



REPUBLIC OF KENYA



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**Republic v Kihara (Criminal Case 10 of 2018)
[2024] KEHC 1446 (KLR) (15 February 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 10 OF 2018
RM MWONGO, J
FEBRUARY 15, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL NJOROGE KIHARA ACCUSED

JUDGMENT

The Prosecution Case

1. The accused is charged with the murder of his wife Jane Wanjiku Mwai contrary to section 203 as read with section 204 of the Penal Code. The couple lived together and had three children. The prosecution case is that on 1st March 2018, while at their home the accused assaulted the deceased. As a result, she spent her last days in pain, in and out of hospital, until she succumbed to the injuries and died on 10th March 2018.
2. After hearing nine prosecution witnesses, the court placed the accused on his defence. In turn, the accused gave sworn evidence, and availed two defence witnesses, a nursing officer who had attended the deceased and a doctor who testified as an expert.
3. The key witness in the prosecution case was PW1 Daniel Mwai, aged 15 years, and first-born son of the deceased. He was in standard 6 at the time of the incident. The court noted that the witness was intelligent and understood what was going on. That notwithstanding, the court noted that he also appeared traumatised, unable to look directly at his father, and spoke with a soft voice.
4. PW1 testified that he was in standard 6. He said that in the first week of March 2018, whilst he was playing with his brothers John and Peter, his mother had cooked rice and chapati for lunch which she took to their father in the sitting room. He threw the food to the chickens and ordered her to cook eggs. That night he heard his mother crying in her bedroom where her father also was. The other children started crying until their father came out and told them to go and sleep. They went to watch TV and



- their mother came out walking with difficulty. She told them she had injured her leg after being beaten by their father,
5. The following day they went to school and returned home as usual. In the evening, Wa-Joyce a friend of their mother, came to their house and helped cook supper. On the following day, a Saturday, WaJoyce came at about 8.00am together with their uncles Wambugu and Maina. Together with their father, they took his mother to Engineer hospital, and returned at 7.00 p.m. The next day, they took the deceased to hospital again. She said she was injured in the head and leg. Uncle Maina told them they had taken his mother to hospital in Nakuru that Saturday, PW1 learnt from his uncle Maina that his mother had died.
 6. PW1 stated that he remained with his grandmother until the funeral date. He said mother and father had a bad relationship; that his father insulted his mother frequently; that his father used to threaten him with a panga and that his father used to beat his mother so often, it was almost every day. He identified his father in the dock.
 7. In cross examination, he stated that on the day he did not go to school, a Saturday, that was when he was told his mother had died. He did not go to school for tuition on that day, and remained with his grandmother. He admitted that when his father was in the bedroom with his mother, the door was shut, and he did not see what was going on inside. However, she came out to the sitting room with an injured leg. In re-examination, he said he heard his mother crying in the bedroom, and he heard the beatings by his father.
 8. PW2 Mary Wangari Maina, a neighbour and friend of the family, testified that she lived in Kahuru in Kinangop. On 2nd March 2018, she received a call from the deceased asking to help her go to hospital after a fight with her husband. She went to assist the deceased and found her in pain in her hip. She got help from a passer-by to dress up the deceased. She gave the helper the accused's number and he called the accused.
 9. After a while the accused sent someone by the name Mwangi to drive the deceased to hospital and they went to Engineer hospital where an Xray was taken. According to PW2 she visited the deceased again on 7th March where she found her in bad shape. She called the deceased's sister, Mary Muthoni (PW3), and told her of deceased's condition. They agreed deceased be taken to hospital the following day. On 8th March PW2 prepared the deceased for hospital and received 3,200/- from PW3. Using a driver, Geoffrey Kungu, she took the deceased to Engineer Hospital, from where they were given a letter to go to Naivasha District hospital.
 10. PW2 called the deceased's brother Joseph Maina, who told her to pass by their home. There, she found Joseph Maina, the deceased's mother and one Wambugu. Joseph and Wambugu took over and with Mwangi, they took the deceased to Naivasha hospital, whilst PW3 went home. PW2 learnt on 10th March that the deceased had died.
 11. In cross examination, PW2 said her house was about 500 metres from the deceased's house; that before 2nd March, 2018, no one had ever called her to tell her that the deceased had been beaten; that the deceased was ailing from hip, thigh and head pains, including a swollen thigh; that she told the doctor at Engineer hospital what she had seen of the deceased's injuries/pain. She also said that the deceased told her she had argued with her husband.
 12. PW3 Mary Muthoni, the deceased's younger sister, testified that the deceased had called her and told her in 2019 that the deceased was having fights with her husband and she had reached the end of her road; that the disputes with her husband began even before 2018; that around 1st March 2018, the deceased called her crying and said her husband had beaten her that the night before. She complained



