Republic v Mosonik & another (Criminal Case 9 of 2018)
[2023] KEHC 1585 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 9 OF 2018

RL KORIR, J

FEBRUARY 24, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

DUNCAN KIPLANGAT MOSONIK ..... 1ST ACCUSED

JOSPHAT KIPNGETICH LANGAT ..... 2ND ACCUSED

JUDGMENT

1. Duncan Kiplangat Mosonik and Josphat Kipngetich Langat (1st and 2nd Accused respectively) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 9th day of January, 2018 at Koiyet village, Sugumerga location in Chepalungu sub-county within Bomet County jointly murdered one Sharon Cherotich Kirui.

2. The two accused denied the charge and the trial commenced before Muya J. who heard 9 witnesses. I took over the matter at its tail end and heard the last two prosecution witnesses.

3. By a ruling dated 29/3/2022, after consideration of the Prosecution's evidence, this court found that the Prosecution established a prima facie case against both accused and accordingly placed them on their defence.

The Prosecution Case

4. The Prosecution case was that the 1st and 2nd accused descended on the deceased with slaps and kicks causing her fatal injury. The scene of the crime was in the home of the deceased where a host of revellers were drinking illicit brew. According to PW1 Charles Rono, he was present at the home alongside one Marcella (PW2), Linah (PW3) and the deceased when the two accused arrived around 10pm and asked to be served busaa for Kshs 60/= but they were served for Kshs. 40/= and a quarrel ensued between

them and the deceased. He said that Duncan (1st accused) slapped the deceased on the face and she fell. He proceeded to kick her and Josphat (2nd accused) also kicked her several times on the stomach and chest while she was on the ground.

5. Mercella Lelongono (PW2) stated that she was at Sharon's (deceased) place when Duncan and Josephat entered and ordered liquor for Kshs 60/= saying they had Kshs 40/= and would pay the balance later. That Sharon (deceased) refused saying that the liquor was not hers. That Duncan got angry and slapped Sharon and a quarrel ensued between the accused and Charles (PW1). PW2 said that when the fight broke out, she ran away followed by Linah (PW3). On returning back, they found Sharon on the ground and on trying to help her up she said she was dying. They got Bernard (PW5) and Ezra to take her to hospital. She was treated and brought back home in the night and in the morning PW2 went to seek out the deceased's father in law to come and take her to Longisa hospital where she was treated and taken back home.

6. Linah Chepkwony (PW3) was also present and was drinking with Charles (PW1) and Marcella (PW2) and she witnessed the quarrel and when the accused threatened to beat up the deceased, she grabbed her child and that of the deceased and rushed into the house only to come out and find the deceased on the ground complaining of pain on the chest and stomach.

7. The deceased was taken to hospital by PW5 Bernard Kipkirui who first took her to Sigor Health Centre, then Longisa and finally Tenwek Mission Hospital where she died after undergoing surgery. The post mortem was conducted by PW10 Dr Esau Langat who produced the post-mortem report Exhibit No. 1 which showed the cause of death as septic shock secondary to perforated gut secondary to blunt abdominal injury. The body was identified to him by PW7 Jackson Kipkoske and PW8 Sharon Laboso.

8. The Prosecution case was wrapped up by the Investigating Officer PW11 who also testified that the two accused disappeared after the incident and were arrested 6 months later.

The Defence Case

9. Duncan Kiplangat Mosonik (1st Accused) gave an unsworn statement in which he denied any knowledge of the incident. He told the court that he was away at work in Kisii on 30th December, 2017 and went to his home for New Year celebration on 1st and 2nd and left for work on 3rd January. That he was later informed that someone had died at home. He got arrested when he returned home at the end of his contract on 8th June, 2018.

10. Josphat Kipngetich Langat (2nd Accused) told the court in his unsworn defence that he was working in Kilgoris for a Chinese Company and left for home for Christmas on 24th December,2017 from where he returned to work on 1st January,2018 around 4pm. That he received a call after 1 ½ weeks informing him that Sharon had died. That upon receiving the message he went back home and remained there until 9th June, 2018 when he was arrested at night. The 2nd accused denied any knowledge of the death of the deceased.

