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In re Inquest Into the Sudden Death of Martin Gituma Under Sections 385 and 387 of the Criminal Procedure Code Cap 75 Laws of Kenya (Inquest E002 of 2023) [2024] KEMC 3 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEMC 3 (KLR)

REPUBLIC OF KENYA

IN THE GITHONGO LAW COURTS

INQUEST E002 OF 2023

AT SITATI, SPM

MARCH 21, 2024

IN THE MATTER OF AN INQUEST INTO THE SUDDEN DEATH OF MARTIN GITUMA UNDER SECTIONS 385 AND 387 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

JUDGMENT

Outline of the Judgement

A. The Established Facts

B. The Dying Declaration Principles

C. The Eggshell Skull Principles

D. Statutory Principles Of Causation

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A. The Established Facts of the Case.

1. IW1 Catherine Kabiringiti Muguna mother to the deceased Martin Gituma told the court that on 6th August, 2023 at 11pm her son was dumped by the gate. He was groaning in pain and bleeding from the mouth when she got to his position by the gate. She spoke briefly with him when he said that his employer DOUGLAS KOOME had beaten him up. She took him to his house where he rested for the night.

2. The next day, his lorry conductor Kirimi showed up to accompany him to their usual work. Later that day, the deceased was brought back to the house by Kirimi on a motorcycle. Kirimi and the deceased reported that Douglas Koome had again beaten and assaulted him over work-related issues. The deceased specifically said that Douglas Koome had stamped his feet on his chest and rib cage. The

man complained of stomach and chest pains. When he was brought voer, he stayed indoors from that afternoon till 9pm when he died.

3. IW2 Eunice Gaceri Riungu told the court that on 6th August, 2023 at 11pm she was woken up by loud groans coming from the gate-side. Together with IW1 they proceeded to the gate and found the deceased dumped there. He told both OW1 and IW2 that Douglas Koome had assaulted him earlier that evening over work-related issues. He explained that the boss assaulted him for loading a half-full lorry of ballast instead of a full lorry. The next day, IW2 saw the deceased go to work in the company of Kirimi but returned in the course of the day saying that he had been beaten up again by the employer. He thus took rest in his house but later died in bed. When cross-examined by Douglas Koome, IW2 pointed out that the deceased explained that he was required to fill up the half-full lorry the next day.

4. IW3 Jesse Karimi Mbaya Alias Kirimi told the court that he was the turn-boy to the deceased who was the lorry driver. He pointed out that he and the deceased were employed by Douglas Koome as operators of the Isuzu lorry for transport business.

5. IW3 added that on 6th August, 2023 he did not work with the deceased because it was a Sunday but the deceased called him to express his frustrations that one client had rejected a half-full ballast consignment. The deceased revealed that he had worked with MATUMBI as a turn-boy. At 4:30pm, the deceased contacted IW3 saying that he had parked the half-full lorry at the employer's compound following the fall-out over the half-filled lorry and then instructed IW3 to join him up the next day i.e. 7th August, 2023 to fill up the lorry and make a fresh delivery of the ballast.

6. On 7th August, 2023 Kirimi went to wake up the deceased to go with him to work. On arrival at the house, he found the deceased still in bed in pain. The deceased and his mother explained that he had been assaulted by their boss the previous evening over the half-ballast issue. Nonetheless, both reported to work with the deceased going to the employer's compound to collect the lorry. After collecting the lorry, they went to top-up the ballast at the CDF area. While there, the deceased who appeared injured from the previous day's reported assault by the employer, kept complaining of stomach pains. He noted that the deceased was sober.

7. Just while the lorry was being loaded to capacity, their employer showed up and furiously assaulted the driver using fists, kicks and all manner of blows. It was a bad beat-down that made the deceased to fall down immobilized. This made the deceased to abandon the lorry and the trip as the employer brought over another hired driver. Kirimi hired a motorcycle and took the deceased to Gatimbi Health Centre where he was given painkillers and directed to report the assault to the police. As he was taking the deceased to file a report at the Kariene Police Station, the deceased re-directed him home saying that he did not want to file the report at that time. As a result, he took the deceased home and handed him over to his mother and relatives. The relatives declined to take him back to hospital immediately citing lack of funds to pay for the anticipated medical fees. When he returned the next day, he learnt of the sudden demise of his workmate.

