



**Republic v Muhalia alias Deinah (Criminal Case 9 of 2021)
[2024] KEHC 13345 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 9 OF 2021
JN KAMAU, J
OCTOBER 29, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

RACHAEL MUHALIA ALIAS DEINAH ACCUSED

JUDGMENT

Introduction

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 9th day of July 2020 at Sigong’o Village, Shaviringa Location, Cheptulu Sub-County within Vihiga County murdered one Linda Ngonyele.”
2. This matter was previously handled by Musyoka J. This court became seized of the same on 21st March 2023. The Prosecution’s case was heard on diverse dates between 19th September 2023 and 5th February 2024 when it closed its case. On 28th February 2024, this court found that the Prosecution had established a prima facie case against the Accused person herein and thereby put her on her defence. The defence case was heard on 13th March 2024.
3. When this matter was mentioned on 26th June 2024 to confirm compliance, the Accused person’s counsel informed this court that they would not be filing any Written Submissions. On its part, the Prosecution indicated that they had filed their Written Submissions which the court noted had not been placed in the court file. It undertook to ensure that the same were placed in the court file by 9th July 2024. A perusal of the e-filing portal showed a PDF document but on clicking the same, the same was returning a message that stated “Failed to load PDF document.” As at the time of writing this



Judgment, the Prosecution's Written Submissions had not been placed in the court file, the Judgment herein was therefore based on the evidence that was tendered during trial.

Legal Analysis

4. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Linda Ngonye (hereinafter referred to as the "deceased") died?
 - b. If so, was her death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased's death?
5. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

6. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

II. Proof Of Cause Of The Deceased's Death

7. The cause of the deceased's death was a pertinent issue. Dr David Akaliche Adori (hereinafter referred to as "PW3") tendered a Post mortem Report dated 11th July 2020 in respect of the deceased herein as an exhibit in this matter. After conducting the Post mortem examination, he formed an opinion that the cause of death was acute death due to excessive bleeding. It was therefore crucial to establish how the deceased sustained the injuries that caused her death.

III. Identification Of Perpetrator(s) Of Deceased's Death

8. The Accused person testified that on the material day of 9th July 2020, she woke up and went to the kiosk where she usually sold water. She stated that she found the deceased seated nearby and she was crying and shaking. The deceased asked her to help her. Her evidence was that the deceased told her that the previous night they had visited Jumuia Hospital with her husband for treatment of asthma and as they were going back, they ran out of petrol. She said that she asked the deceased if she was given any medicine at the hospital and she responded that she had taken medicine at night.
9. She said that she decided to take the deceased to her house to await her husband. She offered to give her a cup of tea but the deceased told her that she just wanted to sleep. She offered the deceased her bed to sleep on but she requested to sleep on the floor. She let the deceased to sleep on the floor, covered her and left for work.
10. On her way to work, she saw someone asking for the deceased. She led him to her house where she left them talking. The person, the deceased's husband, later told her that the deceased had died.
11. She denied knowing if the police got a needle and a bottle with a brown liquid from her house. She also denied procuring an abortion on the deceased.
12. Phedah Vinaywa Idambo (hereinafter referred to as "PW1") was the deceased's mother. She testified that on the material day of 9th July 2020, she was at home when one Duncan Lusaba, the deceased's husband came and informed her that he had taken the deceased to hospital. She was surprised at this



