Republic v Nyongesa (Criminal Case 126 of 2014)
[2024] KEHC 2719 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL CASE 126 OF 2014

HM NYAGA, J

MARCH 19, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOHN IMOLEIT NYONGESA ..... ACCUSED

JUDGMENT

1. The accused was charged Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of offence were that on 19th December, 2014 at Njokerio Location in Njoro Sub County within Nakuru County, he murdered Faith Cherotich.

2. The accused pleaded not guilty to the charges and the prosecution called a total of eight witnesses, whose evidence is encapsulated as follows.

3. PW1 Philip Kamau Muchiri testified that he knew the accused, who was one of his tenants, occupying Room No. 17 on his property. That the accused was working at Kega Clinic which was located near his residence.

4. He recalled that on 19th December, 2014 when he was leaving Nakuru for Njoro, Hannah Muthoni called him, telling him that she had seen strangers coming out of the accused's room. She described them as two men and one woman and they were soaked in blood. He rushed to the scene and upon reaching there, Hannah informed him that the two people had gone to Egerton Sanatorium. He proceeded there and on arrival he met the clinical officer who informed him that the lady had passed away while the man was being held by Egerton Security Guards. He then reported the matter to the police.

5. The witness stated that later, he went to the scene where he saw blood all over the floor and blood-soaked beddings. The police came and carried away the blood stained bed sheets, a bucket containing

an item he did not know as well as some medical tools. The witness produced a Tenancy Agreement as Exhibit no. 1.

6. In cross examination, he reiterated that the accused was his tenant, occupying room no. 17. He conceded that the Tenancy Agreement did not bear the plot number and was not signed by either him or the accused. He then conceded that there was no tenancy agreement and they used to record rent payments in a book. He further stated that his mother was the actual landlady and the accused used to pay rent directly to her. That at the material time, his mother was hospitalised at a hospital in Nakuru. It was also his testimony that the accused was the occupant of the room in question between October and December, 2014. He did not have the register of tenants of the plots before court. He said he had never seen the accused in his mother's plot and only knew him from the records.

7. PW2 was DR. Geoffrey Wahome. He said he is a medical practitioner in Nakuru and Egerton University. That on 19th December, 2014 at about 2-3 pm, he received a call from the Egerton University hospital nurse, one Eunice Mumo, who asked him to go and attend to a patient who had been taken there. He rushed there and found the patient on the couch and upon examination he noted that she was not breathing. He added that the patient had blood and some pieces of foetus were coming out from her private parts. That she was pale as a result of blood loss. He certified her dead on arrival.

8. He also stated that the patient had been taken to the hospital by one Eric Kirui and he had blood all over his body. He later established that the deceased had been brought from a nearby location. He produced the observations /records of the material day as exhibit no.2

9. In cross examination, he said Eric was hysterical and disoriented and he was unable to speak.

10. PW3 was the said Erick Kirui. He testified that on 16th December, 2014, he was in Elburgon. He received a phone call from the deceased who informed him that she was travelling from Nairobi to Nakuru. They agreed to meet in Nakuru. Upon her arrival, they met at around 5 pm and since she appeared tired, he decided to take her to his friend's place, belonging to one Philemon which was opposite Eveready within Nakuru Town. He left her there and went to town to run a few errands. He joined her later, and they spent the night together. On the following day, they went to Egerton University, where he resided. That the deceased complained of stomach ache and they agreed to go see a doctor on the following day if the condition persisted. On the following day, 18th December, 2014, the deceased's condition persisted and she told him that she would go alone to see her friend who was a doctor. That the deceased left alone while he remained in the house. At around 5.00pm, he became worried because the deceased had not returned and her phone was off. He decided to go and look for her. He went to the clinic that she had indicated she was going to but he found it closed. He went back to the house hoping to find her but she did not return. On 19th December, 2014 he went back to the clinic and found it was still closed. He found a friend around the clinic who directed him to the accused person's house. That upon reaching room No. 17 where the accused lived he found the door open. He entered the room and found the deceased alone, sleeping. The deceased told him that she hadn't been able to go back to the house as she had become very sick and had decided to terminate the pregnancy. He said the deceased also told him that the accused person assisted her to do the same. He was shocked and couldn't ask any further questions. He decided to go buy breakfast for her. On his way he saw a text on the deceased's phone which was from the accused's number to buy lunch and brufen for the deceased. He bought the same and went back. Upon reaching the house, he found the deceased had fallen down on the floor. He said she was unconscious and he thought she had fainted. He splashed water on her and gave her glucose but it did not work. He noted that there were blood stains on the floor and so he decided to take her to the hospital. He carried her outside and got a boda boda which took them to the Egerton University Hospital. When they got there the deceased was received while he remained outside. Then the doctor called him and informed him that the deceased had passed away.

