Republic v Ngulat (Criminal Case 31 of 2014)
[2024] KEHC 1799 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 31 OF 2014

HM NYAGA, J

FEBRUARY 22, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

BENSON CHERUIYOT NGULAT ..... ACCUSED

JUDGMENT

1. The accused, Benson Cheruiyot Ngulat was charged with the offence of Murder contrary to section 203 as read section 204 of the Penal Code. The Particulars of the offence were that on the night between 11th and 12th May 2013 at Kiplombe Village, Koibatek District within Baringo County jointly with others not before court murdered Mark Kipkorir Changwany.

2. On 3rd April 2014, the charge was read to the accused and he pleaded not guilty and thereafter the trial ensued. The prosecution called a total of five (5) witnesses in support of its case. Their evidence is encapsulated as follows.

3. Kipruto Changwany was PW1. He stated that on the morning of 12th May 2013, he received a call from the area chief who informed him that a man had been found dead in Kabiet River. He went to the scene and found a crowd gathered there. He added that he saw a dead body lying in the river. That he identified it as that of his brother mark Kiptur Changwany. The face was covered in water and his jacket had mud. The deceased was wearing a cap. The police who were there took photographs of the scene.

4. To the witness it appeared like the deceased that being killed elsewhere and had been thrown into the river. From the river they went to the house of the accused person where they found his wife. The police interrogated her and she stated that her husband had left in the morning. That outside the Accused's house, the ground was disturbed, which indicated a sign of a struggle. The police searched the accused's house and recovered a muddy jacket. Later the witness went to the mortuary to attend a post-mortem examination on the deceased's body. The body had scratches on the neck and the back. He added that

he was not aware of any problem between the accused and the deceased. The river where the body was found was about 200 meters from their accused's house.

5. PW2 was Roda Chelagat Rotich, the chief of the area. She stated that on the morning of 12th of May 2013, she received a call from one Hellen who informed her that a man had been found murdered, and that the body was lying by the river. She called the assistant chief and instructed him to go to the scene and confirm the report. She also called Philemon, the brother to the deceased and together they went to the scene where they found the body of the deceased lying in the river facing downwards. The body was clothed but had no shoes on. There was some mud on the deceased's clothes. The witness also stated that she did not see any injuries on the body of the deceased.

6. PW3 was police inspector Habel Omuka, then attached to Eldama Ravine Police Station. He testified that on the morning of 12th of May 2013, while at the police station, the chief of Kiplombe location reported to him through a call that a body had been found lying in a river within Kiplombe Village. Together with other officers, they went to the scene. That he examined the scene and noted the following;

    a. The deceased of was fully clothed and was lying on his stomach across the river.

    b. The deceased had no shoes and the body including the legs were not fully submerged because the ankles were above the water level.

    c. The river had natural stones and there was a rarely used footpath that cut across it.

    d. The surrounding was bushy and on the back of the deceased there was soil which appeared dry.

7. The witness stated that there were no signs of struggle at the scene and he suspected foul play. The police received information that the deceased and others had been at the home of the accused person throughout the previous day, consuming illicit brews. They then opted to go to the said home which was only about 100 meters from the scene. They found the accused's wife who informed them that he had left very early in the morning. They conducted as search and found a male Brown jacket which was wet on the left shoulders and was hung behind the door of the accused's bedroom. They took soil samples at the scene where there appeared to have been a struggle and also the soil samples from the deceased's jacket. They then collected the body of the deceased and took it to the Mercy Hospital Mortuary. They also arrested the accused's wife for further investigations.

8. The witness added that on the 2nd June 2013, police officers went to the home of the accused and arrested him together with one Brian Biwott and Evans Kibet. That during the investigations, there is a witness who stated that on the material day the deceased and the accused had fought because apparently, the wife of the accused had given food to the deceased. Investigations also revealed that the accused used to sell illicit brews and most of the witnesses were his clients and were drunk at the time of the incident.

9. The witness also confirmed that a post-mortem was done and the pathologist confirmed the cause of death was not drowning. He then took the jacket of the deceased, the jacket found in the Accused's house and the soil samples taken from the scene to the Government Chemist for examination.