The Law & principles

11. The law on the offence of murder is contained in Section 203 of the Penal Code which states that:-

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

12. In Halsbury's Laws of England, 'Criminal Law', (Volume 25 (2020) at paras 1–552 and Volume 26 (2020), paras 553–1014), the elements of murder are outlined at paragraph 129, as follows:-

> " To establish a case of murder, the prosecution must prove:-
>
> i. That the unlawful death of the victim was caused by an act or omission of the defendant.
>
> ii. That the defendant did that act or omitted to act with malice aforethought, express or implied."

13. In the case of Johnson Njue Peter vs. Republic (2015) eKLR, the Court of Appeal of Kenya listed the three elements that must be proven to sustain a charge of murder as follows:-

i. The death of the deceased and the cause of that death.

ii. That the accused committed the unlawful act which caused the death of the deceased.

iii. That the accused had the malice aforethought.

14. For the offence of murder to be proven, like any criminal offence, the onerous task of proof falls on the Prosecution. Section 107 of the *Evidence Act* provides that:-

> " (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."

15. With respect to the burden of proof, the Court of Appeal in Stephen Nguli Mulili v Republic (2014) eKLR held that:-

> " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case."

16. The standard of proof in a criminal case is that of proof beyond reasonable doubt. In the famous case of Miller v Ministry of Pensions, (1947) 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt that:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

17. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt stating that:-

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

18. Having restated applicable law and principles, I now consider the evidence adduced to prove the elements of the offence.

Death and cause of death

19. The death of the deceased was not in issue in this case. Prosecution witnesses PW1, 2, and 3, were among other revellers who were present in her home partaking illicit brew on 3rd January, 2018. They saw her engaged in a quarrel and a fight with the two accused during which fight she was injured and was taken to hospital by PW5.

20. PW5, he first took her to Sigor Health Centre, then Longisa hospital, then subsequently Tenwek Hospital. Emily Chepkemoi (PW3) testified that the deceased died after undergoing an operation at Tenwek hospital. The pathologist (PW10) produced the post mortem report (Prosecution Exhibit 1) confirming the death.

21. I therefore find that the death was proved beyond reasonable doubt and that deceased died on 9th January, 2018.

Cause of death

22. An autopsy was conducted on the body of the deceased by Dr. Esau Langat (PW10) on 18th January, 2018 at Tenwek Hospital Mortuary. He observed that the deceased had undergone corrective surgery in the digestive system. There was a drain in place, and a surgical incision and gauze. The surgery incision was still open. He noted that some intestines were stuck together and there was an infection in the small intestines. He also noted visible stitches suggestive of surgery of the intestines. PW10 made a finding that the cause of death was septic shock in the abdomen caused by a perforated small intestine leakage into the stomach which caused infection.

23. The defence through cross examination suggested that there was negligence in the treatment of the deceased and that it was such negligence which caused the death and not the injuries sustained at the time of the assault. In answer to the suggestion, the pathologist clarified that the gauze which he found was covering the wound and was not inside the body. Secondly, the pathologist explained that he had the clinical summary of the treatment of the patient when he conducted the post-mortem. He stated that the small intestines had been clipped to remove the infected part. He maintained his finding that the initial injury on the deceased was caused by blunt force trauma.

24. The pathologist's findings contained in the post mortem report and his oral testimony was expert evidence receivable by the court. Section 48 of the *Evidence Act* provides that:-

> "(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
>
> (2) Such persons are called experts."

25. The principles guiding the court with respect to expert evidence were elaborately set out by Mativo J. (as he then was) in the case of Stephen Kinini Wang'ondu vs The Ark Limited (2016) eKLR where he held that:-

> "……..While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
>
> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
>
> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
>
> Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

26. Similarly in Kagina vs Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the Court of Appeal held that:-

> "On the issue of the expert witness, the Court adopted the position taken in a persuasive authority namely, Buham and Others [2005] EWCA CR. M. 1980, on the approach a court should take when addressing questions regarding admissibility, qualifications, relevance and competence of expert testimony which in law are left to the discretion of the trial court. Secondly, there is also need for the court to subject such expert testimony to vigorous in-depth analysis, weigh it along with all other evidence bearing in mind that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased

opinion in relation to matters within their expertise with regard to issues in controversy before the Court."

