



REPUBLIC OF KENYA



**Republic v Mulongo & another (Criminal Case E009 of 2022)
[2023] KEHC 3098 (KLR) (12 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E009 OF 2022**

DK KEMEL, J

APRIL 12, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

SAMSON CHEMIAT MULONGO 1ST ACCUSED

LEAH NABWALA WEKESA 2ND ACCUSED

RULING

1. The two accused herein have been charged with an offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the charge are that on the 5th day of March 2022 in Binyenya village, Kimilili Sub-County within Bungoma County, they murdered Jane Nangila Sindani.
2. Both accused denied the charge and a trial thus commenced wherein the prosecution called nine witnesses in support of its case. A recap of the prosecution's case is as follows:-
3. PW1 was Ruth Nanjala, a saloonist at Kimilili area, testified that she was at her home around 9:00PM when she heard screams from the home of the accused persons. She rushed there and met the 2nd accused outside her home and still screaming. She peeped through the door and saw the deceased lying down on the floor and who had injuries on the legs and shoulder. The 1st accused then emerged from the house while armed with a panga and a club and ordered everybody out of his compound as he needed to accomplish his mission. She left for her home and that the following day she learnt that the deceased has been killed and her body dumped on the road near accused's home and one Paul Aseka.

On cross examination, she stated that she saw the deceased lying outside one of the bedrooms door and with the help of a solar light she was able to see the injuries on shoulder, hands and legs. She also stated that she was the first to leave the scene and couldn't tell what happened thereafter.



4. PW2 was Rael Nyongesa who testified that she was asleep when she heard screams from the home of the accused persons who are her neighbours. She rushed there and found the 2nd accused screaming and requesting everybody to go to the scene and see for themselves. She entered the house and saw the deceased herein lying on the floor of the sitting room and that the 1st accused emerged from the bedroom while armed with a panga and club and who ordered everybody out of his compound as he needed to sort out his issues alone. The following day, she learnt of the death of the deceased and that she went to where the body was and saw injuries on the legs with blood oozing from her private parts. She stated that there were solar lights powered by Sun King solar.

On cross examination, she stated that the deceased was well known in the area as an alcoholic. She also stated that she was not the last person to leave the scene and could not tell what transpired afterwards.

5. PW3 was Andrew Nyongesa Mutimba who testified that he was at his home around 9:00PM when he heard screams from the compound of the accused persons herein. He rushed there and joined other volunteers numbering about twenty. He met the 2nd accused screaming and who directed him to enter the house and see for himself. He entered the house and saw the deceased lying face down on the floor of the sitting room. He stated that the 1st accused emerged from the bedroom while armed with a panga and a club and who ordered everybody to leave his compound as he would accomplish his mission alone. The following day at 10:00AM, he visited the accused's home and found the body of the deceased lying outside the gate and who had several injuries on her private parts.

On cross examination, he stated that he had known the deceased as an alcoholic. He also stated that he did not witness the killing of the deceased and could not tell what transpired after he left the scene.

6. PW4 was Lilian Nafula Soita who testified that she heard noise at 9:00PM emanating from the home of the accused persons. She rushed there and saw the deceased lying on the floor of the sitting room. The 1st accused emerged from the room and ordered everybody to leave his compound as he was equal to the task in sorting out the issue himself. She heeded the demand and went to her home and that the following day he joined other villagers and proceeded to the gate of the accused persons where the body of the deceased lay. She saw that the private parts of the deceased oozed blood. She added that afterwards the home of the accused persons was burnt down by irate villagers.

On cross examination, she stated that the deceased was a known alcoholic. She also stated that she did not see the accused persons assaulting the deceased and could not tell what transpired after she left the scene.

On re-examination, she stated that she did not know how the deceased left the home of the accused persons. She stated that the body of the deceased lay near the gate of the accused persons.

7. PW5 was Sylvia Nafula Khisa who testified that she is a daughter of the deceased herein. She testified that on the night in question she received a call from one Selina Mulongo, a daughter to both accused persons, and who enquired about her uncle's mobile phone number but did not inform her of the incident. The following day, she learnt that her mother had been killed and she went to the scene and saw her body. She was able to identify the deceased's pair of shoes recovered by the police investigators and which were marked for identification as Mfi-1.

