



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Amuyauwa (Criminal Case 57 of 2014)
[2023] KEHC 2240 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 57 OF 2014
PJO OTIENO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DORIS IMINZA AMUYAUWA ACCUSED

JUDGMENT

1. The accused person, Doris Iminza 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 October 11, 2017 at Kabinjaru village, Banja location, Kipcheken sub location, Hamisi Sub- County, within Vihiga County, the accused person jointly with another not before court murdered John Khajora.
2. The accused person pleaded not guilty to the charge.
3. In order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from seven (7) witnesses.

The Evidence

4. PW1, Patrick Limanya Khajira testified that on October 24, 2014 he received a call that his father, the deceased, was in a bad state and when he got home at about 4 PM, he found that his father has died and they took his body to Mbale Hospital Mortuary.
5. It was the evidence of PW2, DM, a daughter of the deceased that she was 15 years old and that on October 11, 2015 at about 2PM she had come from school and joined his siblings and a neighbor 's child by name of S in playing and that S was later called by her mother. At around 7:30 PM, she heard the accused shouting asking where her daughter S was. She then heard someone breathing at the banana plantation and when she checked she found S who informed her that her mother had chased her away from home. She then assisted her into the house. After sometime the deceased opened the door to go



- outside and was met by the accused and one Daudi who started to beat the deceased. She was able to see them from the lamp light. They screamed and when people came Daudi ran away while the accused insulted the deceased claiming that he wanted to defile his daughter. The next day the deceased went to hospital. On the third day after the incident, she heard that her father had died.
6. On cross examination, she stated that the accused was drunk and refuted claims that the deceased was sick before the incident.
 7. PW3, Rodgers Kimdai Lumwachi, a village elder testified that on October 11, 2015 at 11PM he was woken up by one Diana who informed him that her father, the deceased, was being beaten by two people. They went to the house of the deceased who informed him that S was in his house but had refused to leave because she feared being beaten by her father when he got home. He then escorted her and the accused home. The next day he reported the incident who the sub-chief who asked him to advise the deceased to get a P3 though he did not see any injuries on him.
 8. On cross examination, he stated that before the incident the deceased was weak and that he did not go to hospital. He further stated that the deceased died two weeks after the beating.
 9. PW4, Miriam Kabaya Otanga, testified that on October 11, 2014 at 11PM she was asleep when PW2 knocked at her door saying two people were killing each other. They rushed to the scene where the deceased informed them that he had been beaten and injured.
 10. PW5, Peter Ingaji Maheli, testified that on October 29, 2014 he went to Mbale Hospital where he identified the body of the deceased to the doctor who performed a post mortem.
 11. PW6, Obadiah Ndege, a clinical officer at Vihiga County Referral Hospital produced the post mortem report of Dr Amunga and stated that Dr Amunga conducted an autopsy on the body of the deceased on October 29, 2014 and found that the deceased had a fracture of the right side, laceration of the same rib, 3ml of blood on the right plural space, and bleeding from the right prandial vessels. He was of the opinion that the deceased died due to respiratory failure secondary to laceration of the right lung.
 12. On cross examination he stated that laceration can be caused by trauma and that a fracture is caused by a blunt object.
 13. On re-examination he stated that what caused the fracture could cause laceration on the lungs.
 14. PW7, No xxxx CP Shem Saya of Serene Police Station gave evidence that on October 24, 2014 they received a report from members of the public that there was a body of a person lying dead in his house. They proceeded to the scene and learnt that the deceased had been assaulted on October 11, 2014 by the accused and one Daudi. They took the body to the county mortuary, arrested the accused and recorded statements from witnesses. On October 29, 2014 they received an autopsy report of the deceased and decided to charge the accused with murder.
 15. On cross examination he stated that the deceased neither reported the assault nor attended any medical facilities.
 16. The court ruled that a prima facie case had been established against the accused person and she was thus placed on her defence.
 17. The Defence called one witness, the appellant herein, who in her sworn statement stated that on October 11, 2014 she was home until 3PM when she took her wares to the stall to sell and sold them until 6:30PM when she returned home and tethered the cows. She called her daughter Selphin who responded from the home of one John Ajira and she asked her to come home and they had supper together. On October 24, 2014, boda boda guys came to her home throwing stones and set it ablaze.



She escaped through the back door to the AP Camp where she was informed that the neighbor had died. She was later arrested by the police for the murder of the deceased.

18. On cross examination she stated that she did not know why the boda boda guys attacked her home and on re-examination she stated that she learnt about the death of the deceased on October 24, 2014.
19. Her testimony marked the close of the defence case.

