



**Republic v Irungu (Criminal Case 16 of 2018)
[2023] KEHC 891 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 16 OF 2018
CM KARIUKI, J
FEBRUARY 13, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

PAUL KAMAU IRUNGU ACCUSED

JUDGMENT

1. The Accused is charged with murder and was arraigned before the Honourable Court to face charges of Murder Contrary to section 203 as read with section 204 of the *Penal Code* Cap 65 Laws of Kenya.
2. It is alleged that on the night of 23rd and September 24, 2018 at Kongoni village, Ndindika Sub-Location within Laikipia County the accused person unlawfully killed Peninah Wanja Njoki aged 31 years old.
3. The accused person pleaded not guilty to the charges.
4. The prosecution closed its case on June 14, 2022 having called six (6) Prosecution witnesses.
5. Upon being placed on his defence, the Accused person elected to give an unsworn statement in which case he adopted his self-recorded statement dated September 29, 2018.

6. Evidence by Prosecution

7. The evidential material relevant to this discussion was to the following effect: -
8. PW 1, one Susan Chebet Mengich, confirmed that on September 23, 2018 at around 7.00 pm, the deceased was taking “changaa” inside PW1’s home. PW 3, one Isaac Irungu, came looking for the Deceased and informed PW 1 that the Accused person was calling her. The Deceased declined to go and after a short while the Accused came and called out for the deceased and told her in Swahili “unafanya



- nini na hawa wanapika na kwako hakupukwi". Soon thereafter, the two departed towards their home. PW 1 didn't witness any brawling or fighting between the two as they were leaving.
9. PW 1 knew the Accused person and the deceased because she was their neighbour since 1988. The Accused person and the deceased were married to each other and their relationship was otherwise smooth as she had never witnessed any fighting.
 10. PW 3 stated that on September 23, 2018, he was at home with his 5 siblings.
 11. The Deceased who was his mother used to wash clothes at Mama Wambui's home. Her routine was from 8.00 am to 4.00 pm. His mother, the deceased, reported home at 4.00 pm as usual and sometimes before 7.00 pm, she went to Mama Wambui's home to ask for her wages.
 12. At 7.00 pm the deceased reverted and found PW 2, PW2's siblings and the accused person. He, the accused person, immediately began assaulting the deceased as was his custom every time he arrived home. He was demanding the money she had earned.
 13. The accused was whipping the deceased with bottle brush twigs [Exhibit 1] and he would pluck some more every time the twigs shredded away. He persisted until midnight. When PW 3 attempted to intervene, PW 3 would also be whipped. They all slept hungry as nobody cooked.
 14. Then after beating her thoroughly, the accused began thumping the deceased chest and also stabbed on the breasts with a small knife [Exb 2] without a handle. He then dragged her outside and assaulted her some more until blood would ooze from all over her body and seeping onto the grass-lawn
 15. The deceased fell unconscious, and the accused dressed her up and dragged her into the house and onto the bed. In the morning he left locking the door from outside. PW 3 had to force the door open using an iron/metal rod [Exhibit 3].
 16. PW 4, Edward Mwangi, stated that on a date he couldn't recall in September 2018, PW 4 recalled that his deceased mother was at Mama Wambui's home. The accused came home and enquired where the deceased was and the children told him that she was at Mama Wambui's home. The Accused person went to look for her and came back with her while beating her using bottle brush twigs.
 17. He began beating her while at Mama Wambui's home but since the witness was in the kitchen he could not witness the assault. All the children were in the kitchen and the witness prepared vegetables while his elder brother, PW 3, prepared ugali.
 18. The accused wrestled the deceased to the ground and stripped her naked. PW 4's mum was drunk but the accused was not drunk. The accused slapped the deceased and kicked her while dragging her towards the grass lawn. The accused then locked all the children inside the house so that he could continue assaulting the deceased. The deceased was screaming intensely saying that she was dying.
 19. The accused briefly opened the door and called PW 3 and PW I outside and invited the two to beat up their mother. When the two refused, he ordered them back to the house. When he was done with her, he demanded a "shuka" to cover up the deceased's nakedness. PW 3 handed over the "shuka," and the deceased ran into the house and climbed onto the bed.
 20. The accused accosted her, pulled her out of bed,, and thumped onto her chest with his feet. He then set her ablaze using a light hearth, and her mum was burnt all over until she died. They all witnessed as the life crawled out of their mum. The accused then poured a whole jerry-can of water onto her body. He then told them that she was dead!



