



**Republic v Wanjekeche (Criminal Case E035 of 2021)
[2024] KEHC 11431 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E035 OF 2021**

DK KEMEL, J

SEPTEMBER 30, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

EMILY MUKHWANA WANJEKECHE ACCUSED

JUDGMENT

1. The accused herein Emily Mukhwana Wanjekeche has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 19th day of July, 2017, at Brigadier area, Kiminini location in Bungoma North Sub- County within Bungoma County, she murdered Jonathan Barasa Burudi.
2. The prosecution called seven (7) witness in support of its case. PW1 was Selina Nanyama Mandila who testified that she was a traditional herbalist and who had treated the deceased to a cocktail of herbal concoctions for a long period. She confirmed having prescribed some herbal concoctions to the deceased and was shocked to learn about his death.

On cross – examination, she testified that she had treated the deceased for over four years. That she did not know the cause of death.
3. Simon Wamela Burudi (PW2) testified that the deceased was his elder brother. He stated that he received the report that the deceased was quite ill and had diarrhoea with blood as well as vomiting. That he rushed to the hospital and had him transferred to Mediheal hospital for endoscopy but he died before the tests could be carried out. He stated that he witnessed the autopsy on the body of the deceased and that some stomach contents were collected for analysis which later revealed that the deceased had sustained severe bleeding which corroded the intestines and that the loss of blood led to anaemia.



On cross examination, he confirmed that the deceased used to take herbal medicine for his stroke. That the family was concerned about how the money had been spent between the date of withdrawal and death of the deceased. That he could not tell from where the poisonous substance recovered from the house of the deceased came from. That it is the accused who brought the substance and handed it over to the police. That he could not tell if the accused was involved in the murder.

4. Martha Akasa Barasa (PW3) testified that the deceased was her father and who used to suffer from ulcers and used to bleed frequently and that he used to live with the accused peacefully.

On cross examination, she stated that she did not know anything about the alleged poison. She further added that she had not been alerted by the deceased about any fears from the accused.

5. Barasa Nato Tekka (PW4) testified that the deceased was his father and that he found the deceased at the hospital in bad condition. He stated that the post-mortem examination revealed that the deceased had ingested poison.

On cross examination, he stated that he is not a biological child of the deceased. He added that he is aware that the deceased suffered internal bleeding and that he has no evidence linking the accused to the death of deceased.

6. No. 78788 PC John Kulecho (PW5) testified that he received a report from Anette Barasa. That the deceased had died under unclear circumstances. He stated that an autopsy was conducted at Cheranganyi Nursing Home wherein the pathologist established that the deceased had been poisoned. He stated that he collected some stomach contents and then visited the home of the deceased where he recovered some liquid substance in a water bottle which the accused claimed had been supplied to the deceased by a herbalist. He added that he handed the specimens to his colleague PC Felix Oduor to escort them to the Government Chemist in Nairobi. He further added that he learnt that the deceased had withdrawn a sum of Kshs. 460,000/- from a certain bank and that he later received a withdrawal slip and two copies of certificate of death. He finally stated that an insecticide had been detected in the liquid which was inside a water bottle.

On cross-examination, he stated that he charged the accused because she was the only person living with the deceased. He stated that the herbal concoction which was recovered had been supplied to the deceased by a traditional herbalist. He also confirmed that he had preferred an inquest vide inquest number 3 of 2018 at Kimilili law courts. He also stated that the pathologist did not indicate the issue of poison in his report.

On re-examination, he stated that the accused did not give him a satisfactory answer as to how the deceased met his death.

7. Dr Ombongi Harun (PW6) testified that the autopsy on the body of the deceased had been carried out by Dr. Patrick Masita who is currently outside the country pursuing further studies. He sought to produce the autopsy report on his behalf since he was familiar with his handwriting and signatures having worked with him in the past at Kitale District Hospital. He testified that blood oozed from the orifices and that there was some inflammation along the gastric mucosa and that the entire mucosa of the small gut was severely hyperemic and hemorrhagic. He stated that the cause of death was severe anaemia due to gastro intestinal tract bleeding. He produced the autopsy report as exhibit 2.

On cross examination, he stated that there are many causes of severe anaemia and that the cause of death could be due to several probabilities.

8. Stephen Matinde Joel Weibe (PW7) was the Government Analyst. He testified that he detected a substance called amitraz which is an insecticide and poisonous when ingested. He formed the opinion



that prior to his death, the deceased had ingested the insecticide. He produced the report and exhibit memo form as exhibits 7A and 7 B respectively. On cross examination, he stated that pesticides and insecticides re harmful if ingested.