- of an injury in her leg, saying she could not get out of bed. PW3 called PW2 (also known as Wa Joyce or Mama Joyce) to go and check on the deceased. PW2 went and took deceased to North Kinangop hospital. PW2 also told her that the deceased was unable to walk.
13. On 7th March, the deceased called PW3 on phone. She was wheezing and straining to talk, and complained of chest pain. The accused appeared unconcerned, but Wa Joyce was already there. So PW3 called David Mwai and Joseph Mwai, who took her to hospital at Naivasha Sub County Hospital. There the deceased had to be helped to even stand. On 9th March the doctors referred the deceased to Nakuru Provincial Hospital, where she was immediately admitted, and put on oxygen and medications. She passed on soon thereafter.
 14. In cross examination, PW3 stated that a post mortem was done on the deceased by Dr Ngulungu; that she paid 30,000/- to Dr Ngulungu; that at the post mortem, the doctor showed them the injuries on the deceased. She also stated that the deceased was buried before the post mortem report came out.
 15. PW4 Geoffrey Njuguna testified that he received a call from the accused on 3rd March 2018 to go to his house and take a sick person to hospital. He obliged, and found the accused's wife was the one who was ill. She told him she had been beaten by her husband. Her brothers, Maina and Wambugu were there, and carried her into his car. Together with them, he drove her to Naivasha District hospital, and took her back home at 1.00am.
 16. PW5 George Gathuita Mwangi, a former Senior Assistant Chief from Engineer testified that he knew the accused. He said he was called by Joseph Mwai who told him that he had been told his sister had been beaten. He went to the house and found his sister in bed, unwell. PW5 kept in touch with Joseph and it was agreed that the deceased be taken to hospital again. Josph Mwai told him his sister was taken to Naivasha hospital, but later heard she had died.
 17. In cross examination, PW5 said the accused and deceased came to him to solve a problem only once; that the accused denied he had beaten the deceased; and that he was not aware of any assault report.
 18. PW6 Anthony Kariuki Njoroge, a Clinical Officer from Engineer Hospital testified that on 2/3/2018, he examined the deceased. She was in pain and he sent her for pain relief injection, and then for x-rays. The x-ray disclosed no problem. He prescribed pain killers and the deceased went home. He produced the Outpatient Card as PEx 1A dated 2/3/2018.
 19. The deceased returned to Engineer hospital on 8/3/2018. PW6 was not there, so she was attended by his colleague. This time she complained of pain in the head, chest and legs. The Laboratory report of that day showed her white blood cells were high so she was injected again. She was referred to Naivasha Hospital as there was no ward space for her admission. From there she was sent to Nakuru Hospital. He later learnt that she had died. He produced the Outpatient Card for 8/3/2018 as PExb 1B
 20. In cross examination, PW6 testified: that a doctor could review the card of a patient; that in this case, PExb 1 was not fully filled, but a new card, PExb 1B was opened instead; that PExb 1 B did not indicate that the patient had a history of being attended before; and that the patient gave her story on 8/3/2018. Further, he stated in cross examination, that the doctor tests to be done to rule out Recurrent Tract Infection (RTI), and Deep Vein Thrombosis (DVT). He said that a person with DVT can have pin in the leg and difficulty in walking.
 21. PW6 admitted that the card does not show that the deceased had complained of being beaten, nor did the deceased tell him she had been in Mwenda-Andu Clinic, under Engineer Hospital, in Nyandarua. When shown a treatment card from Mwenda-andu dated 1/3/2018 (PExb 1A) which showed she had pelvic and leg pain, he said it would be expected that the next record would follow on in the card and not that a new card would be opened.