21. The accused then dressed the lifeless body of the deceased and laid her on the bed, and went to sleep. The following morning, he departed on his bike. The reason for the fighting was money. The accused would always demand the money their mom had earned.
22. During re-examination, the witness begged to change his testimony in chief and add to her testimony that her mum was drunk as she appeared to be unstable and staggering. The witness also recalled that the accused hit the deceased on the head using a metal bar [Exhibit 3].
23. The witness also added that her mother was suffering burns on her back, and when the deceased left following morning, the witness used a panga to force the door open and that it was not his brother, PW 3, who forced it open both doors.
24. PW 5, Boniface G. Miringu The pathologist, testified in material respect that when he received the body of the deceased on September 28, 2018, at 4.14 pm, he observed the following injuries: Wounds consistent with whip-lash all over the body; Strangulation marks on the neck; Frictional burns on the back indicative of being dragged on the floor; Sub-scapula hematoma on the left side of the head; Massive sub-dural hematoma covering both sides of the brain. The witness determined the cause of death to be subdural hematoma following severe head injury.
25. He figured that the strangulation marks were consistent with compression of the larynx due to human fingers. However, the witness never observed any thermal injuries consistent with being set alight/ablaze.
26. He also determined that the deceased suffered a blunt force trauma to the head that was not penetrating. This was consistent with falling onto a floor surface, wooden surface /structure, or being hit by an object such as a hammer.
27. The parties were directed to file submissions after the defence was closed.

Prosecution Submissions.

28. On the fact of the death of the deceased, there cannot be any doubt

29. The information states that the deceased had been murdered. A post-mortem was also done on the deceased as a proof that she was dead. The deceased body was identified by her relatives including PW6 who proved that the deceased died and PW5 Dr Miring'u who conducted the post mortem, found that the deceased had indeed died and produced the same as Prosecution Exhibit 1 in this case.

30. On the cause of the death of the deceased

31. PW5 produced a post-mortem report as Prosecution Exhibit 2 which concluded that the deceased died due to t subdural haematoma following severe head injury and strangulation. This was expert medical evidence regarding the cause of death and was neither challenged nor converted in any way by defence.
32. On whether an unlawful act or omission on the part of the accused person caused the said death
33. PW3 a child aged 15 years and a son to the deceased and the accused, testified that on the September 25, 201,8, while at home, the deceased came home and found the accused who demanded for money the deceased had earned from a job. The (accused) then pick a bottle brush stick, which he used to beat the deceased and would get another it to finish and continued beating her until 3:00 am. He was also stepping on her chest and stabbing her with a knife while outside, and there was a lot on the grass and all over her body. He then removed her clothes when he realized she had died and dressed, dressed her in other clothes placed her on the bed outside.



34. PW4, a child aged 11 years and a brother to PW3, collaborated with PW3's evidence, for he was also an eye witness for he was also at home and narrated how he saw his father assault his mother, and at one time was also assaulted by the accused. He stated how his father even strangled the deceased and was even asking for help for she was being killed.
35. All that testimony above directly proves the fact in issue as to the cause of deceased death and the act that the accused was responsible for and proves the same beyond doubt.