On cross examination, she stated that she did not witness the incident.

8. PW6 was Richard Wekesa who testified that on the material night he received a call from the 2nd accused herein who informed him that she had found the deceased in her home. He advised her to escort her to the clan elder. He stated that the following morning he visited the home of the accused persons only



to stumble upon the body of the deceased lying next to the road and drenched in blood. He alerted the authorities and later the body was collected by the police.

On cross examination, he stated that he couldn't tell what transpired.

9. PW7 was Dr Elly Kiplimo Kosgei, based at Bungoma County Referral Hospital, who testified on behalf of his colleague Dr Achienga Shikunzi, who had conducted the post mortem on the body of the deceased herein on 9/3/22 at Dreamland Mission Hospital mortuary in Kimilili. On external examination, there were injuries on fingers below the chin, frontal area of the head, deep genital cut wounds on labia majora as well as perineum (pelvic) region up to the pubic area into the femoral triangle. There were also bite marks above the knee and muscle area. On the internal examination, the femoral artery was affected as well as bleeding on the pelvis. There was a cut on the liver as well as a ruptured bladder. There was a right temporal brain contusion. The opinion formed was that the cause of death was severe hemorrhage resulting from cut left femoral artery and vein caused by a sharp object due to assault. He produced the post mortem report as Exhibit 2.

On cross examination, he stated that the post mortem was conducted about one week after the death. He also stated that the injuries sustained are similar to those inflicted by a mob. He finally stated that no samples were taken for purposes of testing if the deceased were intoxicated.

On re-examination, he stated that it is possible that the injuries could be inflicted by one person and that the cause of death was excessive bleeding.

10. PW8 was No 237XXXX PC Evans Chesebe Mwanja who was the investigating officer. He stated that the suspects sought refuge at the police station on allegation that they had been involved in a murder incident. He began investigations by visiting the scene and found the suspects homestead had been burnt down and that sugarcane crops had also been torched as well. He was directed to a toilet within the compound where he saw a metal rod which was retrieved by the villagers. Two pangas were also recovered from the toilets as well as a pair of grey plastic sandals. The same were produced as exhibits 1, 3, 4 and 5. He stated that he drew a sketch map of the scene which he produced as exhibit 6. He stated that he witnessed the post mortem examination and noted that a sharp object had been inserted into the vagina of the deceased. He later escorted the exhibits to the Government analyst for further investigations. He added that the two pangas had blood stains and hence the need to establish if the blood belonged to the deceased. He also added that he established that the deceased had a love affair with the 1st accused herein and that the 2nd accused found them in her matrimonial bed and that it was the genesis leading to the demise of the deceased.

On cross examination, he stated that it was the witnesses who brought about the issue of a love affair between the deceased and 1st accused. He stated that there was only one toilet in the compound of the accused persons. He admitted that he did not make an inventory of the recovered exhibits at the scene and that the accused persons were not present when he visited the scene. He denied charging the accused persons based on the ground that they had sought refuge at the police station.

On re-examination, he stated that members of the public on seeing the recovery of the exhibits became irate and that none could agree to participate in the inventory taking. He also added that the toilet was exclusively used by the accused persons and their family.

11. PW9 was Polycap Lutta Kweyu, a Government analysts based at Kisumu, testified that he received the exhibits from PC Evans Chesebe for analysis. The items he received composed of finger nails of Jane Nangila (deceased) marked as "A" as well as a cotton wool vaginal smear of Jane Nangila (deceased) marked "B". He also received a rusted panga in a brown envelope marked "C1" plus another rusted panga in a brown envelope marked "C2". He also received a rusted metal bar marked "D" as well as a buccal swab from Samson Chemiat Mulongo (accused) marked "E".



