



**Republic v Mikisa (Criminal Case 70 of 2015)
[2024] KEHC 1733 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 70 OF 2015
SC CHIRCHIR, J
FEBRUARY 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JULIUS WAFULA MIKISA ACCUSED

JUDGMENT

1. The Accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the 21st day of October 2015 at Chamevele Area in Matete sub-county within Kakamega County murdered Patrick Wafula Mikisi.
3. The accused person pleaded not guilty to the charge, and the prosecution called 7 witnesses in support of its case.

The Evidence.

4. PW1, testified that on 21.10.2015, at around 10.00 p.m. she was at home sleeping when she heard dogs barking and screams coming from her upper side of her home. She went out to investigate, she saw her neighbour, and the deceased and the deceased was being supported by his wife and another neighbour. Upon inquiry, she was informed that the accused had beaten the deceased and had ran away.
5. She stated that the deceased was rushed to Nyayo hospital in Webuye, Bungoma County and at about 6.00 a.m. in the morning, the deceased passed away.
6. On cross examination by the court, the witness stated that she noticed that the deceased left hand had been fractured, and he had an injury on his head and left eye.



7. On cross examination by the accused counsel, the witness stated that the deceased homestead was close to her house; that she had known the accused person for 30 years. However she did not see him assault the deceased.
8. PW2 recalled that on 22.10.2015 at around 6.00 a.m, he was home when he heard people wailing . He went to the deceased homestead and was informed that the deceased had died.
9. On cross examination, he told the court that the deceased and the accused were his brothers and that they all lived together in the same homestead. It was his evidence that the deceased was attacked on 20.10.2015 and died on 21.10.2015 .
10. PW3, recalled that on 22.10.2015, at around 6.00 a.m. he was headed to the farm when he heard screams coming from the deceased's home. On inquiry he was told that the deceased had died. They reported the incident to Matete police station. He identified the accused as the one seated at the dock
11. PW4, testified that on 22.10.2015, he was home when he heard screams coming from the deceased home. He went to the scene and found that the deceased had sustained injuries .He never witnessed the assault on the deceased.
12. PW5 recalled that on 21.10.2015 at about 10.00 p.m, she was sleeping at her home when she heard people quarrelling. She went outside to investigate and found her husband lying on the ground . He had fainted . He was alive but he could not speak.
13. She further stated that her husband had injuries on his left side of his head and hands. As she got there she saw her brother- in law, the accused, running away. She made a telephone call to the deceased brothers who came and took the deceased to hospital .On 23.10.2015 she reported the incident to matete police station. Later on in her evidence -in -chief, she stated ,that she was not sure if the person she saw was the accused, as she did not shine any light on him and that it was her brothers- in- law who informed her that it was the accused who had attacked her husband.
14. On cross examination by the court the witness testified that on the night of the accident, there was no other light save moonlight. It was not very bright, she said. She could see up to a distance of about 70 meters away. She claimed that the quarrelling continued until she got to the scene and the accused ran away.
15. On cross examination by the accused's counsel, she stated that the time was about 10.00 PM . She stated that she awoke to a quarrel outside; that she heard the word “ shamba “ being mentioned . She could hear two voices, and she was able to identify that of her husband.
16. She stated that she went where her husband was but she did not meet with anybody; she saw another person at the scene but could not identify who it was. She screamed and her neighbours and her brother- in- law came to the scene. She stated that that she did not recognize the person who ran away. She was aware about the existence of a land dispute in the family.
17. PW6, was Dr. Brian Iriwa. He produced the post- mortem report dated 23/11/2015 on behalf of Dr. Simon Kisaka who conducted the post mortem .
18. The post- mortem was conducted at Webuye sub- county Hospital mortuary on 26.10.2015. According to the report, the deceased had a vertex head cut wound and on the left upper arm; there was fracture with displacement on the humerus. Internally on the digestion, there was blood in the abdomen with clots, he had a ruptured spleen and the scalp injury had extended to the brain.



19. He concluded that the cause of death was internal haemorrhage and brain injury which was complicated by a fractured humerus due to an assault. He produced the report (PEXB 1.)
20. PW7, testified on behalf of PC James Kinyua the investigations officer. He stated that on 22/10/2015, a report about the incident which occurred on 21.10.2015 at 2100 hours , was made at the station. The police officer went to the mortuary, took the photographs and visited the home where the incident took place. The accused was later arrested. He told the court that he did not carry out any further investigation after he took over the file from the first investigating officer. He stated that the photographs were taken by the officers at the crime scene and the sketch plan was drawn by the previous investigating officer. He produced the sketch plan of the crime scene- (PEXB 2).
21. On cross -examination, he stated that he took the matter from the initial investigating officer after the investigation had already been completed. He stated that he visited the scene of crime after he was handed over the file, although he did not record statements.
22. According to the statement he took from the Accused, it came out that there was a land dispute between him and the deceased.
23. The Accused was put on his defence at the conclusion of the prosecution's case and he opted for a sworn testimony.
24. He told the court that on 22nd October 2015 he was taken to Makutano police station and later to Kabras police station where he was informed of the charges he was facing. He stated that none of the prosecution witnesses saw him attack the deceased.
25. The accused told the court that he never committed the crime; that none of the witnesses saw him commit the crime; that he was with his family on the night he was alleged to have committed the crime.

