



**Republic v Musikoye (Criminal Case 27 of 2018)
[2024] KEHC 815 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 27 OF 2018
SC CHIRCHIR, J
FEBRUARY 1, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSHUA MUSIKOYE ACCUSED

JUDGMENT

1. Joshua Musikoye (The Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on the 5th and the 6th June 2018 at Lunyierra village Fuvale sub- location , Chesero Location in Kakamega North South sub-county within Kakamega county, the accused murdered one Mollen Mmogi Lubanga (Deceased)
2. The accused pleaded not guilty to the charges and the matter went on to full Trial. The prosecution called a total of six (6) witnesses, in support of its case

The Evidence

3. Pw1, testified that on 6th June 2018 at around 1.00pm, she was at home harvesting vegetables when her son Brian, aged 10 years, came to inform her that the Accused was looking for his father. she informed her son that his father had already left. Her son then informed her that the accused was at Mollen’s house and that he was sick. She rushed there. On the way, she met with Accused’s brother, Rodgers Muhatia. Upon inquiring from Rodgers about the accused’s condition, Rodgers informed her that the Accused was not sick ,and that the Acused’s wife was dead. Rodgers did not provide any further information. Both headed to the Accused’s house and and on arrival , found the accused sited outside the house. They entered the house and went into the bedroom. The bedroom was dark; she asked Rodgers to open the windows. It was then that they saw the body of the deceased lying on the bedroom floor. She screamed, attracting the attention of other neighbours. She further stated that the Accused



- started crying. The accused had been her neighbour for ten years and that there were no differences between them
4. On cross examination, she told the court that the deceased was the accused's wife and the two had been together for 10 years. She was not aware of previous fights between the two.
 5. PW2 was the brother to the Accused. He testified that on the material date, he passed by near the accused's house . When the accused saw him he called him over , and told him that his wife had stabbed herself and taken poison and that she had died . He further told the brother that he (the Accused) too had drunk poison.
 6. He further told the court that he immediately went looking for the pastor but only found the pastor's wife (PW1). Together with PW1, the two went back to the accused home and they found the accused outside ,removing clothes from the hanging line, though he looked weak. They held his hand and took him to the house so that he could tell them what had happened. The Accused led them to the bedroom.
 7. They found the windows to the bedroom closed ,and the Accused said : "Shemeji yako ndio huyo hapo" which translates to : "there is your in-law". Upon opening the window, pw2 was able to identify the body of the deceased which lying with her back, on the floor of the bedroom. He stated that he did not see any marks or blood on the body. PW1 started screaming, and neighbours responded.
 8. He took the Accused to Malava general Hospital for treatment. He later recorded the statement with the Malava police station. He stated that there were no differences between him and the Accused.
 9. He stated that the Accused had two wives, who lived almost 100 meters apart and that each wife lived in her own home.
 10. On cross examination, he testified that the accused and the deceased had lived peacefully and he had never heard the two quarrel. He stated that that it was the accused who informed him that his wife had died by taking poison and he , the accused had also ingested poison.
 11. PW3 was the deceased's co – wife. She recalled that on 6.6.18 at about 1 pm, she was at her home when she heard screams coming from her co-wife's house. She decided to go and check what was going on. she found that it was PW1 screaming, outside her co- wife's house. On inquiry, she was informed that her co-wife had been found dead. She entered the house and found the deceased lying on the bedroom floor ,on her back. she turned the body and confirmed that the deceased had indeed died. The accused was sitting in the sitting room. She questioned him in an attempt to find out what had happened but the Accused did not respond. The Accused was crying. She went out , came back and questioned him for the 2nd time and the Accused responded " Jasho yangu"! "Jasho yangu!" ("My sweat!", my sweat!").
 12. On cross examination, she told the court that the Accused and the deceased had 5 children and that she had never witnessed any fights between the two.
 13. PW4, was the Assistant- chief. He told the court that on 6.6.2018 he was in his office when he got a call from one of the villagers, one Jennifer Malesi informing him that one of the local teachers had died and her husband had taken poison. Accompanied by the village elders , whom he had been having a meeting with, they went to the home of the accused. On arrival they found a crowd. In the bedroom he found the body of the deceased lying on the floor.
 14. He further stated that he examined the body and found a deep wound. He proceeded to inform the Area- chief, as well as the police who came and took the body. He did not find the accused since he was informed that he had been rushed to the hospital. He testified that he knew the accused before the incident as they were school mates.



15. On cross examination, he stated that there was no blood in the house and he had never received any report of a fight between the accused and the deceased.
16. PW5 testified that he attended the post mortem together with his son and they identified the body of the deceased . He observed that there was a hole on the neck and injury to the spinal code.
17. On cross examination, he stated that the relationship of the Accused and the deceased was harmonious
18. PW6 produced the post mortem report on behalf of his colleague who was reportedly indisposed. There was no objection to the production by the defence. The post mortem was done on 8/6/2018 at Webuye mortuary. The conclusion was that the cause of death was shock due to severed brachial vessels due to stab wound.
19. On cross examination, he ruled out the possibility of the injuries having been self- inflicted, as the injuries extended to spinal cord.
20. PW7 was the investigations officer. He told the court that on 6/6/2018 at 1530 hours, he received a report of a murder incident. He proceeded to the Accused's homestead and found the body of the deceased. He took photographs of the scene. He produced a certificate for the crime scene photos dated 7/10/21 (PEXh 3); a blood stained kitchen knife (PEXh 4A); knife cover(PEXh.4B);a part of the mattress covered in blood (PEXh 5); a government chemist report dated 17/9/18(PEXh 6A); and the Exhibit memo dated 4/7/18(PEXh6B) .
21. He testified that the body was moved to Webuye county hospital mortuary while the accused was taken to Malava general hospital and later to Royal hospital. On 8/6/18, he attended the post-mortem examination.
22. He testified that from his investigations there was no one else at the house at the time , deceased and the accused when the incident occurred.
23. On cross examination, he told the court that he took photographs of the scene . He admitted that the photos do not show the knife cover, only the knife.(PEXB.2a) He further stated that the blood on the mattress was found to be that of the deceased. He claimed that the deceased told the police that the deceased had stolen money from him , but were unable to establish if this was true. The neighbours told the police that the accused had taken poison but they were unable to establish this.
24. The accused was placed on his defence and he opted to testify on oath.
25. He testified that on 1/6/2018, he had come from Kitale and the deceased who was his 2nd wife arrived the following day. They checked on, and discussed family issues. He further stated that on 6/6/2018, he woke up from his first wife's house. The house was 50 meters from the deceased's house. He further told the court that at 12.30 pm, he went to the deceased's house. He found the door shut but not locked. He pushed it and went to the bedroom. The bedroom was dark. As he moved to open the curtain, he stepped on a leg. It was that of the deceased. He asked her why she was lying on the floor. On opening the curtain, she realised she was death. He began shaking; went out and called for help. His brother came. upon hearing the screams neighbours came. He further stated that he was taken to hospital as he was not feeling well, and was given first Aid. He did not see blood on the scene. He told the court that he had a good relationship with the deceased. He denied killing her. He denied ever seeing the knife he allegedly used to kill the deceased. (PEXB2A)
26. On cross- examination he told the court that he had two wives, the first being Emily and the 2nd one being the deceased. He restated on the previous night, he had slept on the first wife's home and refuted the evidence of his first wife(pw3) to the effect that she last saw him on the 4.6.2023. He also refuted



PW1's and PW4's testimony to the effect that the deceased was found half naked and in a pool of blood. He denied that he had drunk poison. He admitted that he was in Malaba hospital when his wife's body was taken away by the police. On being questioned on why he went to the hospital instead of the police station to report the incident, he stated that he was advised by a man named James to go to the hospital. He Stated that the first person to know his wife had died was his brother (pw2). He insisted that Pw1, 2, 3 and 4 all lied to the court about his condition at the time they found him.

Accused's submissions

27. The accused filled his submission on 18th October 2023. It is the Accused submissions that all the witnesses testified that they found the deceased lying on the floor dead but there was no blood. He also submits that there was conflicting evidence on the site of the stabbed wound on the deceased.
28. The Accused casts doubts on the evidence of the investigations officer referring to the presence of a knife yet none of the other witnesses testified of seeing a knife on the scene.
29. He further submits that he had no motive to kill the deceased as there was ample evidence that their relationship was good. Therefore, he further submits, the prosecution had failed to prove that there was malice aforethought.

