



**Republic v Jeptoo & another (Criminal Case 57 of 2020)
[2024] KEHC 2065 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 57 OF 2020
JN KAMAU, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SERAH MUSIMBI JEPTOO 1ST ACCUSED

VICTOR SHIGANGA 2ND ACCUSED

JUDGMENT

1. The Accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 2nd day of July 2021 at Gamoi Sub-Location, Gisambai Location in Hamisi Sub-County within Vihiga County, murdered Alfred Keya.”
2. This matter was heard to conclusion by Musyoka J. The Prosecution’s case was heard on diverse dates between 19th October 2021 and 27th January 2023 when the Prosecution closed its case. The said Learned Judge found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on 27th February 2023 and parties were directed to file their Written Submissions.
3. This court became seized of this matter on 17th October 2023 on which day the Accused persons and the Prosecution indicated that they wished to proceed with the matter from where it had reached.
4. The Prosecution’s Written Submissions were dated and filed on 7th November 2023. The Accused persons indicated to court that they would not file any Written Submissions. The Judgment herein is therefore based on the said Respondent’s Written Submissions and the evidence that was adduced during trial.



Legal Analysis

5. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Alfred Keya (hereinafter referred to as the “deceased”) died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
6. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

7. Dr Masika Collins Were (hereinafter referred to as “PW 4”) testified that he conducted the Postmortem examination on the deceased. The examination could only have been conducted if the deceased was dead. In fact, David Kipruto Keya (hereinafter referred to as “PW 3”) attended the postmortem examination and identified the body of his deceased brother.
8. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

II. Cause Of The Deceased’s Death

9. The cause of the deceased’s death was a pertinent issue. PW 4 tendered a Postmortem Report dated 6th July 2021 in respect of the deceased herein as an exhibit in this matter. After conducting the postmortem examination, he formed an opinion that the deceased died of subluxation secondary to trauma.
10. It was therefore clear from his evidence that the deceased’s death was not as a result of natural causes. Rather, it was due to trauma to the neck which PW 4 said could also have been caused by a fall. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

III. Identification Of Perpetrators Of Deceased’s Death

11. Both the 1st and 2nd Accused persons adduced sworn evidence. The 1st Accused person was the 2nd Accused person’s mother. They did not deny having been with the deceased on the material date of 2nd July 2021. However, they denied having assaulted and/or pushed him into the ditch.
12. The 1st Accused person testified that on the material date of 2nd day of July 2021, she left her home at about 6.00 am for tea picking and returned at 2.00 pm. Fedha Kigasia Kimoi (hereinafter referred to as “PW 1”) came to her house around the same time. The 2nd Accused person was not present at the material time. She heard someone asking them to go where he was outside. When she came out she saw that it was the deceased who had fallen into a ditch.
13. She tried to greet (sic) him but he slipped and fell into the ditch. He was drunk at the time. She asked PW 1 to assist her remove the deceased from the ditch but PW 1 said that they should leave him alone and she left. She then called the 2nd Accused person and they removed him from the ditch and placed him in the compound. At the time, the deceased was talking. He was not bleeding and had no injuries. The 2nd Accused person left and she went to wash her utensils near where he lay.



