



**State v Nasoka (Criminal Case 16 of 2021)
[2024] KEHC 14486 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL CASE 16 OF 2021
RPV WENDOH, J
NOVEMBER 21, 2024**

BETWEEN

STATE PROSECUTOR

AND

ROBERT NASOKA ACCUSED

JUDGMENT

1. Robert Nasoka faces a charge of Murder contrary to section 203 as read with section 204 of the Penal Code. He is alleged to have murdered his wife Purity Nadukui on 9/2/2021 at Sunflower village, in West Pokot County.
2. The case proceeded to full hearing with the prosecution lining up five witnesses in support of their case.
3. PW1 Paul Juma Wafula, a resident of Makutano Kapenguria recalled that on 8/2/2021 about 8.00p.m. he was coming from work on his way home when he encountered his neighbours, Robert (the accused) with his wife (the deceased), that the accused asked him to assist them reach their house because both him and his wife were drunk. PW1 and accused held either hand of the deceased and two (2) metres away from their house, accused told PW1 that he would not enter the house as accused and his wife wanted to remain outside their house to continue drinking alcohol. PW1 explained that he lived in the same plot with the accused where there were only two houses and that accused was the caretaker.
4. PW1 went to sleep and about midnight, heard accused and the wife fighting outside the house; that accused later entered his house and continued to abuse the wife calling her a whore; that the wife continued to cry from outside. After a while, PW1 decided to go outside to find out what had happened to accused's wife and saw a pool of blood on the floor where she lay. He called the Chairman of Nyumba Kumi, Boniface Analo Ayuma (PW3) and on using his phone, they saw a lot of blood around the deceased's neck; that PW3 called out accused who was still in the house. He came out and was asked to take the wife into the house. He tried to lift her up but in vain and then said she was dead. The village



- elder (Mukasa) PW4 Mariam Asha Ahmed was called to the scene and in turn called police. Police took away the accused and the deceased's body. It was PW1's evidence that accused and the wife used to fight frequently. PW1 denied seeing any injuries on the accused.
5. PW2 DR. Tom Kipkosgei Chirchir a Medical officer at Kapenguria County Referral Hospital performed the post mortem on the deceased.
 6. PW3 recalled having been woken up on 9/2/2021 about 12.30a.m. by PW1. They went together to accused's house where they found the deceased lying half naked outside the accused's house (room); The deceased did not respond to his calls and he then called accused who was inside the room; that accused came out and PW3 told him to take the wife inside the house and he tried to lift her but could not. PW2 noticed blood on the piece of mattress (P.Exh.no.1) that deceased was lying on, PW2 said that accused wore a white /black dotted shirt which was blood stained. He identified a piece of wood which accused tried to push away when police had come. He did not see accused assault the deceased.
 7. PW4 Mariam Asha Ahmed the village elder, confirmed having been called to the scene by PW3. At the scene, she saw a lot of blood where the deceased head was resting; that the deceased was half naked as if she had engaged in a fight. PW4 did not see accused assault the deceased.
 8. PW5 PC Godfrey Kagutai was the Investigating Officer in the case which was assigned to him 9/2/2021. PW5 recorded the evidence of PW 1,2,3and 4 and received a blood stained wooden stick which was suspected to be the murder weapon, accused's blue stripped and white shirt that had blood stains on the sleeves (P.exh. no.5), a small piece of mattress(P.exh.no.3), He forwarded the items to Government chemist for analysis and he produced the Chemists report as P.exh.no.1). The said exhibits, (mattress, shirt and stick) were found to be stained with deceased's blood; that post mortem report was P.exh. no.1. PW5 also found out that accused and deceased fought almost daily.
 9. When called upon to defend himself, accused gave unsworn evidence; that on 8/2/2021 morning, he agreed with his wife that they look for a buyer for their bricks and the deceased was supposed to go to his work place. He waited for the wife till 4.00p.m. but she did not show up and could not be found on her mobile phone. The neighbour's children Wafula, informed him that the wife left in the morning and he met one Nick who told him that the deceased was drunk at his home as he sells alcohol. Accused went there and found the wife had collapsed, was bleeding from the ears, was naked and that Nick had disappeared. He raised alarm and Wafula came to help take deceased to hospital but they passed by his house. He put deceased on a mattress outside the house, entered the house and on coming out found the wife had died, Boniface was also passing by and accused explained what had happened. Boniface told him to carry the wife into the house only to notice that she was dead and cold. He called the village elder but he did nothing since Nick was his son; that it is the village elder who framed him.
 10. Ms. Chebet, the defence Counsel filed submissions urging the court to acquit the accused. Counsel addressed the three ingredients, that need to be proved in a Murder case under section 203 as read with section 204 of the Penal Code.
 11. On whether accused murdered the deceased, Counsel submitted that the evidence was circumstantial as none of the witnesses saw accused assault the deceased, that save for PW1 who said he heard the accused and deceased quarrel, then fight; he did not see them whilst PW2, and 5 went to the scene later. Counsel submitted that before the court can draw an inference from the evidence that the accused is guilty, it must satisfy itself that there are no other circumstances which could weaken or destroy the inference of guilt. She relied on the decisions of Sawe V. Republic (2003) KLR 364, Counsel further urged that there were no injuries found on accused's body therefore, no evidence of a fight; that the wooden stick which was allegedly stained with blood was examined and the deceased's DNA was not found; that the deceased could have been assaulted by anybody as she returned home.



12. As to whether malice aforethought was proved, Counsel submitted that the same was not proved. Counsel further submitted that PW2 and 3 confirmed that accused and deceased had a good relationship and were in good spirits that day before the death. Counsel relied on the two decisions in Paul Muigai Ndungi VS. Republic (2011) eKLR and Joseph Kimani Njau VS. Republic (2014) e KLR

Whether the case was proved beyond reasonable doubt;

13. Counsel argued that none of the witnesses saw accused assault the deceased; that the prosecution has not in any way discredited the defence evidence; that it has not been shown that only accused could have murdered the deceased.
14. I have now considered all the evidence on record, the submissions of the defence Counsel.
15. Since the accused faces a criminal charge of murder. The burden of proof rests on the Prosecution to prove its case beyond reasonable doubt. The term “beyond reasonable doubt” has been defined in various decisions, the celebrated one being that Woolmington VS. DPP (1935) AC 485, where the court stated that proof beyond reasonable doubt is not proof beyond a hilt. The court stated thus;

“That degree is well settled. It needs not reach certainty; but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

Also see Cr. A 44/2015 Republic V. Joshua Koikai Sitaya (Kajiado).

16. The Prosecution therefore has a duty to discharge the said burden and at no time does it shift to the accused. If he so wishes, accused only needs to give a plausible explanation, otherwise he can opt to remain silent.
17. In this case, the prosecution needs to establish the following beyond reasonable doubt,
1. The death of the deceased;
 2. That the accused committed the act or omission that caused the deceased’s death;
 3. That the accused had malice aforethought

Death of the deceased;

18. PW2 performed the post mortem on the deceased as per the report dated 15/2/2021. The doctor found that the whole body was covered with dotted blood and the body was generally pale; that there was a wound on the neck, another wound 2cm on left temporal occipital region and a severed left temporal artery. The Doctor was of the opinion that the deceased died of severe haemorrhage secondary to ruptured temporal artery probably due to trauma.
19. The findings of the Doctor read together with the observations of PW1, 3 and 4 that the deceased was half naked, with only an innerwear blouse on chest was evidence of a struggle. This court has no doubt that deceased died as a result of an assault, not due natural causes.



Who caused the death of the deceased?

20. As pointed out by defence Counsel, nobody witnessed the assault leading to deceased's death. The Prosecution case turns on circumstantial evidence. Circumstantial evidence has been said to be the best evidence for proving a fact. In the case of R.V Taylor Weaver and Donovan (1928) 21 CRC.20, the court stated as follows; -

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances when by intensified examination, is capable of proving a proposition with accuracy of mathematics"

21. Though regarded as the best evidence, it must be taken with utmost caution so as not to be abused. In Teper V. Republic (1952) AC Pg. 489, the court said

Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence, to be sure that there are no co-existing circumstances which could weaken or destroy the evidence".

22. The court of Appeal in Abang'a alias Onyango V. Republic CRA 32/1990, set down the three criteria to be considered by the court where the case entirely turns on circumstantial evidence. The court said;

23. 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 guilt of the accused;
- 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."

The same test was adopted in the Sawe case (Supra).

24. This court has the duty to examine the evidence thoroughly to find out if it meets the three tests.

25. PW1 stated on oath what transpired on the fateful evening of 8/2/2021. PW1 helped accused and deceased to walk home by holding the hands of the deceased. PW1 maintained that both accused and the wife were drunk. The accused's allegation that he had searched for the deceased and found her passed out and bleeding from the ears, is an afterthought. PW1 testified and no such questions were put to him. When PW1 helped walk the wife home, she was not injured but both accused and deceased were drunk and could not walk.

26. The accused blames one Nick for framing him, that deceased had been drinking in his home where according to accused, therefore, the deceased must have been injured. Nick was never mentioned throughout the trial. Accused alleged that Nick is the son of PW3 but that was never alluded to either in cross examination of PW1 or 3. The introduction of Nick in the picture is an afterthought and not believable.

27. PW1 lives in a one roomed house next to accused's one roomed house. They were the only ones living in the said compound. PW1 escorted accused and deceased up to their door, where they remained to



continue drinking. Later, PW1 heard them fighting and deceased crying. Accused entered the house and continued to hurl abuses at the deceased till PW1 decided to check on deceased only to find her injured. Accused left the deceased at the door crying, meaning she was already assaulted when accused entered the house.

28. The law is clear that the burden of proof always rests on the prosecution to prove the case against the accused beyond all reasonable doubt. No duty or burden is imposed on the accused to prove his innocence but there are instances when the law places a duty on the accused to explain certain facts particularly those within his own knowledge. Section 111(1) of the Evidence Act casts the burden of proof on the accused and provides: -

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

29. Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence”

30. Accused was the last person to be seen with the deceased. I find that accused has not given a plausible explanation of how deceased came to sustain the fatal injuries. The court is satisfied beyond reasonable doubt that it is accused who assaulted his wife. The circumstantial evidence against him forms such a chain that there is no possibility of the chain being broken. The evidence unerringly points to accused as the culprit.

Whether accused had malice aforethought.

31. Malice aforethought is defined under section 206 of the Penal Code as;
32. Malice aforethought shall be deemed to be established by evidence proving 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.”



33. In the case of Tubere s/o Ochen Vs. Republic (1945) 12 EACA 63, the Eastern Court of East Africa had this to say of malice aforethought;

In determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

In Hyam V. DPP (1974) AC, the court held “malice aforethought in the case of Murder is established by proof beyond reasonable doubt when during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious bodily harm.”

34. A piece of wood was found near the deceased’s body which is the likely murder weapon as it had the deceased’s blood. The deceased suffered serious injuries to the head with the rupture of an artery. A lot of force must have been used and therefore the one inflicting the said injuries intended to grievously injure deceased or cause her death.

35. Though the accused did not plead intoxication as a defence, there is evidence by PW1 that when he met the accused and deceased about 8.00p.m. both were very drunk and the court cannot overlook that piece of evidence. Under section 13 of the penal code. Intoxication is not a general defence in criminal offences except in the circumstances set out under the Act. The section reads as follows:-

36. Section 13 of Penal code

13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.

37. It follows that a person who commits an offence while intoxicated is not ipso facto, excused from the consequences of the act. The section affords a defence in three situations: The first is involuntary intoxication where at the time of commission of the crime or the act, the accused does not know that it is wrong or does not know what he is doing because of intoxication caused without his consent by a malicious person or negligence of another. In such a situation, accused may be discharged.

38. The second situation is where the accused is temporarily insane by reason of intoxication, so that at the time of the crime, he does not know that it is wrong or he does not know what he is doing and the



court is required to deal with the person under MacNaughten Rules under the Criminal Procedure Code and find the person guilty but insane.

39. The third situation is under section 13(4) where by reason of intoxication, the person is incapable of forming a specific intent which is an element of the offence charged. In such circumstances, the court would not find an accused guilty of Murder but manslaughter. In the case of Said Karisa Kimunzu V. Republic CR.App 266/2006 (Msa.) the Court of Appeal said,

But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son".

40. Again, in David Munga Maina V. Republic CR.A 202/2005, the Court of Appeal said "a party who says he had taken some liquors is not necessarily raising the defence." Cr.A 107/2014 Bakari Magangha Juma Vs. Republic (MSA)
41. In the case of Roba Galma Weru V. Republic CR.A 159/2014 (2015) e KLR the court observed that the onus rests on the accused to prove intoxication if he raises the said defence.
42. As observed earlier, the accused did not raise the defence of intoxication, but from PW1's testimony, the accused and the deceased were very drunk when he helped hold deceased's hand and helped walk her home. The accused and deceased reached home and continued to take more alcohol. PW 1,3 and 4 all testified that accused and deceased fought frequently. Under the circumstances, I am convinced that accused did not form the necessary intention to kill his wife and therefore malice aforethought has not been proved. I discharge accused on the charge of murder contrary to section 203 and 204 of the Penal Code. I substitute the murder charge with a charge of manslaughter contrary to section 202 as read with section 206 of the penal code. I convict accused accordingly.

SIGNED AND DATED AT KAPENGURIA THIS 21ST DAY OF NOVEMBER, 2024

R. WENDOH.

JUDGE

Judgment delivered virtually in the presence of

Mr. Majale for the State –

Accused – Present

Accused Counsel – MS Chebet

Court Assistant - Juma/Hellen