8. In cross-examination by Douglas Koome, IW3 told the court that the deceased complained of stomach pains and looked bruised from the previous day's assault.

9. IW4 Anne Kawira, a ballast dealer told the court that on 7th August, 2023 Douglas Koome a.ka. Mwalimu Koome called her saying that he was going to send his lorry for ballast loading. When the lorry showed up at the ballast loading site, she hired casuals tol load up the ballast and left the scene. She returned later and found the lorry filled to capacity.

10. Anne Kawira added that she found the deceased on the ground immobile. He was struggling to get up and lean on an electric pole. At first, she thought that the man was drunk. She ignored him and

went on with her business but learnt that he died later that night. Douglas Koome did not question this testimony.

11. IW5 Laban Mutua told the court that Douglas Koome hired him as the alternative driver to drive the full laden lorry to Marimanti on 7th August, 2023. This was after its initial driver was stood down.

12 IW6 Medical Doctor Sophie Nyiha Mwaniki told the court that she conducted the post-mortem examination on the deceased's body and produced the Post Mortem report dated 10th August, 2023 as P.Ex.1. She made the following observations:

    1. Rigour mortis had set in.
    2. Small scar on the lip.
    3. Pleural cavity had blood and around the pulmonary trunk.
    4. Dilated loop
    5. Liver was enlarged measuring 8cm by 12cm by 8cm.
    6. Liver tore easily with nodules.
    7. Abdominal cavity had flor
    8. Bleeding in the small intestines around 10cms from curvature.

13. In her professional opinion, the deceased died of pneumo-hemothorax from blood vessel rupture secondary to severe hypertension from liver cirrhosis and secondary oesophageal varices and portal hypertension. Dr. Nyiha confirmed that the deceased bled from the ruptured lungs.

14. In Cross-examination, Dr. Nyiha stated as follows:

    1. The stomach pains that the deceased complained of were consistent with ascites – fluid collection in the stomach spaces.
    2. The stomach pain was also attributable to the ruptured small intestines.
    3. The rupture of the small intestines was attributable to high pressure to the belly.
    4. The deceased was also suffering from untreated hypertension.
    5. A beating to a hypertensive patient would increase the pressure to a level that can rupture the small intestines' blood vessels.
    6. A direct blow to the stomach would ideally rupture the spleen but in this case the spleen was not ruptured.
    7. The liver manifested early signs of cirrhosis.

15. IW7 Corporal James Sila S/No. 80979 testified as the Investigating Officer. He told the court that on 8th August, 2023 Eunice Gaceri filed a report that her male relative had died in his house. CPL Sila proceeded to the house and found the deceased's body in bed which he removed to the mortuary for post-mortem examination. He recorded the witnesses' statements thereafter. CPL Sila told the court that from his inquiries and the witnesses' statements, the deceased was a driver employee of Douglas Koome's lorry registration number KAU 680P Isuzu FSR model. He told the court that on 6th August, 2023 the deceased loaded ballast and parked the lorry at the employer's compound but when he went

home he complained that his employer had assaulted him. He was found injured by the gate on the evening of 6th August, 2023. He went to bed while injured.

16. The next day, the injured driver reported to work to top-up the ballast which was destined for Marimanti but did not finish the loading because the employer showed up and assaulted him before giving the lorry to another driver to deliver the ballast to Marimanti. The injured driver was taken to Gatimbi Health Centre by Kirimi whereat he was given painkillers and advised to report to the police but he opted to first go home whereat he died after several hours. The deceased had complained of severe stomach pains and being sacked by the employer.

17. The post-mortem examination was conducted by Dr. Nyiha who signed the report after the exercise. The body was positively identified by the deceased's relatives prior to the examination. 9 Photographs were taken of the deceased's body during the examination and these were produced as P.Ex. 4(I-IX) together with the Exhibit Memo Form as P.Ex.2 and the Certificate as P.Ex.3. the police then arrested the prime suspect Douglas Koome and detained him.

18. In cross-examination of CPL Sila, the following came to light:

    1. The deceased openly complained of a violent assault inflicted upon him by his employer Douglas Koome.

    2. Kirimi witnessed the violent assault on the deceased by the employer.

    3. CPL Sila stated that a slap was used to inflict some of the injuries.

    4. It was true that the deceased had an underlying medical condition which was untreated at the time of being assaulted by the boss.

    5. The deceased openly lamented of being assaulted by the boss and had visible bruises on the mouth for which his mother gave him a face mask to hide the bruises when he went to work on 7th August, 2023.

19. At the end of the calling of the witnesses by the DPP, the court gave an opportunity to the prime suspect mentioned in the proceedings to give his version of events.

20. Douglas Koome swore that it was true that the deceased was his driver for lorry Isuzu FSR. He told the court that on 7th August, 2023 the deceased showed up at his compound at 630am for the lorry. He noted that the deceased was wearing a face mask and thought that he was concealing his drunkenness. As usual, he drove away with one Mariara to load up the ballast. At 10am Murero called him saying that the deceased could no longer drive the lorry due to condition. This made Douglas Koome to hire an alternative driver to deliver the ballast to Marimanti as scheduled. He went to school and retired home in the evening.

21. The next day, according to him, he learnt from one David that the deceased had died. He denied that he killed the deceased although rumours circulated in the village that he had killed his employee. He closed his version to the Inquest.

22. The duty of the court under section 387 of the Criminal Procedure Code is to determine the cause(s) of the sudden demise of the deceased and whether or not there is/are any person(s) culpable for the said demise.

Determination on the Facts of the Case

23. The tested testimonies of IW1, IW2 and IW3 were that on the first evening, the deceased was dumped by the gate. His groaning attracted the attention of the family members who picked him up. He immediately told his mother and wife that his boss had just assaulted him over a business transaction relating to ballast delivery. The man was in great pain and had visible facial bruises arising from the alleged assault. When he was so found, he made an immediate declaration that the person responsible for his then assault was his employer who had done so as a punishment for his alleged under-loading of ballast for a client who was in Marimanti. When he later died, this statement matured into what is known as a Dying Declaration.

B. The Dying Declaration of the Deceased

24. As already pointed out, the statement made by the deceased prior to his demise naming his boss as his tormentor amounted to a dying declaration within the meaning of section 33 (b) of the *Evidence Act* and was admissible in law. A similar situation arose in the authority of Republic –versus- James Githinji Wamani [2020] eKLR (Jairus Ngaah J.). An extensive reproduction of the reasoning of the learned Judge is made hereunder:

> “ The prosecution answer to the first limb of this question is primarily the evidence of a dying statement or declaration of the deceased. Moments before his death, he told his brother Ndei (PW1) that the accused had stabbed him. His other brother Ndegwa (PW2) also heard him say that Gidii had murdered him. He had been walking home with his brother all along, but the latter had to go back to buy cigarettes. Nyokabi (PW3) confirmed in her testimony that moments after the deceased and Ndei (PW1) left her bar, the latter returned to buy cigarettes. Nyokabi's testimony lends credence, at least to the evidence of Ndei, that he not only went back to the bar but that his brother was alone at the time he was assaulted.
>
> The evidence of a dying declaration or statement is admissible under section 33 (a) of the *Evidence Act* cap. 80; it reads as follows:
>
> 33. Statement by deceased person, etc.,
>
> When Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
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> a. relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> This provision of the law is in pari materia with section 32(1) of the Indian *Evidence Act*, which applied in this country prior to the enactment of our

> own *Evidence Act*. It has been applied in several cases where the evidence of a dying declaration has been brought to the fore; one such case was Jasunga s/o Okumu versus Republic (1954) 21 E.A.C.A 331. In that case, the deceased had been found lying on the road with a stab wound in his chest. He told the police officer who had found him that he had been stabbed by the appellant. The officer took him to hospital from where the deceased's statement was also recorded. In that statement, the deceased stated that he was on his way home when the appellant and another person confronted him. The appellant demanded money from him and assaulted him; he also threatened that he would kill him if he did not give him money. The appellant then drew a knife stabbed the deceased in his chest. He fell down and the appellant and the other man ran away. He died of internal haemorrhage and shock the following morning.