14. It was her further evidence that Francis Sino Keya (hereinafter referred to as “PW 2), a brother to the deceased, came to her home at around 2.00 pm and he told her that the deceased had been making chang’aa while drinking it. He requested her to prepare some porridge for the deceased. He assisted him to sit and they fed him porridge. On giving him the third spoon, the deceased dropped slowly and fell. PW 2 placed him on the ground and left. She also rushed to Gisambai (sic) to report of the incident.
15. While at the Police Station, she received a call that the 2nd Accused person was being attacked. She was driven to her home in a police vehicle where they picked the 2nd Accused person and the deceased.
16. The 2nd Accused person’s testimony corroborated her evidence. His evidence was that on the material date, the 1st Accused person called him to assist her remove the deceased from a ditch. He did so and lay him in the compound. He then left to do his chores. He did not see any injuries on him. At the time, the deceased was talking but one could not hear what he was saying.
17. At about 4.00 pm, the deceased’s neighbours went to where he was working and informed him that the deceased was dying in their compound. They demanded that he explains what had happened to the deceased. When he got to the house, he found that the deceased had already died. At the time, the 1st Accused person was not there. Police officers arrived shortly thereafter and arrested him.
18. On its part, the Prosecution submitted that the Accused persons did not dispute having been in the vicinity of the scene of the crime.
19. Notably, PW 1 testified that she was at the 1st Accused home on 1st July 2021 at about 2.00 pm when a young man whose name she did not know came and called the 1st Accused person asking her to come out of her house. He shouted “Toka nje” (come out). When the 1st Accused person stepped out, the young man grabbed her violently. However, the 1st Accused person overpowered him. She lifted him and brought him down (sic). The young man appeared to have been drunk or hungry.
20. As the young man lay on the ground, the 1st Accused person called the 2nd Accused person. She said that she told them not to beat him and left. She was emphatic that the 1st Accused person assaulted the young man with her bare hands and pointed out that she did not see her with any weapon.
21. When she was re-examined, she stated that she did not see the 2nd Accused person but just heard the 1st Accused person calling him.
22. PW 2 testified that on the material date of 2nd July 2021, he was informed that the deceased had been beaten at the 1st Accused person’s home. He went there and found him in a ditch near her house. The deceased was unconscious at the time. He said that the 1st and the 2nd Accused persons removed him from the ditch. He asserted that the deceased was the 1st Accused person’s lover but he did not know if they had issues between them.
23. No 232669 PC Stephen Mungai (hereinafter referred to as “PW 5 a Police Officer at Gisambai Police Patrol Base received PW 2’s report regarding the incident”) on 3rd July 2021. Accompanied by No 62149 CPL John Kalamu (hereinafter referred to as “PW 6”), they went to the 1st Accused person’s home where they found the deceased dead. PW 5’s evidence was that the deceased had bruise (sic) on his face and his body was covered with blood. He appeared to have been killed elsewhere and moved to where they found him.
24. PW 6 was the Investigating Officer. He recorded all witness statements and those of the suspects. He produced several photographs and a Certificate as exhibits in this matter.



25. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was apparent that PW 1 saw the altercation between the 1st Accused person and a young man. She also only saw her assault the young man with her hands. This was on 1st July 2021 at about 2.00 pm. She did not see the 2nd Accused person but only heard the 1st Accused person calling him. She did not also make reference to the events of 2nd July 2021 when the deceased was removed from the ditch.
26. On his part, PW 2 saw both the 1st and 2nd Accused persons remove the deceased from the ditch on the material date of 2nd July 2021 at about 11.00 am. However, he did not see them assault him. He did not also say who told him that the deceased had been beaten at the 1st Accused person's house. He only stated that he got information that he had been beaten at the 1st Accused person's house.
27. The people who witnessed the deceased being beaten at the 1st Accused person's house and informed PW 2 were crucial witnesses. They would have shed light as to what would have led to the injuries that the deceased sustained. This is because PW 1's version of what transpired was different from that of PW 2 and that of the 1st and 2nd Accused persons. As these crucial witnesses were not called as witnesses, the omission greatly weakened the Prosecution's case.
28. Indeed, it was also not clear if the young person PW 1 saw on 1st July 2021 was the same person as the deceased who PW 2 found in the ditch the following day on 2nd July 2021. This was pertinent for the reason that PW 5 told the Trial Court that the 1st and 2nd Accused persons beat the deceased and left him in a ditch overnight.
29. Although PW 1 did not know the young person's name, she could not have confused a young person for an old person. Notably, PW 2 told the Trial Court that the deceased was fifty eight (58) years at the time of his demise while when he conducted the autopsy, PW 4 put his age at sixty one (61) years. One of the photos PW 6 produced as evidence in this case was one of an elderly man. He was not a young man by any means and would not have fitted the description of PW 1.
30. Doubt was therefore created in the mind of this court as whether the incident of the young person on 1st July 2021 was the same incident of the deceased on 2nd July 2021 and/or whether or not the young man was the same person as the deceased herein.
31. Further, the injuries the 1st Accused person was said to have inflicted on the young man were not consistent with the injuries that the deceased herein suffered. PW 1 had talked of the 1st Accused person assaulting the young man with her bare hands. Her assertion that the 1st Accused person lifted him and brought her down was ambiguous.
32. Whereas what transpired may have been lost in the translation as she was adducing evidence in Kiswahili, it was the responsibility of the Prosecution to have prodded her further to connect the "bringing down" to the life threatening injuries that the deceased suffered.
33. According to PW 4, the deceased suffered bruises on the knee joints and chest, dislocation of shoulder joint, internally systems were normal except on head. There was fracture at the base of scalp and separation of two (2) spinal bones.
34. The above notwithstanding, relying on circumstantial evidence to link both the 1st and 2nd Accused persons as the persons who inflicted serious injuries on the deceased would be difficult. Indeed, no one saw them assault the deceased and inflict on him injuries, which PW 4 said could also have been caused by a fall.