He testified that he was requested to establish any related genetic relation between the samples. He did carry out the tests and came up with the following analysis:-

- i. The panga (“C2”) was heavily stained, while panga (“C1”) was moderately stained, while the metal rod (“D”) was lightly stained with blood of a human being.
- ii. The vaginal smear (“B”) tested negative for seminal fluid.
- iii. The DNA profile generated on the pangas (“C1”) and (“C2”), metal bar (“D”) and the vaginal smear (“B”) all matched the DNA profile of Jane Nangila (deceased).

He produced the analysis report as Exhibit 7.

On cross examination, he stated that he established the DNA profile matched with those of the deceased. He stated that he did not have any other prior DNA samples of the deceased other than those forwarded via the exhibit memo. He also confirmed that nothing linked the 1st accused herein. He finally stated that no samples were obtained from the 2nd accused.

12. The investigating officer (PW8) was recalled and that he produced the exhibit memo form as Exhibit No 8.
13. At the close of the prosecution’s case, learned counsels for prosecution and defence opted to rely on the evidence so far tendered. At this stage of the proceedings, the prosecution is under a duty to establish a *prima facie* case against the accused persons so as to warrant them to be called upon to make a defence. A *prima facie* case is one in which a reasonable tribunal directing its mind to the law and evidence placed before it can convict an accused if no evidence is offered by the defence to the contrary. In a nutshell, what this means is that, from the evidence tendered so far, the same should be sufficient to sustain a conviction against the accused persons if they elect to remain silent in defence. See *BHAT V R* [1957] EA 332.
14. The issues for determination at this stage of the proceedings is whether the prosecuted has established a *prima facie* case against the accused persons herein to warrant them to be called upon to make a defence. Indeed, the accused persons face a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. Pursuant to section 206 of the *Penal Code*, the prosecution must establish the essential ingredients of the charge of murder namely:- that there was death; that the death was caused with malice aforethought and that the accused persons are the one who caused the death.
15. On whether there was death, the evidence of the pathologist Dr Elly Kiplimo Kosgei (PW7) left no doubt that indeed the deceased died. The said doctor formed the opinion that the cause of death was severe hemorrhage resulting from cut on left femoral artery and vein caused by a sharp object due to assault. He produced the post mortem examination report form dated 9/3/22 as Exhibit 2.
16. On whether there was malice aforethought, it transpired from the evidence of the pathologist that there were multiple injuries on the body of the deceased and that the injuries concentrated on the vaginal area of the deceased. The injuries left no doubt that the perpetrator intended that the injuries sustained do cause grievous leading to death of the deceased. It transpired from the evidence that the deceased first sustained injuries inside the home of both accused persons before her body was discovered the following day lying outside the gate to the accused persons.
17. On whether the accused persons caused the death or were behind the death of the deceased, the evidence of PW1, PW2, PW3, PW4 and PW5 is to the effect that they all rushed to the home of the accused persons upon hearing screams and on arrival they found the deceased lying on the floor of the sitting room and that the 1st accused ordered them and other villagers to leave his compound and



to allow him to complete his mission. The following day, they found the body of the deceased lying outside the gate to the accused people's home. Again, the investigating officer (PW8) testified that upon visiting the home of the accused persons, he recovered two pangas and one metal bar plus the deceased's grey plastic pair of sandals from a toilet within the compound of the accused persons. The Government analyst established that the DNA profile generated from the blood stains on the recovered pangas and metal bar plus the vaginal smear of the deceased all matched the DNA profile of the deceased herein. All these circumstances clearly placed the accused persons at the scene of crime and must offer an explanation as to how the deceased sustained injuries inside their house and how she left there and ended up dead outside their gate.

18. From the foregoing analysis, it is my finding that the prosecution has established a *prima facie* case against both accused persons to require them to be called upon to make a defence. Consequently, I find that each accused has a case to answer and are now called upon to elect to conduct their defence in line with the provisions of section 306 (2) of The [Criminal Procedure Code](#).

DATED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF APRIL 2023

D. KEMEI,

JUDGE.

In the presence of :

Samba Chemint Mulongo 1st Accused

Leah Nabwala 2nd Accused

Miss Wakoli for both Accused

Mukangu for Prosecution

Okwaro Court Assistant