36. On proof that said unlawful act or omission was committed with malice aforethought

37. PW3, 4 and 5 confirm that the deceased died because the accused used a stick to assault the deceased and also strangled her and also stepped on her chest. We submit that the act of the accused repeatedly assaulting the deceased with a stick and when it got finished getting another one and continued assaulting her from 8:00 pm until 3:00 am and stepping on her chest proves that he was aware that when he assaults the deceased overnight and stepping on her chest, she would either sustain grievous harm or be dead. This sufficiently proves mens reus.
38. Furthermore, when he realized that the deceased had died after that thorough beating, he dressed her in other clothes, returned her in the house, pulled her by her hands, placed her on the bed, and went outside. This is after he realized that she had blood all over her body. Hence, he had a motive of murdering the deceased and was concealing the same by those acts. Otherwise, if he had intended to discipline the deceased, he would not have beaten her throughout the night.
39. On the minor contradictions adduced by the prosecution, it is submitted that the same are not material as all major elements of the offence have been proved and the contradictions are minor.
40. Reliance is made on: *Woolington —v- DPP* 1935 AC 462 where it was held at reasonable doubt need not reach certainty.
41. The Prosecution submits that on the totality of the evidence adduced by the prosecution and accused, evidence by the prosecution is believable, firm and consistent that the accused intentionally assaulted the deceased and injured her fatally and there is sufficient evidence to prove that when placed on his defense, it's noteworthy to note that he elected to rely on an unsworn defense and produced his statement under inquiry as his Exhibit 1.
42. In addition, in the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has yet to be seen would carry a different weight than evidence as to what has been since. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will initiate the point.
43. In *Amber May v The Republic* [1991 KLR 38, the High Court held that an unsworn statement has no probative value notwithstanding the provisions under section 211(1) of the Criminal Procedure Code. An appeal against that decision and reported as *May v The Republic* [1981] KLR 129, the Court of Appeal Inter alia held: -

“That unsworn statement is not strictly speaking evidence, and the rules of evidence cannot be applied to an unsworn statement. It has no probative value but it should be considered about the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value, it must be supported by evidence recorded in the case, 2:00 adverse inference can



be drawn against the accused for electing to make an unsworn statement as he was exercising his right conferred by section 211(1) Criminal Procedure Code Cap 75, Laws of Kenya”.

44. Based on the above authority, it is submitted that since the accused made an unsworn defence, such has no probative value in the absence of collaborating witnesses.
45. Further submit that the evidence contained in Defence Exhibit 1 to wit his statement under inquiry, could not displace the testimony by PW3 and PW4, respectively, who were eyewitnesses to the commission of the murder.
46. In his statement under inquiry which the accused wants the court to rely on, he has indicated how he found the deceased at Susan's place appearing very drunk, and that she was unable to walk but was staggering all through upto home. There nowhere it's indicated that she may have fallen. Hence, Court to disregarded the assertions that she may have fallen and hit her head. Moreover, the cause of death is indicated in the post-mortem as subdural haematoma following severe head injury, which is consistent with the beating she received on her head and strangulation.
47. Did the Accused person of malice aforethought cause the deceased's death?

48. Defence Submissions

49. A thorough examination of the evidential material presented by the prosecution will reveal that the deceased never died at the hands of the accused person in the process of lawful chastisement. The unfortunate death of the deceased was a misfortune of her creation.
50. The frictional burns, whip-lash injuries and related injuries did not cause the deceased's death. Instead, PW 5 stated unequivocally that the deceased died out of blunt force trauma to the head, which led to a massive sub-dural hematoma (blood clot).
51. None of the witnesses testified that the accused person struck the deceased with a blunt object on the head save for PW 4, whose evidence is wanting.
52. During the re-examination of PW 4, the witness sought to depart from his self-recorded statement and his examination in chief regarding Exhibit 3, the metal rod. The witness stated that the accused used the metal rod to hit the deceased on the head. However, PW 3 stated unequivocally that the metal rod [Exhibit 3] was used to force open the door when the accused locked the door from the outside.
53. The evidence of PW 4 on this point is directly contradicted by the evidence of PW 1 and PW 3.
54. The testimony of PW 4 in law can only stand if it is corroborated by other evidence by dint of Sections 124, of the *Evidence Act* Cap. 80 as read together with Section 19 of the *Oaths and Statutory Declarations Act*.
55. PW 4 was also not a credible witness due to his susceptibility to couching and bias. He testified that the deceased was set ablaze by the accused using a hearth. This testimony was directly contradicted by PWS, who testified that the deceased had not thermal injuries but frictional burns. Finally, PW 3 was unequivocal that the iron rod/metal rod was never used during the assault.
56. All the witnesses were consistent that the deceased was as drunk as a skunk when she was retrieved from PW 1's home where she had been consuming “chang'aa”. PW 5 confirmed that the blunt force injury to the head may be caused by falling onto a wooden object or hard surface. The act causing the injury actus reus was never inflicted by the deceased, rather, the deceased must have stumbled and hit her head.
57. No single shred of evidence connects the death of the deceased to the accused.



58. 2) Did the accused use reasonable force during chastisement?