10. PW4 was Catherine Sarah Murambi, a government analyst with the Kenya Government Chemist. She stated that on the 12th of June 2013 they received exhibits from Eldama Ravine Police Station, submitted by Sergeant Habil Omeleu. These were;

    a. A black soiled jacket said to belong to the deceased Marked A.

    b. A brown soiled jacket said to belong to the accused Marked B.

c. A brownish soil sample packed in a brown envelope stated to be samples collected from the scene of crime marked C.

11. The witness stated that upon analysis of the samples, it was confirmed that the soil sample "A" was found to contain silica ferric oxide and bansitte. The same chemical composition was also detected in exhibits B and C. With that analysis it was confirmed that the soil samples emanated from the same source.

12. PW5 was Caroline Chepkoskei Kerich. She stated that in the morning of 11th May 2013 she woke up and went to the Shamba. When she returned she discovered that one of her sheep was lost so she asked around and was informed that one was seen headed towards a place known as Dagoreti. The following morning at around 6:00 a.m. she went looking for the lost sheep. That on the way, she met the accused person who was going towards the river. She asked him about the animal and then went on to look for the same. Later she learnt that somebody had been found dead at the river. When she reached there, she saw the body of the deceased which was lying face down in the river. The police took the body away.

13. At the close of the prosecution case, the court found that the accused person had a case to answer and he was duly placed on his defence.

14. In his unsworn statement, the accused stated that on the material day he herded his animals the whole day. That later he came to learn that someone had been found dead by the river. He denied killing the deceased.

15. At the close of the hearing, advocate for the accused person filed written submissions. He pointed out the provisions of Article 50(2) of *the Constitution* on the presumption of innocence of an accused person, unless the contrary is proven. The advocate also referred to the provisions of section 107 of the *Evidence Act* which places the burden of proof on the person who alleges.

16. To buttress his arguments, the advocate for the accused cited the decision in Timothy Muthama Nzioki vs Republic where the court reiterated the settled principle in law that the burden of proof in criminal cases never shifts from the prosecution. Also cited was the well known case of Woolmington vs DPP.

17. Counsel for the accused further submitted that there was no eye witness called to implicate the accused and as such the prosecution case rested wholly on circumstantial evidence. He went on to cite the case of Chiragu and another vs Republic which in turn referred to the decision in Abanga alias Onyango vs Republic, where the court held that;

> " 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."

18. Also cited was Sawe vs Republic (2003) KLR 364 where the issue of circumstantial evidence was amplified by the court 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 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 of the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

19. It was submitted that the evidence on record could not be considered to be sufficient to prove guilt on the part of the accused person.

20. Counsel for the accused submitted that the evidence of the Government Analyst was that the samples that were examined had been presented to them while tied together in one bag. That the jacket collected from the accused's house was so collected in his absence. That as a consequence the samples were contaminated and thus could not be relied upon.

21. There were no submissions from the DPP, even at the time of writing this judgment.

22. It is basic law that the burden of proof in criminal cases lies on the prosecution at all times. The standard of proof is beyond reasonable doubt. Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR expressed himself as hereunder:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not 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. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

23. Lord Denning in Miller vs Ministry of Pensions, [1947] 2 ALL ER 372 had this to say: -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course 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 least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

24. It is against these revered principles of law that I have to consider the evidence presented before the court by the prosecution and the accused in his defence.

25. Section 203 of the Penal Code provides that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

26. The Court of Appeal in Anthony Ndegwa Ngari vs Republic [2014] eKLR held that:

> " For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
>
> (a) the death of the deceased and the cause of that death;
>
> (b) that the accused committed the unlawful act which caused the death of the deceased and
>
> (c) that the Accused had the malice aforethought."

27. In the instant case therefore, the question that the court must answer is whether the prosecution proved:

a. That there was the death of the deceased and the cause of the said death.

b. That the death was caused by unlawful acts or omission.

c. That the accused committed the unlawful act or omission which caused the death of the deceased.

d. That the accused had malice afore thought.

