



**Republic v Koskei (Criminal Case 40 of 2016)  
[2023] KEHC 18451 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18451 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 40 OF 2016  
HK CHEMITEI, J  
JUNE 14, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SAMUEL KIPLANGAT KOSKEI ..... ACCUSED**

**JUDGMENT**

1. The accused person herein was charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that on July 6, 2016 at Ogilgei Farm Kamungei village in Njoro Sub- County within Nakuru County, murdered Lydia Muthoni.
2. The Accused person pleaded ‘Not guilty’ and the case proceeded to hearing. The prosecution called a total of 3 witnesses.
3. PW1 was Dr. Titus Ngulungu a pathologist based at PGH Nakuru. He testified that on July 8, 2016he conducted an autopsy on the body of the deceased Lydia Muthoni at Egerton University funeral home. That the body was of a female adult aged 39 years, the same was identified by Monica Wambui and Hillary Kibet. He testified that it was alleged that the deceased was assaulted during a domestic quarrel and upon examination of the body he noted rigor mortis has set in, signs of pallor, signs of head injury, multiple bruises all over the head, upper limbs back, buttocks and legs. That the same were linear bruises inflicted by an object like a stick hitting the body, there was trauma and fat embolic to the lungs which in his opinion was the cause of death. He testified further that he signed the post mortem report which he produced as Pexh 1.
4. On cross examination by the advocate of the accused, he confirmed that he noted multiple bruises which were trauma like caused by direct violence by an object like a stick. He stated that there was evidence of lack of oxygen before death and that the fat embolic caused the lungs to collapse leading to death.



5. PW2 was Judy Jepkoech aged 11 years who gave a sworn testimony after the court conducted a voire dire. She testified that on July 6, 2016 she was from school in Njoro, it was 3 pm and she met the deceased and her grandmother at home. That the accused had gone to work. Her sister Rona was also there. After lunch was served she went with the deceased to buy firewood with. She testified further that the deceased came while drunk and asked where the deceased was and he said that she would die that day. That her grandmother told him that she had gone to buy firewood and he went following the deceased.
6. PW2 testified further that at 6pm she saw Rona came with firewood and her grandmother asked her where the deceased was and she said that she was coming from behind. She heard her screaming from a nearby shop and they went with her grandmother who told the accused to stop beating her and she took a stick from him. Thereafter, the accused cut a branch tree, he shaped it and began beating the deceased but she did not know what happened the whole night. However, in the morning about 6 am the accused knocked at their door and he told them to go to the deceased place to stay but she had heard that the deceased could not wake up.
7. On cross examination, she stated that she did not know why the accused used to assault the deceased and that the neighbours used to hear the noise and the beatings. That she could see the deceased bleeding and wounded.
8. PW3 was Rona Chebet aged 14 years old gave a sworn testimony after the court conducted a voire dire. She testified that on July 6, 2016 she came home from school and was by then in class 3 and she met the deceased who gave them lunch. That thereafter, the deceased said that they go and buy firewood in Njoro town so they left PW2 and grandmother at home. When they came home, they saw the accused coming their way and when he arrived the deceased asked him what was going on but he began beating her.
9. PW3 testified further that the accused was drunk and they tried stopping him from beating the deceased but he threatened them and he went to the house and locked the door. They heard the fighting and the accused took a branch from the fruit tree and went back to the house and beat the deceased again.
10. Later when the accused opened the door, they saw that deceased was badly beaten. That around 5am the accused knocked on their door and he told them to go to the deceased's friend whom they were with the day before. She went on to testify that they later found out that the deceased had died and many people came. She said that they used to live well but he would beat the deceased demanding money.
11. On cross examination, she stated that she could not recall the distance from home to where they bought the firewood but they left home at 1:30pm and returned at around 7pm. She stated further that the accused used the firewood to assault the deceased and she had been injured on the leg. That one could hear the deceased screaming but it was dark and could not call the neighbours to assist her.
12. On re-examination, she testified that there was nobody in the next house and she could not recall the distance or seeing people coming to help.
13. When put to his defence the accused did not call any other witness and he gave sworn evidence. He testified that the deceased was his wife, and PW3 was his daughter and that on July 6, 2016 he went to work and he came back at 4.00 pm. That his mother had sent the deceased to get firewood and so he went to look for her as she had stayed for long. He testified further that he met the deceased at Makaburini in Njoro and she was drunk and bleeding from the nose. That he thought she had fallen down and so he took her home but he was also drunk. Upon reaching home at 8.00pm the deceased slept on the bed and he also went to sleep in the bedroom.



14. He went on to testify that the deceased before she slept requested for water to drink which he took to her before he also fell asleep. That when they woke up in the morning and tried to wake up the deceased she was not breathing as she was dead. He called the neighbours to confirm that the deceased had no injuries. Thereafter he went to call the chief and she told him that they go to the police station where he recorded his statement. He testified that he did not assault the deceased and that she first screamed at the kids thought they were fighting.
15. On cross examination, he stated that he saw the postmortem but he did not know its contents. He confirmed that PW2 was his daughter, that he heard what they had said and at the time they were 3 years and 4 years old. He stated that by the time they arrived home the children were asleep at his mother's place. Also, that the deceased had no injuries except for the blood from the nose and that she did not fall when he was with her. The accused confirmed that the deceased was very drunk and that they both took chang'aa but they never fought. He added that his mother was asleep and that she could not walk out of the compound.
16. The court directed the parties to file written submissions which they have complied.