59. The evidence on this point is quite consistent that the accused person used bottle-brush twigs to chastise the deceased. The same were produced in evidence and could not inflict fatal wounds.
60. More so, PW 3 and PW 4 exaggerated the nature of assault meted on the deceased. They testified that the accused thumped onto the deceased using his feet. PW 3 even claimed that the accused used a pen-knife to stab the deceased on her chest. Unfortunately, all this testimony was not borne out by the post-mortem. As such, the only credible/consistent evidence on this point is that the accused whipped the deceased using twigs for corrective purposes.
61. In any case, the deceased was drunk and helpless while she was being whipped and it is preposterous to suggest that it was a fight or scuffle as PW 3 and 4 attempted to suggest.
62. Truth is a lofty aspiration to seek in a court of law. One aspect or other of testimony may be truthful and could easily be ascertainable, such as, what is the time? Or what day is today? While other aspects, though truthful, may not be easily ascertainable, such as, what time did the assailant strike? Or what clothes did the assailant wear?
63. Therefore, to make a Judicial Officer's life easier, Courts have formulated principles which should be pointers and guidelines. I need not go any further than quote the Dicta J.M. Mativo, J who made the following eloquent observation [which I entirely associate myself] about trial by evidence and the right to presumption of innocence in the case of *Philip Muiruri Ndaruga V Republic* Criminal Appeal No. 76 of 2012 (reported online as [2016] eKLR): -

“The third issue is whether the prosecution tendered sufficient evidence to support the charges. I have carefully evaluated the evidence tendered in the lower court and the submissions by counsel for the DPP, I am persuaded that this is a case where the appellant ought to have been acquitted on both counts because the offences were not proved as required. The evidence tendered did not meet the required standard of prove in criminal cases and on that ground alone, the appellant ought to have been given the benefit of doubt and acquitted.

64. The South African case of *Ricky Ganda v The State* provides useful guidance.

“...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt”.

65. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.
66. See also in 1997, the Supreme Court of Canada in *Republic - versus- Lifchus*.



67. Issues, analysis and determination

68. .. The salient issues from the matter herein are whether the ingredients of murder have been proved beyond any reasonable doubt. Did the unsworn defence exonerate the accused?
69. Section 203 PC cap 63 LOK defines the offence of murder. It requires proof of the following elements beyond a reasonable doubt to establish the crime of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.
70. Murder; Elements of Murder; Generally, most offenses are established by proving both actus reus and men's rea. Actus reus is a Latin term meaning a guilty act, while men's rea means a guilty mind. Specifically, men's rea refers to the mental state, including intent, knowledge, recklessness, and criminal negligence. Proving actus reus is easy as it is the physical act of killing someone. It involves one of the acts or omissions discussed above.
71. As previously noted, from a reading of section 203 of the Penal Code, the men's rea element of murder is malice aforethought. Malice aforethought, in this sense, does carry the literal meaning but means the existence of intention. Therefore, the presence of malice aforethought is of utmost importance, for it is the presence or absence of it which determines whether an unlawful killing is murder or manslaughter.
72. In the English case of R v Maloney, the House of Lords stated that the malice aforethought of murder consists of an intention to kill any person or cause grievous bodily harm to any person. The conception of malice aforethought in the above-cited case also mirrors our courts' definition. As noted by the Court of Appeal in Nzuki v Republic, before an act can be murder, it must be aimed at someone, and it must be committed with the following intentions: –Intention to cause death; Intention to cause grievous bodily harm;
73. Where the accused knows there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
74. Furthermore, the intentions have been codified under section 206 of the Penal Code. This section provides for circumstances when malice aforethought is deemed to be established. These circumstances are;An intention to cause the death of or to do grievous harm to any person, whether that person is the one actually killed or not;The knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person;An intent to commit a felony;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. Additionally, to make the exercise of determining whether a murder has been committed easy, the courts have developed a three-element test.
- This is exemplified by the case of Anthony Ndegwa Ngari v Republic, where the elements were listed as follows: –
- The death of the deceased occurred;That the accused committed the unlawful act which caused the death of the deceased; andThat the accused had malice aforethought.
75. The burden of proving the existence of the above elements is on the prosecution. The prosecution must discharge this burden sufficiently and beyond reasonable doubt for the court to find a person guilty of murder. So it is the case; therefore, where malice aforethought is not proved, the accused is usually found guilty of manslaughter.



76. On the cause of the death of the deceased

77. PW5 produce a post mortem report as Prosecution Exhibit 2 which concluded that the deceased died due to subdural haematoma following severe head injury and strangulation. This was expert medical evidence regarding cause of death and was neither challenged nor converted in any way by defence.
78. On whether the said death was caused by an unlawful act or omission on the part of the accused person.
79. PW3, a child aged 15 years and a son to the deceased, and the accused testified that on September 25, 2018, while at home, the deceased came home and found the accused, who demanded for money the deceased had earned from a job. The (accused) then picked a stick a bottle brush stick, which he used to beat the deceased and would get another it got finished and continued beating her until 3:00 am. He was also stepping on her chest and stabbed her with a knife on breasts while outside, and there was a lot of blood on the grass and all over her body. He then removed her clothes when he realized she had died and dressed her in other clothes and placed her on the bed, and went outside.
80. PW4, a child aged 11 years and a brother to PW3, collaborated with PW3's evidence, for he was also an eye witness for he was also at home and narrated how he saw his father assault his mother, and at one time was also assaulted by the accused. He stated how his father even strangled the deceased and was even asking for help because she was being killed.
81. All that testimony above directly proves the fact in issue as to the cause of the deceased death and the act that the accused was responsible for and proves the same beyond doubt.
82. On proof that said unlawful act or omission was committed with malice aforethought.
83. PW3, 4, and 5 confirm that the deceased died because the accused used a stick to assault the deceased and also strangled her and also stepped on her chest. We submit that the act of the accused repeatedly assaulting the deceased with a stick and when it got finished got another one and continued assaulting her from 8:00 PM until 3:00 AM and stepping on her chest proves that he was aware that when he assaults the deceased overnight and stepping on her chest, she would either sustain grievous harm or be dead. This sufficiently proves mens reus.
84. Furthermore, when he realized that the deceased had died after that thorough beating, he dressed her in other clothes and returned her in the house, pulled her by her hands and placed her on the bed, and went outside. This is after he realized that she had blood all over her body. Hence, he had a motive of murdering the deceased and was concealing the same by those acts. Otherwise, if he had intended to discipline the deceased, he would not have beaten her throughout the night.
85. On the minor contradictions adduced by the prosecution, it is this court's view that the same are not material as all major elements of the offence have been proved and the contradictions are minor. Reliance is made on: *Woolington v DPP* 1935 AC 462 where it was held that reasonable doubt need not reach certainty.
86. The court view is that on the totality of the evidence adduced by the prosecution and accused, evidence by the prosecution is believable, firm and consistent that the accused intentionally assaulted the deceased and injured her fatally and there is sufficient evidence to prove that when placed on his defence, it's noteworthy to note that he elected to rely on an unsworn defence and produced his statement under inquiry as his Exhibit 1.
87. In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to



what has been since. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement.

88. In *Amber May v The Republic* [1999] KLR 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions under section 211(1) of the Criminal Procedure Code. An appeal against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal Inter alia held: -

“That unsworn statement is not strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value, it must be supported by evidence recorded in the case, 2:00 adverse inference can be drawn against the accused for electing to make unsworn statement as he was exercising his right conferred by section 211(1) Criminal Procedure Code Cap 75, Laws of Kenya”.

89. Based on the above authority, it is this court’s holding that, since the accused made an unsworn defence that such evidence has no probative value in the absence of collaborating witnesses.
90. The evidence contained in Defence Exhibit 1 to wit his statement under inquiry, could not displace the testimony by PW3 and PW4, respectively, who were eyewitnesses to the commission of the murder.
91. In his statement under inquiry, which the accused wants the court to rely on, he has indicated how he found the deceased at Susan’s place, appearing very drunk, and that she was unable to walk but was staggering all through up to the home. There nowhere it’s indicated that she may have fallen down.
92. Thus, the Court to disregards the assertions that she may have fallen and hit her head. Moreover, the cause of death is indicated in the post-mortem as subdural haematoma following severe head injury which is consistent with the beating she received on her head and strangulation.
- i. In sum the court finds that the prosecution has proved its case beyond reasonable doubt and thus the accused is found guilty of murder and therefore convicted accordingly.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13TH DAY OF FEBRUARY, 2023.

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CHARLES KARIUKI

JUDGE