Determination

26. The only issue for determination is whether the prosecution has proved its case beyond reasonable doubt
27. Section 203 of the penal code defines murder as follows: "any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
28. For the prosecution to sustain a conviction it must prove the following:
 - (a) the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
 (Ref: Anthony Ndegwa Ngari v Republic [2014] eKLR)
29. The post-mortem Report (PEXB 1) reveals that the deceased died and the cause of death was cardiovascular failure secondary to internal haemorrhage and brain injury complicated by a fractured humerus due to an assault. Before the post- mortem examination was done, the body was identified by Henry Mulongo and Peter Wetia. The fact of death of the deceased and what caused it, was therefore proved.
30. The next question is whether the accused caused the death of the deceased.
31. It was the evidence of PW5 that when she heard people quarrelling outside her house, she went outside to investigate, and saw her husband lying on the ground and the accused running away . On cross



examination however , she stated that she saw someone ran away, but did not see who it was. She stated that the time was 10.00 p.m. and that there was no light except for the moonlight . She admitted that she did not see who attacked her husband .

32. PW5 is therefore the only witness who came close to witnessing the attack, but she admitted in cross-examination that she never identified the person. It was her brothers- in – law who later told her that it was the Accused who had killed his brother.
33. In essence, the prosecution case is based solely on circumstantial evidence.
34. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal defined circumstantial evidence as : “ evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved..... It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” (Emphasis added)
35. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“ 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 Subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions 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 unerringly pointing towards the guilt of the Subject;
 - 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.”
36. Also in Sawe Vs. Republic [2003] KLR 364, the Court of Appeal held : “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 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.”

What are the circumstances in this case?

37. PW5 heard a quarrel outside her home, she gets out to investigate. She saw the deceased on the ground and the accused running away . The time was approximately 10 pm and there was moonlight. Towards the end of her evidence in chief , she sated : “ am not certain that the accused is the person I saw , as I did not shine a light on him” .She never witnessed the attack as when she got out the deceased was already on the ground and someone was running away. She admitted , in cross- examination that she never identified the person running away, and from the quarrel she could only identify the deceased’s voice.



38. The investigations officer told the court that in the course of investigation , which was not conducted by him, but by another officer, it was established that there was a land dispute that existed between the deceased and the Accused.
39. Beyond the Account of the said two witnesses , there is nothing more. There were no more and better particulars to suggest that the land feud mentioned by the witnesses led to the Accused wanting to kill his brother.
40. As for the evidence of PW1, PW2, PW3 and PW4 all testified that they heard screams near the deceased home and on inquiry, they were informed that the accused had attacked the deceased and ran away. Their testimonies are all hearsay and therefore inadmissible
41. In effect there is not even a single strand of evidence that would be said to link the death of the deceased to the Accused. The only witness who was nearest to the scene and who initially stated that she saw the Accused running away, retracted that testimony in cross- examination, stating that she never identified the person running away. If the person running away had been positively identified as the Accused, it may be concluded that he was the assailant if evidence could be led showing that he was the only one seen with the deceased prior to his death, or if other circumstances were brought forward showing that the person running away could not have been anyone but the deceased. In this case he was not identified. There was therefore no evidence placing the Accused on the scene.
42. Thus there are no circumstances available that would suggest any inference of guilt on the Accused. It must be remembered that for the court to rely on circumstantial evidence “ 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.” (Ref: Abanga alias Onyango vs Republic) (supra)
43. In the present case, there is no single strand of Evidence , let alone that would be said to form a chain to infer guilt on the part of the accused .
44. On the third ingredient ,malice aforethought, Section 206 of the Penal Code gives the instances when malice aforethought is established. It states 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.”
45. In the case of Hyam v DPP {1974} A.C. the Court held interalia that:
- “Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”



46. In the case of Daniel Muthee v Republic Criminal Appeal No. 218 of 2005 (UR) expounded on what constitutes malice aforethought. It observed: “When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”
47. Further in the case of Joseph Kimani Njau v R (2014) eKLR, the same court held : “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”.
48. Thus where the circumstances of the case demonstrate that in carrying out the unlawful act the accused acted with full knowledge that the act was highly capable of causing death or grievous harm malice aforethought should be inferred.
49. The deceased in this case was cut on the head leaving a 5cm wound, his hand was also fractured. He suffered internal bleeding as a result. Whoever did that to him must have known that the injuries had the potential to cause death. Malice aforethought was therefore established.
50. Thus though the prosecution proved the death of the deceased and its cause and malice aforethought, there was no evidence linking the accused herein to the death of the deceased.
51. In effect the prosecution has failed to prove its case beyond reasonable doubt.
52. The duty of the prosecution to prove was articulated in the United States case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Cited In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) where the court stated:

“ The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden..... A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation..... The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt.If you find there’s a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.” (Emphasis added)



53. Locally, Justice Mativo had this to say about the Accused person's entitlement to the benefit of doubt, in the case of Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR:

“The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.”

54. In conclusion , I do find that the prosecution has failed to prove the charge of murder against the accused herein, and consequently I hereby acquit him under section 215 of the criminal procedure code.

55. He shall be set free forthwith, unless otherwise lawfully held.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF FEBRUARY 2024

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin- Court Assistant

Mr. Getanda for the Accused

The Accused

