



**Republic v Karisa & 2 others (Criminal Case 46 of 2018)
[2023] KEHC 20478 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 46 OF 2018**

A. ONG'INJO, J

JULY 6, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

TUMAINI KARISA 1ST ACCUSED

NYAMVULA DZENGO MAKASI 2ND ACCUSED

SIMON UDZILE SAMWEL 3RD ACCUSED

JUDGMENT

Introduction

1. The accused persons Tumaini Karisa, Nyamvula Dzenzo Makasi and Simon Udzile Samwel face a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya.
2. The particulars are that Tumaini Karisa, Nyamvula Dzenzo Makasi and Simon Udzile Samwel on the 8th day of September 2018 at Tsagwa Sub-location, Jibana Location, Kaloleni Sub-County within coast region jointly murdered Mwaka Kazungu Dimwa. The prosecution called 5 witnesses to support its case that the accused persons committed the offence herein and the accused persons were placed on defence.

Prosecution Case

3. PW1, Zawadi Kazungu Dimwa, testified that Tumaini Karisa is known to her as she was her sister-in-law, Nyamvula Dzenzo Makasi was her step mother and Simon Udzile Samwel was a child to her elder brother. She identified them all in the dock. She stated that the deceased Mwaka Kazungu Dimwa was her mother. PW1 informed court that on 8.9.2018 at about 11.00 am, she went to her mother's home to assist her with washing clothes. That on getting there, she found her mother and her step mother



- and that PW1 inquired from her step mother where her nephew had gone and she told her he had gone to a person who prays nearby.
4. PW1 stated that her mother gave her clothes to wash and that she ran short of soap and went to buy and that on her way back, she heard her mother screaming. That when she approached, she saw Simon, his mother, 1st Accused, and the 2nd Accused, Nyamvula, beating her mother. That while the 1st and the 2nd Accused persons used their fists to hit PW1's mother, the 3rd Accused kicked the deceased on the head. That Simon, the 3rd Accused also had a stick which he used to beat the deceased with. PW1 stated that her mother was elderly and unable to defend herself and that PW1 could not intervene as she was carrying a child on her back. She stated that she asked why they were beating her mother and they said that she was a witch and that she had gone and made people have sleepless nights. That earlier Tumaini had also beaten PW1's mother claiming he had dreamt she was a witch.
 5. PW1 further testified that she raised an alarm and her husband who was nearby went and asked why the deceased was being beaten. That the 2nd Accused told him to keep quiet as that was not his home. That the neighbours who responded to the alarm helped PW1 take her mother to Jubana Health Centre. PW1 stated that she left her mother at the hospital and went to report to the Assistant Chief who went and saw PW1's mother at the health centre. She testified that they were referred to Kilifi Hospital where she was admitted. That the next day PW1's husband went to visit her mother in hospital and he found that her condition was not good. That on Tuesday, she received a phone call and was told that her mother had passed on. That she went and recorded her statement at Kaloleni Police Station.
 6. PW2, Samuel Mwanje Lugo, stated that Tumaini Karisa was known to him as her husband was his brother-in-law, Nyamvula was the co-wife to PW2's deceased mother-in-law, and Simon was the son to his brother-in-law. PW2 identified the accused persons in the dock. He testified that on 8.9.2018 at about 3.45 pm, he was near his mother-in-law's place when he heard cries. That he rushed to the scene and found his mother-in-law was on the ground. PW2 stated that he saw the 1st Accused beating the deceased with a stick while the 3rd Accused kicked her on the head. That when PW2 asked why his mother-in-law was being beaten, his step mother-in-law told him not to bother. That she said Simon had come from prayers and was told it was the deceased who had bewitched him and that is why he was getting nightmares.
 7. PW2 said that his mother-in-law vomited when being beaten, she was bleeding, her face was swollen and that her teeth were also broken. That they took his mother-in-law to Djibane Health Center where first aid was administered and referred to Kilifi. That on 9.9.2018, PW2 went to Kilifi and found his mother-in-law's condition had worsened. That the head and face were swollen and she could not see. That he was given treatment notes from Djibane Health Center and that he went and made a report to the police that his mother-in-law had been beaten by three people known to her. PW2 testified that on 11.9.2018 at about mid-day, he got information that his mother-in-law had died and that he recorded his statement at Kaloleni Police Station.
 8. PW3, Samwel Kazungu, stated that the deceased was his biological mother and that on 20.9.2018, he was called to Kilifi Hospital Mortuary where he identified the body of his mother. He testified that the postmortem report was in court – MFI-1 and that his mother died on 11.9.2018 and that it was established his mother had internal bleeding.
 9. PW4, No. 86346 CPL Chesarea Bruno, attached at Kaloleni Police Station stated that he was the investigating officer in the case and that in August 2019, he took over the investigations from CPL Titus Mutunga who was due for retirement from the police service. He testified that the investigating officer led him to the scene of crime in Tsangwa sub-location. He stated that the murder incident was reported on 9.9.2018 by Lugo who reported that his mother-in-law was beaten by the 3rd Accused using a rungu



