



**Republic v Ndegwa (Criminal Case 15 of 2018)
[2024] KEHC 4037 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 15 OF 2018**

GL NZIOKA, J

APRIL 24, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

MOSES MORUCHO NDEGWA ACCUSED

JUDGMENT

1. The accused was arraigned in court charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. The particulars of the charge are that on the 9th day of July 2018 at Githabai village, Kinangop Sub-County, within Nyandarua County, he murdered Esther Wairimu Karanja.
3. He pleaded not guilty to the charge and the case proceed to full hearing. The prosecution case is that, the deceased and the accused were living together as husband and wife. They had lived together for about 8 years. That the deceased had an earlier marriage that ended. She had two (2) children from that previous marriage. She had no children with the appellant, although the appellant was maintaining the two children from the deceased's previous marriage.
4. It is in evidence that, the couple had matrimonial disagreements and the deceased had moved out of the matrimonial home to her mother's house. That, on the 8th day of July 2028, the accused went to the deceased's mother's homestead at about 2am. He was making noise demanding that, the deceased return to her matrimonial home or he would kill someone. That he said he was on "operation rudi nyumbani". Fearing for their lives, the deceased's family members called their uncle who in turn informed the Nyumba Kumi elders of the accused's conduct. The Assistant Chief then called the accused and instructed him to leave. The accused left.
5. However in the morning the deceased's family members went to the police station and reported the matter and they were issued with a letter to take to the accused warning him to desist from creating



disturbance. On 9th July 2018, the deceased who was a primary school teacher went to work. She had the letter from the police station which she gave to her son Patrick Gikeria (PW4) to deliver to the accused.

6. The evidence reveals that PW4 Gikeria took the letter to Isaac Gikima Kimani (PW2) to deliver to the accused. According to PW2, he boarded the motor bike of Gikeria (PW4) to deliver the letter from the Assistant Chief (although earlier indicated from the Police Station) to the accused. As they approached the accused's house PW2 got off the motor bike. He went to the accused's house but he was not there. He was led to Nyakio Centre where the accused was said to have gone to.
7. That while on the way he met the accused. They greeted each other and PW2 handed over the letter to him. That, the accused remarked that "hii maneno yenu ninajua" and went into his house. PW2 testified that after walking for a short while, he saw someone in a red jacket walking behind him. He turned and realized it was the accused. He had a sack.
8. That the accused passed by the school where the deceased was working, going round walking slowly. That on reaching the gate the deceased came out and joined him, then the deceased greeted PW2 who had arrived at the scene as he joined them at the gate.
9. PW2 Gikima Kimani testified that, at that point the accused, took out a knife from his jacket and swiftly stabbed the deceased. That the deceased shouted "Kwani unataka kuniua". That the deceased held on PW2 and they both fell into the ditch. However, the accused continued stabbing the deceased everywhere, on the neck, chest and thighs.
10. That as PW2 struggled to release himself from the deceased, the accused turned on him but he escaped. The accused then went away to his house as members of the public streamed to the scene. The deceased was rushed to hospital at Kwa Haraka Centre but was confirmed dead on arrival. In the meantime a report of the incident was made to the police station.
11. (PW10) No. 230922 Inspector Alexander Njagi attended the scene of crime. He then went to Kwa Haraka Health Centre where he found the body of the deceased and moved it to the mortuary for post mortem. In the meantime the scene of crime personnel led by PW8 No.83334 Corporal David Tebes, a scene of crime officer took photos of the scene. PW11 the investigating officer in company of other officers went to the accused's house which was about 320 metres from the gate of the school. They recovered a dagger, cum knife which was on the bed and believed to be the weapon used to stab the deceased. That, the accused was arrested after one week.
12. (PW9) Dr. Julius Murimi N'twiga who performed the post mortem on the body of the deceased noted that she had blood soiled clothes, green curtain and sky-blue sheets. That she had sustained a stab wound on the right forearm approximately 4cm in length, six (6) multiple stab wounds, as follows:
 - a. On the right cheek bone approximately 3cm in length/diagonally oriented
 - b. On the right breast, approximately 4cm/horizontally oriented
 - c. On the mid epigastric region approximately cm/horizontally oriented
 - d. On the right mid axillary (armpit) region approximately 4cm/horizontally oriented
 - e. On the right hip 4cm in length vertically oriented on the posterior neck approximately 1cm in length.Internally the deceased suffered injuries as follows:
 - a. Fractures of 2nd and 3rd ribs along the axillary region



- b. Fracture of the 5th rib attaching to the rib cage
- c. Bilateral haemothorax “massive bleeding in the chest cavity”
- d. Approximately 700ml of blood on the right and 200ml on the left side
- f. A cut/laceration on the lower digestive system approximately 5cm

The doctor established that the cause of death was massive haemorrhage and bleeding secondary multiple stab wounds leading to bleeding in the chest cavity.