27. In this case, and guided by the authorities above, I have considered that evidence as a whole. As already stated and found, three witnesses being PW1, PW2 and PW3 were present at the scene and witnessed an altercation between the deceased and the accused. PW1 in particular saw the accused descend on the deceased with kicks while PW2 and PW3 sought refuge when they saw the two accused hastily and viciously approaching the deceased and when they turned back, found the deceased writhing on the ground saying "I am dying" and that she had pain in her stomach and chest.

28. The expert report by the pathologist showed that the deceased suffered blunt abdominal injury which led to a perforated gut. This in turn led to septic shock. The evidence that the deceased had suffered abdominal injury accords with and corroborates the testimonies of PW1, PW2 and PW3 that the deceased was kicked on the stomach and chest. I therefore accept the expert findings of the pathologist as being credible and unassailable.

29. I have considered the suggestion by the defence that the deceased may have died out of the negligence of the doctors who treated her and put her through surgery. Indeed such an issue was bound to arise as the prosecution did not call the doctors who treated the deceased to shed light on the treatment accorded to the deceased. One cannot tell whether the deceased would have found better medical care to save her life. It is possible that the treatment may have accelerated her death instead of saving her life. The relevant accused's issue therefore is whether the action of causing injury to the deceased was the sole cause of death or whether there was a supervening cause of death.

30. Section 213 of the Penal Code provides that:-

> " A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—
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> (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
>
> (b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
>
> (c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
>
> (d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;
>
> (e) if his act or omission would not have caused death unless it had been accompanied"

31. In Rex v Okule s/o Kahect (1941) 8 EACA 78, the Court stated that:-

> " a person who inflicts injury on a person who is already in a weak state, whether by reason or illness or a previous assault by another is guilty of murder if death results from such injury, supervening upon the weakness of the victim, even though, the last injury would not by itself have killed a healthy person."

32. In Re: Jayaraman vs Unknown 1967 CriLJ 776, the court held that:-

> " .....The simpler case would be where death results directly from the act itself. When death results from consequences naturally or necessarily flowing from that act, then also there need be no hesitancy in saying that the act caused death. For the "thirdly" of Section 300 to apply the requirement is, that the injury inflicted is sufficient in the ordinary course of nature to cause death, a high degree of probability in the ordinary way of nature that death would ensue on the injuries. The difficulty comes in when there are recognisable contributory causes leading to the ultimate, and the Court is called upon to consider in such a case the relative effect and strength of the different causes in bringing about the effect and then to find whether the responsibility for the result could be assigned to a particular act or not as the proximate or efficient or effective cause.
>
> But the theory of causation has to be kept within reasonable limits at both ends. The question when there are latter complications would be, whether the complications are the natural or likely consequences of the injury, the ordinary course it takes before death causes. That the consequences are labelled as a supervening condition or disease, given a name and shown as the immediate cause of death will not efface from the train of events and causes the original injury, if death is its ultimate result....."

33. Similarly in Mohammad Salam vs State Of Madhya Pradesh 1992 CriLJ 1612, the Madhya Pradesh High Court held that:-

> " .....It is true that death of the deceased had resulted not directly from the injury sustained by him but from peritonitis, which was the supervening cause. Where the supervening cause is the direct result of the injury, the person inflicting the injury is as much liable for causing death even though the death was not the direct result of the injury."

34. In this case it was clear to the court that the deceased had suffered kicks and blows which threatened her life. This was the genesis of her being rushed from one hospital to another eventually necessitating surgery on her. The surgery may not have succeeded for many reasons and may have amounted to a supervening cause of death. As already found above, there can be more than one cause of death and a supervening cause does not extinguish the primary cause.

35. I am therefore satisfied that the cause of death was proved to the required legal standard. The death was caused by septic shock secondary to perforated gut. Secondary to blunt abdominal injury. The blunt abdominal injury was not accidental but was caused by kicks and blows on the deceased, an act which was clearly unlawful.

Whether the accused were positively identified as the person who caused the unlawful death of the deceased

36. Both the 1st and 2nd accused denied the charge in unsworn testimony. The 1st accused raised an alibi that he was away at work in Kisii on the material date, having returned from the Christmas festivities on

3rd January 2018. Similarly, the 2nd accused also gave an unsworn statement that he too had returned to work in Kilgoris on 1st January, 2018 around 4pm after the Christmas and New Year festivities and was therefore not at home on the material date.

