



**Republic v Makokha (Criminal Case 57 of 2019)
[2024] KEHC 12333 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 57 OF 2019
PJO OTIENO, J
SEPTEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANIEL OMUTIKU MAKOKHA ACCUSED

JUDGMENT

1. The matter herein interrogates the death of one Jacob Mutambachi Shikuku. the accused is charged that he murdered the deceased contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the charge sheet allege that on the 29th day of August 2019 at Emutatiera village, Shitsitwi sub-location, Ímanla location in Butere subcounty within Kakamega County, the accused Daniel Omutiku Makokha unlawfully assaulted the deceased to death.
2. Towards the discharge of its duty to prove the case, the prosecution called six witnesses. PW1 was Elvas Mukonzo Motiangala, the deceased’s nephew. He testified that on the day of 29/8/2019 while he was at work at around 2 p.m. he received a telephone call from one of their family members by the name Wycliffe Ehimei informing him that his uncle had died but declined to tell him the cause of the death. He then decided to go to the deceased’s home where he found many people having arrived as well as police officers.
3. The deceased was at the time still lying on the bed with blood coming from his head. He told the Court that when he inquired what had caused the deceased’s death, he was told that the deceased had had an argument with the accused who beat him with a blunt object. The accused had been tied on the hands behind his back before he was led to the police station and the body taken to the hospital. On cross-examination he confirmed not to have seen the person who killed the deceased and that the deceased’s home had been partially fenced.



4. Evidence by PW2 John Nyamwesa Were was that on 29/8/2019 at around 1.20 a.m. he heard noise coming from his neighbours. When he went to the deceased's place, he found the accused outside crying. On inquiry, he was told that it is the deceased who had died. He then asked the accused to go to the house and light the lamp and the accused replied that there was no paraffin to light the lump. It is at that moment that one Habil arrived and they entered the house using torch from his phone. In the bedroom, the two found the deceased's body lying on the the bed with cuts on the head and ears with the bed having blood stains.
5. He told the Court that the accused told him that the deceased hit the bed as he was dying. Later, one of the villagers called and informed the chief who then informed the police of the incident and afterwards came and took the body to the hospital as the accused was arrested.
6. On cross-examination, he affirmed that the deceased's home was partially fenced and that one would freely leave and enter the homestead through the gaps in the fence. He emphasized that when he arrived he found the accused outside the house crying and that never saw the accused either beat or injure the deceased and that he never noticed any indications of attempts of the accused washing the deceased.
7. Evidence by PW3 Wycliffe Chimeyi Nyende was that on 29/8/2019 at around 1.30 a.m. while he was sleeping heard wailing from outside. He came out and went to the home of the deceased and when he arrived, there were many people at the homestead and was told that Jacob had been killed by his son. The deceased at the time was on his bed with open wounds on the head. He then decided to call the the assistant chief who later informed the police who picked the body to the hospital and also arrested the deceased. He told the Court that it is only the accused and the deceased who lived in the home which had only one house.
8. PW3 on cross-examination conceded not to have seen the accused kill the deceased and that he only found the accused tied after having been beaten, but was not aware of those who had beaten him.
9. PW4 was Habil Were Chitechi who told the Court that on 29/8/2019 he was at home when he heard wailing from the deceased's home. He headed to the scene and found the accused crying and on inquiry, the accused told him that the deceased had died. When he got to the house, he noticed blood under the bed and the deceased was dead lying on the bed with no cut but a swelling on the forehead. He reiterated that when he got to the homestead with PW1, only the accused was present at the moment. He told the court that the deceased live in the home with the accused only and that the home comprised of a single house with two rooms. In the house, no weaponof murder was recovered.
10. On cross-examination, he maintained that the deceased's home had no fence and that it was possible for one to freely move in and out through the space on the fence. He confirmed not to have seen anybody assaulting the deceased and was also not aware when the accused came back home that evening. He asserted that they decided to tie the accused as the suspect being he was the only person who used to lie with the deceased.
11. The last witness, PW5, Jacqueline Khalili Makotsi testified to the court that on 29/8/2019 she was at home sleeping when she received a call from a village elder who brief him of the wailing from the deceased's home. She received a call from area Chief who informed her that Mzee Jacob Shikuku had died and that the OCS Butere police station had been notified. Later the OCS called the witness and asked her the direction to the home of the deceased and she relayed the desired direction. Using such direction the OCS accessed the scene and collected the body which then taken to the hospital. The witness only went to the homestead the following day and found the deceased's body had been taken to the hospital and at the time no one present at the home. That evidence marked the close of the prosecutions case.



