



**Republic v Gathirimu (Criminal Case 22 of 2018)
[2024] KEHC 4693 (KLR) (29 April 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 22 OF 2018
SN MUTUKU, J
APRIL 29, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBIN MWAURA GATHIRIMU ACCUSED

JUDGMENT

The Charge

1. Robin Mwaura Gathirimu, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the offence are that on the 30th November 2018, at Kiserian Township in Kajiado North Sub-County within Kajiado County, he murdered Angel Wangui. The accused pleaded not guilty to the charge.

Prosecution case

2. The prosecution called a total of eight (8) witnesses. Six of these witnesses testified before Hon. Mr. Justice Mwita. I took evidence from two (2) witnesses. The evidence of these witnesses reveals that the deceased, Angel Wangui aged six years, left her sister J.W (PW1) to play with other children at Green Garden Academy, about 40 metres away from their home in Kiserian. It was on 31st November 2018. Their mother, M.N (PW2), was away at the time. On returning home, PW2 did not find the deceased. She asked PW1 where the deceased was. PW1 told her mother that the deceased was playing with other children.
3. PW2 sent PW1 to check on the deceased but PW1 did not find her sister. She enquired from the other children who told her that the deceased had gone with a boy wearing goggles and a white bag. PW2 tried to follow the direction where the deceased went. She did not find any lead to where the deceased was. She returned to inform her mother. Efforts to trace the deceased were unsuccessful. After some time, PW2 was shown to the home of the said Robin by someone identified as a teacher. PW2 entered



- the compound shown to her as the place where the said Robin lived. She found the house locked from inside, but she could hear movements inside the house. She was afraid and went to seek help. On returning to the house, she found it locked from the outside.
4. PW2 was assisted by a man to break open the door of the house identified as belonging to Robin. A search inside the house led to the discovery of the body of the deceased stuffed in a gunny bag under the bed. PW2 was able to identify the body as that of her daughter, the deceased. The body had been dismembered.
 5. The matter was reported to the police who went to the scene and started investigations. The clothes of the deceased, a pink jacket and dress, were recovered from a pit latrine in the same compound.
 6. The accused was arrested by the police on 1st December 2018. He was being beaten by a mob who had attacked him accusing him of killing the child on 30th November 2018. The report of the beating of the accused was made to the Kiserian Police Station to PC Duncan Odhiambo Ochieng (PW4) by a boda boda rider. PW4 went to the scene of the beating and found about 40 to 50 members of the public beating the accused. He persuaded them to leave the matter to the police. He called the Station motor vehicle and took the accused to the Police Station where he was charged with this offence after PC Jackson Bitok (PW8) investigated the matter and was satisfied that the accused was implicated in the murder of the deceased.
 7. The body of the deceased was examined by Dr. Peter Muriuki Ndegwa (PW7) on 5th December 2018 at the City Mortuary, Nairobi. The doctor found the following injuries:
 - i. Right foot amputated at the ankle joint.
 - ii. Multiple incisive wounds left ankle area.
 - iii. Head decapitated.
 - iv. Severed neck muscles all around.
 - v. Dilated anus.
 8. The doctor formed the opinion that the cause of death was due to exsanguination due to multiple injuries caused by sharp force trauma. He found the hymen intact. He took samples of nail clips, blood and anal swabs for DNA examination.

Defence case

9. The court placed the accused on his defence after finding that he had a case to answer. He testified on 23rd November 2023. He was barely audible in his testimony because he spoke with difficulty. He gave a sworn defence and told the court that he was aged 17 years and in Form 3 at the time of his arrest.
10. He told the court that on a date he could not remember, he was helping his cousin at a construction site. He worked until 1.00pm and he left to meet his friends at Kiserian town at a field where people usually rest. They were consuming miraa, smoking bhang and drinking alcohol. He said that when he came to he was told that he had committed murder. He said he did not remember what had happened and that he found himself at the police station. He said he did not know the deceased.
11. On cross examination, the accused told the court that he did not remember the date. He admitted that the body of the deceased was found in his house and that he was arrested by the members of the public who beat him up. He said he was high on drugs. He admitted that police found his photographs in his house as testified by the prosecution witnesses and that he used to see the deceased.



Analysis and Determination

12. The offence of murder is created by section 203 of the Penal Code in the following terms:

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

13. The onus of proving a criminal offence like this one before the court lies with the prosecution who must prove the offence beyond reasonable doubt. The ingredients of murder that must be proved by the prosecution to that standard are:

- a. Unlawful act or omission causing the death of a human being.
- b. Victim of the offence.
- c. Identity of the perpetrator of the offence.
- d. Malice aforethought as defined under section 206 of the Penal Code.

14. I have examined the evidence by the prosecution witnesses. It confirms without a doubt that the deceased, Angel Wangui, had died. Her body was found inside a gunny bag hidden under the bed inside a house identified as that of the accused. Inside that house were found photographs belonging to the accused. Dr. Peter Muriuki Ndegwa confirmed the death of the deceased which was caused by exsanguination (severe loss of blood). The head of the deceased had been decapitated and her right ankle. It is without a doubt that the death of the deceased resulted from an unlawful act.