Prosecution's submissions

30. The prosecution while admitting that their case is based purely on circumstantial evidence, submits that it has proved the 3 ingredients required to prove murder namely the fact and cause of death, the perpetrator and malice aforethought. It is submitted that the fact of death was proved through the post-mortem report and the testimonies of PW1,2,3 and 4. The body was duly identified by the deceased's father and the cause of death as shock due to severed brachial vessels due to a stab wound
31. On whether the perpetrator was the Accused, it is the prosecution's submissions that the totality of the evidence show that the deceased was the last person to be seen with was the Accused. In this regard the prosecution has relied on the case of Ahamad Abolfathi Mohammed and another vs. republic (2018) eKLR and Abanga alias Onyango vs Republic (CR. APP NO. 32 of 21990)
32. On malice aforethought, the prosecution has relied on the definition given under section 206 of the penal code and assert that the circumstances prove malice. It has also relied on the case of Rex vs Tubere s/o Ochen (1945) 1 ZEACA 63.

Determination

33. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In Anthony Ndegwa Ngari v Republic [2014] eKLR, the elements of the offence of murder were listed as follows: -
 - (a) The death of the deceased occurred;
 - (b) That the accused committed the unlawful act which caused the death of the deceased; and
 - (c) That the accused had malice aforethought.
34. On the first element, the fact that one Mollen Mmogi Lubanga died is not in dispute. PW1, PW2 PW3 and PW4 saw the body of the deceased. The post mortem report did confirm the death. The cause of death as per the PW6's testimony was shock due to severed brachial vessels stab wound. Thus the death of the deceased as well as the cause thereof was duly proved.



35. On the perpetrator of the crime, the available evidence as readily admitted by the prosecution is purely circumstantial.
36. Circumstantial Evidence was defined in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, by the court of Appeal as “evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved” The court went on to state that “Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial. (Emphasis Added)
37. To base a conviction on circumstantial evidence, such Evidence must meet certain criteria, namely:
- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.” (see *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR)
38. Further in the case of *Mwangi & Another* (2004) 2KLR 32 the Court of Appeal stated “In a case depending on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge”
39. In *Mwita v. Republic* (2004) 2KLR 6 it was held : “It is trite that in a case depending exclusively upon “circumstantial evidence” the court must, before deciding upon a conviction, find that the inculpatory facts are incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”
40. Finally , the court of Appeal , in the case of *Wilson Wanjala Mkendeshwo vs Republic*(2002) e KLR while making reference to the often cited decisions of *Rex vs Kipkering Arap Koskei* (1949) EACA 715 and *Simon musoke vs R*(1958) EA 715 stated: “In order to justify a conviction based wholly on circumstantial Evidence , the inculpatory facts must not only be incompatible with the innocence of the Accused , and be incapable of explanation upon other reasonable hypothesis than that of his guilt , but also the said facts must exclude Co- existing circumstances which may tend to weaken or destroy inference of guilt”.
41. The circumstances in this case are that the deceased was the wife of the Accused. The Accused and the deceased’s body were found by the first witnesses in their house. PW2 his brother was the first to appear in the scene, summoned by the Accused. Neither this witness nor the Accused indicated that there was a third person in the house at the time. The 2nd person was pw1 accompanied by pw2 who had gone to get her. She too found the Accused and the deceased’s body. She told the court that there was no one else in the house Thus it is only the Accused who was found with the Deceased, and was the one with the responsibility to explain what happened to the deceased. And explain, he did. He told pw2 that the deceased had stabbed herself and drunk poison. PW6, the Doctor ruled out self- infliction based