22. Joseph Maina Mwai, the deceased's brother, testified as PW7. He stated that he received a call from the deceased on 3/3/2018, that she was unwell. He called his brother David Wambugu and they agreed to check on their sister. They reached her house at noon and found her sitting in pain in the sitting room. She told them she had been beaten by the accused
23. PW7 and his brother Wambugu, decided to go and report the issue to the accused's father, whom they met in the shamba. They told him deceased was unwell. They then went to the accused's mother, and reported the same information. On going back to the deceased's house, they met the accused. They decided to take the deceased to Naivasha Hospital, where she was treated, discharged, and taken back home.
24. PW7 testified that on 8/3/2018, he received a call from Mama Joyce who told him she had been in Engineer hospital with the deceased, who had been admitted to Naivasha Hospital. On 9/3/2018, his brother went to see the deceased. She was in bad shape and was transferred to Nakuru Hospital. PW7 said the accused and deceased had frequent arguments and that he used to beat her, and that he tried to reconcile them with the Chief. On 10/3/2018, he was informed that his sister had died at Nakuru Hospital.
25. In cross examination, PW7 confirmed that he had been told by Wa Joyce that the deceased had been beaten by her husband; that he had not reported the beatings to the police; that he did not report to the police even when the deceased's condition deteriorated.
26. PW8 PC Dominic Mugambi testified that he was the Investigating Officer in the case. He explained how the matter was reported; that there were two family members, Mary Mwai and Samuel, of the deceased, who said they needed to do a post-mortem for a lady whose body was lying at Engineer hospital. They wanted to know the cause of death. He filled the post mortem report and they went to identify the body.
27. PC Mugambi and one Sgt Cheboi went to Engineer Hospital for the post mortem. There they found Mary Mwai and Samuel, two family members. Dr Ngulungu carried out the post mortem, and took some body specimens. Dr Ngulungu eventually brought the post mortem report
28. After he received the report from the doctor advising the cause of death as due to being beaten, he needed to make arrests. He called the family members who gave him the accused's phone number. They arrested the accused and took him to Engineer police station. The following day, he took the accused to court to ask for more time to investigate. He then started recording witness statements.
29. One child told him that the accused used to beat his mother, the deceased, and when he approached his father, the accused would chase him away with a panga; another witness, a neighbour called Wa Joyce, informed him that the deceased had called her to tell her that the accused had beaten her and she needed to go to hospital; when she went to take the deceased to hospital she could not walk; further he was informed by Mary Mwai that deceased had also called her and told her she had been beaten by her husband. Mary sent her money to go to hospital. At hospital an x-ray was done which found she had tissue injuries in her thighs. The deceased was then referred to Naivasha hospital and later to Nakuru Gen Hospital where she died.
30. From the investigations and witness statements he noted that there were disagreements between the accused and deceased. PW8 then arrested the accused and he was charged.
31. In cross examination, PW8 said the deceased's son told him he saw her mother being assaulted in February 2018; that she went to hospital on 2nd March 2018; that he did not obtain records – introduced by the defence as DMFI1 – from Kahuru Health Centre where the deceased was first taken;



that if he had obtained that document he would have analysed it; that Exb 1A Outpatient Card from Engineer Hospital was only filled in half page; that Exb 1B another Outpatient Card from Engineer Hospital and that he did not check their serial numbers.

32. PW8 further stated in cross examination that PExb is incomplete and the content of PExb 1B depended on what the patient reported; that the Chief recorded a statement in which he said he had received a call from Joseph Maina; that the child was the only eyewitness as to the assault; and when shown DMFI 2 the Daily Crime and Incidence Report, the date of the assault was 1/3/2018
33. When shown DMFI 3, his covering report, it stated that the accused never accompanied the deceased to hospital. He admitted that when the pathologist left the post mortem room, he had made no opinion on the cause of death; further, that there were no pictures of the deceased's body; that Mary Wangari (PW2) the deceased's neighbour had not reported that she heard any screams; and that no report was made to the police; and that only the deceased's son PW1 saw the assault.
34. PW9 Dr Ngulungu, the Nakuru District Pathologist, testified that he conducted the post mortem, after the body was duly identified. On examination of the body, he said that the body was decelerate showing it had a brain injury; the body had bruises on the hands, and when he dissected the blood had clotted (haematoma) on the hands and the back.
35. He measured the bruises which were 6.0 cm on the head. She had many bruises of 3cm each. On her thighs there were also bruises and when dissected he found haematoma or clotting below the fatty tissue.
36. Internal examination showed that the lungs had dark spots due to coagulation. When he dissected them, he found clots (thrombo embolic). The head showed scalp oedema congestion which was also visible when he dissected the brain. He took lung tissues and did histology and produced a histology report (PExb 2B).
37. He opined that:

“ The cause of death was pulmonary fat emboli, that is, the fat from the body and blood clots blocking tissue. There was blunt force trauma in keeping with assault”.

He produced the Post mortem Report as PExb. 2A.
38. In cross-examination, he said he was asked by the family to do the postmortem, that one can get a second opinion and that the history of assault was given to him by the deceased's relatives Mary Muthoni and Njuguna.
39. Further, he stated that he approximated the injuries as having occurred moments before death as they were the ones that caused death. He said the attending doctor would have seen the bruises and swelling, and the skin would show darkness. He said he heard that the deceased died whilst undergoing treatment at Engineer hospital.

The Defence Case

40. The accused gave sworn testimony and was cross examined. He availed two witnesses, the Nursing Officer in Charge of Kahuru Dispensary and a medical expert Prof Kiama Wangai.
41. He testified that he married the deceased in 2004. She came with one child, and he had two children with her. He said that they had a good relationship, but the only problem was that the deceased never wanted her first child to be disciplined or instructed, so he left her to handle that child.



42. The accused stated that on 28/2/2018 he came home and found his wife complaining of illness and pain in her back; on 1/3/2018 she complained of pain in her leg. When he asked her about it she said he hit her. Upon his denial, she said that she may have slept on it. In any event, they walked to the dispensary about 1.5 kilometres away, and returned home. On 2/3/2018, he told his wife to call for Wa Joyce whilst he got a taxi to take her to Engineer Hospital. She went with Wa Joyce to Engineer and came back with medicine
43. On 3/3/2018, he said, Maina and Wambugu, the deceased's brothers came to their house when he was not home. He returned about one hour later, and his wife told them her brothers had been there. They had gone to his father's home, and came back to find him home. They asked him why his wife was in pain and he did not take her to hospital, and he told them she had been to hospital on 1st and 2nd March and had medicine.
44. The Chief then called him and asked him if he had beaten his wife and he said she had pain in her leg and he had taken her to hospital. The Chief told him to take her again, so he called a taxi and took her to Naivasha with her brothers. She was x-rayed and injected, but the doctor said he could see nothing wrong with her leg. On leaving hospital, her brothers advised her to go to the police station but she, refused, saying she had not been hit by anyone, and they went home. She was better, and able to walk
45. Between 4/3/2018 and 7/3/2018, his wife was at home. On 7/3/2018 he came home and found her complaining of chest pains, so on 8/3/2018, he woke up early and went to his parents' home to seek financial help. Whilst he was there, he learnt that his wife's brother, Wambugu, had come to his house and taken his wife with them. He called them, but they did not pick his call. In the evening his children, Kihara and Maina came home, but Daniel did not. When he asked Kihara where Daniel was, he said that he had been told by his mother to go to their maternal grandmother's home.
46. He testified that he stayed home with the children until 10/3/2018. He did not find out where his wife had gone. However, Wa Joyce had told him she had been taken to Naivasha hospital by her brother. He did not bother to follow up as he had called them and they did not pick his calls between 8th and 10th March.
47. On 10/3/2018, Wambugu called him and told him that his wife had died at Nakuru hospital, and he arranged transport to bring her body to North Kinangop hospital. He said he pater arranged for a postmortem. He also soon learnt that he was being accused of causing her death. It was then that Chief Gathuita advised him to look for a lawyer.
48. He later attended the postmortem, and Muthoni and her cousin were given the report. He paid 15.000/= for the postmortem, but was not immediately told the cause of death.
49. In cross examination, he said he was at the post mortem; that his relationship with the deceased was good; that his wife never said he hit her; and that Daniel PW1 gave false evidence against him.
50. Further, he discounted the evidence of PW2 as lies since she was the deceased's sister with whom he had bad relationship; that PW4 was jealous that he, and not PW4, married the deceased; that PW5 was lying in his evidence that he and the deceased went to him to solve problems; and that PW6 may have been bribed. He felt that all the witnesses had conspired against him.
51. Finally, he stated that his wife had had pain problems in her head for many years and that her death may have been due to those issues.
52. In his testimony DW2 (Elias Muturi Thuo) a registered Community Health Nurse attached at Kahuru Dispensary, testified that he was the Nursing Officer in charge on the material day. The deceased came



- as a patient and complained of leg and back pains. He examined her BP and pulse rate and did physical examination. He stated that he didn't note any problem. She was put on painkillers. He produced hospital records as D. Exhibit 1. He stated that the patient did not come back to the clinic again.
53. In cross-examination, he admitted that he was the one who filled in the card D. Exhibit 1, but he did not put his name on it, and it was not stamped. He admitted that some corrections made were not rectified or countersigned, and that the Exhibit was incomplete.
 54. On re-examination he stated that the D. Exhibit 1 had no stamp but was on the letter head of Nyandarua County Government. He also said that the deceased did not report a history of being beaten and her condition was fine.
 55. DW3, Prof. Kiama Wangai, testified as a registered Pathologist. He was not involved in the postmortem. His role was to give expert opinion on the content of medical documents that were sent to him. These were the Post Mortem Report PExb 2A the Autopsy report dated 22.3.2018 PExb 2B, the Outpatient treatment card P. Exhibit 1A and a second Outpatient treatment card P. Exhibit 1B.
 56. On P.Exhibit 1B he noted that the deceased on 8.3.2018 and was complaining of left sided headache, chest pain, coughing, and lower limb pain with numbness. She produced greenish sputum and found to have respiratory Infection with Deep Venous Thrombosis associated with left lower limb pain and numbness.
 57. On P.Exhibit 2A Post mortem report dated 20.3.2018. The cause of death was stated as Pulmonary Fat/Thrombo emboli due to extensive soft and fatty tissue blunt trauma in keeping with fatal assault. He stated that the Deep Venous Thrombosis (DVT) is not based on assault but based on a normal illness. Further, he stated that fatal assault is where there is instant death.
 58. During the post mortem, he said, the pathologist took samples of lungs, liver, heart muscle, brain for histopathology but no report was availed hence the post mortem was incomplete. Further it indicated DDX (Differential Diagnosis) which could mean a pneumonic process but no report was availed to rule out pneumonia. On DVT no laboratory test was conducted for the internal organs e.g brain, lungs, spleen, liver because they have diseases of their own which could have helped to establish whether it was natural death.
 59. In cross-examination he said he did not interact with the deceased anywhere and he was not ruling out the post mortem result on assault. He stated that the report which was most important was that of 8.3.2018 which gave the sequence of events before death. He said that he was concerned on whether the deceased's death was caused by trauma or otherwise. P.Exhibit 1A did not show anywhere that she was assaulted. P.Exhibit 1B on the last two lines did show "Marked tenderness left thigh, no swelling". Further, he said that the medical notes did not state that when deceased entered hospital she was being supported on either side. He said that he considered the information in the two reports but he did not see any report on histopathology.
 60. In re-examination, he stated that DVT was shown on the report of 8.3.2018 P.Exhibit 1B - the tenderness on left lower limb which is the whole structure from the thigh to leg. He stated that this diagnosis was given by the doctor at Engineer
 61. At the close of the hearing, the parties filed submissions and authorities, all of which I have carefully considered.

Analysis and Determination

62. The prosecution is obliged to prove the following ingredients of the offence of murder.



- a. That the death of the deceased.
- b. That the deceased's death was unlawfully caused.
- c. That the death was caused by the accused who harboured malice aforethought.
- d. That the accused has been placed at the scene of the crime as a participant involved in causing the death.

The Death of the Deceased:

63. It is not disputed that the deceased died. Her body, after being identified by the deceased's sister, Mary Muthoni (PW3), was subjected to a post-mortem. Dr. Ngulungu (PW8), performed the post-mortem after the identification.
64. According to the Pathologist, Dr. Ngulungu, the cause of death was:
"Pulmonary fat/thrombo emboli; Due to extensive soft and fatty tissues blunt trauma in keeping fatal assault"
65. There is no need to labour on the uncontested fact of the deceased's death.

That the Deceased's death was unlawfully caused:

66. I will address this issue under several limbs.
 - a) The relationship between the accused and the deceased.
 - b) The cause of death: Disputed Treatment records and Post-mortem reports

The relationship between the Deceased and the Accused:

67. The only eyewitness evidence that tends to suggest what led to the deceased's death was that of PW1 Daniel Mwai, the deceased's 15 years old son. He testified that in the first week of March 2018 at about 8.00 pm, his mother came out of her bedroom limping. She had been there with the accused, and she said she had been beaten by the accused. It was the night following the day when his father had spilt his food, thrown it to the dogs, and told his mother to cook eggs.
68. This was the only beating incident PW1 specifically described, though it is clear that he did not witness that beating in early March 2018. However, PW1 also said:
"My mother and father had a bad relationship. My mother was beaten by my father. He used to beat her often almost every day"
69. In cross-examination, he confirmed that on the night his mother was beaten, they had been at home at about 1.00 p.m when his mother had cooked eggs after his father spilt the lunch she had cooked and gave it to the chickens.
The defence asserts that since PW1 was a pupil, he could not have been at home at that hour, and thus that he must be lying.
70. In my view even if PW1 was confused, or inconsistent about the dates, or was lying about that specific incident, he did assert that his father beat his mother frequently. In re-examination he said he even heard his father beating his mother in the bedroom.



71. I accept the evidence of PW1 that the accused beat, or may have beaten, the deceased on more than one occasion. This is despite the denial by the accused that the couple had a bad relationship. The accused denied almost every aspect of all prosecution witnesses' evidence.
72. The deceased's neighbour and friend PW2, Mary Maina, said that on 2nd March 2018 the deceased told her the two had disagreed; and that they had had a fight in the house. This was the day she had gone to deceased's house and had to take her to Engineer Hospital.
73. The conduct and attitude of the accused himself also showed that his relationship with his wife was not great. He stated that from 8th March when he left home and his wife was taken to hospital by her siblings, he did not bother to find out where his wife had gone. This is notwithstanding that Wa Joyce had told him that she had been taken to Naivasha hospital. Throughout 9th and 10th March he did not bother to know about his sick wife, until 10th when he was told she had died.
74. Other evidence that the couple's relationship was not great was by Mary Mwai PW3 who said the deceased had told her she had been beaten by the accused; evidence by PW4 Geoffrey Njuguna who also said the deceased told him she had been beaten by the accused. Further, PW5, Chief George Mwangi, gave evidence that the accused and deceased came to him with a problem to be resolved. He said the accused denied he had beaten the deceased, so he advised them to go to the police station and report. They did not do so.
75. It is a fact that the evidence of beatings given by all the other witnesses is hearsay, given that it was allegedly told to them by the deceased. The accused denied beating his wife. He said PW2 lied as he did not get along with her as she did not like him; that PW4 lied because they were on bad terms as he (the accused) married the deceased before PW4 could do so, and he was jealous. As for PW5s evidence, the accused also discounted it as mere lies.
76. Thus, the testimony is that the relationship between the Accused and deceased was not great; that PW1 heard his mother being beaten, together with hearsay evidence of several witnesses that the deceased was beaten by the Accused. The question is, even if the accused did beat the deceased, is there evidence that the beating or beatings were the cause of or substantially contributed the deceased's death? The evidence of post-mortem and medical treatments is critical here.

The cause of death: Disputed Treatment Records and Post-mortem report

77. Starting with the medical treatment records, the defence complained that the prosecution did not avail evidence of the deceased's first visit to hospital on 1st March 2018. The outpatient card produced as DExb. 1 by DW2 Elias Thuo the Nursing Officer at Kahuru Dispensary, disclosed that the deceased was attended by Elias Thuo. He did not see any injuries on the deceased after she complained of leg and back pains. He prescribed pain killers.
78. The following day, 2.3.2018 the Deceased was attended at Engineer Hospital as shown in PExb 1A. PW6 Anthony Kariuki a clinical officer testified that he examined the Deceased who said she had been beaten and had pain in the "head chest and legs.....[and] pelvis /stomach area". She was injected, and an x-ray taken disclosed nothing. Pain killers were prescribed. No injuries were recorded.
79. On 8.3.2018 the Deceased returned to Engineer Hospital. The hospital card PExb. 1B, was also produced by P.W.6 Anthony Kariuki. Deceased was attended by his colleagues. Deceased was attended by his colleague. The hospital card records that the deceased complained of pain in her head, chest and legs. She was sent to the laboratory, and the report showed she had increased white blood cells.