- turn of events because she had spoken to the deceased the previous day at around 3.30 pm. She also wondered why he took the deceased to hospital at Cheptulu at around 5.00 pm and why the hospital had asked that she accompanies him.
13. She asked that they first pray before leaving and when they arrived at the said place, he found him standing next to a woman who was sitting on a chair. She said that when she asked him where the hospital was, he looked at the woman. That woman was the Accused person herein.
 14. She told the Accused person that she was the deceased's mother and the Accused person started "telling her stories." She insisted on knowing where the deceased was but she warned her to speak in a low tone to avoid attracting people. The Accused person led her to her rental house where a child opened the door. The Accused person opened a curtain and she saw someone under the bed. Half of her body was under the bed and was facing upwards. She then realised that it was the deceased.
 15. She pulled her from under the bed by her hand and realised that she was dead. She screamed and people came. At the time, the Accused person was telling her not to scream. The deceased had blood on her legs but with no other injuries and that when she asked the Accused person what had happened, the Accused person said that she was not aware but had heard the deceased screaming in the night.
 16. She was categorical that she had never known the Accused person to have been a doctor. She said that there were syringes, blood, a pot with herbs and wires which looked like small needles.
 17. She called her husband, Laban Idambo Viriango (hereinafter referred to as "PW2") and informed him that she had found their daughter dead at Cheptulu. When he came, they went and reported the case to Cheptulu Police Station. Police came and took the deceased's body to the mortuary.
 18. PW2's evidence corroborated PW1's evidence. He confirmed that on the material day he was at home with her when the deceased's husband came and left with her. After twenty (20) minutes, PW1 called and informed him that he found his daughter dead under the bed in a certain house.
 19. When he asked the Accused person the registration number of her hospital, she only responded by saying that she had not killed anybody. He saw the police removing blood stained clothes, a pot with herbal medicine, syringe and tablets in a manhole. He was emphatic that the room was not a hospital.
 20. PW3 testified that the external post mortem examination on the deceased's body showed severe pallor, severe whitening of the eyelids, blood stains around the pubic regions and on the legs. However, there were no bruises on her body. He stated that the internal appearance of the body showed a problem in the genito-urinary system that had severe pallor, the uterus had severe pallor (whitening), tissues and clots and appeared bulky in size. The cervix was open and there was a mild pallor of the large intestines. He formed an opinion that the cause of death was acute death due to excessive bleeding.
 21. He collected three (3) samples, contents from the stomach to rule out drugs intake, contents from the uterus to rule out if the tissues were placental or not, blood sample for DNA analysis and Beta HCG to confirm if the content of the uterus was pregnancy or remnants of pregnancy.
 22. Polycarp Lutta Kweyu (hereinafter referred to as "PW4") was the Government Chemist DNA Analyst. He testified that on 17th July 2020, Police Constable Edwin Ombuyi, DCI, Hamisi submitted four (4) items to him. These included a green flowered piece of cloth in a blue carrier bag marked "A1", a white piece of cloth in a blue carrier bag marked "A2", a piece of mattress in a blue carrier bag marked "B1" and blood sample of the deceased marked "3". He was required to carry out DNA analysis and indicate the presence and origin of biological evidential material.



23. He carried out the analysis and found out that the DNA profile generated from the blood stains on the green item cloth “A1”, the white piece of cloth “A2” and the piece of mattress “B1” matched the DNA profile of the deceased. He produced his Report dated 21st January 2021 and the Exhibit Memo as evidence in court.
24. Jane Nabutu Waya (hereinafter referred to as “PW5”), also a Government Chemist Analyst, testified that she received Exhibit Memo Form from No 62149 Corporal John Kalamu, DCI, Hamisi (hereinafter referred to as “PW6”), with samples of a small plastic container that was marked “1” which had stomach contents, a small plastic container marked “2” that had urine, a plastic bottle marked “3” that had blood, a plastic container marked “4” containing a piece of liver, blood stained bed sheets marked “A1” and “A2”, blood stained mattress marked “B1”, a needle that had a clear liquid marked “C” and a plastic bottle with a brownish liquid marked “D”.
25. She had been requested to do a toxicology analysis on the above-mentioned exhibits to ascertain if there was any poisonous substance. She said that she did the analysis and observed that there was presence of disopyramide drug that was used to treat heart rhythm abnormalities. The said drug was extracted from the urine, blood and in the syringe that had the clear liquid. She produced the Report from the Government Chemist dated 17th October 2023 and the Exhibit Memo Form as evidence in court.
26. PW6 was the investigating officer in this matter. His evidence corroborated that of PW1, PW2, PW3, PW4 and PW5. He produced the pieces of the mattress and bed sheet as evidence in court.
27. After carefully analysing the evidence on record, it was clear that there was no direct evidence of the prosecution witnesses pointing to the Accused person. The prosecution sought to rely on circumstantial evidence.
28. In order to prove a case relying solely or majorly on circumstantial evidence, the parameters are well known. In the celebrated case of *Kipkering Arap Koske & another v Republic* (1949) EACA, the Court of Appeal held that in order to justify the inference of guilt under circumstantial evidence, 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. It added that the burden of proving facts which justify the drawing of that inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution.
29. Basically, the prosecution case was that the deceased sought for treatment from the Accused person who was an unqualified person. PW1 had alluded to the fact that the deceased’s husband had called her the previous day indicating that he had taken the deceased to hospital only to find out on the material day that it was not a hospital but the Accused’s person’s rented house.
30. It was not in dispute that the deceased was found in the Accused person’s rented house. This was confirmed by the evidence of PW1, PW2 and PW6. The deceased had blood on her legs. The DNA profile generated from the blood stains on the green item cloth “A1”, the white piece of cloth “A2” and the piece of mattress “B1” matched the DNA profile of the deceased. Thus, it was not in doubt that the deceased died while in the house of the Accused person.
31. The presence of disopyramide drug used to treat heart rhythm abnormalities was found in the deceased’s urine, blood and in the syringe that was collected from the Accused’s person’s house.
32. Although, the Prosecution did not prove whether or not the deceased was pregnant at the material time, the circumstantial evidence adduced pointed irresistibly to the Accused person as having had a role to play in the deceased’s death by medicating her unlawfully. She did not adduce any evidence