37. In submissions filed by learned defence counsel Mr. Kenduiwo on 24th August 2022, both the 1st and 2nd accused submitted that the Prosecution had not proved the case beyond reasonable doubt. That the incident occurred at 10pm and it was demonstrated that there was sufficient light to aid in identification of the accused. That no identification parade was held to identify the two accused from amongst all the persons who were present at the scene. Further, counsel submitted that the crucial witnesses being PW1, PW2, PW3 and PW4 were all drunk at the time of the incident and could not have been in a position to clearly identify the culprits.

38. I will proceed to analyse the Prosecution case alongside the defence case on the issue of identification. This will enable the court deal with all facts of the case in order to not only make a finding on whether the Prosecution has proved its case to the required standard but also consider whether the accused's defence was plausible and casts doubt on the Prosecution case.

39. In Wamunga vs Republic (1989) KLR 424 the Court of Appeal stated thus:-

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

40. In Mungania & 2 others v Republic & 2 others (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated)) [2022] KEHC 167 (KLR) (4 March 2022) (Judgment), Mativo J. (as he then was) stated:-

> " Before addressing the question of identification, it is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration. Human memory is not foolproof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex."

41. It is true as submitted by the defence that the incident took place at night. This is according to the testimony of PW1, PW2 and PW3 who were all present at the house of the deceased. The deceased's mother PW4 also told the court that she received a call at about 10pm informing her that her daughter had been injured. The issue then is whether the 3 prosecution witnesses were able to identify the accused as the persons who assaulted the deceased. There is ample case law on the principles applicable in identification under the circumstances stated in this case. In Anthony Muchai Kubuika v Republic (2013) eKLR the Court of Appeal made reference to its decision in Waithaka Chege v R (1979) EA 271 that:-

> " One always needs to approach the issue of visual identification with great care and caution... and the guiding principles laid in Simiyu and another versus Republic (2005) 1 KLR 192 that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given"

42. Further, the English case of R vs Turnbull (1977) QB 224 was also useful thus:-

> "If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".

43. In this case, I have tested the evidence of PW1, PW2 and PW3 to see if they truly could have identified the accused persons. Firstly, and as already stated, they testified that the incident took place at night. However PW1, PW2, PW3 and both accused were not strangers at all. They were villagers and persons who were all known to one another. PW1 testified that they were at the home of the deceased together with Marcella (PW2), Linah (PW3) when Duncan Langat (1st accused) and Josephat (2nd accused) arrived and ordered to be served chang'aa worth Kshs 60/=. PW1 said that the two had Kshs 40/= and said they would pay the balance later. PW1 testified that an argument arose between the two accused and the deceased over the money and the two briefly walked away only to come back and assault the deceased.

44. PW2's testimony corroborated that of PW1. She was present when Duncan and Josphat entered and asked to be served liquor. She saw Duncan slap the deceased upon an argument when the deceased declined to serve liquor worth Kshs 60/= as the two had only Kshs 40/=. PW2 did not watch the rest of the fight as she ran away when the fight broke out. She told the court that it was not so dark.

45. PW3 on the other hand confirmed that she knew Duncan and Josphat who were her neighbours and that when the two arrived at Sharon's (deceased) house, they found Sharon selling alcohol and shortly a quarrel erupted between accused and Sharon. That when the two approached the deceased threatening to beat her up, she (PW3) picked her child and the deceased's child and ran into the house.

46. It is clear that the witnesses said that it was night but that it was not so dark as not to see clearly. I accept the evidence of the 3 witnesses that they could see clearly and could identify not only one another as they drank together but also the 1st and 2nd accused, whom they knew as their neighbours. According to their evidence, the 1st and 2nd accused were persons who were clearly known to them and they knew them by their names. Under these circumstances one cannot possibly argue that because the witnesses did not say that there was a bright light, they could have been mistaken in identifying their neighbours who were clearly their usual drinking buddies. Further, PW1 and PW2 testified that the issue precipitating the quarrel and subsequent assault was the demand by the 1st and 2nd accused to be served alcohol worth Kshs 60/= but on payment of Kshs 40/=. The ensuing argument shows that there was close interaction between the accused and the deceased and PW1. Their interaction was not a fleeting moment so as to raise any doubt on the possibility of mistaken identity.