80. In cross-examination, PW6 said the Deceased had said she had been beaten on the night of 1st March, 2018, but there was no recorded history of her being beaten. PW6 admitted that the treatment card PExB. 1 A is not filled and fully completed.
81. In conclusion the medical records PExb. 1A and DExb 1 show that on 1st and 2nd March 2018, there is no record of a history of the deceased being beaten. The first record of the deceased being beaten is the hospital card PExb. 1B of 8.3.2018 which records “marked tenderness left thigh”. However, no injuries of the head are recorded.
82. The crux of the prosecution’s case surrounds the findings in the Post mortem Report PExb. 2A as presented by Dr. Ngulungu. PExb.2A (Post mortem) shows bruises on arms and head, left outer thigh. Sticky clots were seen in multiple areas, with internal bruises seen on the internal appearance of head. The conclusion he reached was that the death was due to pulmonary fat thrombosis emboli due to soft and fatty tissue blunt trauma in keeping with fatal assault.
83. Dr. Ngulungu’s report was disputed by the defence who impugned it on the basis that: Firstly, he was paid by the deceased’s sister PW2; Secondly, that as a result, he took into account the alleged history of beatings and crafted his report to align with the history; Thirdly; that the records of the deceased’s medical treatment did not disclose the beatings; and Fourthly, that Dr. Kiama, the Defence’s expert witness, poked holes in the post-mortem report and its conclusion as to the cause of death.
84. DW3 Dr. Kiama stated of the post-mortem report (PExb. 1B) that the deceased complained of left sided headache for 2 years, chest pain and coughing, and she produced green sputum. She was found to have Respiratory Tract Infection (RTI), and Deep Vein Thrombosis (DVT) associated with the left lower limb pain and numbness. Although DW3 said there were no other complaints on that day, the treatment card PExb. 1B shows the deceased had:
- “No lower limb swelling” and there was
- “Marked tenderness left thigh”
85. Further PExb 2B the Autopsy Report accompanying the post-mortem report, concludes:
- “The findings represent the consequence of fatty and soft tissue blunt trauma as the fat and clots find their way into blood vessels and cause blockage of pulmonary vasculature causing co-pulmonale and lung failure. The assaulted person died of lung and heart failure”.
86. My understanding was that, essentially, fatty and soft tissue blunt trauma led to fat and blood clots finding their way into blood vessels, and blocked heart and lung vessels leading to heart and lung failure.
87. DW3 Dr. Kiama took issue with the cause of death on being due to blunt trauma “in keeping with fatal assault” as recorded in the post-mortem report. He pointed out that “fatal assault” would mean instant death; he pointed out that thrombo emboli is associated with Deep Vein Thrombosis (DVT) and that Deep Vein Thrombosis is not based on assault but is based on a normal illness.
88. DW3 also impugned the fact that the Post mortem Report showed two alternative possible causes of death by indicating DDX on the report. There were either a thrombo embolic event or a pneumonic process. The Pathologist did not rule out pneumonic process, that is a process relating to pneumonia or the lungs, yet there was evidence from the medical report PExb 1B that deceased had chest problems and greenish sputum showing infection. Finally, DW3 pointed out that the Pathologist should have tested the thrombo emboli through a lab test.



89. The golden thread running through the post mortem evidence is that: the pathologist had at least two alternative possible causes of death a pneumonic process or a thrombo embolic cause. He did not make a final determination through testing both possibilities. Instead, he relied more on the given history of beatings/assault to reach his conclusion that blunt trauma was the ultimate cause of death. In reaching that conclusion he made the mistake of attributing the death to fatal assault, when in fact the death was not instant as a result of assault.
90. As a result, I find that the Post Mortem Report cannot be said to be conclusive that the cause of death is associated directly or indirectly from assault since a pneumonic process was also suggested. Thus, there is reasonable doubt that the death was caused by the assaults or beatings alleged by the prosecution.
91. Accordingly, there is insufficient medical evidence on record to support a proposition that the death of the deceased was unlawfully caused by the accused. The state in their further final submissions cited as persuasive the Canadian case of *R v P.C.M.B (1994) ISCR 555*. There the court held:

“The crown has a duty to present a case to meet that implicates the accused in a strong and cogent network of inculpatory facts.....”.