### **Prosecution's Submissions**

17. The prosecution counsel submitted that the accused person's testimony was a pale shadow of what PW2 and PW3 had testified. That their credibility was not shaken and that the accused person denied what had happened yet the post mortem disclosed the contrary. Further, that the idea that there was no attack on the deceased was far from what happened as the accused was angry with the deceased and the minors said the two frequently fought until the neighbours became used to the disputes.
18. The prosecution counsel submitted further that the prosecution had discharge its bit of proofing the case beyond reasonable doubt. That the accused person was not remorseful and the court should look at his conduct that resulted to the death of the deceased.

### **Defence Submissions**

19. The counsel for the accused person submitted that remembering what had happened 7 years ago for a child of tender age had some distortion. Therefore, that this court should take their evidence with caution. Further, that the evidence of the PW2 and PW3 who were children was not corroborated by any member of the family. That PW1 only gave evidence as to the probable cause of death and thus his evidence could not amount to corroboration as to what took place till death of the deceased.
20. The counsel for the accused person submitted further that there was no report by the investigating officer from a hospital to the extent of the accused's drunkenness. That no investigating officer attended court to give evidence of what transpired from witnesses on the ground leading to the death of the deceased. Thus, the prosecution failed to close that gap and therefore the accused person was innocent in respect of the charges against him. Further, that there was no direct circumstantial evidence linking the accused person to the death of the deceased.
21. The counsel placed reliance on section 203 of the *Penal Code* and submitted that no malice aforethought had been disclosed in the evidence placed before the court linking the accused person as the one who caused the death of deceased. He urged the court to find that the accused person was not guilty and acquit him.



## Analysis and Determination

22. I have looked at the evidence on record and duly considered the submissions before this court. This court has a duty to weigh and evaluate the evidence as placed before it by the prosecution to establish whether the offense against the accused has been proved beyond reasonable doubt. The burden of proof to tender evidence to disapprove the innocence of an accused person is always cast upon the prosecution.
23. This is well illustrated under section 107 (1) of the Evidence Act cap 80 of the Laws of Kenya which provides:
- “(1) Whoever desires any court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
24. In addition, Lord Denning dealt with the onus of proof in criminal cases in the case of *Miller v Minister of Pensions* (1947) 2 ALL ER 372 where he stated:
- “It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect community if it admitted fanciful possibilities to deplete the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible but not in the least probable; the case is proved beyond reasonable doubt but nothing short of that will suffice.”
25. It is also trite law that the accused person is presumed innocent until the contrary is proved as clearly provided for under article 50 (2) (a) of the Constitution of Kenya, 2010. Therefore, the prosecution bears the burden to prove that the offence was committed and the culprit is the accused person in the dock. The evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like fanciful and suspicious possibilities.
26. In the instant suit, it is not in dispute that the accused person has been charged with the offence of murder contrary to section 203 of the Penal Code. The said section provides as follows:
- “Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”
27. This definition was well captured in the case of Republic v Andrew Omwenga [2009] eKLR where the court stated:
- “It is clear from this definition that for an accused person convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
- a) The death of the deceased and the cause of that death.
  - b) That the accused committed the unlawful act which caused the death of the deceased; and



- c) That the accused had the malice aforethought.”
28. The first ingredient of death of the deceased and the cause of death was proved by the post-mortem report produced in court by PW1 as Pexh1 and it was PW1’s testimony that the cause of death was fat emboli to the lungs following fat tissue by multiple linear injuries in keeping with fatal assault.
29. On the second ingredient, the prosecution is required to prove beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased. The prosecution in proving the same relied on the testimony of PW2 and PW3 who testified that they witness the accused person assaulting the deceased with a stick and the same led to the deceased sustaining severe injuries and they later found out that she had died. The evidence of the two witness who were minors was corroborated by the testimony of PW1 who confirmed upon examination of the deceased body. He testified that upon the said examination of the deceased body rigor mortis had set in, signs of pallor, signs of head injury, multiple bruises all over the head, upper limbs back, buttocks and legs. That the same were linear bruises inflicted by an object like a stick hitting the body, there was trauma and fat embolic to the lungs which in his opinion was the cause of death.
30. Lastly on the third ingredient, 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:
- “(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) An intent to commit a felony;
  - (d) 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.”
31. In the instant case, the evidence adduced by PW1 the pathologist described in detail the severe injuries sustained by the deceased. The severity of the attack by the accused on the deceased was quite clear from the post-mortem report produced in court as Pexh1. Further, PW2 and PW3 described the horrific incident which they witnessed and they had tried to stop the accused person but he threatened them.
32. The accused line of defence does not hold water. He does not deny the fact that he was with the deceased that afternoon or evening as she came from the purchase of firewood. He does not oust the fact that by the time the deceased arrived home she was already injured and was bleeding from the nose.
33. The allegation that she sustained the injuries elsewhere does not lie considering the evidence of the minors which in my view was cogent enough.
34. In view of the foregoing, this court finds that the accused in launching so vicious assault upon the deceased had a clear intention to kill or cause grievous harm to the deceased, more so having locked himself together with the deceased in the house where nobody could rescue her and continued to assault her. The beatings were sustained for a long time and may have continued on a better part of the night.



35. No amount of pleas from his mother or the children could stop him from assaulting the deceased. I find that mens rea was proved and therefore the charge of murder was proved against the accused person beyond any shadow of doubt.

36. For this reason, the accused is hereby found guilty of murdering the late Lydia Muthoni under the provisions of section 215 of the *Criminal Procedure Code* as read with section 203 of the Penal Code.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14<sup>TH</sup> DAY OF JUNE 2023.**

**H. K. CHEMITEI.**

**JUDGE**