12. On his part, the accused, Daniel Omutiku Makokha, when put on defence stated that on the day 29/8/2019, he had left for work and when he came back at around 8 p.m. he found the deceased already dead. Thereafter people gathered, body was taken to the hospital and him arrested. He described the homestead as partially fenced.
13. On cross-examination, he emphasized that at the home there was only one house with two rooms and that they were using the same room with the deceased. He revealed that his father would ordinarily go to bed at 9 p.m.

Analysis and Determination

14. For the Prosecution to secure a conviction on the charge of murder, it has to prove, beyond reasonable doubt, four elements of the offence against the accused person. The duty on the prosecution is to prove that; (i) the death of the deceased indeed occurred; (ii) that the death was due to an unlawful act or omission committed by the accused and (iii) that the accused in so acting was propelled by malice aforethought. See *Anthony Ndegwa Ngari v Republic* [2014] eKLR .
15. To start, there is no dispute that the deceased herein died as was confirmed by the prosecution witnesses including the accused himself. PW1, Elvas Mukonzo Motiangala testified that on the day of 29/8/2019 at around 2 p.m. he received a telephone call from one of their family members informing him that the deceased had died and when he reached the deceased's home, he indeed found the deceased dead at the time lying on bed with blood coming from his head. This was in corroboration with evidence of both PW2 and PW3 who affirmed the court that when they reached the deceased home and got into the house, they found the deceased lying on the bed and was already dead.
16. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of the *Constitution* clearly outlines that every person has the right to life and that a person shall not be deprived of life intentionally except as au or other written law. The court in *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 in line with unlawful act 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 or in defence of property.”
17. Evidence of PW1 was in corroboration with that of PW3 and PW4 that when they went to the deceased's home they found the him dead at the time lying on the bed with blood coming out of his head. PW4's testimony was that on 29/8/2019 he heard wailing from the deceased's home and soon after he went and got to the house, he noticed blood under the bed and the deceased was dead lying on the bed with no cut but a swelling on the forehead. A post-mortem conducted by Dr. Muchana on the body revealed that there were bruises on the deceased shoulders. The deceased had also sustained deep cut wounds measuring 2x7cm wounds on the right face. This led him to the conclusion that the deceased death had been caused by severe head injury due to assault by blunt sharp object trauma.
18. The crux of the case then lies with the question on whether the accused persons were responsible for the death of the deceased. Alternatively did the prosecution prove beyond reasonable doubt that it was the appellants and nobody else who committed the unlawful act that led to the death of the deceased. I herein rely on a persuasive Canadian decision in the case of *R v Lifchus* 1997 Can LII 319 (SCC) 1997 3SCR 320 as follows:



19. “... the standard of proof beyond a reasonable doubt is extricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused. ... a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty. Such a standard of proof is impossibly high...as well, the word “doubt” should not be qualified other than by way of the adjective “reasonable”.”
20. Upon careful evaluation of the prosecution evidence, I notice none of the prosecution witnesses actually saw the accused kill the deceased and that the prosecution case is wholly grounded on circumstantial evidence linking the accused with the deceased’s death. The totality of the prosecution evidence is that they did not find the accused assault the deceased but only resorted to tie up the accused on the the basis of suspicion that he was the one who had been living with the deceased.
21. PW1 testified to the court that on the day of 29/8/2019 while he was at work at around 2 p.m. he received a telephone call from one of his family members informing him that his uncle had died but was never told the cause of the death. When he got to the deceased’s home, he was told upon inquiry that the deceased had had an argument with his son the accused herein and it is the accused who beaten him to death. On cross-examination, he conceded not to have seen the person who killed the deceased and that the deceased’s home had been partially fenced to the extent one would freely move in and out of the compound through the available gaps.
22. PW2 told the court that when he arrived at the deceased’s home stesd, the deceased was already dead lying on the bed with blood coming out of his head. The accused who was at the time seated outside the house crying had told him that the deceased hit the bed, what led to his death. On cross-examination, he indicated that the deceased’s home was partially fenced and that one would freely leave and enter the homestead through the fence and that he never saw the accused beat the deceased.
23. PW3, Wycliffe Chimeyi Nyende also when was being cross-examined conceded not to have seen the accused kill the deceased and that had found the deceased tied after having been beaten, not aware of those who had beaten him. The same position was maintained by the by PW4 in his testimony and reiterated in cross-examination that the deceased’s home had no fence and that it was possible for one to freely move in and out through the space on the fence. He stated that the reason why they had tied the accused was on grounds of suspicion being he was the only person who had been living with the deceased and that they had been sharing the same room.
24. Accordingly, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial were laid down in the case of *Abanga alias Onyango v Republic*, Criminal Appeal No 32 of 1990 (UR) where the court stated that:

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (i) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established (ii) those circumstances should be of a definite tendency unendingly pointing towards guilt of the Accused (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”



25. In the case of *Abamad Abolifatbi Mohammed & another v Republic* [2018] eKLR the court held in regard to circumstantial evidence that:

“However, it is truism that the guilt of an accused person can be proved by either direct 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”

26. It is the duty of the prosecution to lead evidence to prove all the ingredients of the offence beyond reasonable doubt. This burden does not shift at all times except in statutory exceptions. This is the principle established in Section 107 and 109 of the *Evidence Act* Cap 80 which provide: -“Section 107.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 states:-

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

27. The court in *Sawe v Republic* [2003] eKLR 364 amplified itself on the same that:

“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 reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

28. I find the only circumstantial evidence linking the accused to the murder of the deceased by the prosecution is the fact that he used to be the one staying with the deceased. However, it is my opinion this does not rule out the fact that someone other than the deceased would have sneaked his way into the compound and perpetrated the crime owing to the fact that the deceased’s home was partially fenced as was confirmed by both PW2 and PW3.

29. The accused when put on defence told the court that upon realising that the deceased had died on his arrival that he started crying and people started coming and later tied him up without asking what had happened. It is my view that despite the doubtful time variation between when the accused returned home and immediately realised that the deceased had died and when some of the prosecution witnesses who were deceased’s neighbours allege to have heard the accused crying, that alone would not confer conviction of the accused.

30. It is my position that all the evidence tendered by all other prosecution witnesses were grounded on suspicion and going by decision set in *Sawe v Republic* (2003) that suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. I find the same hearsy and cannot be relied on herein.



31. The Court of in *Mary Wanjiku Gichira v Republic*, Criminal Appeal No 17 of 1998, the same court held that:
- “suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”
32. A similar view was expressed by the Tanzania Court of Appeal in *R v Ally* (Criminal Appeal No 73 of 2002) (2006) TZCA 71 where it was held by the Tanzania Court of Appeal that: “Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.”
33. Both PW2 and PW3 confirmed to the court that they never found any weapon that would have been used by the accused in murdering the deceased. Moreover, there wasn’t any indication that there were attempts of the accused to usurp the evidence for instance trying to clean the blood. Further, the records does not reveal the duration of time that may have lapsed when from when the witnesses arrived to when the deceased died. This in my opinion would guide this court in presuming whether actually the death had occurred long before the accused had arrived or if indeed the incident had occurred few moments to when they arrived.
34. It is impossible for this court following the evidence tendered by the prosecution to ascertain when the murder could have been committed not necessarily on that night when the accused had arrived or even in the afternoon before the accused came back. In the instance the deceased was murdered by the accused as alleged by the prosecution, how come nobody heard of any skirmish, struggle or noise as the offence was being committed that night taking into consideration of the silence that was then. This issue entirely leaves doubts on the possibility of the accused killing the deceased and as a result this court opines to entertain its doubts.
35. Justifiably, the prosecution evidence does not disclose any attempt to corroborate the evidence of PW1 who claimed that the accused had informed him on a call to have beaten and killed the deceased. In the absence of such corroboration, the entire prosecution evidence remains that of little probative value and do prove nothing linking either the accused with the deceased’s death and is of no essence.
36. Consequently, I am satisfied that the prosecution has not discharged evidence to prove beyond reasonable doubt that it is the accused persons indeed are the true perpetrators of the murder of the deceased safe to warrant conviction. The accused persons are hereby found not guilty of the charge.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 27TH DAY OF SEPTEMBER, 2024

PATRICK J O OTIENO

JUDGE

