



**Republic v Mwebi (Criminal Case 48 of 2018)
[2024] KEHC 10353 (KLR) (Crim) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 48 OF 2018**

GL NZIOKA, J

AUGUST 21, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH NYANYUKI MWEBI ACCUSED

JUDGMENT

1. The accused was arraigned before the court charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the charge are that, on the night of 11th and 12th August 2018 at about 12.00am, while at Mukuru Kwa Njenga in Embakasi within Nairobi County he murdered Kamene Kasinga.
3. The charge was read out to the accused and he pleaded not guilty. As a result the case proceeded to full hearing. The prosecution case is that, on the material date the deceased was not feeling well. As a result, her friend (PW2) Michael Makau Kikuvi, in the company two ladies one called mama Carol went to get a doctor to attend to the deceased. That they found the accused in a clinic at Mukuru Kwa Njenga and he agreed to accompany them to the deceased's house. That, the accused was accompanied by his aide.
4. According to PW2 Kikuvi the accused requested all of them to leave him alone with the deceased and they obliged. However, while outside the house he heard the deceased screaming in pain and he went to find out what the issue was. That he was told by the accused to leave him do his work. Further that, he found the accused examining the deceased in her private parts, with a lot of blood where the accused was working from.
5. PW2 Kikuvi testified that, when the accused called him the second time into the house, the accused requested for thread, and when he inquired as to what the thread was for, the accused again told him to



- leave him do his work. Even though, he gave the accused the thread as requested. That, he still observed a lot of blood on the floor and a bucket with substance like meat.
6. That after he left the house and mama Carol entered she told him that the deceased was “aborting” and that the accused referred as the doctor had gone to remove her placenta which was stuck.
 7. That, after the accused finished his work, he requested for a payment of Kshs 6,000 but PW2 Kikuvu offered him Kshs 1,000 which he declined to accept and left.
 8. That the deceased slept until the following day when her condition deteriorated and she was taken to Mama Lucy Hospital, admitted and taken to theatre. That she stayed in hospital for sixteen (16) days and at one time she lost her mental ability and was communicating though she was “Mwenda wazimu” a mad person. That eventually she died on 28th August 2018. According to PW2 Kikuvu the deceased told him before she died that, the accused who attended to her “cut her intestines”.
 9. Be that, as it were, the post mortem on the body of the deceased was conducted by Dr. Muturi on 5th September 2018 and it revealed that, she died as a result of multiple organ failure due to septicalmia due to abdominal visceral injuries post abortion.
 10. The matter was reported to the police officers who held the accused to blame and charged him as herein stated.
 11. At the close of the prosecution case, the court ruled that, the accused had a case to answer and placed him or his defence. He testified on his own without calling any witness.
 12. He told the court that at the time of the offence, he was working at Lucky Medical Clinic. That he was an assistant to the owner of the clinic, one Dr. Ochieng. Further, on the material night, he stayed late in the clinic as it was raining.
 13. That, at 11.00pm a man and three ladies went to the clinic and informed him that, they had a patient who they wanted him to go and attend to. That he asked them to take the patient to the clinic as he was not willing to leave.
 14. However, he agreed to go and see the patient. That he found a lady sitting on a bucket which was full of blood, and there was also blood on the floor. That the blood was from her private parts and he inquired and learnt that she was aborting that, the placenta had failed to discharge.
 15. That, the patient had been attended to at a clinic called “Bright”. That, he told the people who called him to return the patient to Bright or take her to another “bigger hospital”. However, he learnt the patient did not want the abortion to be made public. That, he did not attend to or treat the patient.
 16. The accused described himself as a sheep in the slaughter house. He further argued that, he has never seen the “letter” which referred the patient to Mama Lucy hospital. That, he was not the one to have taken the deceased to Kenyatta National Hospital. He denied ever going to deceased’s house with thread and stated that, he found the thread there.
 17. At the conclusion of the case the parties filed their respective submissions. The prosecution filed submissions dated 19th September 2023. The prosecution cited section 203 of the Penal Code which provides for the offence of murder and submitted that, the elements of the offence that need to be proved are that; the death of the deceased occurred, the accused committed an unlawful act which caused the death of the deceased and the accused had malice aforethought.
 18. The prosecution further submitted that the first element was proved through the evidence of PW3 Dr. Muturi who produced the post-mortem report dated 5th September 2020 which indicated the cause