13. At the conclusion of investigation, the accused was charged as herein stated.
14. At the close of the prosecution case, the accused was placed on his defence. He denied committing the offence and testified on the 9th July 2018, the deceased told him that, she wanted to eat chicken. That he prepared the chicken and took it to the gate of the school where the deceased was working. He sent a child to call her. She responded went to the gate, and after they spoke she took the chicken. That as they were talking PW2 approached him and stood between him and the deceased and then greeted the deceased. That he did not greet him but gave him a letter. That he wondered what the letter was all about and as he was reading it, PW2 stabbed him with a knife on the shoulder and voice box twice.
15. That he ran home and as he was bleeding a lot he became unconscious, and gained consciousness after four (4) day while in ICU at Kijabe Hospital. He testified further that, he stayed in the hospital until 18th July 2018 and on 19th July 2018 he was arraigned before the Senior Principal Magistrate’s Court charged with the offence of manslaughter but later he was charged with the offence of murder before the High Court.
16. He stated that he met the deceased after she divorced her husband of 30 years. That she had two children from the previous marriage but they stayed together for 8 years. Further, they had “small disagreements’ in that, after he finished educating the deceased’s children, she lost respect for the marriage and was planning to return to her first marriage. That he had sold all his property to educate those children and was left poverty stricken. He denied going to the deceased’s home to threaten her, and stated that, he did know, who killed the deceased.
17. The prosecution submitted on the charge and evidence and argued that, the prosecution had proved the ingredients of the offence of murder being; the fact and cause of death, the act of commission or omission being linked to the accused person (actus reus), and the act of commission or omission or commission, and malice aforethought (mens rea).
18. The prosecution cited section 206 of the *Penal Code* which states that malice aforethought shall be deemed to be established by evidence which proves; an intention to cause death of or to do grievous harm to any person whether killed or not; or knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether the person is actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm or not, or by a wish that it may not be cause.
19. The prosecution also relied on the case of; *Rex vs S/O Ochen* (1945) 12 EACA 63 where the court stated that in determining whether malice aforethought has been established the court should consider the weapon used, the manner it was used, the body part targeted, the nature of injuries inflicted, and the conduct of the accused before during and after the incident.
20. The prosecution submitted that, it fully established malice aforethought through the evidence of PW2 that he witnessed the accused remove a dagger from his coat, wrestle the deceased to the ground and



stab her on the neck and abdomen. That, the accused knew his action of stabbing his wife severally on the neck, breast and abdomen could result in her demise.

21. The prosecution further submitted that, it was relying on circumstantial evidence by PW1 and PW5, the sister and mother of the deceased respectively, that the accused and deceased had frequent domestic issues that forced the deceased to leave the matrimonial home and return to her parents' house. That, on 8th July, 2018, one day before the murder, the accused visited the deceased's parents' home and stated that he was on a mission to return home with his wife failure of which he would kill someone.
22. Furthermore, PW4 testified that he saw the body of the deceased outside the gate of Nyakio Primary School, the scene of the crime, and also saw the accused walking away from the scene of crime towards the farm, which evidence was corroborated by the accused who admitted that he had met the deceased outside the school gate.
23. The prosecution argued that, the circumstantial evidence points to the accused as the sole perpetrator of the heinous act and relied on the case of *Republic v Abamad Abolfathi Mohammed and Another* [2019] eKLR, where the Supreme Court laid out the principles applicable to circumstantial evidence.
24. The prosecution further submitted that, the cause of death was proved through the production of the post mortem report (Pexh 4) which confirmed that the cause of death was due to massive haemorrhage due to multiple stab wounds by a sharp blade (knife), and which evidence corroborated by PW1 Sarah Njeri.
25. Finally, the prosecution submitted that, it has proved that the accused had the intention to end the life of the deceased, carried a knife and stabbed her severally leading to the loss of life and urged the court to find him guilty, convict him and sentence him to death.
26. At the conclusion of the case I have considered the offence the accused is charged with and note that, it is provided for under section 203 of the *Penal Code* which reads as follows: -

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
27. Pursuant thereto, the ingredients of the afore offence are settled through various decision. The Court of Appeal in the case of; *Joseph Githua Njuguna vs Republic* (2016) eKLR stated as follows: -

“ Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are: (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulitz & 4 others v Republic* [2015] eKLR.”
28. Based on the foregoing, the ingredients of the offence of murder can be summarized as follows; a) occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.
29. To revert back to this matter, I note that as regards the first issue, there is no dispute that, the deceased was murdered on 9th July, 2018. Most of the witnesses who have testified on behalf of the prosecution confirmed the occurrence of the deceased's death in corroboration with (PW9) Dr. N'twiga confirmed



both the death and the cause thereof as being, massive haemorrhage due to multiple stab wounds. Therefore the first element was adequately proved in evidence.

30. The next issue is whether the death was lawful or unlawful. In that respect, the provisions of Article 26 (3) of the Constitution of Kenya, 2010 states that: -

“(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law”.

31. Further, in the case of *Gusambizi Wesonga vs Republic* [1948] 15 EACA 65 the court stated that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence of property.”