9. Upon the accused being placed on her defence, she tendered a sworn testimony. Her case is that the deceased was her husband with whom they got married in 1992 and that they were blessed with five children. She testified that the deceased later divorced his first wife Annette Nasimiyu Siundu vide Webuye Divorce Cause No. 3 of 2007. She stated that the deceased suffered from diabetes, stroke, blood pressure and ulcers. She testified that the deceased used to be attended to by a traditional herbalist as from 2009. She stated that in 2017 the deceased started experiencing swollen feet and lower abdomen. She testified that the herbal concoctions used to be contained in bottles. She denied poisoning her husband whom she loved and took care of plus the children. She stated that upon the death of the deceased, she has had no peace since her co- wife and her in-laws lodged a case at Kimilili Law Courts over some parcel of land as well as benefits of the deceased since their aim is to disinherit her and her children from the benefits which are still being held by the Public Trustee. She finally stated that she is still the administrator of the deceased's estate.

On cross examination, she stated that she was the one taking care of the deceased. That the alleged poison was the work of the deceased's brother when the deceased was moved to another hospital. That she does not know the origin of the alleged pesticide. That she did not participate in the prescription of the herbal concoction as the herbalist used to do that.

On re- examination, she stated that she could not have known if the herbal concoctions were poisonous. That she did not keep any pesticides in her home.

10. Parties were directed to file and exchange submissions. It is only the defence that complied.
11. I have considered the evidence tendered by both the prosecution and defence as well as the submissions filed. I find the only issue for determination is whether the prosecution proved its case against the accused beyond any reasonable doubt. It is trite law that the burden to prove all the ingredients of the offence herein falls on the prosecution in all cases save for a few statutory offences. The standard of proof in all criminal cases is that of beyond any reasonable doubt. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. See *Miller -vs Minister of Pensions [1943] ALL ER 372*. In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he/she does not have the burden to prove his/her innocence or to justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence by the accused.
12. The four ingredients that the prosecution is required to prove in a charge of murder are inter alia; that there was death of a human being; that the death was unlawfully caused with malice aforethought; that the accused directly or indirectly caused the death.
13. As to the fact of death , there is a post mortem report produced as exhibit 2 by Dr Ombongi Harun (PW6) who formed the opinion that the cause of death was severe anaemia due to severe acute, lower gastrointestinal tract bleeding. This ingredient of the offence was duly proved by the prosecution.
14. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic -vs Boniface Isawa Makodi [2016]*



eKLR that referred to the case of *Guzambizi Wesonga -vs- Republic* [1943] 15 EACA 65 where it was held;

“ 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 or in defence of property”.

15. The deceased herein was found to have died from severe anaemia due to severe acute lower gastrointestinal tract bleeding. There was excessive bleeding in the stomach. It is not in dispute that the deceased lived with the accused herein who is his second wife after he had divorced his first wife. It is also not in dispute that the accused and deceased were blessed with five children. It is also not in dispute that the deceased had been ailing and had suffered several illnesses such as stroke, diabetes, ulcers etc. It was the evidence of the deceased's daughter Martha Akasa Barasa (PW3) and son Barasa Nato Teka (Pw4) that their father used to suffer from ulcers and used to bleed frequently. It is also not in dispute that the deceased used to take herbal concoctions administered by a traditional herbalist Selina Nanyama Mandila (PW1) for a long period and up to the time of his death. It transpired from the evidence of the prosecution and defence that the accused herein who is the second wife of the deceased has not been on good terms with the deceased's first wife and her family. It can be seen by the fact that the accused was shoved aside during the hospitalization of the deceased and who did not participate in the entire process save only at the initial period when she rushed the deceased to hospital for treatment. It also transpired that the dispute between the accused and her co- wife relates to the distribution of the estate of the deceased and which dispute still persists to date. It also transpired that an inquest had been initiated at Kimilili law courts vide inquest No. 13 of 2018 which proceeded briefly but was withdrawn at the behest of the prosecution and subsequently the present charge was preferred against the accused herein. Hence, the inquest was not concluded as regards the cause of death and the identity of the persons involved and or suspected to be behind the death of the deceased. It is the contention of the defence that the traditional herbalist (PW1) should have been taken to task over the death of the deceased since she was the one who prepared the herbal concoction and administered it to the deceased. The accused in her defence stated that the herbalist prepared the concoction and gave it to the deceased and requested her to let him drink the rest of the fluid in a plastic water container. The accused has vehemently denied harming her husband with whom they had five children and whom she cared after the first wife divorced him. According to the investigating officer (PW5), he charged the accused herein because she was the only person living with the deceased and that she did not give him a plausible explanation as to how the deceased met his death. It was further the defence contention that if poison was detected, then the same was the work of her brother in-law who took charge of the deceased and locked her out of the picture. The accused in her defence stated that she did not participate in the prescription of the herbal concoction that the deceased consumed for a long period before he died. It is the accused's contention that the recovered herbal concoction must have been tempered with during the handling process and that it is her contention that her co- wife and brother in-law (PW2) were behind it as they were out to fix her. It is also instructive that the proposal to conduct an inquest was informed by that fact that there was no direct evidence regarding the cause of death and the identity of the perpetrator. This fact of conducting an inquest was a clear indication that the cause of death and Identity of the perpetrator had not been established at the time and hence the conclusion that there was no foul play at the time. The prosecution should have allowed the inquest proceedings to be concluded before taking further action. It would appear to me that the introduction of the pesticide into the equation led to the present charges. The prosecution has not explained as to why it had proposed to conduct an inquest which it did half way then abandoned it without allowing the court to come up with a finding. This seems to raise some suspicions on the part of the prosecution and which thus bolsters the accused's contention that the issue of the pesticide was introduced much later. Hence, I