and that he was with his mother Nyamvula. PW4 stated that the deceased sustained head injuries and was taken to Jibana Hospital where she was referred to Kilifi County Hospital. That on 10.9.2018, postmortem was done at Kilifi County Hospital Mortuary and the cause of death established. PW4 informed court that he was able to interrogate witnesses and recorded their statements. That from the statements, PW4 established the accused persons committed the offence. That the deceased was suspected by the accused persons to be a witch. PW4 then preferred charges against the accused persons in the dock.

10. PW5, Dr. Swaleh Mansoor Hussein, stated that he conducted postmortem on the body of the deceased on 20.9.2018 and that the body was of a female with no clothing. That she was apparent age of 70 years, nutrition status was good, height 4 feet 8 inches and the postmortem changes were that the body was in regamortise. That there were bruises on the frontal and temporal regions of the head.
11. PW5 testified that on internal appearance, the respiratory, cardiovascular, digestive, and genito-urinary systems were not opened. That on the head, the skull was opened and a clot approximately 100mls evacuated. Subdural hematoma was noted on the frontal and left temporal parietal region. That the spinal column and cord were not opened. That as a result of examination, PW5 formed the opinion that the cause of death was subdural hematoma secondary to head injury – bleeding between brain and brain covering – compressed on brain stem.

Defence Case

12. The 1st Accused, Tumaini Karisa, stated that on 8.9.2018, Simon had a sleepless night and that they called his grandmother who prayed and Simon calmed down but kept vigil until the next day. That the grandmother advised them to go to church. That the person who prayed for his son said it was spiritual attack. That thereafter, they went back home and that there was a mango tree within the home where Simon went to lie under up to 5.00 pm and that it was her, Simon and Josephine who were at home on the material day.
13. The 1st Accused testified that she had entered the kitchen when she heard screams outside and that when she got out, she found Josephine and on looking around she saw the deceased lying down and that she had fallen behind the house. That she saw the deceased had been cut on the forehead and on the mouth, and was unconscious. The 1st Accused said that Nyamvula also went to the scene and that she was carrying water which they used to pour on the deceased to see if she could regain consciousness. That her husband's younger brother by the name Tommy got a motorbike which they used to take the deceased to Mwanzai Hospital. That the 1st Accused sent Tommy to go and take Zawadi to hospital which he did. That at 9.00 pm, the deceased was referred to Kilifi County Referral Hospital and that she stayed in hospital until the deceased died. That it is not true she claimed the deceased was a witch as they used to cook and eat with the deceased.
14. The 2nd Accused, Nyamvula Dzenzo Makasi, testified that Mwaka Kazungu Dimwa is her co-wife. She stated that on 8.9.2018, she had gone to the river to wash clothes and at around 6.00 pm when she was on her way back, she heard screams at home and that she went and saw Tumaini standing and Mwaka lying down. That she was carrying water on her head and clothes in a basin. That she removed water from her head and used the water to wipe Mwaka's face which had soil and that she was unconscious. The 2nd Accused informed court that she did not see Simon, Zawadi and her husband. The 2nd Accused further testified that they decided to take the deceased to hospital and that it was her son Tommy who brought a motorbike and took Mwaka to Mwanzai Hospital and later referred to Kilifi Hospital. That she did not see Zawadi and her husband in hospital and that their testimonies in court are false. The 2nd Accused stated that they stayed well and even shared meals with the deceased.



15. The 3rd Accused, Simon Udzile Samuel, stated that on 8.9.2018 at 7.00 am, he was not feeling well and his mother took him to church for prayers. That he was stressed because his father had been terminated from work and he had been discontinued from school because of school fees. The 3rd Accused testified that on the material day, everyone at home had different engagements and that later he went to sit on benches under a mango tree and dozed off.
16. The 3rd Accused stated that about 6.00 pm, he was woken up by screams within the home. That when he went to the direction of the screams, he saw his mother, aunty Josephine and other neighbours crying. He testified that he found his grandmother lying on the ground and was bleeding from her mouth. That the 2nd Accused poured water on the head of the deceased and wiped blood from her mouth. That Zawadi Kazungu and her husband did not go to the scene as the 3rd Accused did not see them. That his uncle Tommy was sent to bring the motorbike which was used to take the deceased from Mwanzai Sub-County Hospital. That his grandmother was later referred to Kilifi County Hospital and that he returned home. The 3rd Accused said that it is not true that he killed his grandmother. That his grandmother loved her grandchildren and he was surprised when his aunt claimed that she had differences between her and her mother. He stated that they have lived well and she did not expect such claims from her.
17. DW4, Silas Karisa, testified that his sister got married in the accused persons' home, that they were neighbours and that the accused persons were well known to him. He informed court that on 8.9.2018 at around 4.00 pm when he got home from work and was going to greet his uncles, he heard someone say "*amekufa*" but he could not recognize the voice of the person who said that. DW4 said that he rushed to the scene where a crowd was gathering and he found the deceased lying on the ground and bleeding through her mouth. That they used a motorbike to take the deceased to hospital but she was referred to Kilifi County Hospital. That they had to raise money to pay for an ambulance so DW4 made a phone call to Mwaka's son and told him they needed money. That the son's contribution was Kshs. 527 which was sent through Mpesa A/c [particulars withheld] – ExhD1. DW1 informed court that he went home after the deceased had been taken to Kilifi District Hospital and that when he followed up with the son after about two or three days, he was informed that Mwaka had died.
18. DW5, Tommy Kahindi Kazungu, said that the 1st Accused was his step brother's wife, the 2nd Accused was his mother while the 3rd Accused is his step brother's son. He testified that on 8.9.2018, he was at his barbershop when a neighbour's child went and told him that there was a lot of noise at home. That it was at 5.45 pm when he rushed home to see what the problem was when he found his sister-in-law crying, the deceased was lying on the ground and his mother was pouring water and wiping the face of the deceased.
19. DW5 stated that Silas Karisa was at the scene and that he told DW5 to go and look for a motorbike for Mwaka to be taken to hospital. That DW5 went to the road and brought a motorbike and silas and the neighbours as well as Simon, his mother and sister-in-law helped carry her and she was taken to the hospital. That at Mwanzai Hospital, doctors started attending to her and his mother, Silas and Tumaini told him to go and inform Zawadi and to take her to hospital. DW5 informed court that they were referred to Mariakani or Kilifi but they did not have money. That the 1st Accused made a phone call to her husband through Silas Kazungu's phone to ask for money for the ambulance. That his step brother sent the money and his mother and sister-in-law accompanied the deceased to hospital.

Submissions by the accused persons

20. The accused persons submitted that the issue for determination is whether the prosecution has proved the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) to secure a



- conviction against the accused persons to the required standard. They relied on the holding in Criminal Case No. 14 of 2020, *Republic v Agnes Nyamoita Gesora* (2021) eKLR where Lady Justice E. N. Maina quoted the case of *Anthony Ndegwa Ngaria v Republic* (2014) eKLR where elements of the offence of murder were summarized to include that the death of the deceased occurred, that the accused persons committed the unlawful act which caused the death of the deceased, and that the accused persons had malice aforethought. The accused persons stated that there was no dispute on the death of the deceased as both prosecution and defense witnesses attested to the death of the deceased.
21. On whether the accused persons committed the unlawful act which caused the death of the deceased, the accused persons submitted that the testimonies of PW1 and PW2 were marred with contradictions, therefore, unreliable and incapable of sustaining the charge against the accused persons. That PW1 stated that she arrived at the deceased's homestead at 12.00 pm or thereabout and started sweeping her house before going to fetch water. That she then met with Samuel Kazungu on her way back. That thereafter, she took money and went to the nearby shop whereupon return, heard people screaming only to find her mother lying down injured. That she also stated that as the assault on the deceased was going on, PW2 arrived asking the accused persons to stop the said assault. That on the other hand, PW2 stated that he arrived at the deceased's homestead at around 4 pm and that he saw a crowd of people gathered with the deceased lying on the ground with multiple head injuries, and that he was 10 metres away. That in his testimony, PW2 never stated recognizing anyone else at the scene other than the accused persons. The accused persons submit that the testimonies raise doubts as to whether PW1 and PW2 were present at the scene.
 22. The accused persons contend that it took the accused persons almost 4 hours from the time PW1 witnessed them assaulting the deceased and that they continued with the said assault until PW2 arrived at the scene. That secondly, PW1 stated that on her way back from fetching water, she met Samuel Kazungu. That this statement is untruthful as Samuel Kazungu was in Mishomoroni, Mombasa County at the time of the incident. That this was clearly corroborated by the evidence of DW5 who informed court he was sent money from Samuel Kazungu via Mpesa and produced an Mpesa statement as Dexh-1 to support his averments. That thirdly, it was PW1's testimony that it was the 3rd Accused person who was assaulting the deceased with the log while PW2 in his testimony mentioned the 2nd Accused person. That the said log was never found and/or produced as evidence to buttress the witness averments.
 23. The accused persons submitted that the defence takes issue with the fact that out of all the people who were present on the material day, only PW1 and PW2 who are couples were availed as prosecution witnesses. That the evidence of PW1 and PW2 may have been crafted to fit a narrative that implicated the accused persons. That in their defence, the accused persons and their witnesses were categorical that neither PW1 nor PW2 was present on the material day. That there being no other independent witness to corroborate the evidence of PW1 and PW2 means that their evidence was uncorroborated and therefore incredible.
 24. The accused persons relied on Criminal Appeal No. 22 of 1979, *Joseph Ngungu Kimanyi v Republic* (1979) eKLR 282 where the Court of Appeal held that a witness should not create an impression in the mind of the court that he is not a straightforward person or raise suspicion about his trustworthiness, or do or say something which indicates that he is a person of doubtful integrity, and Nyamira Criminal Case No. 14 of 2020, *Republic v Agnes Nyamoita Gesora* (2021) eKLR where the learned Judge E. N. Maina in dealing with insufficient evidence in the prosecution case stated that evidence did not help unravel the circumstances that led to death of the deceased at all and that the evidence adduced by the prosecution fell short of the standard required to infer guilt upon the accused.



Analysis and Determination

25. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
26. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
27. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

28. Death of the deceased is not disputed by the prosecution or the accused persons and their witnesses.

Death was caused by an unlawful act or omission

29. PW5 Dr. Swaleh Mansoor Hussein examined the body of the deceased and found that on the head, the skin was open and a clot approximately 100 ml evacuated. He said that there was subdural hematoma noted on the frontal and left temporal parietal region of the head. The doctor was of the opinion that death was caused by subdural hematoma secondary to head injury. He said the injuries must have been caused by a blunt object such as a rungu, a log or a metal rod. The injuries were not self-inflicted and they were not accidental. It is no doubt therefore that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

30. The participation of the accused persons in the commission of the offence was alluded by PW1 and PW2 who witnessed the accused persons assaulting the deceased. PW1 said that she had gone to buy soap at a shop 5 minute-walk away and when she returned one hour later at 4.00 pm, she heard her mother screaming and she found that she was being assaulted by the accused persons. That she also screamed and her husband who was nearby went and asked why her mother was being beaten and that the 2nd Accused told him to keep quiet as that was not his home. She said that neighbours responded to the alarm and helped take her mother to Jibane Health Center. PW1 said that she reported the matter to the Assistant Chief who went to the health center and saw the mother before she was referred to Kilifi County Hospital.
31. Although PW1 said that she raised alarm and her husband who was nearby went to help her, in cross examination, she said that her husband came at 4.45 pm and together with other neighbours helped



her to intervene. That was 45 minutes later after she allegedly arrived home and found her mother being beaten. The timespan is not explained in the prosecution's evidence.

32. It is apparent in the evidence on record that the 1st and 2nd Accused accompanied the deceased to Kilifi County Hospital where they waited upon her until she died while undergoing treatment. PW1 said that it is other neighbours who assisted her mother to go to hospital and she could not give the names of those neighbours. The fact that PW1 cannot give names of neighbours who allegedly assisted take her mother to hospital jeopardizes her evidence as lacking in credibility. She did not acknowledge that it is indeed the 1st and 2nd Accused who went with her mother to hospital. This could either be by design or it could be because she was not at home when the mother was being beaten as alluded to by the accused persons and DW4 and 5.
33. The Assistant Chief to whom PW1 allegedly reported to was not identified and the said Assistant Chief did not testify as to the report that was made to him by PW1.
34. PW4 said that he interrogated many witnesses but were not willing to record statements. He also testified that PW1 said the 2nd Accused did nothing although she was at the scene.
35. DW5 testified that he is the one who took the deceased to hospital after which he went and brought PW1 from her home where the mother was being attended to. The evidence that PW1 and 2 were not at the scene at the time of the incident is fortified by the contradictions in their own evidence and the evidence of the accused persons as well as that of DW5 coupled with the fact that the Assistant Chief was not called as a witness and the fact that the initial Investigating Officer did not testify as to how he connected the accused persons to the offence.
36. This court therefore finds that there is a likelihood that the accused persons were involved in the murder of the deceased but the threshold of proof by the prosecution of beyond reasonable doubt has not been attained. The prosecution's evidence is marred with contradictions and inconsistencies that raises doubt in the mind of the court as to what exactly happened that led to the death of the deceased. The doubt is resolved in favour of the accused persons and they are therefore acquitted.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 6TH DAY OF JULY 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Kiti h/b for Mrs. Makuto Advocate for the 1st Accused Person

Mr. Kiti Advocate for the 2nd and 3rd Accused Persons

Accused persons present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Kiti Advocate: 1st and 2nd Accused were released on bond. I pray that surety be discharged. I pray for a copy of judgment.

Order: 1st and 2nd Accused sureties discharged. Copies of judgment to be supplied to defence and prosecution.



HON. LADY JUSTICE A. ONG'INJO

JUDGE

6.7.2023