11. He said he did not see the accused that day. He added that he had met the doctor in question, who is the accused herein, only once before.

12. In cross examination, he stated that he learned the deceased was pregnant when he met her in Nakuru on 16.12.2014. He confirmed he was in a relationship with her and they had had unprotected sex. He believed the pregnancy was his. He stated that he wished she kept the pregnancy as it would not have interfered with her studies since she was in her final year. He said he met the accused person once when he went to the Kega clinic for treatment. He confirmed in his statement he had not indicated that the deceased knew the accused but that she had gone to Kega Clinic for treatment. He confirmed he neither saw nor talked to the accused on the day the deceased left for treatment. He denied that he was the one who assisted the deceased to abort. He said he spent a night in the police cells over the deceased death and after recording his statement he was released.

13. PW4 was Eunice Mumo a nurse at Egerton University Hospital. She recalled that on 19th December, 2014 she was at the outpatient department at the said Hospital when she saw a motor cycle coming in. Someone shouted "nisaidieni" and she went out and found 3 people on the motor cycle ; a rider, a lady passenger and one man. She helped to carry the deceased into the facility. She stated that she noted that the deceased was very cold and she called Dr. Wahome. She physically examined the patient and noted she was unconscious and was not breathing. Her clothes, especially the trouser, was soaked in blood.

14. PW5 was Wilson Kibet. He is the father to the deceased. he narrated how he had received of his daughter's demise. He testified that on 22nd December 2014 he went to Nakuru Municipal Mortuary and identified the body of the deceased to Dr. Titus Ngululu for post mortem examination.

15. PW6 was Fredric Musili, a chief inspector of police attached at DCI Cybercrime Unit. He testified that on 20th January 2015 he received an exhibit memo from the DCI, Njoro. He referenced the same as CU81/2015. Accompanying the memo form were;

    a. Exhibit marked A which was a Huawei mobile phone U513U-1 of International Mobile Equipment Identity (IMEI) No. 0603050200 156982, was paired with Safaricom ICCID No. 89254029541005054772 IMEI.

    b. Exhibit B which was a Tecno Mobile Phone T209, IMEI No. 86749010952040/57 paired with safaricom ICCID No. 892540500012620.

    c. Exhibit C was a Nokia –C3-00, Mobile phone IMEI No. 353697059496527135 paired with Safaricom ICCID No. 89254028971002127774.

16. He explained that IMEI refers to a unique number assigned to each mobile number by the manufacturer and each device has a separate IMEI.

17. He stated that they were required to retrieve all text messages from 10.12.2014 to 24.12.2014 in the said devices. He explained that the three mobile phones were not compatible with the cellbite forensic device they used but the extraction was done from the sim cards which were compatible with the said cellbite device.

18. He said Exhibit A were messages extracted from sim card A. He stated that these messages paired with EXH B. It was his testimony that they were not successful to extract any message from the sim card paired with Exhibit C because they did not find a PIN code to that message. He said they were not tasked to establish the owners of the phones.

19. It was his further testimony that the SIM card paired to Exhibit A was off from 22.12.2014 at around 21:59hours and as for SIM card paired to EXB B there were exchanges of romantic messages. He produced the forensic report as Exhibit 7.

20. PW7 was Henry Kiptoo Sang, a Government Analyst. He testified that on 20th January, 2015 he received the following;

    i. Blood Sample marked as Exhibit "A" with the name Faith Cherotich;

    ii. Piece of PVC carpet in Khaki envelop marked as "C",

    iii. White shirt in a Khaki Envelop marked as "D";

    iv. Grey bed sheet in a Khaki envelop marked as "E";

    v. Navy Blue T-Shirt in a Khaki Envelop marked as "F";

    vi. Black Sock in an envelope marked as "G" and

    vii. Blood Sample in a bottle marked as "H"

21. He said the above items were accompanied by an Exhibit Memo Form. He examined the items and he found out that exhibits C, D and E were all moderately stained with human blood while exhibits F and G were lightly stained with human blood.

22. Upon conducting DNA analysis and generating DNA profiles, he formed an opinion that the DNA profiles from items C, D, F & G matched the DNA profile generated from "A" while DNA profile generated from item E originated from an unknown female. He produced a report as Exh.7.

23. PW8, No. 74665 CPL Bernard Marete, was the investigating officer in this matter. He stated that the OCS, Njoro Police station informed him that the deceased had been found in a house at Njokerio. He proceeded there in company of PC Chacha and P.C Judy. Upon reaching the scene they met a caretaker, one Anne, who opened the door for them. He said the door had three padlocks which had been placed by the tenant, landlord and security officer at Egerton University. He said the house was a single room and inside it they found pair of some gloves; 6 pieces of Always; one under pant; black t-shirt; one lesso; one piece of small towel; a black jean's trouser, a black ladies skirt, one red blouse, jumper; glucose; blood stained bed sheets, blood stained P.V.C carpet, blood stained black t-shirt and one blood stained sock.

24. He prepared an inventory and commenced investigations which revealed that, the accused of ID No. 28039529 and Tel no. 0703367540 was a tenant of Room No. 17. That the Deceased was a girlfriend to Eric Kirui, who was a 5th Year student at Egerton University. That the deceased had visited Eric and at night she complained of stomach ache and sought treatment from the accused. That the accused was an employee of Kega Medical centre which was next to the plot in issue.

25. It was his testimony that when they visited the said facility they did not find the accused as he had not reported to work on 18th and 19th and could not be reached on phone. That following tips from their informant, they arrested the accused in Nakuru. He said after the post mortem examination was conducted he prepared an exhibit memo form and sent the specimen and items found in the house to the Government Analyst.

26. It was his further testimony that he revisited the scene and from therein he managed to obtain a job application letter, CV, ID card and Family Bank Account Card. He said as per the information he received from the registrar of person, the said ID belonged to the accused. He said he enquired about

admission number DCM/10-507 from Great Lakes University, and it was confirmed that it belonged to the accused person who was pursuing a course in Diploma in Clinical Medicine.

27. He visited Egerton University Hospital and he was issued with a treatment note dated 19.12.2014 which confirmed the deceased had been attended to but appeared dead due to Haemorrhagic shock. He also got a copy of tenant register from the landlord that showed room no.17 was occupied by the accused.

28. He produced Exhibit memo as Exhibit no.8, letter from the university as Exhibit No.9, NRB details as Exhibit No.10 and the treatment note as Exhibit No.11.

29. On cross examination, he said the room was locked by only two padlocks which belonged to the landlord and the Egerton security officer. He said the tenant register had accused's name but not the room number. He said the accused was not present when they took an inventory and he did not sign it. He said the deceased was found in the house and he did not find any relationship between PW3 and the accused. He said no one witnessed the deceased going into the room. He did not collect accused's blood sample but he did so for Erick as he had blood stained clothes.

30. At the close of the prosecution case the court found that the accused had a case to answer and he proceeded to give sworn evidence.

31. In his defence, the accused testified that he has a Diploma in Clinical Medicine from Great Lakes University, Kisumu. He produced a letter from the institution dated 21.1.2015 as DEXH 2 and a copy of his CV as D. Exhibit 3. It was his testimony that he had been employed on Locum basis by Kega Medical Center. He said on 20th December 2014, he received a call from his boss at around 9.00 am enquiring whether there were people who had fought in the hospital and asked to meet him. He was off duty on that day and he met him at a Shell petrol station. His employer was in company of people he did not know. They proceeded to Njoro Police Station, and his boss who looked nervous, kept calling the lab technician telling her to destroy the counter book and the receipts. He said while at the station, one of the officers told him to produce the deceased. He stated that his fingerprints were taken and he surrendered his phone, ID CARD, and other items. He said he was given a proposal and instructed to just sign it. He did not have a chance to read it. He produced PW8's statement as defence Exhibit No.4.

32. The accused stated that he did not know the deceased and he had never met her, and he had never stayed in Room no. 17, as alleged and that he used to commute from Nakuru. He wondered why his employer called Carol and told her to destroy the counter book then close the facility. He blamed his employer, stating that he was the one to be charged.

33. On cross examination, he stated that as at 19th December 2014 he was an employee of the facility in question but the last time he was on duty was on 16th December, 2014. He disputed ever residing in Njoro area. He said the tenancy agreement has his name but he never signed it. He did not know how his CV was obtained. He said the only person who had it was his boss. He said he never met the deceased on 19th as he was off duty.

34. In re-examination, he stated the employer has the employee records. He did not know the source of the rent schedule.

35. At the close of the defence case, only the accused person chose to file his submissions.

36. The counsel for the accused submitted that it was evident that the accused was not at his place of work or the neighbourhood at the time of the offence.

37. He posited that it was strange that PW3 never called for assistance when he found the deceased lying on the floor alone in a room or sought for treatment details given to her from the accused.

38. He wondered why the accused's mobile phone number 0703367540 was not subjected to forensic analysis if indeed he had texted the deceased with the said number. He also wondered why PW3 did not make any effort to contact the accused if it is indeed true he had come across his message in the deceased's mobile phone.

39. He argued that evidence of PW3 was not corroborated by any independent evidence and hence it would be unsafe to convict the accused based on the same.

40. The counsel faulted the prosecution for failing to call the owner of Kega Clinic as a witness in this case. He believed his evidence would have established whether or not the accused was his employee, whether he was a resident of Nakuru, whether he was off duty during the time the deceased is alleged to have visited the hospital, whether he had shared a copy of the accused's CV with the police and whether he had instructed someone to destroy some hospital records.

41. He urged this court to make an inference that had the owner of Kega Clinic been called as a witness, his evidence would have been adverse to the prosecution's case. To support this position, he referred this court to the case of Bukenya vs Uganda (1973) EA 549 cited in the case of Joseph Peitun Losur vs Republic Criminal Appeal no. 168 of 2001.

42. The counsel further submitted that the evidence of PW6 in totality is not useful for purposes of establishing circumstantial evidence. To this effect, he placed reliance on the case of Paul vs Republic Criminal Appeal No. 71 of 1979.

43. He accused PW1 for failing to produce ownership documents to prove the property where the alleged room No.17 was situated and that it belonged to his deceased father. He posited that there was need to investigate the correlation between the passing on of the deceased and the closure of Kega Clinic in order to unravel the real perpetrators of the offence.

44. He submitted that the evidence of PW8 was selective, shallow, inconsistent, contradictory and incredible for reasons that: his written statement indicated that the alleged room no. 17 had been locked with three padlocks while in his oral evidence he claimed the padlocks were two; he relied on the alleged tenancy agreement without conducting investigations so as to ascertain the name and ownership of the premises associated with the accused; he failed to take the accused whom he had found in the police cells to the said room no.17 when he purportedly went to collect some items so as to provide him an opportunity to answer any questions regarding the alleged tenancy or the items recovered; the C.V he alleged to have recovered from the alleged room no.17 is not listed in the inventory; he prepared an inventory without involving the accused; he never recorded the statement of the owner of Kega Clinic; he released PW3 without charging him considering he was the one who took the deceased to the hospital. To bolster his submissions, he relied on the case of Augustine Njoroge vs Republic Criminal Appeal Number 185 of 1982 for the proposition that contradicted evidence is unreliable.

45. He submitted that the prosecution failed to prove its case beyond reasonable doubt and urged the court to acquit the accused person.

Analysis & Determination

46. It is basic law that in criminal cases, the standard of proof is beyond reasonable doubt. This point was stressed in Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR where the learned Judge 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 favorite 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."

47. On the same issue, 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."

48. I have considered the evidence presented before the court both by the prosecution and the defence.

49. 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."

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

> " 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."

51. In the instant case, therefore, the questions 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 which caused the death of the deceased

    d. That the accused had malice afore thought.

52. I will now proceed to answer the above questions sequentially. In the process, I will also look at the defence adduced and the submissions by Counsel for the accused person.

53. The death of the deceased is not in dispute. When she was examined by Dr. Wahome upon arrival at the Egerton Hospital, the deceased was confirmed dead. Thus her death occurred prior to her arrival at the hospital. From the evidence Dr. Wahome, there is no doubt that the deceased died from excessive bleeding out of an unsuccessful abortion. The medical report that he produced confirms the cause of death.

54. Was the death of the deceased caused by an unlawful act or omission? That is the question to be answered next.

55. Article 26 (1) of *the constitution* stipulates that;

> " Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law."

56. From these provisions, not all deaths are unlawful. As the principle in the case of Republic vs Guzambizi S/o Wesonga 1948 15EACA 65 articulates, death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

57. The cause of death is indisputable. The deceased died out of an unsuccessful abortion. Article 26 of *the Constitution* provides as follows as regards abortion;

> " Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."

