidence adduced, it is not in dispute that the deceased died. Though the Postmortem was not produced on ground that the prosecution failed to avail the 6 remaining witnesses, the 4 witnesses who testified all said the deceased died on the night of the 3rd October, 2014. This was not disputed by the accused who was the son of the deceased. The accused in his defence denied killing the deceased but confirmed that his father was found dead near a river with his neck hanging from a tree branch.
16. On whether it is the accused who caused the death of the deceased, there is no direct evidence adduced. No eye witness testified. I wish to consider whether there is circumstantial evidence linking the accused to the death of the deceased.



17. What constitutes circumstantial evidence was considered by the court of appeal in the case of *Sawe v Republic* [2003] KLR where the court stated as follows:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any hypothesis other than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances relied on. The burden of proving facts which justify the drawing into this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubts”.

18. The Court of Appeal has set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction in the case of *Abanga alias Onyango -V- Republic* Criminal Appeal No. 32/1990 UR where the court stated as follows:-

“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, unerring 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 no one else”.

19. From pw1 ‘s evidence, the accused was seen moving in the direction where the deceased had gone. Even where the only evidence available is circumstantial evidence, the prosecution is required to prove beyond reasonable doubt that the accused committed the offence. Besides being seen by Pw1 walking towards the direction of the deceased, pw3 testified that the accused’s hummer was at the scene. The accused however denied and stated that the hummer was brought to the scene. The hummer was not produced in court neither did the officer who received it testified in court. The accused also denied having had the deceased’s panga. The same was not also produced in court. Accused in his defence said police interrogated his brother Nicholus Pw3 herein but did not interrogate him (accused) and he said when asked who had conflict with the deceased, pw3 said accused had conflict with the deceased and had threatened to kill him. Accused on the other hand said his father had stress and he had committed suicide. The cause of death was not confirmed in court as the postmortem report was not produced in court. The prosecution did not therefore rule out death by suicide and the cause of death was not therefore ascertained by the doctor.

20. In the case of *Republic vs. Joash Omal Juma* [2016] eKLR, the Court held inter alia that:

“...Having found that indeed the Accused assaulted the deceased which apparently caused his death, there was no medical evidence to suggest the above findings! From the record although Dr, Matilda Wendo PW7 marked the post-mortem report the author of the same Dr. Dickson Michana was not called to produce the same. Its trite law that for the offence of murder to be established the postmortem report ought to be produced. In fact, this court vide its ruling of 17th November 2014 re-opened the case afresh under the provisions of



Section 150 of the Criminal Procedure Code and Article 159 of the constitution so as to allow the prosecution time to call the said doctor. The prosecution for the reasons best known to it failed to seize the opportunity. That opportunity was well seized as expected by the defence.

Although, therefore there is factual evidence that its the Accused who assaulted the deceased based on the evidence on record, medically there is no such sufficient evidence. There is nothing to verify the cause of deceased's death..."

21. That further in the case of Republic v W C C [2017] eKLR, the Court held inter alia that:

“...The failure to bond a doctor and failure to produce the autopsy report in respect of the two deceased children is fatal to the prosecution case. Without such evidence notwithstanding during the strength of any other available evidence a charge of murder cannot stand...”
22. In addition, in the case of Republic v Cheruiyot Serem & Another [2014] eKLR, Lesiit, J (as she then was) held inter alia that:

“...It was necessary for the prosecution to call sufficient evidence to establish its case. The requirement is for the prosecution to call adequate evidence to support its case and that the prosecution failed to do. The court is in the circumstances justified to make an adverse inference that the reason the vital witnesses were left out was because if their evidence was adduced, it could have tended to be adverse to the prosecution case...”
23. In Benson Ngunyi Ndungu v Republic Nairobi Criminal Appeal No. 171 of 1984 (Nyarangi, JA & Platt & Gachuhi, Ag. JA stated as follows:-

“Where the body is available and the body has been examined, a post-mortem report must be produced, 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. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some Hospital or Police file. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the Judge.”
24. From evidence adduced, there is doubt that the accused had bad blood with the deceased. They quarreled frequently and was suspected to be the one who killed the deceased. However, in view of the fact, that there was evidence showing deceased's neck was tied to a tree branch which broke and no prove of death was confirmed to court; Circumstantial evidence was not cogently and firmly established to rule out death by suicide and in my view, it will not be safe to convict accused on evidence adduced. The doubt that arises goes to benefit the accused.
25. Final Orders:
 1. Accused is hereby acquitted.
 2. Accused is hereby set at liberty unless lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET
THIS 29TH DAY OF FEBRUARY 2024.**

.....



RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kipkulei for Accused.

Ms Ratemo for State.

Sitienei/Kibet – Court Assistants.

