



**Republic v Nakoya & 2 others (Criminal Case 25 of 2018)
[2024] KEHC 12232 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 25 OF 2018
SM MOHOCHI, J
OCTOBER 11, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JACKSON NAKOYA 1ST ACCUSED

JUDITH CHEROP 2ND ACCUSED

MUSA EMURIA 3RD ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that:

On 22nd May, 2018 at Kampi ya moto Sub-Location in Rongai Sub-County within Nakuru County jointly with others not before Court murdered Mary Kering Lokulio.

2. They pleaded not guilty. Pursuant to the Ruling of 24th February on case to answer, the Court found that the prosecution had not established the ingredients for murder, but had established the ingredients for Manslaughter contrary to Section 202 as read with Section 206 of the Penal Code against the 1st and 3rd accused. The 2nd accused was acquitted accordingly.

Prosecution’s Case

3. The Prosecution called eight (8) witnesses in support of its case. PW1, Samwel Kariato a boda boda rider and brother to the deceased stated that 23rd May, 2018 at around 11.50pm while in Nairobi, his brother Paul Nathong called him and told him that the deceased had passed away. That there might have been poison in her alcohol. That he phoned his cousins, the 1st and 3rd accused. The 3rd accused answered on the 4th call and denied knowing anything.



4. On travelling home, he met the children of the deceased the following day who informed him that their mother had been beaten by the accused persons. The 2nd accused person is the wife to the 1st accused. On enquiring from his aunt, Christine Lopara, he was informed that the deceased came home removed clothes then disagreed with the 2nd accused over a child and was found dead the following day.
5. At the mortuary, he discovered her boy had injuries all over and had begun to swell. Together with his uncle they reported that she appeared to have been beaten. It was his testimony that since then they have had problems, conflicts, diseases, and sought to be allowed to go home and deal with the matter.
6. In cross-examination, he stated that could not tell what the deceased died from and since he was not with her and could also not tell whether she was a drunk. He confirmed that he never saw anyone beat the deceased but was just told she was poisoned. That the deceased's children said they were present when it happened.
7. He confirmed he was present during the post mortem and saw the bruises. That could not have been beaten where she was drinking at because her children told him she was beaten in their presence. He confirmed that before the incident, the relationship at a home was okay but it had since then spoilt. He denied that there was a problem with their family and they had been living in peace.
8. PW2, Moses Kibet a farmer recalled on 22nd May 2018 at 3:00 pm while at home, he heard noises from the neighbours. He went to the direction of the noise and on reaching the fence he saw mama Lokara lying down. The deceased was screaming and it was drizzling. He then saw the 2nd accused, daughter of mama Lokara, her running outside the gate. He left the deceased screaming while undressing and went back to his farm.
9. It was his testimony further that in the evening, he heard screams and as it was getting dark at around 6.00pm he slept. That the following day at around 8.00 am while taking his children to school he met Mama Lokora who told him that the person that was screaming the day before had died. He did not get involved and went to school. When he went to Lokora's place she told him the deceased was in the kitchen and he saw her lying there. Neighbors began to trickle in, he went and told her children who were working in the butchery. He could however not tell whether the noise he heard that evening was the deceased's.
10. In cross-examination he stated that it was not normal for the deceased to make noise. He did not see the 1st accused on 22nd May 2018 and the 2nd accused was not at home. He clarified that Mama Lokara is the mama of that boma and has a disability. He stated that mama Lokara had told him that the deceased had come making noise and disturbing and may have gone insane. He confirmed he just saw the deceased make noise, the 2nd accused left with a baby on her back and did not see her do anything.
11. PW3, Pauline Chemtai a neighbor of the 1st accused's family stated that, on 22nd May, 2018 at about 4.30 pm she was grazing goats and heard noises from the neighbors, uui mnanitesa. She stood on an anthill and saw two people in the homestead. She could not leave the goats but heard Jack's mother calling out the 2nd accused and then spoke in Turkana she took the animals home and assumed it was the usual commotion there. The next day when she went to graze cattle she heard screaming into the home and learnt from the neighbors of the death
12. Ongoing there, the deceased was on the ground legs straight but no one told them what happened. That a vehicle was brought and when she asked if they had called the police, she was told that they had obtained permit from the chief and the body was taken away. She added that from the anthill she could tell that it was two men from who were raising and dropping their arms but could not tell who was saying "uuui mnanitesa".