- of death was a result of multiple organ failure due to septicemia as a result of abdominal injuries post abortion.
19. On whether the accused committed the unlawful act that caused the death of the deceased, the prosecution cited section 213 of the Penal Code which outlines circumstances whereby a person shall be deemed to have caused the death of another person although his act was not the immediate or sole cause of death.
 20. That, in the present case, the accused masqueraded as a medical officer and performed a surgical procedure which caused the injuries that the deceased succumbed to. Further, the accused was identified through recognition as he was well known in the estate as a doctor and was arrested in his makeshift clinic.
 21. On whether the accused had malice aforethought, the prosecution relied on section 206 of the Penal Code that defines malice aforethought and submitted that, the accused misrepresented himself as a medical officer and carried out a medical procedure without the regard to the wellbeing of the deceased and knew that his actions would lead to the death or grievous harm to the deceased and therefore intentionally caused her death.
 22. That, the prosecution has proved the case beyond reasonable doubt to the effect that, the death of the deceased was unlawful, the accused participated in her death and he had malice aforethought and urged the court to convict the accused under section 203 of the Penal Code.
 23. However, the accused in submissions dated 3rd June, 2024 reiterated the elements of the offence of murder as set out by the prosecution and similarly cited the provisions of section 206 of the Penal Code on the definition of malice aforethought.
 24. The accused did not dispute the fact that deceased died and the cause of death as set out in the post mortem report. However, he denied having caused the death of the deceased but maintained he referred her to Mama Lucy Hospital. That his action cannot be stated to be unlawful neither does it constitute malice aforethought.
 25. The accused submitted the prosecution failed to prove beyond reasonable doubt that, the accused participated in the abortion. That, by the time he was called for help to alleviate the situation through medical assistance, the abortion had been started at the deceased home by the deceased and her friends.
 26. Further, PW1 Mwema Mulandi testified that he had never seen the accused nor did he know who attended to the deceased before he took her to Mama Lucy Hospital.
 27. Furthermore, the deceased gave contradicting information to his friends and boyfriend from what she was ailing from and they admitted the abortion was started at the deceased's house.
 28. The accused blamed the doctors and nurses at Mama Lucy Hospital for negligence arguing that, the deceased required urgent medical attention at the ICU but was made to stay at the hospital for seven (7) days. Further, the medical documents from Mama Lucy Hospital were wanting and relied on the case of; Republic vs Jackson Namunya Tali [2014] eKLR.
 29. At the conclusion of the case I find the key question to answer is whether the prosecution has proved its case beyond reasonable doubt. In answering that question I note that the offence of murder is provided



for under Section 203 as read with Section 204 of the Penal Code. The pertinent provisions read as follows: -

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

30. The above ingredients of the 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 Kabulit z& 4 others v Republic [2015] eKLR.”

31. Based on the foregoing provisions of the Penal Code and the Court of Appeal decision, 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.

32. As regard the 1st element I find that there is no dispute that the death of the deceased occurred on 28th August 2018. The same was confirmed by the witnesses inter alia; PW1 Muema Mulandi who testified that he assisted to take the deceased to Mama Lucy Hospital and thereafter she died. His evidence was corroborated by the evidence of PW2 Makau Kakuvi and PW4 No. 53661 PC Edward Amwayi Indechi who witnessed the post mortem. Indeed the post mortem report is final evidence of the occurrence of the death.