35. PW 2 had testified that the ditch was about six (6) feet deep. It was not clear to this court if the deceased's fall in the six (6) feet deep ditch could have caused the myriad of the injuries he sustained leading to his death as the same did not come out clearly in the Prosecution's case.
36. One of the photos PW 6 tendered in evidence showed a flat area that had a maize plantation. It was at a lower level than another part that was covered by grass. The lower level was covered with soil. It was smooth with no rough surface or stone as PW 5 had contended.
37. PW 5's assertion that the 1st and 2nd Accused persons pushed the deceased in the ditch and left him there the entire night was not supported by evidence. There was also no evidence that the 1st and 2nd Accused persons killed the deceased elsewhere and dumped him in the ditch overnight as he had alluded to during his testimony. Indeed, his evidence did not come clearly as to how he arrived at this conclusion. This is because during cross-examination, he admitted that there were no eye witnesses to the incident herein.
38. Going further, if indeed the deceased was the young man PW 1 saw in the 1st Accused person's compound on 1st July 2021 and was thereafter found in the ditch the following day on 2nd July 2021, there was an unexplained gap of what transpired between 1st July 2021 when she saw the young man at the 1st Accused person's house at 2.00pm and on 2nd July 2021 when PW 2 found the deceased in the ditch, unconscious, at 11.00 am. The question of whether or not the deceased may have sustained the injuries through the hand(s) of unknown third parties was also a possibility.
39. The 1st and 2nd Accused persons were under no obligation to fill the gap to explain what could have happened during a period of slightly less than twenty four (24) hours. Indeed, every accused person has a right not to testify and/or to adduce self- incriminatory evidence against them. The legal and evidentiary burden to prove the case lay with the Prosecution unless it shifted to an accused person.
40. While it was undisputed that the deceased died from unnatural causes, it was not clear if the injuries he sustained were due to an assault or due to a fall to a ditch or if the said injuries were caused by the 1st and 2nd Accused persons herein. Notably, PW 4 did not allude to the injuries the deceased suffered to have been secondary to an assault. He left it open ended when he opined that the said injuries could also have been caused by a fall.
41. When the burden shifted to the 1st and 2nd Accused persons and they adduced evidence that did not still fill the gap of what transpired between 1st July 2021 at 2.00 pm and 2nd July 2021 at 11.00 am, this court came to the firm conclusion that there was no evidence that existed to incriminate them to warrant them to be found liable for the deceased's death.
42. Notably, for an offence of murder to be sustained, the ingredient of malice aforethought had go hand in hand with the ingredient of action and/or omission. This is what was referred to as actus rea and mens rea. A charge could not therefore be sustained if either of the two (2) ingredients was absent.
43. To this end, while this court noted all the Prosecution's submissions on malice aforethought on the part of the 1st and 2nd Accused persons, the same fell by the wayside for the reason that none of the Prosecution witness saw them push the deceased in the said ditch causing him to sustain the injuries that led to his death or inflicted the injuries that resulted in his death.
44. Consequently, this court found and held that the Prosecution did not prove its case against the 1st and 2nd Accused persons to the required standard, which in criminal cases, was proof beyond reasonable doubt.



Disposition

45. For the foregoing reasons, it is hereby directed that the 1st and the 2nd Accused persons herein be and are hereby acquitted of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
46. It is hereby directed that 2nd Accused person be and is released from custody forthwith unless he be otherwise lawfully held.
47. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE

