



**Republic v Nanga (Criminal Case 8 of 2018)
[2023] KEHC 21508 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 8 OF 2018**

**KW KIARIE, J
JULY 31, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER MUMBO NANGA ACCUSED

JUDGMENT

1. Peter Mumbo Nanga is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars are that on 18th February 2018 at Kanam A location in Rachuonyo North Sub County of Homa Bay County, they murdered Mary Auma Mumbo.
3. The deceased was one of the wives of the accused. When she was taken to hospital she succumbed to injuries which the prosecution contended were caused by the accused.
4. Peter Mumbo Nanga, the accused, contended that when he returned home, he found his wife in bed unwell. She informed him that she was scared by a snake and fell down and sustained injuries. She died as he was taking her to hospital.
5. The issues for determination are:
 - a. Whether the accused inflicted the fatal injuries to the deceased; or
 - b. Whether the deceased accidentally fell down; and
 - c. Whether the offence of murder was proved.
6. Lavender Maurine Abonyo (PW2) gave two versions of the incident. In the first version, she testified that on the material date she woke up at about 5 a.m. to go to the lake. She heard somebody tell her to inform the deceased, who was her aunt, to open the door. When the person persisted, she recognized



him as the accused. She called her aunt, the deceased herein and left her with the accused and proceeded to the lake. She returned home at about 8 a.m. but before she arrived, she heard screams and shouts. It was the deceased who was crying saying she was being killed. She (PW2) was with Lilian, the accused's second wife. She saw the accused standing near the deceased and he was saying, "Not yet" apparently in response to her cries. This was her testimony of 11th February 2019.

7. On 4th November 2021 when she was recalled following an application by the defence, she gave a second version. In her evidence she testified that at 5 a.m. it was still dark and that she did not see the accused. She did not recognize the person knocking at the door. When she informed her aunt about the person knocking at the door, she said it could be a customer. She added that the deceased operated a shop. She learnt of her aunt's death at about 6 p.m. when she returned from school.
8. She attributed her first version to what she had been told to by her stepfather and what she came to learn later was not true.
9. These are two competing versions by the same witness and the prosecution did not attempt to reconcile them. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

This witness is untrustworthy and it is not clear which of her evidence is to be relied upon. Her evidence was the only direct evidence.
10. The remaining evidence against the accused is circumstantial. In the case of *Mohamed & 3 Others v Republic* [2005] 1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the instant case, I will seek to establish whether the evidence so tendered is incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
11. Richard Obonyo Agia (PW1) is the brother of the deceased. His evidence was that at about 6.30 p.m. the accused called him and informed him that his sister had died after taking poison. When he went to Homa Bay mortuary, he saw his sister's body with injuries. This evidence by PW1 contradicted the contention by the accused.
12. The accused contended that he returned home on the material day and had to gain access to where his wife was by breaking the glass to the kitchen door. He found the deceased lying on her back. When he asked her what was the matter, she took time to respond but eventually told him she fell after a snake had scared her and sustained injuries. He called John Odooyo Abong'o (DW2) who supported his contention that the deceased had fallen down. This witness testified that he actually heard the deceased scream and when he went to check on her he found her unconscious.
13. The accused testified that he arrived home at about 11 a.m. His explanation as to why it took them up to 4 p.m. to take the deceased to hospital is not convincing especially after his description of the state he found the deceased in.



14. Secondly and very importantly, it was observed that the body of the deceased had multiple bruises and swelling all over. In addition, there were multiple bruises on the occipital (back of the head) region and bruises on the forehead. Even to a lay person, these injuries are not consistent with a fall.
15. I find that the inculpatory evidence against the accused is incompatible with his innocence, and incapable of explanation upon any other reasonable hypothesis than that of her guilt.
16. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In Black’s Law dictionary, 10th Edition malice aforethought is defined as:
The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
- Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:
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.
17. From the evidence on record, I find that the prosecution has not proved the offence of murder against him. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I acquit him of the charge of murder but find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

