

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. 25 OF 2016**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTION**

**VERSUS**

**ERNEST MUSHINDAYI .....**  
**....ACCUSED**

**JUDGMENT**

1. The accused person herein, Ernest Mushindayi, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the night of 30<sup>th</sup> March, 2016 at unknown time at Bukhungu location, Municipality division within Kakamega County, the accused murdered one CHRISTINE CHUMBA.
2. The accused pleaded not guilty, thereby placing upon the prosecution the duty to prove every essential ingredient of the charge beyond reasonable doubt. To establish its case, the prosecution called a total of three (3) witnesses.

**Prosecution Case**

3. PW1 was Margaret Nekesa Arunga Okutoyi. She recalled that on 31.03.2016 at 7:00am in the morning she went to the deceased's house who was her mother-in-law and found the door locked. She went round the house and found the rear door closed but not locked. She called out her name but there was no response. She proceeded with her daily duties and came home at noon to take her unwell child to

hospital. She found her mother in law's door still locked and the cattle still in the homestead which was peculiar. She called his brother-in-law and together, they opened the curtain to the bedroom and saw blood on one side of the room on the bed where her mother-in-law lay covered with a blanket. She stated that the accused, who is her father-in-law ,was on a separate bed covered with a blanket. The two beds were in the same room. The police came. The accused was breathing with difficulty and was taken to hospital whereas the deceased was taken to the Mortuary. They went to the police and recorded the statements. She stated that the doctor informed them at the hospital that the accused had drunk poison. She stated that the deceased and the accused used to argue over the deceased's child before wedlock who was mentally challenged - Irene. She stated that they never got to identify the poison that the accused was said to have taken.

- 4.** On cross examination, she stated that her house was next to that of the deceased. She stated that she could not see what was happening in the deceased's house but used to hear them argue about the deceased's daughter Irene whom they accused wanted the deceased to take to her father's home. She stated that the deceased used to drink alcohol and affirmed that she saw blood on her side of the bed but did not look towards the side where the accused was and that the doctor told them the accused had taken poison. She did not see any poison herself.

5. Upon reexamination, she stated that the deceased used to take alcohol but was uncertain if she came back home drunk on that material day.
6. PW2, was Silas Shabaha Musindanyi, son to the accused and deceased. He recalled that on the material day at around 1:00 PM he was called by his sister-in law and followed her home. He stated that before the incident he had a talk with the accused, his father, who informed him that there had been a disagreement at home. The accused inquired of the whereabouts of the deceased. The next day, at 1:00 PM, PW1 took him home to the window of his parents' house and he looked inside. He saw his mother laying in bed. There was blood on the floor. He tried calling out to her, but she did not respond. He stated that it looked like she had been hit on the head and was bleeding. On the other side of the room, he saw his father who was unconscious and looked like he was sleeping. They screamed and neighbors came. The accused was taken to hospital while the deceased was taken to the mortuary. They were informed that the accused had taken poison and was treated in hospital. The postmortem report on the deceased showed that she had an injury on her head. He affirmed that there was a dispute between the accused and deceased over a child.
7. Upon cross examination, he stated that his parents related well save for the usual differences and did not disagree every day. That Irene lived in his parents' house. That at the window he saw the deceased in blood on her head and that there was a wound on her head. She was

lying on her back he could see her face and on one side of her head there was blood. He stated that despite being told that the accused had ingested poison, they did not see any poison in the bedroom.

- 8.** PW3 was Dr. Dixon Mchana, a government pathologist. He produced the postmortem report of the deceased which he conducted on 11<sup>th</sup> April 2016 in the presence of two witnesses. He stated that the clothes were blood stained. There was laceration on the right earlobe and swelling above right ear on the scalp with bruises. Internally, the deceased had complex fracture along the right side of the skull thus putting pressure on the brain and causing bleeding. The brain had mild swelling. He opined the cause of death to be severe head injury caused by blunt force trauma.
- 9.** On cross examination he stated that the eyes were bluish due to lack of oxygen in the brain caused by brain injury.
- 10.** That marked the close of the prosecution case. This court ruled that a *prima facie* case had been established against the accused person. The accused was called to give his defence under Section 306 as read with section 307 of the Criminal Procedure Code.

### **Defence case**

- 11.** In his defence, the accused elected to give a sworn statement and in denying the offence gave an account of events of the material day as follows: That he recalled on the material day at around 9:00 PM he went to bed and shortly thereafter his wife followed him. He stated that

he was 70 years old, and had lived together with the deceased for many years in a three roomed house, each with their own bed. He stated that he did not know what happened during that time and that he came around to find himself in hospital with no recollection of how he got there. He had injuries on his body, legs and head. While at the hospital, he was informed of the passing of his wife and banned from entering the house after he was discharged. He denied killing his wife and taking poison with the aim of killing himself.

- 12.** Upon cross examination by prosecution counsel, he denied recording a statement to the police but stated that he had thumb printed a statement shown to him at the police station. He denied hitting the deceased as alleged and taking poison in order to die. That marked the close of the defence case.

### **Analysis & Determination**

- 13.** With this background from both the prosecution and the defence, it is now my singular duty to assess the evidence to establish whether the prosecution has discharged the burden of proof beyond reasonable doubt to warrant conviction of the accused.
- 14.** Section 203 of the Penal Code under which the accused is charged provides that:-

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

- 15.** The prosecution's mandate is to discharge this burden of proof of establishing that the accused person in this case committed the offence of murder beyond reasonable doubt. (See section 107(1), 108 and 109 of the Evidence Act).
- 16.** In the case of **Anthony Ndegwa Ngari v Republic** (supra), the Court of Appeal identified the following crucial ingredients of the offence of murder as essential for a conviction: -

**“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:**

**(a) the death of the deceased and the cause of that death;**

**(b) that the accused committed the unlawful act which caused the death of the deceased and**

**(c) that the Accused had the malice  
aforethought.”**

- 17.** It therefore follows that for a conviction to suffice, the prosecution ought to prove beyond reasonable doubt that the following:
- a. The death of the deceased,
  - b. The death was unlawfully caused(*actus rea*)
  - c. That in causing death of the deceased accused’s unlawfully acts were accompanied with malice aforethought. (*mens rea*)
  - d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

**I. Fact and cause of death**

- 18.** It is common ground that the deceased is dead. The postmortem report of PW3 established that the death resulted from severe head injury caused by blunt force trauma. That finding is not challenged and supplies the first ingredient of the offence.

**II. Whether the deceased met her death as a result of an unlawful act or omission on the part of the accused person.**

- 19.** The remaining contest is whether the prosecution proved that the accused unlawfully inflicted the fatal head injury and that he did so with malice aforethought.

**20.** In this case, none of the witnesses saw the accused person hit the deceased. The evidence was largely circumstantial. However, proof in criminal cases can be either by direct or circumstantial evidence. When a witness asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is described as circumstantial evidence.

**21.** Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

***“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”***

**22.** Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established a certain threshold to be met if a conviction is to be based thereon. In **Sawe - vs- Rep [2003] KLR 364 the Court of Appeal** held:

***“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”***

**23. In Abanga Alias Onyango vs. Rep CR. A No.32 of 1990 (UR)**

the Court of Appeal set out the principles to apply to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

***“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.”***

**24.** In summation, of the aforestated case law, it is thus required that before any conviction based on circumstantial evidence is reached, the said evidence adduced must be adequate to prove the case on the required standard of beyond reasonable doubt. In that regard, the court will admit circumstantial evidence if it meets the following criteria;

- a) Evidence that is logically connected to the case.
- b) The evidence must prove or disapprove a fact relevant to the case.
- c) The evidence should be reliable, trustworthy with minimal chance of falsehood.

d) Its potential to influence a decision should not outweigh the probative value.

e) The evidence should not be hearsay.

**25.** The evidence that the accused and the deceased had prior disputes, including disagreements relating to the deceased's daughter Irene, is admitted on the record. Such evidence may point to possible motive, but motive alone cannot constitute proof of guilt.

**26.** The prosecution relies largely on the evidence of PW1 and PW2 who saw the deceased lying in blood and the accused in the same room, apparently unconscious. Neither PW1 nor PW2 witnessed the commission of the assault. There is no evidence of an eye-witness to the act which produced the skull fracture; neither is there direct evidence that the accused struck the deceased with any instrument or otherwise applied the force which caused the injury.

**27.** The accused was found in the bedroom and was unconscious or incapacitated; he was taken to hospital and treated. PW1 and PW2 both stated that they were told at the hospital that the accused had taken poison; neither saw any poison. The accused denied taking poison and denied causing injury to the deceased. The prosecution did not call any witness who observed the actual assault or who could positively link the accused to the act which produced the fatal injury.

**28.** In the circumstances of this case there are material gaps in the prosecution's case. No independent witness saw the assault; there is

no forensic evidence (such as blood spatter analysis linking the accused to the assault), no demonstrable weapon was produced or described with precision, and there is no evidence establishing the sequence of events immediately prior to the discovery of the victims that excludes other possibilities. The presence of the accused in the room at the time of discovery and his incapacity does not, without more, suffice to prove beyond reasonable doubt that he inflicted the fatal injuries to the deceased.

**29.** The accounts given by PW1 and PW2 are consistent in material particulars as to what they saw when they discovered the deceased. Their evidence establishes that the deceased sustained head injuries and that the accused was found in the same room injured or unconscious. The evidence does not establish the identity of the perpetrator of the violence which caused the skull fracture to the required standard.

**30.** The accused's defence that he does not recall how he came to be in hospital and that he was injured is not inherently improbable. Where, as here, the prosecution case depends on inferences and where the circumstantial matrix does not exclude a reasonable hypothesis of innocence, the court must acquit.

**31.** Applying the foregoing principles, I am unable to find, to the required standard of proof beyond reasonable doubt, that the accused

unlawfully caused the death of the deceased with malice aforethought.  
Accordingly, the accused is entitled to the benefit of reasonable doubt.

**Disposition**

32. From the foregoing, the accused is hereby found not guilty of the offence of murder charged and is acquitted.
33. Let any sureties deposited in court be released to the owners.
34. It is so ordered.
35. Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF OCTOBER, 2025.**

**S.MBUNGI  
JUDGE**

**In the presence of:-**

**CA: Angong'a**

Mr. Mango for the Accused present online.

Accused present.