13. As a neighbor to that home, she would visit once in a while to say hi to mama Jack who was living with the late and her children. she identified the 1st and 3rd accused but not the 2nd accused. She saw the 1st accused the next day but not the 3rd accused
14. In cross-examination, she stated that, while on the anthill she saw two men hitting something on the ground with what looked like pieces of wood but could not tell whether it was the accused persons. That she was about 10 to 15 meters away. That there was commotion in that home and one could hear children crying and people making noise. She confirmed that, the deceased would drink once in a while when coming from work. When she later heard that the deceased had died, she related it to the beating of the previous day. She did not see any injury or blood
15. In re-exam she clarified that from where she was standing on the ant hill she could not see a person seated on the ground in the homestead.
16. PW4, Lokora Nakoya recalled on 22nd August, 2018 at around 5:00 p.m. she was at home sleeping. The 2nd accused has a child with her son the 1st accused and was staying with her. The deceased came home at 4: 00 p.m. on a boda boda then heard someone hit the door and fell. On asking the deceased replied, “Mathe, nini.”. She added “alikuwa analewa’.
17. The deceased found the 2nd accused and demanded to know what she wanted from the home. She slapped the 2nd accused who left then the deceased took the baby. She asked the deceased to give her the baby and the deceased threw the baby to her thighs. The 2nd accused had gone to the kitchen.
18. She stated further that she then heard the deceased screaming ‘Uui!, Uui!. Wooi! Wooi’ a child came and told her that people were fighting outside. She gave the baby to the child and went out to find the deceased and the 2nd accused struggling while holding each other, the deceased was crying. She separated them but was thrown to the ground, the two had already separated by the time Kibet arrived. Kibet gave her the walking stick and went back to the house. The 2nd accused ran to Kibet’s house and the deceased went behind the house and started removing her clothes.
19. It was her testimony that the 1st accused came home at around 5:00 p.m. and found the deceased sleeping, thinking she was just sleeping, he took a rubber (bladaa) from the motorbike and started hitting her telling her to get up. When the 3rd accused came and saw the deceased, he questioned why her eyes were turning green and foaming from the mouth. She was naked. The 1st accused and the 3rd accused took to the deceased to the kitchen. That day they cooked in the main house and when the children took food to the deceased they returned with it saying she had declined she also declined milk. They slept.
20. In the morning on taking milk to the deceased, she knocked but there was no response. She went in to check up on her and found her already dead. The 1st accused and the deceased’s brother James Amana took the body to the mortuary.
21. In cross-examination she stated that, she does not live with the 1st and 3rd accused at home and that the deceased was hardly at home. She would come to eat and then leave. She stated that the 1st accused hit the deceased a little but did not hate her. She confirmed she knew PW3 but her home was far. She did not know who killed the deceased or what caused her to foam at the mouth or for her eyes to turn colour.
22. She stated that when the 2nd accused was slapped she did not respond, she left and left the baby behind. She also stated that the deceased was so drunk she was falling down and crawling. She could not tell who started the push and pull but that could not have killed the deceased since the 2nd accused left.