58. In addition, section 228 of the Penal Code prohibits the killing of an unborn child which is actually abortion. The section provides as follows;

> "
>
> " 228. Killing unborn child
> Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life."

59. From the court record the evidence adduced shows that the deceased who was indisputably pregnant. It was also the evidence of Eric(PW3) that the deceased complained of stomach ache and that was the

reason she went to seek medical attention. No medical notes were procured from the facility that the deceased went. Thus it cannot be stated that she was in need of emergency treatment and that her life or health was in danger.

60. It is also evident that what the deceased was seeking was an abortion but in an illegal way. It is thus clear that the deceased died through an unlawful act, that of trying to procure an illegal abortion, contrary to the law.

61. The next question to be answered is whether the prosecution has proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased

62. From the evidence on record, it is clear there is no direct evidence of the prosecution witnesses pointing to the accused. The prosecution sought to rely on circumstantial evidence.

63. 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."

64. In the case of R v Hillier {2007} 233 A.L.R 63, Shepherd v R {1991} LRC CRM 332 it was held that:

> "The nature of circumstantial evidence is such that while no single strand 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."

65. 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."

66. The above authorities do not need any further elaboration as to what entails circumstantial evidence. The duty of the court is to establish if such evidence herein is sufficient to convict the accused.

67. Basically, the prosecution case is that deceased wanted to procure an abortion and that it is the accused who helped her to do so. The prosecution posits that the deceased was found in the house rented by the

accused. The accused was charged with the present offence because the deceased was allegedly found in his house after he allegedly assisted her to procure an abortion.

68. There is no doubt that the deceased was found in the room No. 17. The evidence of Eric Kirui(PW4) is to the effect that he found her in that room. She was bleeding and he rushed her to hospital. The blood samples collected from the room were found to belong to the deceased. Thus it is not in doubt that after the deceased supposedly went to see a doctor, she ended up in Room No. 17.

69. To prove that the said Room No. 17 was occupied by the accused, the prosecution availed PW4, who was the son to the owner of the house. He stated that the accused had occupied the house from the month of October to December. He produced the Room Register, which at No. 17 bears the name John Imoleit, for the months of October to December 2014.

70. The accused pointed out that the tenancy register that was produced did not bear the his signature. For this reason, counsel for the accused submits that there is no sufficient proof that the accused occupied the house in question.

71. In my opinion, it is not every tenancy that is reduced into writing. There are many that are not reduced into writing but that does not mean that there is no tenancy. The law recognizes both written and unwritten tenancies so the absence of a tenancy agreement does not of itself mean that no tenancy existed.

72. PW4 explained that the accused was registered in the records that they kept, and which were produced in court. I have examined the records. These are ordinary records made by the landlord. They clearly show that someone bearing the accused's name rented Room No. 17. A number 28039529 is written against his name. As it turned out, that was the identity card of the accused as confirmed by the report from the National Registration Bureau(Exhibit 10).

73. From the said Room No.17, the investigators were also able to recover documents that belonged to someone bearing the accused's name. These were;

    i. An identity card bearing the name of the accused.

    ii. A Family Bank Card bearing the name of the accused.

    iii. A job application letter and a Curriculum Vitae(C.V.) in the name of the accused.

74. The defence has suggested that the documents were placed there in order to connect the accused. It is submitted that the Proprietor of Kega Clinic was the one who had been given the accused's documents when he applied for employment and thus could have given the police the said documents. Counsel also referred the court to the accused's evidence that the proprietor of the clinic had called his employee and asked them to destroy some records.

75. That argument, in so far as the C.V. and the application may hold water, but what of his identity card and the Bank ATM Card? These are personal items that only the accused would ordinarily be in possession of and only he could have placed or left them in the room in question. These items clearly point to the fact that the accused was in occupation of the said room at the material time. If he had not been occupying the room then they could not have been in the aid room in the first place.

76. That being so, then there has to be an explanation why the deceased, instead of going back to her boyfriend's house ended up in the accused's house. The only explanation is the process that the deceased had considered, that of inducing the abortion. There is really no other plausible explanation.

77. The accused vehemently denied the offence. He stated that he did not know the deceased and he had never met her. He also disputed ever residing in Njoro where the offence was allegedly committed. That denial has been countered by the presence of his very own personalized items from the room where the deceased was found by Eric. It is thus my finding that the Accused was the occupant of the room in question.