32. In the instant case, it is in evidence that, the deceased did not die of a natural cause. Further, this is not a case of homicide. It is a clear case of murder. PW2 stated that, he witnessed the deceased murdered. PW1 Sarah Njeri testified that the deceased left home in good health to go and work. Therefore her death was unlawfully occasioned. In fact there is no evidence that she invited the same to herself through provocation of the perpetrator and neither was it due to an accident. I therefore find that the deceased's death was unlawful.

33. The third issue is the identity of the perpetrator. The particulars of the charge point to the accused as the perpetrator. He has of course denied commission of the offence. Unfortunately the deceased cannot give her version of what transpired from her grave. Someone else who might have evidence is the only one who can.

34. In that regard, the prosecution availed PW2. The witness narrated how he gave the accused a letter from the Assistant Chief and how he saw the accused stab the deceased severally. That he had to run for his dear life as the accused approached him. The accused has in turn testified that, PW2 Gikima attacked him for no apparent reason. The question is whose version of evidence between PW2 and the accused is the truth.

35. To answer the afore question, the whole evidence must be considered in total. In that respect it is in evidence that, the deceased and the accused had matrimonial disagreements during the subsistence of their marriage. The accused attributes it to the mistreatment by the deceased, lack of respect and impoverishment. In fact, from the evidence of the accused, he seemed to have been very bitter that, he had spent all his hard earned income on the deceased's children and was being mistreated. Further, she was planning to return to her first marriage after impoverishing him. Does this particular evidence reveal or present an opportunity for the accused to have revenged on the deceased? I shall revert to answer this question later.

36. Furthermore, the evidence reveals that the accused visited the deceased's mother's house the day before her death. That, he was threatening to kill someone if she did not return home. Of course the accused has denied the same. However, PW1 Sarah Njeri the sister of the deceased testified that the accused went to her mother's house on 8th July, 2018 at 3.00am and was shouting saying he had gone for an “operation rudi nyumbani” and said in Kikuyu:

“Mimi ni Moses Mwurusho Ndegwa. I was born by my father Ndegwa and mother Wamaitha. That he had tried to get her to come back and she had refused. Therefore he would kill someone”



37. PW2 David Njoroge testified that PW1 Njeri called him at 2.45am on 8th to 9th July 2018 and informed him that the accused was making noise behind her mother's house. The witness then informed the Assistant chief and the Assistant chief called the accused. Similarly, PW5 Ann Wangari the mother of the deceased testified that the accused went to her house on 8th July 2018 at 2.00am and demanded that, the deceased go back home or he would kill her. That he further said that every night he would go to the deceased's mother compound and the deceased's school gate and wait for the deceased there. It is therefore clear that, the evidence of PW5 corroborates that of PW2 that, the accused went to their house and caused disturbance.
38. To crown it all, PW6 Teresia Wambui Kibuika the Assistant Chief confirmed and corroborated the evidence of PW2, that PW2 called her to inform her that, the accused was making noise outside PW5's house. Therefore, the evidence of these witnesses clearly confirm that, the accused had threatened to hurt someone if the deceased did not go back home? The question that arises is whether in the given circumstances the accused could have nursed the idea of murder and murdered the deceased. I find the answer in the affirmative. Pursuant to the evidence of these witness, the accused's defence that, he did not threaten the deceased is dishonest and not tenable.
39. It is the finding of the court that, taking into account the fact that, the deceased and accused had matrimonial disagreements, further that the accused was unhappy to learn that the deceased was arranging to return to her previous marriage after spending all his resources. Furthermore, he went to demand she returns the day before and she did not, all these evidence presents strong circumstantial evidence that, he committed the offence, and the motive thereof.
40. The law on circumstantial evidence is settled. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows:-
- “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. 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 mine)
41. It is also noteworthy that, there is direct evidence from PW2 that he witnessed the accused kill the deceased. The allegation by the accused that, PW2 stabbed him is an afterthought as PW2 was never cross-examined on the same. Furthermore, PW2 had gone to deliver a letter to him and therefore his presence at the scene was explained and as confirmed by PW4 Patrick Gikeria that the witness had delivered the letter to PW2 to take to the accused. The allegation that he stabbed the accused from nowhere holds no water.
42. Furthermore, there is no evidence to the effect that, there was bad blood between the accused and PW2 to warrant the witness stab him. The accused's evidence of being stabbed is thus not tenable. I find that PW2 indeed witnessed the accused stab the deceased.



43. Finally, even if the court were to believe the allegation that, the witness stabbed the accused, the question remains who stabbed the deceased. It can only be the accused because he was the other person at the scene.
44. The last question is whether the accused acted with malice aforethought. It is in evidence that the accused had threatened to kill the deceased or someone if the deceased did not return home. Furthermore the accused stabbed the deceased six (6) times to ensure that he killed her. Therefore he had nursed the idea of killing her armed himself with a knife and murdered her. He had malice aforethought.
45. All in all I find overwhelming both direct and circumstantial evidence that, the accused committed the offence. I therefore find him guilty as charged and accordingly convict him.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF APRIL 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The accused present physically

Mr. Abwajo for the State

Mr. Ngunjiri for the accused

Ms Ogutu: Court Assistant

