



**Republic v Mulamula (Criminal Case 2 of 2014)
[2023] KEHC 24604 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 2 OF 2014
SC CHIRCHIR, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SUSAN SOHRE MULAMULA ACCUSED

JUDGMENT

1. Susan Sohre Mulamula, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on the 8th day of January 2014 at Shinyalu Market in Kakamega East District within Kakamega county murdered Sedrick Mulamula Luvongo.
2. The accused person pleaded not guilty to the charges and the case proceeded to full trial.
3. The prosecution called a total of 4 witnesses in support of its case.

Evidence

4. Pw1, Rosemary Masitsa, testified that on 8th January 2014 at around 11.00 p.m. She was asleep in her house when a lady by the name Adamba came to wake her up .She informed her that her daughter, one Miriam Wishenga had been injured. She walked a distance of 100 metres to reach her daughter’s house. She met the accused standing at the door with stones in her hand, while her daughter was wailing and bleeding profusely .
5. She further stated that she took her daughter to St. Pauline’s hospital and that the daughter informed her then that it was the accused who had hit her on the head with stones. She testified that she knew the deceased Cedrick Mulamula Luvonga as the husband to the accused and she had seen him at her daughter’s house. The deceased was seated on the chair. she was not aware of any injuries he had sustained.



6. She reported the incident to the Administration police (AP). The police came, and witnessed that there was blood on the scene. When she went back to the hospital , she saw the deceased but did not talk to him. Two days later, she learnt that the deceased had died at Kakamega General Hospital.
7. On cross examination, she stated that ,after the incident, she asked her daughter about her relationship with the deceased and she informed him that he was her customer since, she sold chang'aa. She reiterated that the accused had stones in her hands and that the Deceased was seated on the chair. She did not see anyone assaulting the deceased.
8. PW2 was Allan Luvulele Khahajira. He told the court that on 9/1/2014 at around 8.00 a.m, he received a call from one Rose who informed him that his cousin, the deceased was unwell and was at St. Pauline Hospital at Shinyalu Market. He went to the hospital and found the deceased. He noted that he had a swollen face and was bleeding from his left leg. He took him to kakamega General Hospital where he was taken to the Intensive Care unit (ICU) but later died at 8.00 p.m.
9. On cross examination, he admitted to know Kizito Munyasi Luvembe. He however did not see him at St. Pauline's Hospital. He stated at the hospital, the deceased was not talking and that he was with him until he passed on.
10. PW3 was one Kizito Munyasi Luvembe. He testified that on 8/1/14 at 11 p.m, he received a call from the accused, asking him to come over to her house. He found her seated with her two sons. She informed him that her husband, the deceased, had obtained an emergency loan and had not been home for the last 3 days. And on further inquiry, she informed him that he was at the house of one "mami" who sold chang'aa. He stated that she confided in him that she fought the lady at her house , that it was a serious fight and that some have been taken to St. Pauline Nursing home. He went to the hospital to check on him and found him with the "Mami" . She noticed that he had a head injury. He claimed that the doctors refused to treat the deceased since he had no money . He stated that he passed by the hospital the following day at 9/1/2014 and found the deceased on the hospital veranda , still untreated. He noticed that his condition was bad.. He arranged for the deceased to be taken to kakamega General Hospital and he went off to school. He was later called by Allan at 8.00 p.m. and informed that Sedrick had died.
11. On cross- examination, he stated that he did not know who assaulted the deceased. He stated that he found the accused in the house with her two sons and when he went to check on the deceased, he was in hospital with "mami". He testified that the accused later came to the hospital with three AP officers.
12. Pw4, the consultant pathologist testified that on 10/1/2014, he conducted an autopsy on the body of the deceased. He confirmed evidence of medical intervention, namely a drip site and dressing on the left leg. The lower shoulder appeared very fatty with massive bleeding below and stated that the cause of death was severe head injury which was secondary to blunt force trauma, following an assault.

Defence case

13. On being put on her defence , the accused testified that on 8/1/2014, at 8am, her husband the deceased left home for work. She also left for her work place at 9 a.m. and stayed there until 7.30 p.m. She stated that at 9.00 p.m . She called him but got no response. she went to his usual drinking den and found him at Mami's house. She looked through the window and saw her husband lying down but the owner of the house refused to open the door. She stated that she confronted the lady of the house and they fought and the lady called her mother.



14. The accused testified that she touched her husband but he was still and did not move. She stated that she went back home and called one Kizito , who was her husband’s colleague and asked him to go pick her husband.
 15. She further testified that that she was called at 11.50 a.m. the next day and told that her husband was in a ditch.;that her daughter went to the scene to confirm if it was true. She later went to see and found him in a ditch. He was looking at her, but he was not talking. He had worn a skirt and vest. She stated that she called one of his colleague and he was taken to hospital and that the doctor indicated that he needed to be admitted at the ICU.
 16. She testified that at about 8.00 p.m, she was called by her in- law Allan, who told her that her husband had died. That at about 9.00 pm on her way to kakamega county hospital, she got a call from a police officer who instructed her to wait for them. The police came with a vehicle and she was taken to Sindeno police station. She was told she will be face charges of having killed her husband.
 17. She insisted that when she got to Mami’s house, she fought with Mami but not with her husband; and when she left her house, the husband did not have any injuries. That even when she found him at the ditch, he had no injuries.
 18. She stated that they had been married since 1998 and had had a good relationship. They had 3 children. She had no reason to kill her husband.
 19. On cross examination, she testified that she did not go with him to get his salary on that day, as she usually did and when he did not go home , she got concerned since she knew he had gone for his salary. She stated that she called one Kizito who later came to the station. That she went to the house of Mamii, she looked through the window and saw the deceased lying on a sack together with other people. She testified that she fought with the lady of the house and only left PW1 came with a whip. She claimed that her husband was still alive when she went to check on him and that she did not kill her husband.
- Accused submissions.
20. It is the accused’s submission that no proof had been presented to show that there was any malice afore thought by the accused.
 21. On the Actus reus, it is her submission that there no evidence showing who assaulted the deceased .
 22. In a nutshell, the defence submits , the prosecution has failed to prove its case beyond reasonable doubt.
 23. The state did not file any submissions.

Determination

24. The only issue to be determined in this case is whether the prosecution has proved the charge of murder against the Accused.
25. The offence of murder is defined in section 203 of the penal code as follows: “any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder.”
26. Under section 203 of the Penal Code, the ingredients of the offence of murder are:
 - a. The death of the deceased and the cause of that death
 - b. Proof that the death occurred as a result of the unlawful act or omission on the part of the accused;



- c. That the act or omission was accompanied by malice aforethought as defined under section 206 of the Penal code.
27. For the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code must be proved beyond reasonable doubt
28. The burden of proof in criminal cases rests on the prosecution and the standard is beyond reasonable doubt. The prosecution may prove its case either through direct or indirect evidence.
29. The fact of death of the deceased was proved by evidence of the autopsy report. The doctor who performed it, PW4, opined that the deceased died due left subdural haematoma due to a blunt force trauma following assault.
30. There was no direct evidence as to who caused the death of the deceased. None of the witnesses who testified saw the deceased being assaulted by the Accused or by any one body else. Therefore the prosecution's case hinges on circumstantial evidence only.
31. What is circumstantial Evidence? In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the court of Appeal had this to say on circumstantial evidence: "However, it is a truism that the guilt of an Accused person can be proved by either direct or 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. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: - 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'" (Emphasis added)
32. To sustain a conviction based on circumstantial evidence the conditions to be met were set out in the case of *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which the court of Appeal again held: "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 guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly 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."
33. In the case of *Mwita v. Republic* (2004) 2KLR 6 it was held :
- "It is trite that in a case depending exclusively upon "circumstantial evidence" the court must, before deciding upon a conviction, find that the inculpatory facts are incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt."
34. In another case, *Mwangi & Another* (2004) 2KLR 32 the Court of Appeal stated this of circumstantial evidence: "In a case depending on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge"



35. Based on the above definition and the essential ingredients of circumstantial evidence ,I now turn to the case before me.
36. According to PW1 she was woken up by a neighbour by the name Adamba who told her to go and see what had happened to her daughter.. That immediately she went to her daughter's house and saw the accused standing at the door of her daughter's house holding stones, and her daughter bleeding profusely. She claimed that she saw the deceased seated on a chair inside her daughter's house but she did not observe if he had any injuries. She was with the Adamba . There were also neighbours present. She took her daughter to the St. Pauline's hospital and went to report at the Administration police Lines. When she went back to the hospital she found the deceased . she noticed that he had a swollen head.
37. PW2 testified that he was called by one Rose who informed him that his cousin, the deceased was unwell and was at St. Pauline Hospital. He was not privy to what had caused the injuries that his cousin had suffered that led to his death.
38. PW3 was called by the accused who requested her to go to her house. On reaching the house she informed him about the fight the accused had fought with "Mami" , that some people were injured and had been taken to St. Pauline hospital. He went to the hospital and found Mami and the deceased . Both were injured. He later arranged for him to be taken to Kakamega county and referral hospital The Accused version differs. She said she told PW3 to go to Mami's house and check on her husband but he never returned. The following day in the morning , she received a call from someone who told her that her husband was lying on the road. Her daughter went first to the road and she followed later. She found her husband in the ditch , wearing a Skirt and a vests, he did not have the clothes which he had gone with. He was not talking. She did not notice any injuries.
39. There is consistency between the testimony of PW1 and PW3 on the fact that the deceased was taken to St. Pauline hospital that night. There is also consistency between the evidence of PW1, PW2, PW3 and the Accused's ,that the deceased later ended up in kakamega county and Refferal hospital , where he succumbed to the injuries.
40. From the evidence available, what points to the accused as the suspect is the fact that she was found holding stones at Mami's house , and said Mami having been injured . There were also two witnesses who testified to seeing the deceased that night in St.Pauline hospital, that is PW1 and PW3. Therefore the Accused's testimony to the effect that she found the deceased lying on a ditch on the road the next morning is not plausible.
41. Further from her cross- examination by the prosecution , it is apparent that she was upset that the deceased had gotten his salary and went to spent it in drinking . The fact that she was upset also came out from the testimony of PW3 who noted that the accused was bitter as she told him how her husband " had gotten lost at the house of that woman who sells changaa". There is no gainsaying therefore the fact that the Accused had a score to settle with the deceased. She had a motive.
42. But there are unanswered questions; For instance how did the Deceased end up in st Pauline hospital? who took him there? PW1 said that he saw the Deceased at Mami's house sited but she was not aware if he had injuries. When she later got the Administration police they first went to the Accused house , then together with the accused they went to Mami's house but did not find the deceased. Thus someone else who is not identified must have taken him to the hospital .
43. The evidence of PW1 also indicate that the accused was not the only person who was in Mami's house that night. The accused told the court that there were other people in the house apart from the deceased and Mami. Further according to PW11 when she went to Mami's house she found neighbours. It is



not known at what point did these neighbour gathered in Mami's house. It is evident therefore that the accused was not the only person who was with the deceased that night.

44. The fact that there was an attack in the house of Mami has been proved ; there is also evidence that the accused and the deceased were at the same place at some point that night. But , there is a gap: The accused and the deceased were not the only ones in Mami's house that night. One of the tests that circumstantial evidence must meet as per the case of Abanga alias Onyango(supra) is that “ 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.”
45. In the present case there were neighbours, according to PW1. There was also the informer, one Adamba , who came and informed her about the attack. According to PW1 she last saw the deceased sitting on a chair. She could not tell if he was injured. She further told the court that the accused left as PW1 was taking Mami to hospital. There is no evidence that after leaving, the accused came back to attack the deceased. May be she did , but the duty of establishing that fact was not discharged by the prosecution. It can not therefore be said , with certainty that the accused could be the one , and not anyone else who attacked the deceased that night. It is not even certain at what exact point the deceased was attacked and if the attack took place inside Mami's house. Motive , even though it has been established is not enough.
46. I have stated before that the testimony of the accused as to what transpired that night is not plausible. Further her testimony that she never saw any injury on the deceased even when she found him in the ditch is not believable In effect , she was not being candid about what she knows about the events of that night.
47. In effect the circumstantial evidence presented by the prosecution falls short. It has not been proved with certainty that the act of assault points irresistibly to the accused, and not any one else. It boils down to suspicion and a strong one at that .
48. However in the case of of Sawe vs. Republic 2003 KLR 364 the Court of Appeal had to say this about suspicion: “Suspicion ,however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond doubt.”
49. The burden of prove must and always remains with the prosecution. In Woolmington –Vs- DPP (1935) AC 462, cited with approval in the case of Rvs Musingila (2018) e KLR t; Lord Sankey in the celebrated “Golden thread; speech; “Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to..... The defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
50. The upshot of the foregoing is that the prosecution has failed to prove to prove the guilt of the deceased .
51. In conclusion, I must register my concerns in the manner in which the investigation and / or prosecution has been conducted.
 - a). There is a central person in this case by the name mami ,whom I expected to have been a key witness. why was Mami not called to testify? The attack is alleged to have occurred in her house, and she was attacked too, during the same incident. She would have been key in telling the court what exactly transpired that night.



- b). There was also another individual identified as Adamba. She is the one who reported to PW1 that Mami had been assaulted. According to PW1 she came back with this Adamba to the scene . What did Adamba see apart from noticing that Mamii had been hurt?
- c). Finally what did the investigation establish, for instance at the alleged scene of crime? what information did the investigators gather from the Accused's daughter who allegedly went ahead of the Accused to the road where her father was allegedly lying? The investigation officer never testified and those questions therefore remained unanswered.
52. The prosecution has failed to prove the charge of murder under section 203 as read with section 204 of the penal code. Consequently, I hereby dismiss the charges and acquit the accused under section 215 of the Criminal procedure code.
53. I order that the accused be released forthwith unless otherwise lawfully held.
54. Right of Appeal, 14 days.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER 2023.

S. CHIRCHIR

JUDGE

In the presence of :

E. Zalo- Court Assistant

Ms. Osoro for DPP

Ms. Wanyonyi for the Accused person

The Accused - present

