Republic v Mwaura (Criminal Case 38 of 2017)
[2024] KEHC 1652 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE 38 OF 2017

RN NYAKUNDI, J

FEBRUARY 23, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

DANIEL MWAURA ..... ACCUSED

JUDGMENT

1. Daniel Mbugua Mwaura hereinafter referred as the accused is charged before this court wit of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63 of the Laws of Kenya). The particulars of the charge brought against the accused provide as follows: that the accused on the 17th June, 2016 at Race Course Centre, Show Park area in Kapseret sub-county, within Uasin Gishu County, murdered Rodgers Kipngetich Too (hereinafter referred to as the deceased) He pleaded not guilty. The prosecution called (6) witnesses to proof its case beyond reasonable doubt. A summary of the case to discharge that burden is as presented herein below.

2. In the present case, PW1 Shadrack Kipchumba Bett, testified that the deceased was his uncle. He told Court that on 16/6/2017 he left his place if work and on arriving home he asked he asked his wife why the deceased had not returned home as they used to live together. He further told the Court that the following day he went to work and was later called by the police at Langas police station and was informed that the deceased's body had been preserved at the Moi Teaching and Referral Hospital. He further testified that on 21/6/2017 he went to view the body and was informed that the deceased had been beaten.

3. PW2 Bilson Kiprop Chumba, told the Court that the deceased was his cousin and that they used to live with him. He testified that the deceased was a student at Moi Teaching and Referral Hospital. He told the Court that on 16/7/2017 at about 2:00pm he was with the deceased and they went to take chang'aa and went back home but later to Riverside Bar. He told the Court that they were four at the time and said in the said bar until 9:30 pm. He told the Court that the deceased in company of others went to

Amigos Bar and Restaurant to attend a party but he went home. He told the Court that the deceased never returned and upon inquiring of his whereabout he was advised to look for him. PW2 told the Court that he went to Central Police Station but he was not there. He inquired from his friends but they did not his whereabouts. He then proceeded to Amigos Bar where he was informed that there was a student who had been beaten and taken to Race Course Hospital. He went to the said hospital and on inquiring about the deceased he was informed that he had died and had been taken to Moi Teaching and Referral Hospital. He then went to Moi Teaching and Referral Hospital where he was able to identify the deceased's body. He told the Court that the deceased's head had blood stains. He told the Court that he does not know the accused as he never saw him on the material date.

4. PW3 Enock Kiplimo Biwott, testified that he is a receptionist at Racecourse Hospital in Eldoret and that on the material date he was at his place of work when at around 5:30pm a group of people, about six brought in a patient. He told the Court that the patient had a cut wound on the head and there was blood. He testified that upon being examined by a doctor, the doctor stated that the patient had passed on. He further testified that he did not know those who brought in the patient. He told the Court that the group that the brought in the patient went outside and left the body there. he told the Court that the facility had CCTV cameras but the same were not clear. He told the Court that he then called his boss who reported the matter at Langas Police Station and later made a statement with the police.

5. PW4 Dennis Yidah, testified that he is a gym instructor and also provides security services. He told the Court that he does not know the deceased. and that on 15/6/2017 he was at Amigos Hotel in Langas when his friend called Evans called him and informed him that he needed security. He told the Court that he got there at 8:00 pm and begun working. He told the Court that the event being held at the said premises was a dancing competition. He told the court that the event was to be held on 16/6/2017 and his duty was to ensure that the event was peaceful. He told the Court that the event was peaceful and went on until 5:00 am on 17/6/2017. He told the Court that people at the event left at 5:00 am and while they remained at the hall to ensure that everyone had left, one man came and told them that he had met an injured person outside the gate of the said premises and he needed assistance taking him to hospital. He told the Court that those present at the time went to assist but he did not, but later heard that he was taken to hospital. He told the Court that the following day his supervisor called him and told him that the injured person had died and that he needed to record a statement at Langas Police Station.