- on the location of the injuries which showed that some were on the spinal cord. Logically therefore it could not have been possible for the deceased to stab herself on the back.
42. The explanation that the deceased stabbed herself and drunk poison is not plausible. If indeed this was the case, did the Accused just stand and watch as his wife stabbed herself and drunk poison, or drunk poison and stabbed herself, whichever came first? Why did he not raise an alarm when the Accused was allegedly attempting to kill herself? He told his brother that he too drunk poison.
 43. PW3, the Accused first wife told the court that twice he asked the Accused what had happened. The first time he did not answer her but on being questioned the second time, the Accused retorted “Jasho yangu”, “Jasho Yangu” (my sweat! my sweat!). “Sweat” within the Kenyan context is a term commonly used to refer to a person’s hard work or fruits of hard work. Whereas such retort does not suggest guilt on the part of the Accused, it is inconsistent with a person under grief or shock as suggested by his Advocate in the submissions.
 44. It is also instructive that the Accused’s first destination after the incident was Malaba hospital and not a police station. Going by his testimony, he stumbled on the body of the deceased in the bedroom. Naturally, the Accused would have first headed to the police station, but he did not. By his own admission he was in Malaba hospital when his wife’s body was being removed and taken to the mortuary.
 45. The Accused in his defence stated that PW1, PW2, PW3 and PW4 all lied to the court about what they saw and/ or heard. In particular while he denied that he told his brother that he drunk poison, he admits that he was indeed taken to Malaba hospital. Thus, there was common ground that he was taken to hospital. Indeed, it was his evidence that he was given first Aid in the hospital. He also admitted at cross-examination that he was in the hospital at the time his wife’s body was being removed as aforesaid. It gives credence to PW2 testimony that he took the Accused to hospital out of concern that he had taken poison and needed medical attention.
 46. Further, whether or not he was being truthful about having taken poison, which report prompted PW2 to take him to hospital, leads me to another question: why would he drink or claim to have drunk poison? If he was innocent why the need to drink poison or why the need to allege that he had drunk poison. Was it that he could not stand what he had done?
 47. He further told the court that he had slept in his first wife’s on the night prior to the discovery of the body, which was on 5.6.2018. But this was refuted by the said first wife (PW3), who told the court that he last saw the Accused on 4.6.2018.
 48. Cumulatively, the above scenarios are incompatible with the innocence of the accused. The Accused was the only person who was found with the deceased. His conduct further leaves no doubt that he, and no one else was responsible for the murder of the deceased. In the case of R VS Miller(2007) 233 A.L.R cited with approval in the case of RVs Juma Kituko Mwambegu(2020) e KLR the court stated: “The nature of circumstantial Evidence is such that while no single strand of Evidence would be sufficient to prove the defendant’s guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant’s guilt is proved beyond reasonable doubt. It is not the individual strand that require proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was not built on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”
 49. I have further considered the Accused defence against the evidence of the prosecution witness testimonies and I find his defence implausible. In particular, his allegations that virtually all the prosecution’s witnesses lied is far from being true. PW2 is a brother to the Accused. He told the court



that there was no enmity between the two. PW2 therefore had no reason to lie about what transpired and particularly against his own brother. This same brother went to the extent of taking the accused to the hospital. Why would PW 2 take the accused to the hospital, presumably based on his honest belief that the accused's life was in danger from the alleged poison? Further I do not believe that pw2 would provide evidence that would potentially find his brother guilty of murder, if what he was telling the court was not true.

50. Another witness, PW3 was the first wife of the Accused. There was no suggestion that there was any acrimony between the Accused and this first wife. Why would his own wife lie to the court about what she saw and heard especially when there was no suggestion of any acrimony between the two?
51. His counsel has submitted that the Accused reaction of taking, or alleged drinking of poison was probably a case of distress seeing that his wife had died. But that is not a normal human reaction to such an incident, unless one has a hand in causing the death of a deceased person.
52. In a nutshell, am satisfied that the circumstances in this case point to the Accused having been the only perpetrator in the murder of the deceased's herein.
53. Finally, the offence of murder is complete when, "malice aforethought" is established if, pursuant to section 206 of the Penal Code evidence proves any one or more of the following circumstances exists:
 - (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)
 - (d)
54. In the case of Hyam vs DPP(1974) A.C the court held : " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that the act would result in death or serious bodily harm"
55. In the present case , the post- mortem report shows that the deceased suffered injuries as follows: "Bruised Right knee joint; bruised left anterior thigh; bruise anterior abdominal wall(para umbilical); stab wound supra sternal left side 4cm sharp margin; pateachial haemmorage left breast(6x4)inches; bruises left side forehead; circumferential haemorrhage right wrist joint. On the chest there was severed left brachial varicular vessels; on the spine there was stab wound suprasternal left side extended up to the spinal column cracked C2 pedicle"
56. It is evident that the injuries were extensive and the most severe attacks were directed at the vessels serving the vascular system and the spine, both of which are vital systems in the human body. The Accused must have known or ought to have known that the attacks had the potential to kill the deceased. To that extent, malice aforethought was established.
57. Am satisfied that the prosecution has proved its case beyond reasonable doubt. I hereby find the accused guilty of murder under the provisions of section 203 as read with section 204 of the penal code and do hereby convict him accordingly.



58. For purposes of sentencing, the director of probation and aftercare services, Kakamega county is hereby directed to prepare a presentencing report within 14 days from today's date. This matter will be mentioned on a date to be given as at the time of delivery of this judgment for purposes of sentencing.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF FEBRUARY 2024.

S. CHIRCHIR

JUDGE

In the presence of:

Mr. Rono- Court Assistant.

The Accused

Mr. Matete for the Accused.

Mr. Leina for DPP