33. The cause of death of the deceased is as already stated herein, and supported by the post mortem report produced by Dr. Charles K. Muturi. According to his evidence in chief and the post mortem report, upon examining the deceased, he noted as follows:

Externally: -

- a. Signs of medical intervention (septic laparotomy wounds 3 other wounds on both sides, 2 on the left, 1 on the right, possibly for drains and colostomy, skin marks consistent with chest monitor leads, skin needle puncture marks on both hands)
- b. Marked pallor of the mucosae
- c. Bed sores on the buttocks of both heels
- d. Generalized oedema

Internally:

- e. Respiratory system: Turbid meural effusion 400-500ml with fibrinons adhesions. Lungs cut surface appears dark and frothy.
- f. Digestive system: copious amounts of pus within abdominal cavity. Extensive adhesion involving the abdominal viscera with gangrene of the gut. Gastric erosion mneseit



- g. Genito-Urinary system: Kidneys show adherent capsule with cortical petechiae. Uterus reveals sutured wound on the posterior lower side. FH – 16/40 and reveals pus within endometrial cavity.
- h. Nervous system: Brain appears swollen. However no pus or haemorrhage noted
34. Pursuant to the aforesaid, it is clear that, the deceased died as a result of injuries sustained post abortion and in particular injuries to the uterus which had suffered wounds on the posterior lower side. This finding supports the evidence of the prosecution witnesses that the deceased was attended to post abortion and there was damage to the affected parts.
35. The key question is who caused the death of the deceased. The evidence of PW1 Muema Mulandi who introduced himself as an uncle to the deceased is that, he learnt of the indisposition of the deceased from a lady caller who called him through telephone number 0720329494. That he talked to the deceased and she told him that, she was very sick. She was at her house and the witness took her to Mama Lucy Hospital.
36. The witness further testified when he got to Mama Lucy Hospital, he was asked whether there was a doctor who had attended to the deceased. That after her death he inquired from PW2 Makau what had happened and PW2 told him that, there was a doctor from Thika who had attended to the deceased.
37. However, the witness could not connect the accused with the incident as he was not privy to the alleged events of the night of 11th and 12th August 2018 at the deceased's residence.
38. However, deceased's friend PW2 Makau Kikuvu testified that he was with the deceased all through from the 11th August when she fell sick until 28th August 2018 when she passed on. That on 11th August 2018 in the company of two ladies, they went to look for a doctor to attend to the deceased and missed one in the first clinic but found the accused in the second clinic at Njenga.
39. He further testified how the accused attended to the deceased and twice when he returned to the house found a lot of blood on the floor. That the deceased was lying on the floor and the accused had put on gloves inserting his hands in her "private part".
40. Further twice he inquired from the accused why the patient was screaming in pain and why he wanted thread and the accused told him to leave him do his work. The witness identified the accused as the person who attended to the deceased on the night of 11th and 12th August 2018.
41. PW3 No. 53661 PC Edward Indeche testified that, after the deceased passed on and a report was made at the Villa police post he was assigned to investigate the case. That he was taken to the clinic where the accused was working by PW2 Kikuvu and found him at a clinic at Mukuru Kwa Njenga however the clinic had no name.
42. That the accused was found treating patients and was arrested when a female police officer posed as a patient in need of help to terminate a pregnancy. That, it is PW2 Makau who pointed the accused out. Further upon inquiry as to whether the accused had any medical certificate, he was found to have none. He was then arrested and charged after the investigations.
43. Pursuant to the afore evidence, it is evident that, indeed the accused was arrested at an alleged health clinic at Mukuru Kwa Njenga. The accused vide his evidence in chief he confirmed that he used to work at a hospital called Lucky Medical Clinic at the time he was arrested. He also confirmed that indeed he was approached by a man and three ladies to go and attend to a patient, who happen to be the deceased.