6. PW5 No. 88xxx PC Geoffrey Kinambuga generally gave the outline on the nature of investigations carried out in regard to the allegations of murder against accused person. According to PW 6 on the evidence collected he came to a conclusion that the accused ought to be charged in reference to the provisions of section 203 of the penal code. That formed the basis of initiating the proceedings by the DPP subject matter of this trial.

7. PW 6 Dr. Macharia Benson testified on oath with respect to the post-mortem examination conducted upon the body of the deceased. It emerged on examination that the deceased suffered multiple injuries to the head, nervous system, spinal column and the spinal cord. At the end of it all he formed an opinion that the cause of death was severe head injury due to blunt force trauma. With this there is no doubt the deceased Rodgers Kipngetich Too is dead. He presented to court the post-mortem report as exhibit No.1

8. At the close of the prosecution case, pursuant to Section 306 of the *CPC* the accused person was placed on his defence. He elected to give a sworn statement which comprise of the following statement. That he is a second hand clothes dealer and on being confronted with allegation of having killed the deceased he answered in the negative. Further the accused recalled that there was a young man who had

been beaten which necessitated him to go and check the surrounding circumstances of the assault. He however denied that he was part of the gang which participated in inflicting the fatal injuries.

Determination

9. I have considered the evidence so far from the prosecution's side, the defence and their respective submissions made and the authorities cited. As I have stated above the issue before me at this stage is whether the evidence so far adduced by the prosecution is capable of discharging the burden of proof of beyond reasonable doubt to proof the ingredients of the offence of murder contrary to Section 203 of the *Penal Code*. That is

    a) That the deceased is dead.

    b) That his death was due to an unlawful act by the accused

    c) That in killing the deceased accused had malice aforethought

    d) That it is beyond per adventure the deceased death was caused by the accused.

10. For the court to find the accused guilty of the offence and convict him as the law established the issue of proof being a matter of evidence must be discharged by the prosecution. This is in consonant with the *Constitution* imperative as provided for in Article 50(2) & (a) to the effect that an accused person is presumed innocent until the contrary is proved by the state under the functional mandate by the Director of Public Prosecution in Article 157 of the same constitution. It is trite as demonstrated in the authorities: *Mbugua Kariuki v The Republic* (1976-80) 1 KLR 1085, *Kioko v Republic* (1983) KLR 289 (1982-88). The test variously applied in Kenya Courts is as clearly stated in the two Landmark cases of *Woolmingtone v DPP* (1935) AC and *Miller v Minister of Pensions* (1947) 2 All ER 372. Lord Denning in the Miller case had this to say:

> " That the degree is well settled. It need not reach certainty, but it must carry a high degree of possibility proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible, but not in the lease probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

11. The prosecution case is purely built on the circumstantial evidence of the events arising out of the movement of the deceased on the material day of the incident. To amplify the position in law courts have provided guidelines on how to match the facts to the circumstantial evidence to make a finding as to the guilty of the accused person. In the case of *R v Hillier* (2007) 233 ALR 63, *Stepherd v R* (1991) LRC Crm 332 the court observed that:

> " The nature of circumstantial evidence is such that while no single stand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.

Similarly, the Court of Appeal in *Simon Musoke v R* 1EA 715 held that:

> "In a case depending exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction that the exculpatory facts were in compatible with the innocent of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. (See also *R. v Kipkering Arap Koske* 16 EACA 135, *Musili Tulo v R* (2014) eKLR.