78. The accused has pointed to contradictions in the prosecution evidence. In particular, the advocate questioned the number of padlocks that were in the room in question. One witness state that they were three in number while other witnesses said they were two.

79. It is not every contradiction that will render the prosecution case unsafe. The contradiction must be such that it affects the foundation of the case. Minor contradictions, which are normal, cannot be deemed to render a fatal blow to the prosecution case.

80. This issue has been dealt with by the superior courts. I will cite three of them.

81. The Court of Appeal in the case of Erick Onyango Ondeng' vs Republic [2014] eKLR held that;

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

82. The same court in the case of Richard Munene vs Republic [2018] eKLR stated as follows:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial Court that an accused person will be entitled to benefit from it."

83. Lastly, in Philip Nzaka Watu vs Republic [2016] eKLR the Court stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

84. The number of padlocks in the room is to me a minor contradiction. The fact is that it was secured upon the realization that the deceased had been found in the said room, for the purpose of preserving it.

85. Having considered the evidence, I am of the view that the circumstantial evidence adduced points irresistibly to the accused as having had a role to play in the deceased trying to procure an abortion.

86. It is indeed very possible that the clinic itself was involved and that Eric was fully aware of the intention by the deceased to procure the abortion. That does not of itself absolve the accused from culpability.

Under the doctrine of common intention, he would still have to carry blame for his role. The doctrine is found under the provisions of section 21 of the Penal Code and states as follows;

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

87. The ingredients of common intention were enunciated in Eunice Musenya Ndui vs Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows:-

> "(1) There must be two or more persons;
>
> (2) The persons must form a common intention;
>
> (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
>
> (4) An offence must be committed in the process;
>
> (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose."

88. Thus, the mere fact that other people may have been involved does not render the accused free of any culpability in the act or omission that led to the demise of the deceased.

89. It is not in dispute that the accused worked at Kega Clinic. He has admitted as much. The testimony of the investigating officer is that the deceased sought "treatment" on the material day, but for obvious reasons, there were no records availed from the clinic.

90. It was submitted that the failure to call crucial witnesses was fatal to the prosecution case. Counsel singled out the owner of the clinic. It is true that failure to call crucial witnesses in a case will lead to a presumption that the evidence would be adverse to the prosecution.

91. This case commenced in 2014 and was only concluded in 2023, a span of 9 years. There could a myriad of explanations as to why the other witnesses failed to testify. It is not shown that the failure was deliberate. The court has to look at the available evidence and satisfy itself that it is sufficient to prove he case against the accused.

92. Having found that that the accused had a role to play in the act that led to the demise of the deceased then it is upon the court to establish if there was malice aforethought.

93. Section 206 of the Penal Code provides the definition of malice aforethought and it reads as follows;

> "'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."'

94. Thus, the ingredient of malice aforethought can be express or implied. It can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.

95. There are numerous authorities that have dealt with the manifestation of malice aforethought on a charge under Section 203 of the Penal Code. For instance, in Rex vs Tubere s/o Ochen {1945} 1Z EACA 63, Eastern Court of Appeal observed:

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

96. In addition, in the case of Hyam vs DPP {1974} A.C. the Court held inter alia 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."

97. The death of the deceased was as a result of an illegal act, that of procuring an abortion. There is ample evidence that accused was not qualified to administer any medical procedure. He was a student at a University and had dropped out due to lack of fees. There is no evidence that the deceased went to receive any regular medical treatment from Kega Clinic. The evidence, and this was borne out of Eric Kirui's evidence, that the deceased was intent on having an abortion. It was the reason she went to seek the termination of her pregnancy.

98. Clearly, the administration of an abortion without proof that it was necessary on account of the deceased's life or health, was an act that could be reasonably be expected to have caused grievous harm.

99. Thus, under the circumstances, I find that malice aforethought can be inferred under section 206 of the Penal Code.

100. After evaluating the evidence in totality, the defence adduced and the submissions by the accused, I am of the opinion that the evidence adduced is sufficient to prove that the accused, possibly with others, was culpable for the death of the deceased. I also find that there is inferred malice aforethought on the part of the accused.

101. Consequently, I find the accused guilty as charged and he is duly convicted.

102. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF MARCH, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

State Counsel Ms Okok

Accused present

For accused -