



**Republic v Ombonya (Criminal Case 35 of 2018)
[2024] KEHC 6205 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 35 OF 2018**

PJO OTIENO, J

MAY 31, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK OMULO OMBONYA ACCUSED

JUDGMENT

1. The Accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 23rd and 24th June, 2018 at Emaholia village, Kisa north location in Khwisero sub county within Kakamega County, the accused person, with others not before court, murdered Aggrey Anunda Mukabane.
2. The Accused person pleaded not guilty to the charge and in order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from three witnesses.

The evidence

3. PW1, Catherine Enos testified that on 23/6/2018 at about midnight she was at home sleeping when she heard noise outside prompting her to get a lamp and step outside though there was also moonlight. She found the Accused person calling her son, Nathan, who was sleeping in the house, to open the door or else he would break in if he did not. She went closer to the accused to inquire what the problem was and the Accused informed her that a jembe had been thrown inside the house. At this time the Accused was in the company of four others who included Anunda. They got in and searched but the jembe was not discovered whereafter the three left while the deceased remained in the house whilst she went to sleep. Later, Anunda, the deceased, was found dead.
4. On cross-examination she stated that nobody beat the deceased in her presence and that she recognized the two Accused persons because she talked to both at the scene.



5. PW2, Wycliff Mukabane testified that on 24/6/2018 he was at his house asleep when at about 6AM he was woken up by his wife who informed him that their son, Anunda, had been killed at the shops. He rushed to the scene where he found many people including the assistant chief who advised him to report the incident with the police which he did and later returned to the scene with the chief. The Accused was arrested while the body of the deceased was taken to Yala Mortuary. He added that the body appeared to have blood oozing from the nose and on other parts of the body. He later attended the autopsy of the deceased where he identified the deceased's body to the doctor.
6. He asserted having seen the deceased the previous day and was not aware where he had been prior to his death but denied knowledge of any grudge between the Accused and the deceased.
7. On cross-examination he stated that he did know who killed the deceased and that even when his wife gave him the news, she was not aware of the killers.
8. On re-examination he stated that it was the chief who told him that the Accused was implicated in the death.
9. PW3, No. 59986, a police officer stationed at Khwisero sub-county, testified that he was the Investigating Officer who received a report of murder on 23/6/2018 from the deceased's father to the effect that the deceased had been found murdered at Mtopendwa market. In the company of the deputy OCS and IP Gitau he proceeded to the scene where they found the deceased lying dead besides the road within the market and the body was half naked with visible injuries on the head, hands and neck. He inquired from members of the public what had happened and he was informed that the accused had left his house the previous night and when he returned he found his items stolen and on inquiring he was told that during the day the deceased had a padlock he was selling. In the company of others, he went to the market and attacked the deceased and left with the deceased while leading him to different houses where he had allegedly sold the items though they made no recoveries. The body was then found abandoned at the scene and they took it to Yala County Hospital Mortuary where an autopsy was conducted and he produced the post mortem report by Dr. Shivachi David as PEXH 1. The report showed that the deceased's cause of death was blunt abdominal injury due to trauma. He further stated that he took witness statements and most of those witnesses have been unable to testify since they are no longer living at their homes.
10. On cross examination he stated that none of the witnesses whose statements he recorded saw the accused assault the deceased.
11. The evidence of PW3 marked the close of the prosecution case which the court then analysed and ruled that a prima facie case had been established against the accused person and he was thus placed on defense.
12. The accused person, when put on his defence elected to give sworn testimony without calling any other witness. In his sworn testimony he stated that on the night of 23rd, 24th June, 2018 he was at home. At about 6PM he went to buy food at the market and then decided to watch football and returned home at 7:30PM. When he returned home he found that his spade, crow bar, axe, jembe and padlock had been stolen from his house. His wife was not at home as she had gone to visit her parents. His neighbor told him that the deceased had been around his house and so he headed to the deceased's house by himself. As he passed through the market, the deceased called him and told him that he was hiding because his neighbors were seeking to beat him for having stolen their sufuria. He also admitted to having stolen his things and the deceased promised to return them the next day. He then went to sleep and next day he was called to the Chief's office to say what he knew about the death of the deceased. He went to the scene and found the deceased's body and he was then arrested by the police.



13. On cross examination he stated that the deceased took him to three homesteads in a bid to recover the stolen items and when they left the last homestead at about 10:15PM, they parted ways on the road and he went home.
14. With the evidence of the accused, the defence closed its case and parties proceeded to file their respective submissions.

Submissions

15. It is the submissions by the prosecution that they have proved the offence of murder against the accused in that the death of the deceased was not disputed and was additionally proved by the post mortem report produced by PW3 and marked as PEXH 1.
16. On whether the death of the deceased was occasioned by an unlawful act attributable to the deceased, it is submitted that according to the post mortem report the deceased died due to cardiopulmonary collapse secondary to severe head injury following assault.
17. On whether it was the accused person who inflicted the injuries on the deceased, it is submitted that the prosecution's case is hinged on circumstantial evidence and pegged on the doctrine of last seen which was explained in Nigerian case of *Stephen Haruna v The Attorney General of the Federation* (2010) 1ILAW/CA/A/86/C/2009 which they cite and where the court held as follows;