12. From the prosecution evidence of PW1-PW6 there is no dispute that the deceased Rodgers Kipngetich Too is dead. The circumstances upon which he met his death are very clear from the evidence given by PW1, PW2, PW3, PW4, PW5 &PW6. The evidence by the pathologist Dr. Macharia who conducted he postmortem on 21st June, 2017 on the body of the deceased paints a picture of a victim maimed by his attackers to sustain fatal injuries. The postmortem examination revealed the bodily injuries suffered included: Swollen face 13 x3 cm laceration extending from the nose to the left ear. The ear (left is also lacerated.), 4x1 cm deep laceration left submandibular region, 2x1cm laceration at the corner of the mouth left side, 6x1 cm laceration right parietal region, forehead bruises 5.3 cm, Right cheek abrasions, no defence wounds, fractured left mandible, Bilated scalp hematomas both parietal regions, there is extensive subdural and subarachnoid hemorrhage both cerebral hemispheres, mild brain edema. As a result of the postmortem examination the pathologist opined that the cause of death was due to severe head injury due to blunt force trauma. So what the evidence tells us is that the prosecution has proved beyond reasonable doubt that the death of the deceased occurred and the cause of it was as a consequence of unlawful acts of assault upon the body of the deceased.

13. The next question then to be answered by this court is whether the perpetrator of the offence was actuated with malice aforethought. Malice aforethought is defined in Section 206 of the *Penal Code* in the following terms:

    a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.

    c. An intent to commit a felony

    d. An intention to facilitate the escape from custody of a person who has committed a felony.

14. I have given consideration of the evidence given that on the material day the deceased enjoyed his right to life up and until when his body was discovered having suffered multiple injuries. In determining this question on malice aforethought one has to look at the gravity of injuries suffered, parts of the body targeted and the intention which was effected by the unlawful acts of assault. The element of malice aforethought are therefore looking at the postmortem report has been proved beyond reasonable doubt by the prosecution. The last question which the prosecution must answer is on identification of the accused person, the significance of identification is to place the accused at the scene of the crime. The test is well set out in the case of *Abdalla Bin Wendo v R* (1953) EACA 166 and *Roria v* (1967) EA 583 In the instant case the prosecution depended on the investigation carried out by PW5 Geoffrey Kinabuga. I am of the considered view that the circumstantial evidence from the events of that night places the accused at the scene of the murder. I therefore find the accused guilty of the offence of

murder contrary to Section 203 of the *Penal Code* and a consequence I enter a conviction as per the law established.

Sentence

15. I have considered the mitigation offered by learned counsel Ruto on behalf of the convict. It is clear from the record that the convict is a 1st offender. In sentencing the convict, I bear in mind the guiding principles in the Supreme court case of *R vs Francis Karioko Muruatetu* 2017 eKLR. Punishment is legitimate because it passes a moral judgement on a person. It speaks to that person and demands of him or her that he or she takes responsibility for the conduct. The judges power is to weigh all the circumstances of a particular case and all the purposes of criminal punishment representing various dimensions of a crime. An analysis of the facts of this case measured with mitigation and aggravating factors persuades this court to sentence to convict to ten (10) years imprisonment with effect from 5.7.2017. What is the rationale in imposing a custodial sentence courts are obliged to factor in the provisions of Section 333(2) of the *Criminal Procedure Code* which provides as follows:

    (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

    The inspiration and motivation of the law of giving credit for the period spent in remand custody is underpinned in Art. 50 (2) (e) of the *Constitution* and being part of the charter of fundamental rights and freedoms it stipulates a right to a fair hearing within a reasonable time by an independent and impartial tribunal or court. The authorities such as *Ahamad Abolfathi Mohammed & another vs Republic* (2018) eKLR highlights that a remedy of giving credit for the period spent in remand custody should be considered by the sentencing court. in my considered view this is where the state must have caused an unreasonable delay in prosecuting an accused person for the indictment. Therefore, where there is a breach of the right to a fair hearing within a reasonable time, the court has the mandate under Section 333 (2) to grant credit in sentence as one of the remedies for the breach. In this context the convict was arraigned in court on 5.7.2017 and his final judgment delivered on 23.2.2024. In such circumstances I am of the view that the convict is entitled to the benefit of the Constitutional redress for the breach for the period he was in pre-trial detention. That reduction of the period shall take the form of a remission in the overall sentence imposed by this court.

16. 14 days Right of Appeal explained.

DATED, SIGNED AND DELIVERED ELDORET THIS 23RD DAY OF FEBRUARY, 2024

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mugun for State

The convict in person