44. The afore defence evidence corroborates the evidence of PW2 Makau Kikuvi on the material night of 11th to 12th August 2018 the accused was at the deceased house.
45. However, the accused denies having treated and/or attended to the deceased whereas PW2 Kikuvi maintains that he treated the deceased.
46. The question is who between the accused and PW2 Makau Kikuvi is telling the truth. In answering that question, I note that PW2 Makau Kikuvi was not known to the accused prior to the night of 11th to 12th August 2018 up to his arrest. In fact, it is in evidence that, the lady mama Carol, who was the deceased friend led the others to the accused place of work.
47. In fact, according to evidence of PW2 Makau Kikuvi the accused asked for Kshs. 6,000 for services rendered and the witness offered him Kshs. 1,000 but he declined. The accused did not rebut that evidence. That the deceased condition deteriorated the following day, necessitating her admission at Mama Lucy Hospital.
48. But even at this stage, the question is, is the accused a qualified and competent medical practitioner. He testified that he was assisting Doctor Ochieng. In fact, at no particular time did he in his evidence in chief testify as to his job description and/or whether he has any medical qualification or certificate.
49. So the further question is, if he was not a medical doctor or a clinical officer, why was he going to the deceased house? Is it possible that, as he is not qualified to treat patients, he attended to the deceased as stated by PW2 Makau Kikuvi and due to the said incompetence he injured her abdominal organ leading to her hospitalization and subsequent death. I find that there is a high possibility to that effect.
50. The investigating officer referred to evidence from Mama Lucy Hospital, without any objection though not produced which showed that the deceased had a perforated uterus with intestines protruding from external cervix, foul smelling per vaginal discharge. Further intra operative diagnosis revealed uterus perforation, ileum perforation with 2 meters of non-viable gangrenous gut, the right ureter was also perforated, the sigmoid colon and rectum were also injured, and there was ccrxamination of the perixoneum with fecal matter.
51. Taking into account all the evidence herein it is clear that, the deceased was having incompetent abortion at the time the accused was called in. Apparently the placenta had not been discharged according to the accused. It does appear from the evidence that is while the accused who is not qualified was removing the placenta he damaged her afore organs which led to her bleeding, to her condition deteriorating and eventually death.
52. Therefore, even if the report from Mama Lucy hospital was not produced, the other evidence available supported by the post mortem report confirm the accused caused the death of the deceased due to negligence.
53. The last question is whether the accused acted with malice afore thought. The law on malice aforethought is found under section 206 of the Penal Code states 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;

- c. an intent to commit a felony; or
- 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.

54. From the facts herein the accused did not know the deceased prior to the 11th August 2018. He simply undertook to treat her when he had no competence to do so. It is an act of criminal negligence. The Court of Appeal in the case of; *Chege & 3 others v Republic (Criminal Appeal 23, 34 & 35 of 2022 (Consolidated))* [2023] KECA 466 (KLR) (28 April 2023) (Judgment) while discussing the concept of criminal negligence stated that: -

“109. Under English law, where a person causes death through extreme carelessness or incompetence, gross negligence is required. In *R. vs. Bateman* 19 Cr. App. R. 8 the Court of Criminal Appeal held that gross negligence manslaughter involved the following elements:

- i. The defendant owed a duty to the deceased to take care;
- ii. The defendant breached this duty;
- iii. The breach caused the death of the deceased; and
- iv. The defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.”

55. Pursuant to the holding above and the circumstances of this case, I find that there is no evidence of malice aforethought in this matter.

However, the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code has been established.

56. The subject section 202 provides that: -

- (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
- (2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

57. In the case of; *Republic v Henry Kaithia* [2022] eKLR the High Court stated thus: -

“

- “13) When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under section 202 Penal Code which is punishable under section 205 Penal Code by a term of imprisonment extending up to life.



14) In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*, the Court of Appeal cited the case of *REX VS TUBERE S/O OCHEN (1945) 12 EACA 63* with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.”

58. Consequently, I find the accused guilty of the offence of manslaughter and convict him accordingly.

59. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 21ST DAY OF AUGUST, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Kigira for the State

Mr. Juma H/B for Mr. Minda for the accused

Accused present physically

Ms. Ogutu: court assistant