Issues and Determination

20. The offence of murder is committed by any person who of malice aforethought causes death of another person by an unlawful act or omission.
21. Therefore, for the prosecution to achieve a conviction, all the ingredients contain in section 203 of the Penal Code ought to be proved beyond reasonable doubt.
22. That said, the issues that arise for determination by this court are as follows:-
 - a) Is John Khajora deceased?
 - b) Was the death of the deceased due to unlawful acts or omission by the accused?
 - c) Whether the accused was actuated with malice afore thought in causing the death of the deceased

Whether John Khajora is deceased

23. The death of a deceased person is proved through the production of a death certificate as was observed in the case of *Ndungu v Republic [1985] eKLR* where it was held as follows: -

' Where a body is available and the body has been examined, a post mortem (report) must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross –examined'.

24. PW6 produced the post mortem report prepared by Dr Amunga which indicated that the deceased died on October 24, 2014 and that the cause of death was respiratory failure due to laceration of the right lung.
25. Furthermore, all the seven prosecution witnesses, including the accused herself, confirmed that John Khajora was deceased. The Court thus determines, from the evidence on record that John Khajora is deceased.

Did the deceased die out of the unlawful acts or omission by the Accused?

26. It was the testimony of PW2, PW3, PW4 and PW7 that the accused and one Daudi assaulted the deceased the night of October 11, 2014. It was also the testimony of PW2 that the deceased went to hospital the next day though no medical documents were produced in that regard.



27. In order to prove the cause of death, beyond reasonable doubt, then medical evidence must be availed to establish what caused death of the deceased and if the same is related to the acts of the accused. This was the holding of the Court of Appeal in *Chengo Kalama v Republic [2015] eKLR*, where it was held;
- ' The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased.'
28. According to the post mortem report, the deceased died due to respiratory failure secondary to laceration of the right lung. To help Court understand what causes laceration, PW6 stated on cross examination that laceration can be caused by trauma. The autopsy report further indicate that the deceased also suffered a fracture of the 4th rib and it was the testimony of PW6 during re-examination that a fracture could cause laceration on the lungs and that a fracture is caused by a blunt object.
29. The assault on the deceased happened on October 11, 2014 and the deceased died on October 24, 2014, thirteen days later. On cross examination, it was the testimony of PW3 that before the incident the deceased was weak and that he did not go to hospital. Though this statement appears to suggest that the deceased could have been ailing from something else, the post mortem report indicates that the deceased died due to laceration of the lung. According to Wikipedia¹, laceration is commonly caused by penetrating trauma but may also result from forces involved in blunt trauma such as shear stress. There is no evidence that the laceration of the lungs was by any other means divorced from the assault by the accused. It is the conclusion of the Court that the beatings by the accused on the deceased led to the fracture of the rib that pierced the lung.
30. The accused person denied going to the home of the deceased or even beating him. However, I find her testimony to be untruthful since PW2 and PW3 place her at the scene of crime. The Court finds the defence set up by the accused to be no more than a bare denial and incapable of controverting the otherwise cogent evidence by the prosecution.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

31. What constitutes malice aforethought was discussed by the Court of Appeal in *Nzuki v Republic [1993] KLR 171* it observed as follows: -
- ' Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:
- i. The intention to cause death.
 - ii. The intention to cause grievous harm.
 - iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences, to ensue or not in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct

¹ https://en.m.wikipedia.org/wiki/Pulmonary_laceration



is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v DPP* [1975] AC 55).'

32. To determine whether or not the killing of the deceased was premeditated by the accused person, the Court has looked at the events leading up to the murder and how the murder took place. It was the testimony of PW2, that the accused person went to the home of the deceased looking for her daughter and when the deceased opened the door to go outside, he was assaulted by the accused person and another.
33. The evidence of PW2 was that the deceased was randomly beaten all over the body by the accused and her accomplice who even stepped on him on the chest. In the court opinion it is never lawful to assault anybody with such severity and the accused and her accomplice must be taken to have intended that they occasion harm to the deceased. That to the court is sufficient demonstration and proof of malice aforethought. The Court thus finds that in beating the deceased as they did the accused and the accomplice were propelled by malice aforethought. The end result is that all the ingredients of murder were duly proved and the accused is therefore convicted of the offence of murder contrary to section 203 as read with section 204 Penal Code.

Dated, delivered and signed at Kakamega this 10th day of March 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution/State

Ms. Mburu for the Accused

Court Assistant: Polycap