47. I am therefore satisfied that the prosecution witnesses PW1, PW2 and PW3 clearly identified the two accused persons as the persons who were present and assaulted the deceased upon being denied Kshs 60/= worth of alcohol by the deceased.

48. I have considered the argument by the defence that no identification parade was held in order to identify the accused. The purpose of an identification parade is to enable eye witnesses to identify suspects whom they allegedly saw.

49. On the issue of identification parades, the Court of Appeal in John Mwangi Kamau vs Republic (2014) eKLR, stated that:-

> " .....It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.
>
> Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:
>
> 6 (iv) Whenever it is necessary that a witness be asked to identify an accused/ suspected person, the following procedure must be followed in detail: .....
>
> (d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent; .....
>
> (n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

50. The Court of Appeal in the case of Samuel Kilonzo Musau vs Republic (2014) eKLR held that:-

> " The purpose of an identification parade, as explained in Kinyanjui & 2 others vs Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

51. I am persuaded by Mativo J. (as he then was) in Donald Atemia Sipendi vs Republic (2019) eKLR, where he stated that:-

> " Identification parade procedures are regulated by Police Force Standing Orders now under the *National Police Service Act* 2011, and previously under the Police Act (repealed). The procedure for identification parades were also laid out in the cases of R V. Mwango s/o Manaa[16] and Ssentale v Uganda.[17] The rules include the following:-
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> i. The accused has the right to have an advocate or friend present at the parade;
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> ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
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> iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
>
> iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
>
> v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
>
> vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; andAs a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts."

52. In this case therefore it is my finding that there was no necessity to mount an identification parade as the accused were not strangers but persons who were well known to the witnesses.

53. I have considered the alibi raised by each accused that they were away at their respective places of work on the material date. Their alibi is clearly false. They called no evidence to prove it and their mere statement did nothing to displace the prosecution evidence which clearly placed them at the scene.

54. Further, I have considered the evidence of the Investigating Officer that both accused disappeared from the locality and were arrested 6 months later when they showed up. The 2nd accused stated in his defence that he returned to work in Kilgoris on 1st January, 2018 and returned home 1 ½ weeks later after being informed that Sharon had died. The 1st accused stated that he was away at work in Kisii until his contract ended on 8th June, 2018 and he returned home. That he was subsequently arrested on 9th June, 2018.

55. I dismiss the 2nd accused's claim that he was at home all the while and was not arrested and charged. I also dismiss the 2nd accused's claim that he was away at work in Kisii and not in hiding. The fact that they were arrested and charged 6 months later demonstrates that they were on the run. Their conduct after the assault of the deceased denotes guilt on their part.

Whether the 1st and 2nd accused acted with aforethought

56. Section 206 of the Penal Code states that:-

> " 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;

(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."

57. In this case and as already found, the 1st and 2nd accused rained kicks and blows on the deceased leading to her eventual death. Prima facie they must have known that they were causing her harm. A look at the circumstances of the case however reveal that the incident took place in the deceased's house which also doubled up as an illegal brew den. The Prosecution witnesses PW1, PW2, PW3 and the Investigating Officer all gave testimony to that effect. While PW2 and PW3 admitted that they had been drinking, they did not tell the court whether the 1st and 2nd accused were also drunk at the time of their arrival when they demanded to be served Chang'aa. There is a likelihood that they were drunk and may have acted in drunken stupor.

58. I am therefore not satisfied that they planned to end the life of the deceased. The circumstances of the offence places doubt in the mind of the court that they acted with malicious intent.

59. I am therefore satisfied that the 1st and 2nd accused were clearly identified as the persons who set upon the deceased with kicks and blows leading to the rapture of her intestines. As I have already found, it was the assault which led to her surgery and subsequent death. They caused the unlawful death of the deceased.

60. As such the benefit of doubt must go to them. As stated by the Court of Appeal in Nzuki vs R (1993) KLR 171, held as follows: -

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;

i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.

61. In the end, I find the 1st and 2nd Accused guilty of causing the unlawful death of the deceased. As the element of mens rea is not proved to the required legal standard, I apply the provisions of Section 179 of the Criminal Procedure Code and substitute the offence of murder with that of manslaughter. The section provides:-

> "(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

62. I convict the 1st and 2nd Accused of the offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the 1st and 2nd Accused, Mr.Kenduiwo for the Accuseds, Mr. Njeru for the State and Siele (Court Assistant).