I do not see the evidence given in this case as having met that high threshold of strong and cogent network of inculpatory facts that result in the accused’s guilt.

92. The prosecution also cited *Coke on the Third Part of the Institutes of the Laws England (London) W. Clarke & Sons (1817)* on unlawful acts leading to death.

“if the act be unlawful or encompasses any conduct prohibited by law: The acid test on causation of murder is to be found in Sec. 213 of the Penal Code which fundamentally provides that the death of another human being need not be caused by the immediate act of the accused person”.

93. The proposition highlighted in *Coke’s* above, is that the death need not necessarily have been caused directly by the accused’s immediate acts. However, that was the prosecution’s case: that the death flowed from the beatings. The argument floated by the prosecution was not that the alleged beatings – if they were not the immediate cause of death – contributed to the cause of death. If that had been the argument, then PExb. 2A and 2B would have gone into greater detail concerning the other factors contributing to the death, beyond an assault.
94. In his examination of the deceased’s body, the pathologist reported bruises on the arms, and on dissection, bruises on the back of the head; and that the left thigh had fat tissue necrosis with extensive muscular contusion.

In his Autopsy Report PExb 2B, the pathologist’s commentary is:

“The findings represent the consequence of fatty and soft tissue blunt trauma as the fat and clots finds their way into blood vessels and cause blockings of pulmonary vasculature causing co-pulmonale and lung failure. The assaulted person died of lung and heart failure”.

Whether the death was caused by the accused through malice aforethought

95. From the foregoing analysis, I have found that the evidence is not clear that the death was caused by the accused. The summary I have given of the evidence concerning the medical reports (PExb 1A and 1B) and the post mortem reports PExb. 2A and 2B is not conclusive that; First either the accused assaulted the deceased, leading to her death; though there is nothing to preclude the fact that he may have beaten



her but the severity of such beatings is not proven; or second that the death is medically connected to any such alleged beating(s).

96. As already indicated the post mortem report makes a conclusion of “blunt trauma in keeping with fatal assault”. As was pointed out by Dr Kiama, fatal assault means death resulting immediately from the assault. Here, the connection was not made beyond reasonable doubt, that death resulted from the accused’s assault.
97. Thus, on the question whether the death was caused though malice aforethought on the part of the accused, this court is unable to make that finding. Nothing in the evidence suggests beyond reasonable doubt, that the accused, had formed an intention to kill his wife, or that it was his action that inexorably led to her death.

Conclusions and Disposition:

98. My conclusions in the light of the foregoing analysis are as contained in the following paragraphs.
99. First, that the prosecution proved beyond reasonable doubt the death of the deceased.
100. Second, that though the accused may have assaulted the deceased, there is no proof from the medical records of 1st or 2nd March 2018 (Pexbs 1A and 1B) that the deceased complained of, assault or injuries at the respective hospitals she attended. The complaint of beating may be reflected in PExb 1B on 8.3.2018 since there is an indication of “tenderness of the thighs, no swelling” in the treatment card.
101. However, there is no evidence immediately before the deceased’s death, of complaints of head, back or arm injuries or extensive muscular contusions as found in the Post Mortem report PExb 2A. Further, PExb 2A was impugned for reaching two possible conclusions as to the cause of death, namely; pneumonic process, and possible thrombo embolic event. Despite this, the pathologist formed an opinion that the cause of death was blunt trauma in keeping with fatal assault. Most likely he relied on the history indicated as to the circumstances of death.
102. Ultimately, I am unable to make the finding in the prosecution’s charge that the accused murdered Jane Wanjiku Mwai, as there is reasonable doubt that her death was caused by his acts.
103. Accordingly, I acquit the Accused of the charge of murder. He shall therefore be set at liberty forthwith, unless otherwise lawfully held.
104. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 15TH DAY OF FEBRUARY,2024

.....
R. MWONGO

JUDGE

Delivered in the presence of:

1. Samuel Njoroge Kihara, Accused in person at Naivasha Court
2. Waithera Mwangi, Advocate for the Accused
3. Josek Abwacho, DPP, for the State
4. Quinter, Court Assistant