28. I will now proceed to address the above issues. The prosecution called 5 witnesses. Section 143 of the *Evidence Act* provides that unless there is provision of the law to the contrary, there is no minimum number of witnesses required to prove any fact. It is thus the duty of the court to determine on the basis of the evidence availed the prosecution have proven their case beyond reasonable doubt.

29. As was correctly pointed out by the advocate for the accused, the prosecution case rests wholly on circumstantial evidence. This is so because no witness came forth to state that he/she witnessed the accused, and possibly others cause the death of the deceased.

30. In order to prove a case relying solely or majorly on circumstantial evidence, the parameters are well known. In the celebrated case of Kipkering Arap Koske and Another vs Republic (1949) E. A. C. A. 135 PAGE 136, the Court of Appeal stated as follows;

> " As said in Wills on 'Circumstantial Evidence' 6th Edition P. 341 in order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts

to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."

31. Further in Philip Muiruri vs Republic Criminal Appeal No. 76 of 2012,the learned judge referred to the South African case of Ricky Ganda vs The State (2012) ZAFSHC 59,Free State High Court, Bloemfontein, which stated as follows;

> " .....the proper approach is to weigh up all of the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

32. The first fact to be proven by the state is the cause of death of the deceased.

33. Strange as it seems, even though there is no dispute that the deceased died, there was no evidence adduced to show the probable cause of death. The record shows that although there was reference to the post mortem examination, the report itself was never produced. I had to repeatedly go through the court record to establish if this was the position and I do confirm, sadly, that is so.

34. The prosecution opted to close its case before the pathologist could testify.

35. Admittedly, the entire case for the prosecution was presented before my predecessors. When the matter came before me, the prosecutor closed their case. I tend to think that this was an inadvertent omission on the part of the prosecutor, who may have assumed that the pathologist's report had already been produced earlier on. Even at the time of delivering a ruling undersection 306 of the Criminal Procedure Code, it escaped the court's attention that the report, though referred to, was not actually tendered as an exhibit in the case.

36. The result of the non-production of the autopsy report means that the court cannot tell what the cause of death was. The cause of death is important because that is what sets in motion the other ingredients of the case.

37. In the case of Ndungu vs Republic (1985) eKLR the court held that;

> " .....where a 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 straight forward 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".

38. Similarly, in Chengo Kalama vs Republic (2015) eKLR, the Court of Appeal held as follows:

> " The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt".

39. Again, 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 post-mortem 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..."

40. It is not in all cases that a post mortem examination report will be needed to establish the cause of death. There may exist exceptional circumstances, such as those that were referred to by the court in Ndungu vs Republic(supra). On such circumstances the court held that;

> "..... The judgment in Cheya case gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case (sic) of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available, some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. To return to Cheya it is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision....."

41. The deceased herein was found dumped in a river. It was apparently intact, from the evidence of all the witnesses who saw it on the material day. According to his brother and the police officer, his body was duly examined to establish the cause of death. In my opinion there are no exceptional circumstances that exist that would have led the prosecution to dispense with the need for an autopsy report.

42. In the absence of the autopsy report, the court cannot the ascertain the cause of death of the deceased. In the circumstances, the first ingredient necessary to establish the offence of murder remains unproven.

43. Although the evidence of Caroline(PW5) seems to place the accused person near where the body of the deceased was found, that in itself is not sufficient to prove that he caused the death of the deceased. Similarly, the evidence of the Government Analyst would have been crucial if there was a known cause of death. Even though that evidence places the deceased at the house of the accused, the same lacked a foundation that is the cause of death.

44. Although the court recognises that a life was lost, there was need to have all the elements of the offence proven. The most crucial one was not proved.

45. In the end, sadly, ((or happily for the accused), I have come to the conclusion that the prosecution has failed to prove its case to the required standard and I proceed to acquit the accused person. He is set at liberty unless lawfully held.

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

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H. M. NYAGA

JUDGE

In the presence of;

C/A Oleperon

State counsel Okok

Accused present