to show that she was an authorised doctor and/or clinician or that her rented house was a registered hospital.

33. Her evidence in defence was simply a denial. PW1, PW2 and PW6 all placed her at the scene of crime. She did not demonstrate that there was any motive for PW1, PW2, and PW6 to have colluded to frame her as the person who unlawfully caused the deceased's death on that material date.
34. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find her evidence to have been watertight enough to have weakened the inference of guilt on her part.

IV. Malice Aforethought

35. Having found that that the Accused person had a role to play in the act that led to the demise of the deceased, it was then upon the court to establish if there was malice aforethought.
36. Section 206 of the [Penal Code](#) provides the definition of malice aforethought and it reads 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.”

37. The ingredient of malice aforethought can therefore be express or implied. It can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.
38. In the case of *Rex v Tubere s/o Ochen* [1945] 1Z EACA 63, the court held that in determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.
39. The death of the deceased was as a result of an illegal act. There was ample evidence that the Accused person was not qualified to administer any medical procedure. The administration of medication was an act that could reasonably have been expected to have caused the deceased harm.
40. Although this court was persuaded to find and hold that the Accused person engaged in illegal acts on the material date and caused the deceased's death, the Prosecution did not present any cogent evidence to suggest that the Accused person intended to cause the death of the deceased and/or to do grievous harm to her. Further, there was also nothing to show that the Accused person had knowledge that the act or omission would probably cause the deceased's death or grievous harm to her.
41. She appeared to have been engaging in a trade that she was known for. Indeed, the deceased's husband took the deceased to her. PW1 testified that she had never known her to have been a doctor. This is not information that anyone would have known had there be no familiarity. The fact that PW1 also asked the deceased's husband that they pray before they departed to Cheptulu Hospital was telling and appeared to suggest that she already knew where they were going. This court therefore took her evidence with a pinch of salt.



42. In the absence of any other evidence, this court did not therefore find proof of malice aforethought that could be inferred as stipulated in Section 206 of the Penal Code.
43. Having analysed the evidence that was adduced by both the Prosecution and the Accused person, this court came to the firm conclusion that although the Prosecution proved the deceased's death and that the deceased's death was a result of the unlawful actions and/or omissions of the Accused person, all the ingredients under Section 203 of the Penal Code were not proven. The ingredients herein are:-
- a. Proof of the deceased's death'
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.
44. It was the finding of this court that the Prosecution did not establish to the required standard, which in criminal cases, was proof beyond reasonable doubt, that the Accused person had malice aforethought to kill the deceased. In other words, there was no proof and/or demonstration of mens rea and/or intention by the Accused person to kill the deceased herein. If any ingredient was missing, a charge of murder could not be sustained.
45. The above notwithstanding, that did not mean that a person who killed could go scot free. The actus rea was sufficient for him or her to be convicted of the offence that had been established. This court was satisfied that there was actus rea and/or unlawful killing of the deceased by the Accused person herein but without mens rea and/or intention to kill her. She therefore had to be held liable for the deceased's death.

Disposition

46. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby discharged of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) but convicted for the offence of manslaughter contrary to Section 202 as read with Section 205 in line with Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
47. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE

