



Republic v Nzau (Criminal Case 1 of 2018)
[2022] KEHC 15743 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15743 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 1 OF 2018
MW MUIGAI, J
NOVEMBER 22, 2022

BETWEEN

REPUBLIC STATE

AND

JOHN MUTINDA NZAU ACCUSED

JUDGMENT

Background

1. The Accused person herein John Mutinda Nzau is charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that the Accused on 23rd day of December, 2017 at Usiumu village, Mumbuni sub-location in Kathiani Sub-County within Machakos County murdered Maureen Wayua.
2. The Mental Assessment Report dated February 1, 2018 and filed in Court on February 5, 2018 found the accused person Fit to Plead. The Accused person herein took plea on March 20, 2018 whereof after the charges were read out to him in a language that he understood he pleaded Not Guilty. A plea of Not Guilty was entered on his behalf.
3. The Accused person was represented by Mr. Makundi Advocate and later on Mr. Musyimi while the state was represented by Mr. Machogu and later Mr. Mwongera.
4. The hearing took off and the Prosecution called a total of seven (7) witnesses in support of its case.

Evidence on Record by Trial Court

5. PW1 Elizabeth Mutinda was a minor. After a *voir dire* was conducted on her by the Court she was found that she was possessed with sufficient intelligence to testify but however did not understand the nature of an oath and it was thus directed that she gives unsworn evidence.



6. She testified that on December 23, 2017 she was at home with Lucy and Fridah their mother Maureen Wayua. While she was asleep, her father Mutinda Nzau, the accused arrived and knocked on the door and her mother opened the door. He went to bed. Later, they quarreled and she witnessed the deceased and accused quarrel who were her parents. PW1 saw the accused slapping the deceased. She told the Court that she went out to alert her grandmother one Mwikali Nzau. On coming back she saw that the face of the her mother /deceased was swollen on one side. Her grandmother came and requested her father (the accused person) not to assault the deceased again. She testified that the following day her mother complained that she was feeling dizzy. The deceased was rushed to Mitaboni Hospital. While at the hospital her father called one Tabitha Muia who had been their best maid. The accused person told PW 1 (Elizabeth) not to tell the said Tabitha what had happened. The deceased later passed on. Prior to this incident her parents used to have quarrels but she did not know the cause.
7. On cross –examination by Ms Nzilani holding brief for Mr. Makundi for the accused person, she said that she had not seen her mother sick nor taking drugs. That it is only on that day when her mother claimed she felt dizziness. She saw her father the accused person herein assaulting her mother. Her father told her not to say anything about what happened to her mother. She has been living with her mother’s sister named Damaris as from December 24, 2017. Her grandmother had not visited her. She stated she was born on 9/10/2004.
8. PW2 Rose Mumbua Musyimi testified that she is a pastor at Full Gospel Churches of Kenya. That on December 23, 2017 around midday she received a call from one John Mutinda Nzau (accused herein) a fellow church member requesting for her car to take his wife (deceased) to hospital as she was unwell. She gave out her car and after one hour the accused person called her again and informed her that his wife had passed on. She rushed to Mitaboni health centre and they later took the body to Machakos Funeral Home.
9. On cross –examination she told the court that she did not know of any squabbles between accused and his wife. That there was a time the deceased had informed her that she was attending clinics.
10. PW3 Daniel Kiio Sila a cousin to the accused person testified that on 23.12.2017 at 2.00 p.m. the accused informed him that the deceased had fallen seriously ill and so he accompanied the accused and the deceased to Mitaboni hospital. However, he was later informed by a doctor at the hospital that the deceased had died.
11. On cross-examination by Nzilani for Mr. Makundi for the accused person he stated that he had known that the deceased used to have stomach illness and had been attending treatment.
12. PW4 Ann Mwikali testified that the accused herein is her second born son. That on December 22, 2017 around 10.30 p.m, PW1 came to her house and informed her that the deceased had fallen down after the accused had opened the door. She rushed to the scene. She testified that at the scene she noted that the deceased had been helped up by the accused but however she had facial swellings. She told the Court that the deceased was taken to hospital the following day and brought back but however she complained of stomach pains that seemed to be a recurrent condition for which she had been receiving treatment. She alerted the accused person who came and managed to secure a vehicle. On their way to Mitaboni hospital the deceased passed on. She told the Court that the accused and deceased did not have squabbles in the past.
13. On cross examination by Nzilani holding brief for Makundi for the accused person she told the Court that her granddaughter Elizabeth (PW1) informed her that the deceased had been injured while opening a door. That the deceased had been attending clinics over stomach problems and that she used



- to suffer from swollen spleen for long since the year 2008. She also used to experience lack of oxygen. The deceased informed her that she had been hit by a door and fell down as stated by her daughter.
14. PW5 Philip Muthusi Mailu testified that he is a distant cousin to the accused person. That on January 11, 2018 he visited Machakos Mortuary to identify the body of the deceased to the doctor who was conducting the post mortem.
 15. On cross examination by Mr. Musyimi Advocate for the accused person, he stated that the accused had informed him that his wife who had been ailing for some time had passed on. He also confirmed that he did not see any visible injuries on the body of the deceased.
 16. PW6, No. 81628 Pc Binti Hamadi attached at Kenol Police Post testified that on 23.12.2017 she was informed that a body of a dead person had been brought to the station. The accused person herein identified himself and informed her that he had brought the body of the deceased, his late wife. He claimed that his wife had been ailing. She told the Court that the accused informed him that the deceased had a kidney problem and that he furnished her with medical notes. She testified that she received a call from the family of the deceased that was to the effect that the accused had in fact killed the deceased and on 26.1.2018 the accused was charged with murder. She confirmed on cross examination that she did not see any visible injuries on the body of the deceased and further added that she did establish that the deceased had been ailing for 7 years due to kidney related complications.
 17. On cross –examination she stated that she did not see any visible on the body of the deceased. The deceased relatives claimed that the accused had assaulted the deceased.
 18. PW7 Dr. Kamotho Watenga testified in respect of an autopsy that had been carried out on the deceased by Dr. Waithera Githendu whose handwriting he was familiar with as he had previously worked with her. He sought to tender the post mortem report on behalf of Dr. Waithera and which was produced as an exhibit there being no objection from the accused’s counsel.
 19. Dr. Kamotho Watenga told the court that the report revealed that the body had a large swelling on the stomach external wall. There was a lot of blood in the stomach measuring about five litres. The liver had some cirrhosis and reduced in size. There was haematoma and contusion on left biceps as well as left buttock and left leg. The doctor formed the opinion that the cause of death was haemorrhagic shock of the spleen due to blunt force trauma. It was reported that the deceased’s spleen was large due to liver cirrhosis. The report was produced as Exh 1.
 20. On cross – examination by Mr. Musyimi for the accused person he stated that liver cirrhosis can cause a large spleen. That large spleen could have been the cause of death. That there was direct blunt trauma on the left side of the rib cage.
 21. On further cross – examination by court he stated that the blunt force was too severe as it could be seen by the presence of five litres of blood in the stomach.
 22. The Prosecution closed its case on October 13, 2020.
 23. The Trial Court Judge Hon. D. Kemei delivered a Ruling on Case to Answer February 2, 2021.

Proceedings by this Court

24. This court took over this matter on October 21, 2021. Proceedings were typed and parties/counsel obtained copies of the same.
25. On 2/11/2021 section 200 [CPC](#) was read out to the Accused person who opted to proceed from where the matter had stopped.



26. The accused elected to give a sworn statement and call one (1) witness.

Defense Hearing

27. DW1 John Mutinda Nzau testified that he is a resident of Mitaboni and works as a driver. On 22/12/2017 he arrived home at 10 p.m. He knocked the door and his wife Maureen (deceased) opened the door for him and started screaming saying that she was in pain and she fell on the seat. He gave her some painkillers and later took her to the hospital where she was treated and they returned home. He went to the market leaving his wife home with his mother who prepared some porridge for her. He was later called. He hired a motor vehicle and took her to the Mitaboni hospital where she was examined and later the doctor informed them that she had passed on. He further stated that his late wife had a problem with her stomach and had visited several hospitals namely Machakos Level 5, Shalom Hospital and Bishop Kioko Hospital. Her stomach used to swell on the side. His daughter Elizabeth PW1 was in her room as well as the other children. He denied ever beating his wife that day. They used to live peacefully but had disagreements as would happen in any marriage.
28. On cross – examination by Mr. Mwongera for the ODP/Prosecution he stated when he arrived home the children were already asleep. That he did not beat his wife. The wife had no injuries. That he did not cause the said injuries as alleged. He did not have any medical records about his wife stomach problems.
29. The Accused closed his case on 26/09/2022 without calling any witness.
30. On 26/09/2022 this Court directed the parties to file written submissions. Each party was to have 21 days each.
31. On 11/10/2022 parties confirmed filing of submissions and matter fixed for judgment.

Written Submissions

Prosecution's submissions

32. It was submitted that the Prosecution availed seven witnesses in order to prove its case and raised the following issues for determination namely;
1. Was the accused involved in the murder of the deceased?
 2. Did the accused have malice?
 3. Was the accused identified appropriately?
 4. Was the cause of death as a result of the injuries inflicted?
33. On the issue of whether the accused person was involved in the murder of the deceased, the testimony of PW1 and PW4 clearly placed the accused person at the scene of crime. It was stated that the accused person came home late and a disagreement arose between accused and deceased and the accused beat his wife brutally.
34. On whether the accused person had malice 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.

In the present case it is evident that the accused person had malice aforethought because he intentionally inflicted injury on the deceased which caused her death.

35. On the issue of whether the accused was properly identified, from the evidence adduced both PW1 and PW4 were present in the house while the accused assaulted his wife ferociously.
36. On the issue of whether the cause of death was a result of the injuries inflicted, PW7 the doctor who testified on behalf of her colleague clearly stated that the deceased's cause of death was hemorrhagic shock to splenic hemorrhagic & blunt force trauma and massive splenomegaly to liver cirrhosis.
37. Reliance was made in the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR wherein paragraph 22 it is stated as follows:-

“It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.
38. Also in the case of *Ramanlal Bhat v Republic* [1957] EA 332 at 334 and 335 relied on by the state the Court stated as follows:-

“It may not be easy to define what is meant by a “*prima facie* case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”
39. Similarly in *R. v. Jagjivan M. Patel & Others* 1, TLR, 85 the Court stated;-

“All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the Court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”
40. It was submitted that the evidence adduced by the accused person cannot shake the prosecution cogent evidence before this Court. PW.1 told the Court that she witnessed a quarrel between the parents and even saw the deceased swollen face on one side as a result of the assault by the accused person.



41. The Prosecution finally submitted that by availing testimonies of seven witnesses as well as documentary evidence it has proved its case beyond reasonable doubt and the accused ought to be convicted of the offence of murder contrary to Section 202 as read with Section 203 of the [Penal Code](#).

Accused's Submissions

42. The Accused submitted that in accordance with the elements of the offence of murder under Section 203 as read with Section 204 of the [Penal Code](#) the state has to prove that the accused not only caused the death of the deceased but also did so with malice aforethought.
43. The first issue for consideration is proof of death. In the instant case there is no dispute of the deceased's death. This was confirmed by all the prosecution witnesses more so by the evidence PW7 who carried out the post mortem on the deceased's body.
44. On the issue of whether the death of Maureen Wayua (deceased) was caused by an unlawful act or omission, the post mortem prepared by PW.7 revealed that the deceased's cause of death was Hemorrhagic shock and intensive splenomegaly and liver cirrhosis.
45. On whether the deceased's death was caused by the accused, none of the prosecution witnesses actually testified as to what caused the death of the deceased hence the prosecution was based on circumstantial evidence.
46. The Accused relied on Sections 111(1) and 119 of the *Evidence Act* on standard and burden of proof.

“ 111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

(119) The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

47. Reliance was made in the case of [Kennedy Ochieng Ongindo v Republic](#) [2019] eKLR.
48. There was contradictory evidence between PW1 and PW4 who were present at the scene. PW.1 told the Court that there was an altercation between the deceased and the accused in the wee hours of 23/12/2017 while the PW4 told the Court that the deceased fell down after she had opened the door for the accused when he arrived home at about 10.00 p.m.
49. That the PW6 investigating officer carried out shoddy investigations and never took her time to conduct candid and thorough investigations.



50. From the evidence adduced herein it is crystal clear that the accused herein did not commit the unlawful and and/or in any matter howsoever that caused the death of the deceased. The evidence of PW1 clearly point to a worsening medical condition on the morning of 23rd December, 2017 with the deceased getting sick in the morning, her condition worsening enough to be taken to the hospital and then getting back home and later on taken back after she deteriorated. This was confirmed by the Pathologist during cross examination where he told the Court that liver cirrhosis can cause enlargement of the spleen.
51. It was finally submitted that the prosecution failed to prove the charges against the Accused person beyond doubt inter alia due to the findings of the Pathologist that the case of death may have resulted from the liver cirrhosis which the deceased suffered from.

Determination

52. The Court considered the evidence on record, written submissions by Prosecution and Defense and the issue for determination is whether the Prosecution proved that the Accused person committed the offence of murder contrary to Section 203 as read with Section and 204 of the [Penal Code](#).

Section 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 204. Punishment of murder: Any person convicted of murder shall be sentenced to death.

53. Malice Aforethought

Section 206 of [Penal Code](#) 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.

54. Burden & Standard Of Proof

(Section 109-111 *Evidence Act*)

Section 109.

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.

Section 111. Burden on accused in certain cases

1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation



of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.....

55. In *Miller v Minister for Pensions* [1947] 2 All ER 372 (Kings Bench) referred to in *Republic v Jane Muthoni Mucheru & Isaack Nganga Wambui alias Kikuyu* High Court Criminal Case No 45 of 2018 (Nakuru High Court) Formerly (Kiambu High Court Crim case 89 of 2016) Hon J. Ngugi J; the standard of proof in criminal cases was stated as follows;

.....the evidence must reach the same degree of cogency as is required in a criminal case before an Accused person is found guilty. The 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 cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be dismissed with the sentence; 'of course it is possible but not in the least probable'; the case is beyond reasonable doubt, but nothing short of that will suffice.

56. To prove the elements of the offence of murder, in *Republic v Mohammed Dadi Kokane & 7 Others* [2014] eKLR, Hon LJ M. Odero stated;

The fact of death of the deceased [{{term{refers To |title Unlawful commission or omission constituting the physical or external element of a crime;

guilty act.} actus reus}}]

The cause of death

Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused person and lastly;

Proof of unlawful act or omission was committed with malice aforethought. [*mens rea*]

Analysis Of Evidence On Record By Trial Court

57. In *Abdi Adan Mohammed v Republic* Criminal Appeal No 1 of 2017, the Court of Appeal considered an appeal from Criminal Appeal 271 of 2012 where the Trial Court applied Section 200 *CPC* to have the hearing start *denovo* and then changed its mind upon application by the prosecution to invoke Section 34 of the *Evidence Act* after it failed to procure the attendance of the witnesses who had previously testified.

58. The Court referred to the case of *Ndegwa v Republic* (1985) KLR 535 where Madan Kneller & Nyarangi JJA (as he then was) stated;

“It could also be argued that the statutory and time-honored formula that the Trial magistrate being the best person to do so; he should himself see, hear, assess and gauge demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the 2nd Magistrate did not himself see and hear all prosecution witnesses even though he said that he carefully ‘observed’ the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanor of all witnesses in the cases. A fatal vacuum in this case in our opinion.....for these reasons we have stated in our view the trial was unsatisfactory.”



59. In *Joseph Kamau Gichuki v R* Criminal appeal 523 of 2010 cited in Nyabutu & Another, the Court stressed that;

“By dint of Section 200(1) (b) of the CPC a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely, but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete trial..... See *Ndegwa v R* (1985) supra. In this case the Trial Judge passed on after having fully recorded evidence of 7 witnesses....in fact [he] had summed up to the Assessors. The trial, moreover, was not a short one but a protracted one which had taken 5 years to conclude. The passage of time militated against the Trial being started *de novo*.....”

60. The principles in the above case law cited applied to the instant case, the trial herein commenced in 2018 and Ruling was delivered by Trial Judge in 2021, the matter was heard over a span of almost 3 years. The Trial Judge went on transfer and this Court also came on transfer and took over conduct of court proceedings from the Trial Court due to explained logistical and personal challenges was unable to come back and complete part-heards as per the letter written to the Presiding Judge of 8/2/2022.

61. The evidence adduced by all Prosecution witnesses was heard by the Trial Judge Hon. D.K. Kemei J culminating with the Ruling delivered on 2/2/2021 on a case to answer, which read in part on evaluation of the evidence and finding as follows;

Par 16 of the said Ruling stated that;

“For those reasons, I find that there is some evidence adduced against the accused person to establish a prima facie case against him and sufficient to put him on his own defense for the offence of murder contrary to sections 203 and 204 of the Penal Code. Consequently, I find that the accused has a case to answer and is now called upon to make his defense in line with the provisions of section 306(2) of the Criminal Procedure Code”

62. With regard to the fact that the court proceedings were partly conducted by the Trial Judge Hon. D.K. Kemei and partly thereafter before this Court particularly with regard to the Defense Hearing; the provisions of Section 200 (3) CPC were not applicable in that the provision provides;

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

63. In the instant case this Court took over the matter after the Prosecution case was closed before the Trial Judge, parties' through their respective Counsel were granted opportunity to file written submissions and thereafter, the Trial Judge after considering the evidence adduced, the law and submissions filed rendered the Ruling of 2/2/2021 and set down the matter for Defense Hearing under Section 306 (2) CPC.

64. The Ruling of 2/2/2021 is and remains a valid, regular and legal order of the Trial Court with similar, concurrent, competent and equal jurisdiction to/with this Court and this Court cannot reopen the Prosecution case in light of Section 200(3) CPC by recall of witnesses and /or hearing of the matter *de novo* because it would amount to rehearing a matter already heard and possibly setting aside Ruling



delivered by the Trial Court. It is the Trial Court that heard the witnesses and thereafter evaluated the evidence. To reopen the case would amount to sitting on appeal of its own decision and this Court lacks appellate jurisdiction over its own decisions.

65. Therefore, this Court applied Section 200 1 CPC that provides;

Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

- (a)
- (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

Section 201 CPC also provides;

- (1)
- (2) The provisions of Section 200 of this Act shall apply *mutatis mutandis* to trials held in the High Court.

Analysis Of Evidence On Record

66. To prove the offence prescribed under Section 204 of the Penal Code requires the following ingredients to be proved by the Prosecution.

67. To prove the elements of the offence of murder, in Republic v Mohammed Dadi Kokane & 7 Others [2014] eKLR, Hon LJ M. Odero stated;

- a. The fact of death of the deceased [*actus reus*]
- b. The cause of death
- c. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused person and lastly;
- d. Proof of unlawful act or omission was committed with malice aforethought. [*mens rea*]

Fact Of Death Of Deceased

68. The Prosecution proved the fact of death of the deceased through identification of the deceased's body by PW5 Philip Muthusi Mailu on 11/01/2018 he visited Machakos Mortuary to identify the body of the deceased to the doctor who was conducting the post mortem.

69. PW7 Dr. Kamotho Watenga testified in respect of the autopsy that was conducted on the deceased by Dr. Waithera Githendu. PW7 stated he was familiar with the Pathologist's handwriting as he worked with her previously. PW7 sought to tender the post mortem report on behalf of Dr. Waithera and the Report was produced as an Exhibit-1 as there was no objection from the Defense.

70. Dr. Kamotho Watenga told the Court that the report revealed that the body had a large swelling on the stomach external wall. There was a lot of blood in the stomach measuring about five litres. The liver had some cirrhosis and reduced in size. There was hematoma and contusion on left biceps as well as left buttock and left leg. The doctor formed the opinion that the cause of death was hemorrhagic



shock of the spleen due to blunt force trauma. It was reported that the deceased's spleen was large due to liver cirrhosis. The report was produced as Exh 1.

71. The Post Mortem Report revealed externally, the body of the deceased was that of an adult African female of good nutrition. The body was severely pale]. The body was swollen, with deep tissue contusion and hematoma on dissection with facial asymmetry and swelling at 4x4cm. There was left flank skin swelling approximately 10 cm diameter. The hematoma was on left lateral biceps (2x4cm); left lateral gluteal (4x4cm); & left lateral leg (25x3cm). The external appearance revealed a bruise on lower back. The body of the deceased was that of an adult African female of good nutrition. The body was severely pale.
72. Internal Appearance of the body revealed that the respiratory system was non-remarkable; the cardiovascular system was normal. The digestive system revealed left flank injury/lumbar corresponds with a subscapular splenic hematoma that tracks towards the hilum. The Spleen was massively enlarged and cut section showed subcapsular hematoma. There was massive hemo-perineum/hematoma 5 litres and liver had cirrhosis and was shrunken. Normal pancreas kidneys intestines no blood in gastric cavity. Uterus & ovaries normal No skull fractures no hematoma or intracranial bleeding.
73. The Pathologist after examination formed the opinion that the cause of death was hemorrhagic shock to selenic hemorrhage and blunt force trauma. Secondly, due to massive splenomegaly & Liver cirrhosis.

The Cause of Death

a) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused person and lastly;

74. The Defense submitted that the Accused person in his sworn testimony in his defense provided the cause of death. The accused person attributed the death of the deceased as caused by being hit by the door as he knocked she opened and on coming in to the house found the deceased on the floor.
75. The Prosecution on the other hand submitted that the Accused person had malice aforethought as he came home on 23/12/2017 at 2am and the deceased came and opened the door for him to enter the house. On getting to the bedroom, a disagreement arose between the Accused person and the deceased and PW1 saw the Accused her father slapping the deceased. The Prosecution submitted that the Accused person had malice aforethought because he intentionally inflicted injury to the deceased which caused her death.
76. This Court read and considered the evidence of PW1 a child of tender years who was born in 2004 and testified in 2018 at the age of 14 years old. After the Trial Court conducted *Voir Dire* examination and formed the opinion that the witness had sufficient intelligence although she did not understand an oath. PW1 gave unsworn statement and was cross examined by the Defense Counsel.
77. In the case of *PON v Republic* [2019] eKLR; the CoA described direct evidence thus;

“In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eye witness account, on personal knowledge or observation. The direct evidence sought in the matter subject of the appeal is who saw the deceased meet her death? [if] there is no such evidence hence the recourse to circumstantial evidence...”
78. This Court finds that the evidence of PW1 is one of a key witness and single witness who witnessed/ saw her father, the Accused person on the night of 23/12/2017 when he came home that night. PW1 saw



her mother, the deceased open the door for the Accused person her father, they went to the bedroom. PW1 heard a quarrel ensue between the Accused person and the deceased and PW1 saw the Accused person slap her mother, the deceased. She went and called her grandmother PW2, on coming back she saw her mother's left eye was swollen. There was electricity and she could see clearly. Her grandmother PW2 requested the Accused person not to assault her mother again.

79. The evidence of PW1 is the only direct evidence of a minor under unsworn statement and it is mandatory that it must be corroborated.

80. In the case of *Republic v Juma Kituko Mwambegu* [2020]eKLR referred to the law on this part of a single identifying witness as it stands today was/is well articulated in the case of *Abdalla Bin Wendo* {1953} 20 EACA 166;

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single identifying witness respecting identification when it is known that the condition favoring correct identification were difficult.”

81. In *Charles O. Maitanyi v Republic* [1986] KLR 198, the Court held;

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification.....The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”

82. In *Republic v Jane Muthoni Mucheru & Isaac Nganga Wambui* High Court Criminal Case no 45 of 2018, the Trial Judge Hon. J Ngugi relied on the case of *United States v Murphy* 253 Ed 404(NDNY 1918) which defined corroboration as;

“Corroborating evidence is evidence which is independent of the evidence of an accomplice, and which taken by itself, leads to inference, not only that a crime has been committed, but that the person on trial, was implicated by it; or it must be evidence that corroborates as to some material fact or facts which go to prove that the person on trial was on trial was connected with the crime....”

83. In *Khalif Haret v Republic* [1979] KLR 308, the Court stated of corroboration as follows;

.....It means no more than evidence tending to confirm other evidence. It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration.

84. There are strands of evidence that point to the Accused person's action that caused death of the deceased. The issue of identification through recognition is established by the evidence on record. The Accused person and deceased lived together as man and wife and on the fateful day were in their home. The evidence of PW1 on record is/was that she witnessed the Accused and Deceased quarrel and then the Accused slapped the Deceased. PW1 ran to call her grandmother and coming back and saw her mother's face/eye was swollen on the left eye. PW1 saw and heard her grandmother tell her father, the Accused person to stop assaulting the deceased. The cumulative effect of these strands of evidence on



record point to the Accused person's unlawful act of assaulting the deceased that caused the death of the deceased.

85. The evidence of PW1 is corroborated by PW4 who confirmed that on 22/12/2017 at 10.30 pm, when she came to house after she was called by PW1, she saw the deceased with injuries on the deceased's face and were just swellings.
86. The evidence of PW1 is also corroborated by the medical evidence derived from the Post Mortem Report where the Pathologist Dr. R. Waithera observed the deceased's body external appearance as follows;

Swollen left infra-orbital & zygomatic area with deep tissue contusion and hematoma on dissection with facial asymmetry and swelling at 4x4cm. There was left flack skin swelling approximately 10 cm diameter. The hematoma was on left lateral biceps (2x4cm); left lateral gluteal (4x4cm); & left lateral leg (25x3cm) the external appearance revealed a bruise on lower back.
87. The Pathologist intimated as per the Report, that the cause of death was hemorrhagic shock to selenic hemorrhage and blunt force trauma. Secondly, due to massive splenomegaly & Liver cirrhosis.
88. The medical evidence by the Pathologist's Report disclosed hematoma on the face, biceps, leg and bruises on the lower back. The hematoma which is clotted blood due to injury is consistent with PW1's evidence's that she saw the Accused slapping the deceased and she ran to call her grandmother who came and told the Accused to stop assaulting the deceased and also found her mother's face /eye swollen.
89. PW3 attributed the cause of deceased's death to the deceased's stomach illness. PW4 confirmed that on 22/12/2017 that she saw the deceased with injuries on the deceased's face and were just swellings when she came to house. She also confirmed that the deceased had stomach problems and attended clinic for enlarged spleen.
90. PW6 stated that she received a report of deceased's death from the Accused who came in the company of Pastor PW2. He said that the deceased was ailing from kidney problem. She saw the body of the deceased and she had no visible injuries.
91. Each of the witnesses who testified the evidence is that the deceased had stomach problems each gave their own view of the specific ailment as outlined above. The witnesses failed to produce any medical records that the deceased was treated for the stomach ailment she was said to suffering from.
92. The Doctor PW7, Dr. Kamotho Watenga who testified on behalf of Dr. R. Waithera who performed the Post Mortem and confirmed they worked together and was familiar with her handwriting and produced the Post Mortem on her behalf as she was on maternity leave confirmed the cause of death to be from hemorrhagic shock to selenic hemorrhage and blunt force trauma. Secondly, due to massive splenomegaly & Liver cirrhosis.
93. The evidence on record confirmed visible injuries and swellings on the face, biceps, leg and bruises on the lower back on the deceased's person and later body as confirmed by the Post Mortem report. These injuries swellings are consistent with blunt force trauma arising from the deceased and Accused Person's altercation that resulted in the assault of the deceased by the Accused person on the deceased and was witnessed by PW1. These injuries and swellings were not self- inflicted and/as the Accused person was the last person with the deceased as confirmed by PW1 PW2 PW3 & PW4 PW6. The net effect is that the Accused person unlawfully assaulted the deceased who sustained injuries and succumbed to her death.



b) Proof of unlawful act or omission was committed with malice aforethought. [mens rea].

94. DW1 John Mutinda Nzau in his Defense in a sworn statement testified that on 22/12/2017 he arrived home at 10 p.m. He knocked the door and his wife Maureen (deceased) opened the door for him and started screaming saying that she was in pain and she fell on the seat. He gave her some painkillers and later took her to the hospital where she was treated and they returned home.
95. He hired a motor vehicle and took her to the Mitaboni hospital where she was examined and later the doctor informed them that she had passed on. He further stated that his late wife had a problem with her stomach and had visited several hospitals namely Machakos Level 5, Shalom Hospital and Bishop Kioko Hospital. Her stomach used to swell on the side. His daughter Elizabeth PW1 was in her room as well as the other children. He denied ever beating his wife that day. They used to live peacefully but had disagreements as would happen in any marriage. On cross – examination he stated that he did not cause the said injuries as alleged. He did not have any medical records about his wife stomach problems.
96. The Accused person’s defense does not cast doubt on the evidence on record; that PW1 told the Court that she witnessed a quarrel between the parents and the Accused person slapping the deceased and shortly thereafter even saw the deceased swollen face on one side as a result of the assault by the accused person. The evidence on record is consistent with the Pathologist’s findings on examination of the deceased’s body, she had hematoma on various parts of the deceased’s left side of her body, face biceps, leg and bruises on the lower back which are consistent with an assault by the Accused person.
97. Although, there is evidence on record vide the Post Mortem report that the deceased had ‘left flank injury/lumbar corresponds with a subcapsular splenic hematoma that tracks towards the hilum. The Spleen was massively enlarged and cut section showed subcapsular hematoma. There was massive hemo- perineum/hematoma 5 litres and liver had cirrhosis and was shrunken’. The other cause of death Secondly, due to massive splenomegaly & Liver cirrhosis, the deceased had stomach ailments pre circumstances that led to her death.
98. The Physical injuries were /are consistent with assault blunt force trauma on the deceased by the Accused person and not the medical condition the deceased was alleged to have had. In any case, even then, the prior/existing medical condition of the deceased, it was manageable and not fatal until the onset of the assault by the Accused person. These blunt force stunts exacerbated the already malfunctioning liver condition that was otherwise manageable before the assault.
99. The Accused submitted that none of the prosecution witnesses actually testified as to what caused the death of the deceased hence the prosecution was based on circumstantial evidence.
100. This Court finds that the evidence of PW1 & PW4 & PW7 on record confirms PW1 saw Accused slapping Deceased, PW4 came and found Deceased swollen, PW7 produced Post Mortem Report whose findings of deceased’s body externally are consistent with Accused person’s assault that occasioned blunt force trauma one of causes of deceased’s death and not the liver cirrhosis as the only direct cause of the deceased’s death.
101. Accused submitted that there was contradictory evidence between PW1 and PW4 who were present at the scene. PW.1 told the Court that there was an altercation between the deceased and the accused in the wee hours of 23/12/2017 while the PW4 told the Court that the deceased fell down after she had opened the door for the accused when he arrived home at about 10.00 p.m.
102. This Court finds the evidence of PW1 was not contradictory with PW4’s evidence as each witness’s evidence was sequential as to unfolding events and not concurrent occurrence. PW1’s evidence on record is that she heard the parents quarrel. Then she saw the Accused person slapping the deceased,



PW1 then ran out to call her grandmother PW4 who came and found the deceased was swollen. These facts on record do not depict any contradiction as alleged as PW1 stated what happened before she asked PW4 her grandmother who stated what she saw when she came.

103. In *Morris Aluoch v Republic* Criminal Appeal 47 of 1996 [1997] eKLR , the Court of Appeal cited *Rex v Tubere s/o Ochen* (1945) 12 EACA 63 as follows;

If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with 1 single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

104. In the instant case, the deceased had a medical condition of the liver, however, the assault occasioned on the deceased on 22/12/2017 made worse the pre-existing medical condition under treatment and caused other injuries externally to the deceased. From these circumstances, whereas the Accused's assault caused injury and grievous harm on the deceased, as evidenced by the external swellings and blunt injuries on the left side of her body which was inconsistent with the said liver condition, there is no evidence depicting malice aforethought/intention to kill the deceased by the Accused person. From the evidence on record, instead the assault arose in the heat of the ongoing quarrel between man and wife on the same night that degenerated to physical assault and adversely affected the deceased's pre-existing medical condition together with other physical injuries accumulatively caused her death.
105. Section 9(3) of the *Penal Code* stipulates that unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.
106. In the offence of murder, the motive has to be the motive with malice aforethought nothing more or less. In *Nzuki v. Republic* (1993) (*supra*), the Court in substituting Nzuki's charge of murder with manslaughter observed:

“ there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

107. The Court is not satisfied that malice aforethought has been established in terms of Section 206 of the *Penal Code* despite the fact that the Accused was the last person with the deceased in their home where they quarrelled and he assaulted the deceased and injured her physically and affected her already existing stomach ailment. Based on the evidence in totality, the Court finds that the evidence on record does not fulfill all ingredients of murder.

108. Section 179 of the *Criminal Procedure Code* 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.

Disposition

1. In the premises, the Court reduces the charge of murder to manslaughter. The accused is acquitted of the charge of murder but convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#).

Judgment accordingly.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

JOHN MUTINDA NZAU - ACCUSED PERSON

NO APPEARANCE - FOR THE ACCUSED PERSON

MWONGERA - FOR THE PROSECUTION

GEOFFREY/PATRICK -COURT ASSISTANT(S)