- That for the period she has lived with the 2nd accused she has been peaceful. She stated that when the 1st accused found the deceased naked he was beating her to wake up and get dressed. That 2 days prior she had come home at 10:00 p.m naked and she left because the children refused to open for her.
23. PW5, Dr. Titus Ngulungu. A pathologist attached to Nakuru County Level 5 performed the postmortem on the deceased on 30th May, 2018. From the findings the deceased had: Externally, Linear bruises, Irregular bruises, abrasions. On the head she had swollen, irregular bruises on face and scalp, on the chest; linear (transline) bruises keeping with flogging, limbs; irregular and linear bruises as well as swelling and on the back, she had, bruises, abrasions consistent with dragging of the body against rough surface.
 24. Internally: On the head she had global brain contusion, swelling increased. Intra cranial pressure subdural hematoma (impeding blood supply in brain – brain death). Hematoma on scalp stomach, fluid material smelling of alcohol. Other systems were normal. Cause of death was severe head injury, brain contusion, multiple blunt force trauma to head keeping with assault, multiple linear bruising all over the body.
 25. In cross-examination, he stated that, the post mortem was done seven days after death and clarified that the bruises did not cause death it was the injuries to the brain. The bruises were in line with flogging with the weapon being something flexible. The irregular bruises were in line with a blunt object. The deceased may have been hurled against a hard surface.
 26. He could not tell if she was drunk as alcohol in the stomach does not make one drunk. That the injuries to the head were on the face and also multiple and that if it was a fall one gets a single injury not multiple. That if she was crawling, injury would not be on the face. The injuries were global. He also clarified that the cause of death is not consisted with whipping and whipping cannot cause hematoma. He however noted that one could not exclude a fall but if a person is flogged he could also not exclude the use of a blunt object.
 27. Cause of death could be violent shaking of the brain, hurling against an object, or brain hit against a wall. The smell of alcohol in the stomach meant the alcohol was not processed and it had not gone to the head. He confirmed that with acute increased intra cranial pressure the injury could be there up to 24 hours. The main injury was head injury, compounded by STI and could cause fat emboli which can accelerate the effect.
 28. In re-exam he stated that a drunk person cannot cause acute hematoma on herself. Even if they fall, the landing gears are always there. They usually get chronic brain hematoma which can cause death years or months later.
 29. PW6, Patrick Mbugua Ndichu, Chief, Kambi ya Moto location stated that on 23rd May, 2018 he received a call from Samwel Lodem saying there were people who wanted to see him. It was the 1st accused and two of his cousins. The 1st accused told him that there had been a death in the home, a cousin had come to visit, was very drunk and shivering so they gave her a place to sleep.
 30. That the following morning, he found that she had died. That they sat as a family and agreed that body be taken to the mortuary. He asked him whether the deceased was sick he said she might have been unwell when she took alcohol. They wanted a letter to enable them take the body to mortuary which he issued them.
 31. It was his testimony further that three days later a brother to the deceased, Samwel Aritor came and said he had seen his sister's body at the mortuary and suspected it was not a normal death. He said the



- body was swollen, had bruises, like she had been beaten. He advised him to go to the nearest police station, Menengai Police Station.
32. He added that he had known deceased for a long time and knew her as a drunk. At one point he found her sleeping in a church and another by the roadside. She used to drink and would get confused but was not a violent person. He did not see deceased on the day she died and would not know what caused her death.
 33. PW7, Carolyne Nakoye deceased's daughter recalled that on the fateful day she came home from school at around 5.00pm and found her grandmother in the house and her two uncles, the 1st and 3rd accused were beating the deceased. The 1st accused was using a rubber and the 3rd accused was using a rope. The deceased was lying down asking them to leave her alone and also asked for help. Next to her was a metal.
 34. Around 6:00 p.m. her grandmother Christine Lokora (PW4) told her to take her clothes and go to her aunt's place and she left leaving the deceased in the compound. They were still beating her. The next day she passed by her grandmother's place and found her two brothers, Delvin and Fidel. Delvin asked whether she had heard that the deceased had passed. She said no and was told to go and see where she had been kept. She was not there. She did not see her body. She identified all accused persons
 35. In cross-examination she stated that she was 19 years old and was in class 8 in 2018. That together with the deceased they lived with her grandmother PW4. She confirmed that the deceased used to take alcohol but would not be violent when drunk. She confirmed also that when she came home she found the deceased lying on the grass but denied that it was her habit to get drunk, undress and lock herself up in the chicken house. She confirmed that the grandmother saw the deceased getting beaten
 36. She stated that she was not cousins with the 1st and 3rd accused and was confused when she told the police in her statement that they were her cousins. Samwel Oriato, is her uncle. She confirmed that she did not stop her uncles from beating the deceased, or call a neighbour. She however denied that she wanted their shamba or had a grudge with her uncles
 37. That the deceased was wearing a grey skirt and was bleeding though the blood did not stain her clothes. She denied the deceased was trying to take a baby from the 2nd accused. She did not know that the deceased staggered, hit her head on a stone near the entrance of the cow shed.
 38. That she only told her desk mate that her mother was beaten and did not report to the police because she did not think the deceased would die. Did not see who took the deceased to the kitchen Delvin told her. he was in class six and saw everything.
 39. The 3rd accused hit the deceased with the white rope used to tie the cows the 1st accused used a black 'bladaa'. They were hitting her whole body and the marks would show. Could not tell clearly what the two were wearing but it was drizzling and one could see there was a fracas. Did not see the deceased clothes but was shown at the police station. There was no blood on the clothes because she bled on the face. She had bruises and injuries on face. She saw a fresh injury on her face that day.
 40. PW8 No. 237004 IP Daniel Gichuki DCIO Kisasi, Kitui County therebefore at DCIO's Rongai. On 26th May 2018, he was at the Menengai Police Station where one Samwel Oriato told them that he had received a report that his sister, the deceased was dead and suspected foul play. That he needed their help to accompany him to Kampi ya Moto. The body was at Nakuru Municipal Mortuary.
 41. In the company of PC Wasike, Koome, PC Nguyo Driver, Inspector Gitau, they proceeded to the scene. They were told that deceased came home drunk, she began a quarrel with her aunt, the husband to the aunt joined the disagreement. They were told by Lokolo Nakoya, the mother to deceased how



the fight went. They saw the items used to beat deceased, a steel pipe used for fire lighting PExh2, an umbrella – white and black Pexh4 and a rubber used to tie luggage to bicycle PExh3.

42. They found the suspects, the accused persons. They were shown where her body was found in the kitchen and were told that she had rolled in the mid outside the house where it was wet. They received information that one brother of the deceased went to seek for permit from the chief to take the body to the mortuary. They confirmed from the chief that he had issued the permit. He did partial investigation because he went to Kiganjo for training and left Corporal Wambui to proceed.
43. In cross-examination he clarified that, when they visited the scene, it was three days later and did not have the scenes of crime personnel to mark the scene or take photos. They did not seek assistance from any other station as the scene had already been interfered with. It was a kitchen and was in use. There were no blood stains, he never personally saw the body but his co- investigating officer went for the post mortem.
44. He knew the cause of death by the finding of the pathologist. He only visited the scene after receiving the report on the same day. Did not prepare an inventory for the things he recovered because they were being told what had happened. Could not tell which weapon was used by who or which inflicted the fatal blow. There was no blood on the weapons.
45. What they got from the witnesses; the deceased went there drunk picked a quarrel with the aunt but was not told that she got injuries from drunken falling. That she was injured long before she reached home.

Defence Case

46. DW1: Jackson Ngoya stated that on 22nd May 2018 the deceased came home intoxicated at 5 – 6 p.m. and was called by a neighbor that she was creating a disturbance. That together with the 3rd accused they got hold of her and placed her in the house. That he lastly saw the deceased alive in the compound and she was unruly, screaming and falling over while stripping. That they only restrained and put her in the house. He denied beating her or injuring her.
47. In cross-examination, he stated that, when he arrived the deceased was outside within compound had soiled herself but never saw any injuries. He confirmed that PW4 was his mother and was aware that she testified that he saw him eat the deceased. In re-exam he stated he was not sure that the deceased fought with the accused
48. DW2, Musa Emurin, denied the charges unaware of charges and stated that, on 22nd May 2018 he was called that the deceased had been brought home drunk and naked. He went and found her soiled and half-naked, there was a huge crowd. She had disagreed with the 2nd accused and was staggering. Together with the first accused they took her in the house, she was without injuries and blood. That he was informed the following day she passed on.

Prosecution's Submissions

49. Through Ms Kisoo for the state it was submitted that the ingredients to prove the offence of manslaughter had been proven. For starters there was a death undoubtedly. Secondly the death was unlawful. That there was nothing to show that it was excusable or that that the deceased died of natural causes as was stated in *Uganda v Lyda Draru alias Atim HCT CRSC-0404 High Court of the Republic of Uganda*. Further that the evidence showed the injuries were inflicted deliberately.
50. Thirdly that the accused persons participated in the death. It was submitted that proof of participation attaches criminal responsibility as was stated in *Republic v Mohamed Dabi Kokane & 7 Others [2014]*



eKLR . that PWs3, 4 and 7 gave an account of how the deceased was assaulted and the participants were the 1st and 3rd accused.

Accused Persons Submissions

51. Counsel for the 1st and 3rd Accused in the submissions filed on 26th June, 2024 submitted that it was possible that the 1st accused was trying to wake the deceased that the deceased was already dead since according to PW4 she was foaming in the mouth and eyes had popped out. That the cause of death was not well established as it cannot be ruled out that the deceased could have hit her head on objects as a result of drunkenness.

Analysis and Determination

52. Counsel for the accused may have mixed up facts of another case with this case because he submitted about the accused persons being in the line of duty and the deceased was being taken to the police station and she tried escaping and ended up getting injured. He submitted on murder and the elements of murder on the facts that the deceased was arrested while selling alcohol late in the night and was arraigned in court the next day which was totally unrelated to this case
53. During the Ruling on no case to answer the Matheka J said the reasons would be given in the judgment.
54. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

55. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; 9iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”



56. In the present case before me, there is direct evidence of an assault upon the deceased person, PW4, Lokora Nakoya testified how the 1st accused came home at around 5:00 p.m. and found the deceased sleeping, thinking she was just sleeping, he took a rubber (bladaa) from the motorbike and started hitting her telling her to get up. When the 3rd accused came and saw the deceased, he questioned why her eyes were turning green and foaming from the mouth. PW7, Carolyne Nakoye deceased's daughter recalled that on the fateful day she came home from school at around 5.00pm and found her grandmother in the house and her two uncles, the 1st and 3rd accused were beating the deceased. The 1st accused was using a rubber and the 3rd accused was using a rope. The deceased was lying down asking them to leave her alone and also asked for help. Next to her was a metal. Even on the second limb of that test, this is an exceptional case because the body of the deceased was found a few hours after the Assault by the 1st and 3rd Accused. When taken with other evidence, points irresistibly to an unlawful killing having taken place.
57. The Medical Evidence corroborates the fact irresistible conclusion that the deceased was on 23rd May, 2018 at 3.00 pm subjected to beating resulting in her unlawful killing and that no evidence was laid indicating that the deceased of the fateful day received injuries elsewhere prior to the encounter with accused 1 and accused 3. The Cause of death was severe head injury, brain contusion, multiple blunt force trauma to head keeping with assault, multiple linear bruising all over the body. Dr T. Ngulungu in cross examination rule out the Internal head injuries to a single fall saying that; That the injuries to the head were on the face and also multiple and that if it was a fall one gets a single injury not multiple. That if she was crawling, injury would not be on the face. The injuries were global.
58. In the case *Kimweri v Republic* [1968] EA 452 it was held that,
- “Although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead. Sir Charles Newbold, then President of the Court of Appeal, had this to say on page 453 letter 1 and page 454 letters A, B:
- “While death may be proved by circumstantial evidence, without evidence as to the production of the body of the allegedly dead person, and without any evidence of a person who saw the body of dead person, and without a confession by a person accused that he caused the death, yet where a court is asked to find in a murder charge that a person is dead in the circumstances which we have stated, the evidence on which the court is asked to infer the death must be such as to compel the inference of death, and must be such as to be inconsistent with any reasonable theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead”.
59. Applying these principles of law to this case it is my holding that the deceased is dead and she was unlawfully beaten to death on the 23rd May, 2018. To hold otherwise would be unreal.
60. While there is evidence of violent assault upon the deceased by Accused 1 and 3 using a whip and a rope and no blunt weapon was recovered, this court is persuaded that circumstantially the whipping and beatings and physical scuffle prior to the beatings would cumulatively result in the deceased being hurled against hard surface that would include the ground upon which she was assaulted. She had multiple facial injuries that would lead one to a logical conclusion that the deceased head was never spared in the assault and the internal injuries sustained were as a result of the assault.



61. This Court is thus persuaded that the prosecution have presented evidence satisfying three tests:
- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
 - “ ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
 - iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
62. This Court finds that, the prosecution has proved its case against the 1st Accused and the 3rd Accused beyond reasonable doubt. I find Jackson Nakoya and Musa Emuria guilty of manslaughter and convict them accordingly.
63. The Court shall reserve sentence for one month to await the Probation department pre-sentence report and victim impact statement. The Accused persons shall in mitigation file written submissions within 14 days from today.
64. The Prosecution shall file written submissions on sentencing within 14 days from today.
- It is So Ordered.

SIGNED, DELIVERED IN OPEN COURT ON THIS 11TH OCTOBER 2024

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MOHOCHI S.M

JUDGE