The learned trial judge convicted the appellant based on the assessors' unanimous verdict that the appellant was guilty. In discussing the admissibility of the deceased's statements, the court held as follows:

> In Kenya the admissibility of a dying declaration does not depend, as it is England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.
>
> In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to the dying decelerations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England.
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> The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases, and a passage from the 7th edition of Field on Evidence has repeatedly been cited with approval.
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> The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and... the particulars of the violence may have occurred circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated his inferences from facts concerning which he may have committed important particulars, from not having his attention called to them.
>
> Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R v. Ramazani bin Mirandu (1934) 1 E.A.C.A 107; R v. Muyovya bin Msuma (1939) 6E.A.C. A. 128. The fact that the deceased told different persons that the appellant was the assailant is evidence of consistency of his belief that such was the case: it is no guarantee of accuracy.

And whether corroboration is necessary in order to sustain a safe conviction solely based on a dying declaration, the court had this to say:

> It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. v. Eligu s/o Odel &Another 1943) 10 E.A.C.A 90; re Guruswami (1940) Mad. 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused... But it is, generally speaking, very unsafe to base a conviction solely on a dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. R v Said Abdulla, (1945) 12 E.A.C.A 67; R v Mgundwa s/o jalo and others, (1946) 13 E.A.C.A 169, 171.).

In addition to the cases cited above, we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration, unless, as in Epongu's case (Epongu s/o Ewunyu, (1943) 10 E.A.C.A 90) there was evidence of circumstances going to show that the deceased could not have been mistaken in his identification of the accused.

As to the question of the sufficiency, admissibility and the weight to be attached to a dying statement; the court ruled as follows:

> The statement was, apparently taken when the accused was suffering from extreme exhaustion: it was un acknowledged and there is no means of knowing whether the deceased would have acknowledged its correctness or would have wished to alter or add to it, had he been able to do so. If the statement had, on the face of it, been incomplete because the accused had sunk into a coma before he finished it, it would have been inadmissible (Waugh v The King, (1950) A.C 203) ... It is not necessary, in order to render a dying statement admissible, that it should be a complete account of the attack, provided that it is, or may rationally be assumed to be, all that the deceased wished to say about it. (Sarkar on Evidence, 9th Edition, p 510). But the weight to be accorded to a dying statement must depend, to a great extent, upon the circumstances in which it is given, and the effects of a wound may dim the memory or weaken or confuse the intellectual powers. (Sarkar on Evidence, 9th Edition pp.303,309).
>
> I have applied the Jasunga decision in at least two previous cases where this question has arisen; this is in High Court Criminal Case No. 27 of 2010(Nyeri), Republic Versus Albanas Kioi Maweu (2019) eKLR and in High Court Criminal Case No. 38 of 2011(Nyeri), Republic Versus George Mwangi Onyango.
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> As the Jasunga decision illustrates, the admissibility and perhaps the weight attached to a dying declaration in England is tied to "the declarant having at the time, a settled, hopeless expectation of imminent death; in which event, "the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath." Such conditions do not apply in Kenya and, for avoidance of doubt, section 33 (a) expressly states that dying statements "are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death". But even if it was necessary that the deceased must have been in imminent danger of death,

circumstances under which the declaration was made in the present case would fit the bill. The deceased here faced the prospects of imminent death and, as it turned out, he died soon after he was stabbed.

