



**Republic v Nyongesa (Criminal Case 22 of 2020)  
[2024] KEHC 80 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 80 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 22 OF 2020  
AC MRIMA, J  
JANUARY 17, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**SALOME CHETO NYONGESA ..... ACCUSED**

**JUDGMENT**

**Introduction:**

1. The accused herein, Salome Cheto Nyongesa, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were as follows: -

On the night of 3<sup>rd</sup> day of August, 2020 at Koronga Farm, in Chepchoina Location within Trans Nzoia County, the accused, jointly with others not before Court, unlawfully murdered Moses Nyongesa Simiyu.

3. When the accused was arraigned and charged before Court, she denied committing the offence thereby prompting the hearing of the case against her.
4. After the close of the prosecution’s case, the Court found that a prima facie case had been established against the accused. The accused was placed on her defense. The Accused elected to give sworn testimony and called no witness.

**The Prosecution’s case:**

5. The Prosecution called a total of 9 witnesses.



6. Until his death, the deceased herein, Moses Nyongesa Simiyu, was the husband to the accused. The accused was the second wife. The first wife was one Evelyne Nyongesa who testified as PW1. The accused had several children with the deceased including one Thomas Wafula (not a witness).
7. The deceased was a brother to one David Makokha who testified as PW2 and to also one Peter Wanyonyi Simiyu who testified as PW5. A village elder namely Gabriel Wafula Dindi testified as PW3. The Assistant Chairperson of Mzabibu Self- Help Group, where the deceased was a member, one Njuguna Karanja, testified as PW4.
8. Dr. Dennis Nanyingi testified as PW6. He conducted the post mortem examination on the body of the deceased on 7<sup>th</sup> August, 2020 at the Kitale County Referral Hospital mortuary. A Government Chemist, one Polycarp Lutta Kweyu, testified as PW7 while No. 236139 IP Fredrick Simiyu Sirengo then attached to the DCI Trans Nzoia county as the In-charge of Scenes of Crime testified as PW8. The investigating officer testified as PW9. He was No. 231392 PC Godfrey Monda attached at Endebes Police Station.
9. It was the prosecution's case that on the 3<sup>rd</sup> day of August 2020, the deceased quarreled with the accused. That was around 5:00 pm. As a result of the fracas, the accused left to her home at around 7:00 pm leaving behind her son one Thomas Wafula, who had completed the National Youth Service training who vowed to deal with the deceased. He spoke in Kiswahili language as 'Nitakabiliana naye... Nitakabiliana naye...'.
10. PW1 prepared supper and ate with her children at around 9:00pm. She thereafter sat at the sitting room. PW1 then heard a sound at a latrine which was next to her house. She asked her child one Merceline Wekesa (not a witness) if she heard the sound, but she answered in the negative. PW1 remained at the sitting room.
11. At around 10:00pm, PW1 saw some torch light outside her house. She pipped through a slit on the door and could see the accused's house which was around 15 metres from hers. They were two torch lights and were both shone towards the accused's house. PW1 saw someone get out of the house of the accused. The person came to her house and squatted outside the door. The person was a man. PW1 thought they were thieves and was really scared. She shed tears not sure of what will happen. PW1 could not sleep that night.
12. It was PW1's evidence that the accused went to see her in the morning. She asked for water to take some medicine. The accused also told PW1 that she had hit the deceased on the head during the previous day's quarrel and that she wanted to inform the deceased's siblings for possible reconciliation. The accused then left.
13. PW1 affirmed that the accused was the most loved wife and that the deceased did not even eat her food. That, he spent at the house of the accused and that whenever PW1 would go to see the deceased thereat, she was beaten.
14. Shortly, PW1 saw one of the deceased's children one Andrew Nandwa, then aged around 4 years old come to her house. He told PW1 that the deceased was not breathing. PW1 rushed inside the house, saw and torched the deceased. He was lifeless. PW1 screamed and the villagers gathered including the deceased's siblings.
15. It was PW5 who informed the Area Chief of the incident. The Area Assistant Chief came to the scene and accordingly informed the police at Endebes Police Station.
16. PW1 observed the deceased. She saw some wounds on the head possibly caused by a panga.



17. PW2 woke up to his farm that morning. At around 10:00am, one of his son Isaac Wekesa (not a witness) accompanied Thomas Wafula, a son of the deceased, to the farm. Thomas was not happy and complained bitterly on how the deceased had mistreated, not educated him and even abandoned him since 2011. That, he had all along struggled by himself until his training at the NYS, but the deceased was really bothering him. He told PW2 to warn his brother, the deceased, otherwise he will do something to the deceased and disappear never to be seen again. Thomas then left.
18. PW2 was really disturbed. He stopped working and returned to his home. As he settled down for tea, his grandchild came crying that the deceased had been killed. PW2 rushed to the home of the deceased. He truly found the deceased dead and that many people had gathered.
19. PW3 was a village elder. As he responded to the screams from the home of the deceased, he met the accused on the road from the home. They both returned to the home. As the crowd was charging upon the accused, PW3 rushed her to Twiga Police Post for her safety.
20. The police came to the scene at around 3:00pm. They included PW8 and PW9. They found the body of the deceased lying on a bed inside a house with injuries on the head and abdomen. Visibly, the intestines were protruding. PW8 processed the scene and took several photographs. He later produced them as exhibits alongside the relevant certificates.
21. PW9 recovered a knife which was on the bed, the blood-soaked mattress and some clothes. He also recovered some other clothes from a nearby latrine. He inspected the compound and found some blood outside the house and in a nearby maize farm. He took samples of the blood stains including those on the maize stalks. The body was eventually removed to the Kitale County Referral Hospital mortuary.
22. PW6 conducted the post mortem examination on 7<sup>th</sup> August 2020. The body was identified by PW1 and PW5. He observed the body externally. There were no fractures, but there was an injury on the right parietal area of the head and another injury on the left hypochondriac area at the mid rib area and another injury at the right supra umbilical area about 1cm from the umbilicus.
23. Internally, the right lung had adhesion to the plural cavity and both lungs were hyperemic. There was no blood in the atrium and ventricles. There was a penetrating wound at the small intestine which repleted on the other side of the gut. There was blood in the peristomium mixed with clots.
24. The cause of death was opined to be hemorrhagic shock/internal abdominal bleeding secondary to assault. PW6 filled in and signed the Post Mortem Report. Blood samples were collected for further tests. PW6 later produced the report as an exhibit.
25. PW9 forwarded the samples collected during the autopsy together with those recovered at the scene for further examination at the Government Chemist in Kisumu. It was PW7 who conducted the analysis and found that the blood on the knife, the mattress and the maize stalk was all the deceased's blood.
26. On completion of the investigations, PW6 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information dated 17<sup>th</sup> August, 2020. The accused was accordingly charged after she underwent a mental examination assessment which confirmed her fitness to stand trial.
27. PW9 eventually produced all the items he gathered in the course of the investigations as exhibits in the matter.
28. After close of the Prosecution's case, the Court found that the accused had a case to answer. She was placed on her defence.



### **The Defence:**

29. The accused elected to give sworn testimony without calling any witness.
30. The accused asserted that she did not commit the offence. She stated that when she was quarreled by the deceased, she left to her home with her two young children and spent there. That, at the time the accused left, the deceased was alive and that he even wanted to beat her. She only returned in the morning to see PW1 and inform her that she was going to see the deceased's siblings as a result of the previous day's quarrel where she recalled to have hit the deceased with a piece of wood on his head.
31. The accused expressed shock on the death of the deceased whom, despite the disagreements, loved so much. She described the deceased as a temperamental person and that they occasionally differed. She stated that when she was taken to the Twiga Police Post, she was the one who reported the matter thereat. She asked this Court to acquit her.
32. After the close of the defence case, parties were directed to file their respective rival written submissions. Mr. Bikundo, Learned Counsel for the accused file submissions dated 16<sup>th</sup> June 2023. He contended that the prosecution failed to the information against the accused and called for dismissal of the charge and that the accused be set at liberty.
33. The Prosecution on the other hand presented its written submissions also dated 19<sup>th</sup> June, 2023. It submitted that the State had established a case to the required standard of proof, being beyond reasonable doubt, against the accused. It urged the Court to find the accused guilty as charged.

### **Analysis:**

34. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
  - (a) the death of the deceased occurred and its cause;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
35. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

### **The death of the deceased and its cause:**

36. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
37. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased wounded and lifeless on his bed. Some witnessed a Post Mortem examination conducted on the lifeless body of the deceased. The body was later released to its relatives and was subsequently buried.
38. The second way in which the death of the deceased was proved was through the evidence of PW6, a Medical Doctor who conducted the autopsy on the body of the deceased.
39. PW6 observed a litany of injuries both externally and internally. He concluded that the deceased died as a result of a hemorrhagic shock/internal abdominal bleeding secondary to assault.



40. This Court, therefore, finds and hold that the death of the deceased in this case and its cause were both sufficiently proved to the required standard.

**Whether the accused committed the unlawful act which caused the death of the deceased:**

41. In this matter, there was no eye-witness account on what exactly happened until the deceased died. The deceased was found long dead and lying on his bed inside the house of the accused.

42. Be that as it may, the case, therefore, revolves around circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
- (ii) The 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.

43. The foregone principles were set out in the locus classicus case of R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.

44. The Court of Appeal in Musii Tulo (supra) in expounding the above principles expressed itself as follows:-

4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

45. Further, the Court of Appeal in Sawe- Vs- Republic [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence: -

... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....

46. Returning to the case at hand, it appears that the evidence by PW1 corroborated the defence by the accused. It is on record that the accused was quarreled by the deceased on the 3<sup>rd</sup> August, 2020 and left



for her home at around 7:00pm with her young children. By then, the deceased was alive and threatened to beat the accused.

47. There was no evidence that the accused returned to her house that night. There was also no evidence that the accused did not spend at her home. The only time the accused returned was in the morning when she went to see PW1. There is also no evidence that the accused went inside her house because of the animosity with the deceased. She, instead, opted to seek reconciliation through the siblings to the deceased.
48. It was PW1 who testified on the people who visited the house of the accused where the deceased had spent. According to her, she saw two torch lights around the house of the deceased. Then she saw a person coming out of the house and headed to the door of her house. The person squatted at the door. PW1 saw the person to have been a man. It seems PW1 did not, however, manage to identify him.
49. There was also the issue of the grudge between the deceased and his son one Thomas Wafula. It was attested to by PW1 and PW2. According to PW1, Thomas was at the centre of the quarrel with his father, the deceased on the 3<sup>rd</sup> August, 2020. After the accused left for her home, PW1 heard Thomas vowing to deal with the deceased firmly. It was that very night the deceased was killed.
50. Thomas also went to see PW2 the following morning. He complained bitterly about his relationship with his father. He asked PW2 to warn his brother, the deceased, otherwise he was going to do something to the deceased and disappear never to be seen again. Thomas then left and he has never to been seen. PW2 then learnt of the death of his brother.
51. The police seemed to have highly believed that Thomas was culpable in the death of the deceased. That may have been one of the reasons the information was drafted to include other suspects not before Court.
52. It, therefore, appears that the only evidence that connected the accused with the death of the deceased was that the deceased was killed inside her house. However, evidence points to the fact that the accused did not spend therein that night.
53. This Court is not, hence, persuaded that the prevailing circumstances in this matter taken cumulatively 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.
54. This is a case where the accused were charged merely on suspicion. However, as was held by the Court of Appeal in *Sawe –vs- Rep* [2003] KLR 364: -

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

55. In *Mary Wanjiku Gichira s. Republic*, Criminal Appeal No 17 of 1998, the same Court held that: -

suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.



56. A similar view was expressed by the Tanzania Court of Appeal in R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71 where it was held that: -

Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

57. Therefore, whereas there may be some suspicion that the accused may have been involved in the death of the accused, that suspicion alone, however, strong cannot form a basis of conviction in a criminal case. It remains the cardinal duty of the prosecution to prove every element of the offence.

58. The prosecution, therefore, failed to prove that the accused was responsible for the death of the deceased in any way whatsoever.

**Disposition:**

59. Having found that there is no evidence that the accused killed the deceased, this Court returns the verdict that the accused is found not guilty of the murder of the deceased.

60. Consequently, the accused is hereby acquitted pursuant to Section 322(1) of the Criminal Procedure Code. She is hereby set at liberty unless otherwise lawfully held.

61. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 17<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court in the presence of:

**Mr. Bikundo**, Learned Counsel for the Accused.

**Miss. Kiptoo**, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

**Chemosop/Duke** – Court Assistants.