15. The identity of the person that caused that death is also not in doubt. Evidence points to the accused as the perpetrator. This was an inhumane act, barbaric in nature and horrifying in extent. This young girl, at a tender age of six years met a very cruel death and must have suffered a great deal. Her head was decapitated, her right ankle amputated and multiple incisive wounds on the left ankle. The accused in his sworn defence admitted that the body of the deceased was found inside his house but denied knowledge that he killed her pleading intoxication.

16. After due consideration of all the evidence before me, I am convinced beyond doubt that there is sufficient evidence to prove the elements of death by an unlawful act, identity of the victim and the identity of the perpetrator. I now turn to the element of malice aforethought.

17. Section 206 of the Penal Code defines malice aforethought in the following terms:

206. Malice aforethought

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.

18. In *Republic v Benjamin Kyalo Mulonzi* [2019] eKLR, the Court had this to say in paragraph 30:

It is therefore clear that malice aforethought is the conscious, premeditated intent to kill another person, without any provocation or just cause. The Court of Appeal in the case of *Republic – vs- Tubere S/O Ochen* (1945) 12 EACA63 held that an inference of malice aforethought can be established by considering the following: -

- i. The nature of the weapon used.
- ii. The manner in which the weapon was used.
- iii. The part of the body targeted.
- iv. The nature of the injuries inflicted either single stab/wound or multiple injuries.
- v. The conduct of the accused before, during and after the attack.

19. In this case, the nature of the weapon, a panga (Ex. 4) was used. The accused used this weapon to decapitate the neck of the deceased, amputate her right ankle and cause multiple incisive wounds on her left ankle. By decapitating the neck, the intention was to kill the deceased.

20. The accused has pleaded intoxication and stated that he did not know what he had done. I captured him in his evidence in chief as follows:

“We went to work in the morning and I left around 1.00pm. I went to town and met my friends. It was Kiserian Town. We went to where we used to meet. It is a field where people usually rest. We were consuming miraa, bhang and alcohol. When I came to, I was told I had committed murder. I do not remember what happened. I found myself at the police station. I cannot remember what happened.”

21. The picture painted by the above evidence is that the accused was unconscious or unable to remember where he was and what he did. But the accused left the place where he was meeting his friends to go home. He did reach home. On the way he picked up the deceased, probably by telling her to go with him. The intention of the accused in having the deceased go with him to his house is not clear. The examinations done on the samples taken from her nail clippings, her anal swab and blood did not show any connection with the accused. These samples only showed that they belonged to the deceased. The doctor in his evidence ruled out sodomy and told the court that the deceased’s hymen was intact.

22. If the intention of the accused was not to sodomize or defile the deceased, was it to kill her? This is a question that has not been answered by the evidence. All this court knows is that the accused did cause the death of the deceased in a very horrifying manner.

23. The accused had locked the door of his house from inside. After PW2 heard movements inside that house and left briefly to seek help, the accused must have left the house and locked it from outside because when the door was finally broken open, he was not inside the house. He had the sense to escape from the scene of the crime. He was not arrested on the same day but the following day. It cannot therefore be true that the accused took drugs and alcohol and lost consciousness only to come to in the police station. He knew how to get home and how to escape from the scene of murder.

24. The defence of intoxication is provided under Section 13 of the Penal Code. This section provides that:



13. Intoxication

- (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
 - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.

25. If the evidence of the accused is to be believed, then he would fall under category 13 (2) (b) above. This court would then be called upon to take into account the fact of intoxication for purposes of determining whether he had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence of murder. This court would further resort to section 12 of the Penal Code which provides that:

12. Insanity

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

26. Other than the word of the accused that he could not remember what happened, I have no other evidence that he was intoxicated to an extent that he was not able to form the intention required to commit murder. I have noted the evidence by the police, Peter Omare, (PW6), that at the scene, accused’s house, a bag was recovered with bhang inside. It is unfortunate that this item was not among the samples taken to the Government Analyst for examination.

27. What the evidence of the defence has done is to raise doubts in the mind of the court that the accused was under the influence of either alcohol or narcotic substances as testified. The burden of proof in a criminal trial does not shift from the prosecution whose heavy duty it is to prove a case beyond reasonable doubt. It is the evidentiary burden that keeps on shifting. The prosecution did not controvert the evidence of the defence that the accused was intoxicated. The outcome of this



analysis is that the prosecution has not proved the element of malice aforethought has not been beyond reasonable doubt.

28. Where the element of malice aforethought is not proved to the required standard, the offence of murder cannot be said to have been proved. What is proved in this case is the offence of manslaughter, an offence created under section 202 (1) of the Penal Code as follows:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

29. This court is aware that had this matter been handled properly in terms of investigations, the outcome of this decision would have been different. There are some loose ends left untied in this case. The death of the deceased was gruesome. The deceased met a very painful death and justice demands that the perpetrator ought to meet the full force of the law. But the offence proved is manslaughter and not the offence of murder.
30. Consequently, after analyzing all the evidence tendered, the law and relevant authorities, it is my finding that the accused, Robin Mwaura Gathirimu, is not guilty of the offence of murder. He is hereby acquitted of that offence. Instead, the accused is found guilty of the lesser charge of manslaughter contrary to section 202 of the Penal Code which offence is supported by the evidence on record. I find that the accused is guilty of manslaughter and convict him accordingly.
31. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH APRIL 2024.

S. N. MUTUKU

JUDGE