> One theme that keeps recurring whenever evidence of dying declaration is considered is that of corroboration of the declaration. It is apparent from the excerpts of the Jasunga case which have been reproduced here that as much as the Court of Appeal for East Africa appeared to downplay the need for corroboration of the evidence of a dying statement, it still acknowledged that "… we have examined the decisions of this court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon a dying declaration without satisfactory corroboration." Thus, the absence of corroboration may not necessarily be fatal to the prosecution case but it is still relevant all the same; I suppose the degree of its relevance depends on the circumstances in which the declaration was made which in turn vary from one case to another."

25. This Honourable Court has applied the preceding extensive legal principles to the established evidence in the Inquest and is satisfied that the Dying Declaration of the deceased pin-pointed to Douglas Koome as the assailant who inflicted the violence that was the causation of the eventual demise.

26. It was proved by the medical doctor Dr. Nyiha that at the time of his demise, the deceased was labouring under a pre-existing medical condition which rendered him brittle and delicate when subjected to undue duress – severe hypertension which was compounded by an onsent of liver cirrhosis. The twin assault on him by the Subject herein occasioned great duress and triggered such a hypertensive shock that that the deceased succumbed to the uncontrolled pressure as manifested by the ruptured blood vessels in the small intestines. The hypertensive state had been untreated for a long time and the sudden pressure occasioned by the violent attack triggered unbearable duress which caused a rupture of the blood vessels. This rupturing was manifested by the severe abdominal pains.

27. Considering this evidence and the line of questioning during the Inquest hearing, it was a legally unacceptable excuse for any person to blame the deceased for his failure to seek urgent and appropriate medical attention to avert the unfortunate outcome. Furthermore, Douglas Koome might not have known that the deceased had a pre-existing medical condition but the application of the Eggshell Skull Principle ousted such ignorance because he ought to have taken the victim as he found him. This Eggshell principle is not new to the criminal law.

C. The Eggshell Skull Legal Principles

28. As long ago as 1975, when applying the Common Law principles of criminal liability in the Eggshell Skull rule, the Court of Appeal of England in the case of REGINA –V- BLAUE [1975] 1 WLR 1411 (Lawton JA, Thompson JA and Shaw JA) had this to say when the Appellant Robert Konrad Blaue challenged his conviction and sentence on murder:

    Lawton JA:

> "The victim was a young girl aged eighteen. She was a Jehovah's Witness. She professed the tenets of that sect and lived her life by them. During the late afternoon of 3rd May, 1974 the Appellant came into her house and asked her for sexual intercourse. She refused. He then attacked her with a knife inflicting four serious wounds. One pierced her lung. The Appellant ran away. The girl staggered out into the road. She collapsed outside a neighbour's house. An ambulance took

her to hospital, where she arrived at about 7.30 p.m. Soon afterwards she was admitted to the intensive care ward. At about 8.30 p.m. she was examined by the surgical registrar who quickly decided that serious injury had been caused which would require surgery. As she had lost a lot of blood, before there could be an operation there would have to be a blood transfusion.

As soon as the girl appreciated that the surgeon was thinking of organising a blood transfusion for her, she said that she should not be given one and that she would not have one. To have one, she said, would be contrary to her religious beliefs as a Jehovah's Witness. She was told that if she did not have a blood transfusion she would die. She said that she did not care if she did die. She was asked to acknowledge in writing that she had refused to have a blood transfusion under any circumstances. She did so.

The prosecution admitted at the trial that had she had a blood transfusion when advised to have one she would not have died. She did so at 12.45 a.m. the next day."

