



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Makokha (Criminal Case 6 of 2017)
[2025] KEHC 1758 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 6 OF 2017
SC CHIRCHIR, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

FARAJ WAFULA MAKOKHA ACCUSED

JUDGMENT

1. Faraj Wafula Makokha (the accused) was charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The victim was his wife.
2. The Particulars of the offence are that on 25/1/2017 at Masinga village, Shinoi Sub Location, Butsotso West Location in Navokholo Sub – County within Kakamega County murdered one Zaina Wanga Abibu.

The prosecution’S Case

3. The first prosecution witness was the couple’s 8 years old child. After voire -dire examination, he gave evidence under oath. He told the court that the time was 6. pm on the material day. He was home, when his father arrived. The witness did not state what immediately transpired between the deceased and the accused, but the accused called the witness’s step- mother and told her to give him a whip . The accused then used it to hit the deceased on the head. He then brought out a pesticide and forced it into the deceased’s mouth but the deceased had already died.
4. The witness started calling people. Some people responded but the accused chased them away. His grandmother arrived and called the uncles to Pw1. His mother’s body was taken away and his father was arrested. The witness identified the accused in court.
5. On cross- examination he denied the suggestion that it was his uncle Haron, had instructed him on what to tell the court.



6. PW2 was the deceased's brother. He testified that he had seen the deceased the previous day, in the company of the accused. The deceased was well. The following day he was told that she had died. She went to the deceased's house. He found many people. The deceased's body was in the bed. He noticed that the deceased's face was swollen and her small finger was broken. The feet had bruises, as though she had been dragged on the ground.
7. PW3 was the Pathologist. He did the autopsy on 30/1/2017. On examination he found that the deceased had sustained a fracture of the left thumb, defence injuries involving the elbows, and waist. There was massive bleeding under the brain -covering involving the left side of the forebrain. There was no evidence of recent medical intervention. He formed opinion that the cause of death was closed head injury, secondary to head injury, following an assault.
8. PW5. was he investigation officer. He told the court that he and his colleagues visited the house of the deceased/accused upon receiving a report of a murder incident. He found the accused already arrested. The accused told them that his wife had committed suicide. The deceased body was on the bed. She had bruises on her face. He was present during the autopsy examination.
9. On cross-examination, he a bottle beside the body. They assessed the scene and ruled out suicide.

Defence Case

10. The accused was put on his defence and he testified under oath. He told the court that on the material day, he arrived at his wife's house in the morning and found PW1 who was studying. He left the boy studying and went to knock on the bedroom door. On getting no response, he went in and tried waking up the deceased. She did not respond. He called out "Mama Rashid" but she still got no response. He noticed that there was foam in her mouth. There was also an odd smell, so he decided to check under the bed. He saw a bottle. It contained poison. It had the smell of insecticide. He called his mother, step- mother and his other wife.

He further testified that on noticing the deceased, his mother went to get milk for her, but the deceased had died.

11. On cross-examination he stated that when he saw the deceased she was moaning, like she was dying. They had parted in good terms the night before, he stated. He denied killing the deceased.

Submissions

12. None of the parties filled the submissions

Analysis and Determination

13. To establish the offence of murder, the prosecution must prove: the death of the deceased; what caused the death; if the accused caused the death of the deceased and finally, whether the killing was accompanied by malice.

The Death of the deceased

14. The pathologist testified that he carried out the autopsy on the body of the deceased. He produced the post-mortem report (PEXB 1). The report indicates that the body was identified by Haron Navakacha and Annita Wakhulu. The Doctor formed the opinion that the cause of death was closed head injury, secondary to a head injury, following assault. Further PW2, PW3, PW4 and the accused, testified to have seen the deceased lying dead in her bed room.



15. It was therefore proved, without a shadow of doubt, that the deceased died. The cause of death was equally proved as aforesaid.

Whether the Accused herein caused the death of the deceased

16. On whether the accused herein was responsible for the death of the deceased, the testimony of PW1 is relevant. PW1 was 8 years old, he was a child of tender years. The then trial judge took him through voir- dire examination and he was satisfied with his intelligence and appreciation of the significance of an oath. PW1 therefore testified under oath.
17. This witness testimony was recorded by one of my predecessors, but I find it precise and straightforward. He told the court that the accused asked for a whip, and the witness's step- mother brought it. The Accused then hit the deceased on the head. The accused also tried to make the deceased drink something in the bottle, but she was already dead. PW1 was a child of the accused and the deceased. He had no reason, and none was suggested, that he had a reason to otherwise frame his own father for such a serious crime.
18. I am alive to the fact that PW1 was a child of tender years and was the only one with a first- hand account of what transpired. I therefore warn myself of the danger of relying on his evidence. However, his evidence was corroborated by the pathologist in particular on where the accused hit the deceased. PW1 had told the court that the accused hit the deceased on the head. This was confirmed not just by the pathologist but also PW3 and PW4 who told the court that the deceased had a swollen face, and bruises on her head. Am satisfied that PW1's testimony corroborated as aforesaid proved that it was the accused who fatally injured the deceased.
19. I have considered the accused defence, he told the court that the deceased committed suicide by drinking poison. According to the pathologist however, death was caused by a head injury and not poison.
20. The Accused refuted the findings of the pathologist, but he had the right to hire his own pathologist which he did not. The pathologist was an expert witness and his testimony could only be countered by another expert testimony.
21. Further the Accused came out in his defence as being less candid. For instance, while in his evidence- in -chief he had told the court that he called out the deceased but did not get a response, he later stated in his cross examination that he heard the deceased moaning. I find his evidence to be contradictory and not plausible at all.
22. Looking at the totality of the evidence, I am satisfied that the prosecution has proved that the accused herein is the one who caused the death of the deceased.

Malice Aforethought

23. Section 206 of the [Penal Code](#) sets out circumstances which infer malice aforethought. The Section provides as follows; “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such



knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

- (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.”
24. The accused hit the deceased on the head and it is apparent that death was immediate as there was no evidence of medical intervention. The presence of defence injuries that deceased had tried to defence herself to no avail. It is not known what the accused used to hit had the deceased as PW1 talked of a whip, yet a whip could not have caused such a serious injury, but whatever the weapon, there is ample evidence that it was directed on the head of the deceased, a sensitive part of the human body. It had the effect of causing a fatal injury. In *Rex Vs Thibere S/O Ocher* (1945) 12 EACA 63, the court had this to say about the targeted part of the human body:: “to determine whether malice aforethought has been established, to consider the weapon used the manner in which it is used, the part of the back targeted the nature of injuries inflicted.....”
25. The accused must have known or ought to have known that hitting the deceased on the head had the potential to cause her death or grievous harm. Am therefore satisfied that malice was proved.
24. In the end, I find that the prosecution has proved the offence of murder against the Accused ,as provided for under section 203 as read with section 204 of the [penal code](#) and I hereby convict the accused herein as charged.

DATED, SIGNED AND DELIVERED AT ISIOLO, VIA MICROSOFT TEAMS ,THIS 20TH DAY OF FEBRUARY, 2025.

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin Luyundi- Court Assistant

The Accused- present in person

Ms. Kagai for D.P.P