“The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”
18. It is stressed that the evidence of PW1 being that she saw the accused in the company of other people, that they came to her house looking for the deceased on the fateful night together with evidence that PW3 also alluded to the fact that the accused went looking for the deceased because it was alleged that the deceased had stolen his property put the accused in the company of the deceased in his last moments. It is further pointed out that the accused admitted that he went to look for the deceased that night, got him and that he walked with the deceased that night to three different homesteads trying to trace his stolen property but left left him on a path only for his body to be discovered the following morning by the roadside and calls upon the court to draw and inference that in fact it was the accused who assaulted the deceased.
19. On the last element of malice aforethought, it is argued that the post mortem report shows that the deceased suffered multiple injuries which included 3 deep lacerations of about 40cm long on his left arm, 2 lacerations on his right hand with bruises in the side, abrasions on the occipital area of the scalp and frontal point, abrasions on the heels, he suffered lung contusions on the right and contusion on the liver. They contend that these injuries show that the accused person, in assaulting the deceased, intended to cause grievous harm to the deceased and possibly kill him.
20. For the accused, the very brief submission offered is that the prosecution failed to prove its case in that they place reliance on the doctrine of last seen yet it was the testimony of PW1 that she saw the deceased in the company of 4 people on the material night. While the defence agree that the evidence offered was essentially circumstantial but add that it is not the kind that would warrant a safe conviction. It



is pointed out that the other people who were allegedly seen with the accused that night were never charged or offered as witnesses yet they were very crucial custodians of the evidence that could have assisted the court dig out the truth.

Issues, Analysis and Determination

21. Under section 203 of the penal Code with which the accused is charged disclose the offence to happen whenever any person, who of malice aforethought, causes death of another person by an unlawful act or omission.
22. Therefore, for the prosecution to achieve a conviction in every charge of murder, it has the onus to prove all the ingredients coded under the provision beyond reasonable doubt. In the context of this matter, the questions the court must pose for itself and answer are whether; Aggrey Anunda Mukabane is deceased; if the death of the deceased was a consequence of by unlawful acts or omission of the accused; and whether the accused person was actuated with malice aforethought in causing the death of the deceased.
23. There is no contention that Aggrey Anunda Mukabane is deceased and his death is confirmed by the autopsy report dated 4/7/2018 produced by PW3 as PEXH 1. In fact, all witnesses including the accused agree that the deceased died and body recovered by the road side.
24. That leave the court with the duty to determine if there is evidence linking the accused to the death and if that connection was premeditated.
25. The right to life is protected and guaranteed under Article 26 of *the Constitution* of Kenya, 2010 to be inderrogable hence any action that tends to harm or take away the life of another is unlawful, unless committed pursuant to the law or in a manner justifiable by the law. It thus follows that every conduct, commission or omission, that harms or terminates life is ipso facto unlawful unless demonstrated otherwise.
26. In this matter, the autopsy report demonstrates that the deceased's cause of death was abdominal injury due to blunt trauma secondary to assault. It being in no doubt that the death was caused by assault it becomes axiomatic that the death was unlawful. If unlawful the next question is whether the assault is blamable on the accused.
27. The prosecution's case is clearly hinged on circumstantial evidence and the doctrine of last seen. The doctrine of last seen has been applied by the Kenyan superior courts applying decisions from Nigeria and India and is not new nor strange¹. The doctrine ordains and enables the law to presume that the person last seen with a deceased bears full responsibility for his death hence where an accused person was the last person to be seen in the company of the deceased and there be circumstantial evidence unerringly pointing to the guilt of the accused and leads to no other conclusion, there is no room for acquittal. In such a scenario, it is the duty of the accused to give an explanation relating to how the deceased met his death. Where the accused fails to give a satisfactory explanation, a trial court is justified in drawing the inference that the accused person killed the deceased.

¹ Republic v EEK [2018] eKLR, Republic v DWK [2020] eKLR, Chiragu & another v Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR)



28. In *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006 quoted with approval by the Court of Appeal in the case of *Chiragu & anot v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment) the court said;

“ Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

29. Applying the doctrine of last seen, the court is not in doubt, while relying on the evidence of PW1, that the accused was the last to be seen with the deceased on that fateful night. In fact, that evidence stands not alone but is corroborated by the evidence of the accused himself that when he learnt of the theft of his property, he went looking for the thief, having been told that the deceased had been seen near his house, met the deceased who told him to have been hiding from his theft victims and who confessed having stolen his property. The deceased then led him to three homes where he had allegedly sold the items but no recovery was made. Up to that level there was the irrefutable and confirmed evidence that the deceased was indeed in the hands of the accused as a suspect of theft on the midnight preceding the morning he was found dead.

30. The accused says he was alone with the deceased. There was no disturbance in the neighbourhood, akin to the one which woke up PW1, to suggest the Accused was confronted by another person other than the deceased. The court thus makes the inescapable inference that it was the Accused, who having suspected the deceased to have stolen his property, having extracted a confession from the deceased and having failed to recover his property from the homes the deceased allegedly sold the item, who became annoyed and harmed the deceased in a fatal manner.

31. The accused had the opportunity to rebut the presumption created by the doctrine of last seen but his evidence that he was with the deceased and left him alone by the road side is not convincing. The court finds the defence account not cogent to displace the presumption so created.

32. The evidence analysed above when looked at from the prism of both circumstantial evidence and the doctrine of last seen unerringly place the accused at the precise position to have a good explanation how the deceased met his death. The same goes well beyond mere suspicion.

33. That leaves the court with the last issue whether the accused was accentuated by malice aforethought. That the body of the deceased exhibited extensive injuries and the evidence that to the accused the deceased was a thief who had confessed but failed recover the stolen items was enough recipe for the accused to premeditate inflicting harm upon the deceased. The court therefore holds and finds that in assaulting the deceased to the extent of the injuries noted by the pathologist, the accused was actuated by malice aforethought.

34. Accordingly, having found that the prosecution has proved all the ingredients of the offence of murder, beyond reasonable doubt, the court adjudges the accused guilty as charged and convicts him. He is found guilty and convicted of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF MAY, 2024.

PATRICK J. O. OTIENO



JUDGE

In the presence of:

Mr. Mageria for the Prosecution

Ms. Wanyonyi for the Accused

Court Assistant: Polycap