find that the issue of malice aforethought (unlawfulness) of the death has not been established by the prosecution. It is instructive that even the traditional herbalist (PWI) who used to give the deceased herbal concoction was not ordered to record a statement under inquiry or made a suspect in this case. The entire evidence did not disclose that the accused had the requisite malice aforethought. What emerged is a supremacy war between the accused and her co-wife plus her brother in-law over the manner in which the estate of the deceased should be shared among the beneficiaries. Consequently, I find that the prosecution has not proved the ingredient of malice aforethought against the accused herein.

16. As to the identity of the accused as the perpetrator, the accused has vehemently denied ever harming the deceased who was her husband of many years with whom they had five children. The accused in her defence evidence confirmed that the deceased used to take herbal concoction prescribed by the traditional herbalist (PWI) as the deceased used to suffer from several ailments such as hypertension, diabetes, and ulcers. The evidence of the deceased's daughter (PW3) and deceased's son Barasa Nato Tekka (Pw4) is that the deceased used to suffer from ulcers and used to bleed frequently. Hence, the issue of bleeding by the deceased was a normal occurrence. The postmortem report indicated the cause of death as severe anaemia due to severe acute lower gastrointestinal tract bleeding. This seems to support the evidence of the deceased's daughter (PW3) and deceased's son (Pw4). The introduction of a pesticide by the analyst (pw7) raises some doubts as to how the same happened yet the prosecution had proposed to conduct an inquest into the cause of the death only for it to withdraw it mid-way. It is highly likely that the issue of the pesticide was later introduced into the picture with a view to nailing the accused as the fall guy since she and her co-wife plus her in-laws had not been getting along well prior to the death of the deceased. Looking at the circumstances of the incident even though the accused had been living with the deceased, the circumstantial evidence does not at all infer any guilt on her part. In the case of *Sawe -vs R (2003) KLR 364*, the Court of Appeal held:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proof in facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused”.

It transpired from the evidence that the deceased and accused had lived together peacefully for a very long period and that the deceased used to take the herbal concoctions for his ailments without any issues. It is only after the deceased fell seriously ill and rushed to hospital that is when her co-wife and brother in-law appeared at the scene and shoved off the accused from further handling the deceased. The accused in her defence had categorically maintained that her co-wife and brother in-law (PW2) must have introduced the issue of the pesticide so as to fix her and thereafter lock her from inheriting the estate of the deceased. I find the circumstantial evidence that has been presented does not infer any guilty on the accused herein since there were many persons who handled the deceased prior to his demise. There is some doubt created in the entire evidence as to the involvement of the accused as the perpetrator of the crime. I find that the benefit of such doubt must be resolved in favour of the accused since the evidence as a whole has neither linked her as the perpetrator nor placed her at the scene of crime.

17. In view of the foregoing observations, it is my finding that the prosecution has not proved its case against the accused beyond any reasonable doubt. I find the accused herein Emily Mukhwana



Wanjekeche not guilty of the offence of murder. She is accordingly acquitted of the same. She is hereby set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024

D K KEMEI

JUDGE.

In the presence of :-

Emily M Wanjekeche Accused

Nakitare for Kraido for Accused

Miss Kibet for Prosecution

Kizito Court Assistant