29. The learned Judge with the concurrence of the Bench went on to state:

> " ...Maule, J.'s direction to the jury reflected the Common Law's answer to the problem. He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself. See Hale, Pleas of the Crown, (1800 edition), pp. 427-428..
>
> ....It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death......If a victim's personal representatives claim compensation for his death the concept of foreseeability can operate in favour of the wrongdoer in the assessment of such compensation: the wrongdoer is entitled to expect his victim to mitigate his damage by accepting treatment of a normal kind. See Stelle v. R. George and Co. Ltd., (1942) Appeal Cases, 497.
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> As Mr. Herrod pointed out, the criminal law is concerned with the maintenance of law and order and the protection of the public generally. A policy of the common law applicable to the settlement of tortious liability between subjects may not be, and in our judgment is not, appropriate for the criminal law." (underlining mine)

30. The Court of Appeal of Kenya most recently pronounced a similar view in Longalom v Republic (Criminal Appeal 22 of 2015) [2022] KECA 725 (KLR) (RN Nambuye, W Karanja & K.I. Laibuta, JJ.A) where the learned Judges held as follows:

"17. ...The last person to touch the deceased before she sustained the complications that evidently led to her death was the appellant.

18. This brings us to the doctrine of causation, which simply refers to the relationship of cause and the effect between one event or action and the result. Was there a correlation between the

appellant dropping the deceased onto the ground and her death? We have no doubt in our minds that the two events were related.

It could be possible that the deceased had a health condition which had nonetheless not manifested itself before the appellant's action, and had remained unnoticed but for the appellant's action of dropping her to the ground.

Criminal law nonetheless prescribes that we must take our victims the way we find them, hence the egg shell, or thin skull rule. The deceased may have had a fragile neck or skull or indeed any other health condition, but she had not died from the same and only died after she was pushed by the appellant. It is worth noting that the deceased was pronounced dead on arrival at Maralal District Hospital before any other intervention. This makes the appellant directly responsible for the act that caused the deceased's death.

19. Whereas medical evidence by way of a post mortem form is important to confirm and corroborate evidence on the cause of death, there is no hard and fast rule that the cause of death can only be proved through production of a post mortem form. See this Court's decision in Dorcas Jebet Ketter & Another v. Republic (supra) where the Court dispensed with the production of a post mortem report where the body was not recovered. We are satisfied that the actus reus was proved.

20. As regards the issue of mens rea, there is no evidence that the appellant went to the deceased's house with the intention of killing her. We also note that he was not armed with any weapon and nor had he used any weapon to inflict injury on the deceased. In view of the paucity of evidence on the nature of the injuries leading to her death, the intent to kill or cause grievous bodily harm on the deceased as defined under section 206 of the Penal code was not proved to the required threshold.

To that extent therefore, we can only find the appellant guilty of the unlawful killing of the deceased, which translates to manslaughter and not murder. In the result, we set aside the conviction for murder and substitute therefor a conviction for the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code. We also set aside the death sentence meted out by the trial court." (underlining mine)

31. Consequently, by the application of the Eggshell Skull principle, the criminal liability pointed to the direction of Douglas Koome.

D. Causation Under Statute: Section 213 Penal Code

32. The foregoing legal pronouncements on causation by the respective Courts of Appeal of England and Kenya are currently anchored in law, more specifically section 213 of the Penal Code which provides as follows:

213. Causing death defined

A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases –

(a) ....

(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) ...

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

33. From the evidence, this Honourable Court is satisfied that the deceased was assaulted twice by his employer and succumbed to the resultant hypertensive shock directly attributable to the assault. The further established evidence from the inquest showed that the deceased died on the second day following the initial assault and a day after the second assault by the same assailant. The family members could not take him for treatment citing lack of funds to meet the anticipated medical costs but their failure, in the light of the Eggshell Skull principles, did not diminish in any way the criminal liability of the assailant.

E. RELEVANCE OF THE TIME OF DEATH AFTER ASSAULT: A YEAR AND A DAY RULE

34. The court admitted tested evidence proving that the deceased died within 48 hours following the twin assault. This timeline of death was also relevant within the sphere of criminal liability as captured in section 215 (1) of the Penal Code which states: -

(1). A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

35. The assault by the prime suspect took place twice. First, on the evening of 6th. The second assault was the very next day at 10am at the CDF materials site. A case of similar application arose in the authority of Republic v Enock Gisairo Asiago [2021] eKLR (E. Maina J.) where the learned Judge made the following pronunciation:

> "In regard to the cause of death the prosecution adduced evidence that the accused assaulted the deceased two weeks prior to her death. It was the prosecution's case that the head injury inflicted upon her by the deceased coupled with a pre-existing lung condition was what led to her death. It was the prosecution's case that Dr. Ogachi's finding that the deceased had bleeding into the subdural and brain matter bilaterally at the occipital area was consistent with the evidence of Clinton Momanyi (Pw2) that he had witnessed his father, the accused, beating his mother on the head.....
>
> ....To the contrary I find that the fact that the accused had beaten the deceased two weeks prior to her death was proved beyond reasonable doubt. The question then is whether given the time that had passed between the assault and death of the deceased and given the element of a pre-existing lung condition it can be said that the accused caused the death of the deceased.
>
> The answer to the question regarding time is answered by Section 215 (1) of the Penal Code which states: -
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> "(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death."

In this case the death occurred after two weeks of the assault and I need not say more on the issue. In regard to the question whether the accused caused the death of the deceased in light of the pre-existing condition ....

...It is my finding that much as the deceased had a pre-existing lung condition which would have caused her death there is evidence that the injuries inflicted upon her by the accused contributed to that death and hence hastened her death. Gender and domestic violence is illegal under our law and it is indeed a criminal offence and it is my finding therefore that the accused committed an unlawful act which contributed to the death of the deceased and for that reason I find that the accused caused the death of the deceased by an unlawful act."

36. The Kenyan statutory provision of the Death Within A Year and A Day rule is not unique to this jurisdiction for traces its roots to the Common Law. This rule was well explained by the English High Court (Kings Bench Division) in REX v. DYSON. (1908) UK Law Rp KQB 96; (1908) 2 KB 454 (Lord Alverstone C.J., Lawrance and Ridley JJ.). The Judgement was delivered by Lord Alverstone C.J. who explained the rule as follows:

"The prisoner was indicted for the manslaughter of his child, who died on March 5, 1908. There was evidence that the prisoner had inflicted injuries upon the child in November, 1906, and certain further injuries in December, 1907. The jury convicted the prisoner, who appeals against that conviction upon the ground that the judge misdirected the jury in that he left it to them to find the prisoner guilty if they considered the death to have been caused by the injuries inflicted in 1906. That was clearly not a proper direction, for, whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause." (underlining mine)

37. The same rule is also in force in Canada. Section 210 of the Canadian Criminal Code contains the Year And a Day Rule in respect of "culpable homicide of the offence of causing death of a person by criminal negligence or by means of the commission of the offence of causing death by dangerous driving or causing death by driving while under the influence or alcohol or a drug."

F. Conclusion

38. The cumulative effect of the foregoing analysis on the facts and the applicable law leads this Honourable Court to arrive at the conclusion that the subject herein bore the only causative, effective and the resultant liability for the death of the deceased. This inquest has not found any supervening or intervening events that would have changed the course of the causative action by the person of interest. Douglas Koome is liable to be charged with the felony of manslaughter of the deceased. The summarized reasons for arriving at this Order are:

    i. Unlawful assault on the deceased.

    ii. The Common Law Eggshell Skull rule.

    iii. The Dying Declaration Rule under section 33 of the *Evidence Act*.

    iv. Causation principles under section 213 of the Penal Code.

    v. Death within A Year-and –A-Day rule under section 215 Penal Code.

39. The court, therefore makes the following orders:

1. Douglas Koome is the individual liable to be arrested and prosecuted on the charge of manslaughter of the deceased Martin Gituma contrary to sections 202 as read with section 205 and read together with section 213 all of the Penal Code cap 63 laws of Kenya.
2. To achieve Order (1) above, he shall be remanded by the OCS Kariene Police Station pending further processes by the DPP including the admission to bail/bond pending the exercise of the DPP's powers prior to the subsequent arraignment before a court of law other than the present court which conducted this Inquest.
3. A certified copy of this Judgement is furnished to the DPP for record and action.
4. This inquest is hereby marked as closed.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 21ST DAY OF MARCH, 2024

HON. T. A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS