



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. 24 OF 2019**

**REPUBLIC .....**

**PROSECUTOR**

**VERSUS**

**JOHN ATSANGO KHATERA .....**

**ACCUSED**

**JUDGEMENT**

1. The Accused person herein was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Particulars are that on the 11<sup>th</sup> day of April 2019, at Yanungu village in Lurambi location, in Kakamega central district within Kakamega county murdered ROBINSON LISANGARE, the deceased herein.
3. The Prosecution called 3 witnesses in support of its case. Consequently, the Accused was placed on his

defence, and gave sworn testimony but did not call any witnesses.

4. PW1 was Dr. Dickson Mchana, a Consultant Pathologist based at Kakamega County General Hospital who produced the autopsy report for the deceased following a post-mortem he conducted on 18<sup>th</sup> April 2019 at the Kakamega County General Hospital. He stated that the deceased's body was identified by two witnesses, Stella Andanje and Thomas Ouma. Upon his examination, he established that the body was of an African male in his early teenage years, and of fair physique and a week had lapsed since the date of death. The nails, lip, and tongue were bluish and there were two grazed contusions of the forehead below the hairline, also a graze just above the eye. He confirmed that there was no evidence of medical intervention. Internally, he established that there was bleeding on his head although there was no skull fracture, and that there was bleeding below the brain covering involving both sides of the brain and the fore and high brain, which was worse on the left front to the right.
5. He formed the opinion that the cause of death was due to severe head injury secondary to blunt force trauma

following assault. He filled a burial permit No. 1231528, dated, signed and stamped the post-mortem which he produced as PExh 1.

6. On cross-examination by Mr. Munyendo, he asserted that the cause of death could not have been due to a hard fall, owing to the extreme bleeding on the left side. He stated that the incidence of a fall was more on the opposite side of the fall.
7. On re-examination by the prosecution, he reiterated that the injuries were inconsistent with a fall in this case.
8. PW2 was Bernard Muhanji, the Chief Bukhungu Location and testified that on 11<sup>th</sup> April 2019, while on duty at Dianungu "A" a lady came crying claiming that the Accused had beaten the deceased and injured him. He followed the lady to the homestead, where they met the Accused's wife, who informed him that the Accused had beaten the deceased, on claims that he had stolen Kshs. 500/= from him. The deceased had already been rushed to the hospital by the Accused. He stated that the Accused was called and asked to report to the police station, and when he followed up later, he discovered that the Accused had reported to the station

and was under arrest as the deceased passed on en route the hospital.

9. On cross-examination by Mr. Munyendo, he stated that he never went to the hospital to confirm whether the deceased was still alive or dead. He said that the Accused had hired a taxi to take the deceased to the hospital.
10. On re-examination by the court, he clarified that the lady who had come to report the incident was an in-law since she was married to the Accused's brother, while the Accused's wife was the deceased's stepmother.
11. PW3 was Naomi Inyanj Musieni, the wife of the Accused. She testified that the deceased was her biological son. She recalled that on 11<sup>th</sup> April 2019, they had gone to register for Huduma number within their locality together with their 7 children and the Accused and went back to the house at around 10.00 a.m. She recalled that when they got home, the Accused searched for his Kshs. 500/= in the house, but was not able to trace it. She claimed that she left to buy milk, and when she came back, found one of the children had collapsed on the floor and on inquiring, the Accused informed her that he had asked the minor about the money, and he

had collapsed. She recalled that the Accused was alone with the deceased, the other children had not yet arrived, and on examination, she confirmed that the deceased had an injury on his forehead, although there was no blood on the recently tiled floors. She stated that the Accused had never assaulted the minor before. It was then that the Accused called for a taxi and rushed the minor to the hospital, who unfortunately died while undergoing treatment.

12. In his defence, the Accused gave a sworn statement. He stated that on the material day, they had gone to register for Huduma number, and then went back home. He stated that while he was in the sitting room, he called the deceased who responded and started going to the sitting room. Then he heard the deceased scream, and on rushing where he was, found that he had fallen and hit his head and was heavily bruised.
13. On cross-examination, he claimed that his wife had wiped the floor and that the deceased slid when he got off the bed and hit his head on the side as the floor was slippery. He stated that the deceased was frothing and he tried first Aid and later called his friend, who had a car, and they rushed the deceased to Kakamega

General Referral Hospital. He testified that upon arrival, the deceased was placed on oxygen directly for 1 ½ hours. Unfortunately, when they disconnected the oxygen, he was already dead. He claimed that the Doctor explained to him that after he sustained the head injury, the deceased suffered a blood clot, which proved fatal. He asserted that he had a cordial relationship with the deceased and denied he had any ill motive towards him.

14. On cross-examination by the prosecution, he stated that they had gone to the Huduma Center as the whole family around 8.00 a.m. and came back at 9.30 a.m. He claimed that the children had already gone home, and the deceased was in the bedroom. According to the Accused, he called the deceased since he wanted to send him to the shops. He stated that they all slept in one big bedroom and that the deceased was on his own bed and the sink was next to the bed. He claimed that when the deceased got out of bed, he slid, hit the sink, fell and hit the floor with his head, as his wife had wiped the floor before she left for the shops. The Accused contested PW1's report that the injuries were from an assault and asserted that the injuries were from a fall.

He testified that he left the hospital at 10.30 a.m. after taking his son to the mortuary. He testified that he went to the police station after he was directed by the area Chief to record his statement.

### **Submissions**

15. The prosecution submitted that it had proved its case against the Accused and relied in the case of **Republic v. Samwel Kinyua Njiru [2016] eKLR**, urging the court to rely on the Doctor's evidence.
16. The prosecution further submitted that based on the facts of the case, the facts fell within a case of manslaughter.
17. The Accused on his part submitted only on facts and posited that the actions of the Accused after the deceased sustained the injuries were not consistent with that of a person who wanted the deceased dead. He urged the court not to convict the Accused on circumstantial evidence as there was an alternative possibility of the deceased's death, which was a fall. He asserted that it was the Doctor's word against his.

### **Analysis and Determination.**

18. The Accused person was charged with the offense of murder contrary to Section 203 of the Penal Code, which section provides that:-

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

19. For the Accused to be convicted for murder, the prosecution needs to prove the following ingredients:-

(a) The death of the deceased, and the cause of death.

(b) That the death was through an unlawful act.

(c) That the Accused has been positively identified as having done the unlawful act.

(d) That the Accused had malice aforethought. See **Republic v. Andrew Omwenga [2009] eKLR.**

20. The Court of Appeal in the case of **Joseph Kimani Njau v R [2014] eKLR** held as follows:

**“Before an act can be murder, it must be aimed at someone, and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;**

**i. The intention to cause death;**

- ii. **The intention to cause grievous bodily harm;**
- iii. **Where the Accused knows that there is a severe risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse to expose a potential victim to that risk as the result of those acts.**

**It does not matter in such circumstances whether the Accused desires those consequences to ensue. None of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed...”**

21. The standard of proof in a murder case is proof beyond reasonable doubt. The prosecution that must therefore produce compelling evidence that leaves no doubt in the court’s mind that the Accused is guilty. This principle was expounded by Lord Miller in the case of **Miller v. Ministry of Pensions [1947] 2 ALL ER 373-375** who rendered himself as follows:-

**“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof of beyond a reasonable doubt**

**does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it addressed forceful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remedy possibility of his favour which can be dismissed with the sentence of course, it doubt but nothing of that will suffice.” See also *Woolmington vs DPP 1935 AC 462*.**

22. The law therefore requires that the court do thoroughly scrutinize and analyze the evidence on record and satisfy itself that the prosecution has discharged its burden of proof while bearing in mind that it is not the duty of the Accused to prove his innocence as the burden of proof never shifts to the Accused.

### **Death of the Deceased**

23. It is undisputed that Robinson Lisangare died. PW1, Dr. Dickson Mchana, the Consultant Pathologist, conducted a post-mortem examination on 18<sup>th</sup> April 2019. The deceased’s identity was confirmed by PW3 Naomi Inyanj Musieni (the Accused’s wife) and another witness.

### **Circumstances Surrounding the Injuries**

24. Where no direct evidence exists, circumstantial evidence must be cogently and firmly established to exclude all reasonable doubt. In **Ahamad Abolfathi Mohammed and Another v Republic** (supra), 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 enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a solid basis for proving an Accused person's guilt just as direct evidence. In 1928, Lord Heward, CJ stated the following 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 that, by intensified examination, can prove a proposition with the accuracy of**

**mathematics. It is no derogation from evidence to say that it is circumstantial."**

**....**

**"Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions designed to ensure that it unerringly points to the Subject person, and no other person, as the perpetrator of the offense. 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;**
- 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."**

25. In the case of **Sawe v Republic [2003] eKLR**, the court reiterated the above-stated conditions and added that the Prosecution must also establish that no other coexisting circumstances could weaken or destroy the inference of guilt.
26. In the case of **Neema Mwando Nduzuya v R [2008] eKLR**, it was held that circumstantial evidence must be examined very closely before forming a basis for conviction.
27. Similarly, in cases of **R v Richard Itweka [2020] eKLR**, **Regina v Exall and Others [1886] 176 ER 850**, and **Mwangi and Another v Republic [2004] 2KLR 32** stressed that each link in the circumstantial evidence chain must be closely and separately examined before the whole chain is put together and a conclusion drawn on the guilt of the Accused.

**Whether the death was the result of an unlawful act**

28. The post-mortem report (PEXh. 1) shows multiple injuries including grazed contusions on the forehead, bleeding inside the head beneath the brain covering (subdural hemorrhage) on both sides, worse on the left

front, indicative of severe blunt force trauma. Dr. Mchana opined that the cause of death was severe injury secondary to blunt force trauma following an assault.

29. The Accused's explanation that the deceased slipped and fell on a slippery floor thereby sustaining the fatal injuries was rejected by the Consultant Pathologist who maintained that the injuries observed, especially the extensive brain bleeding predominantly on one side was incongruent with a fall.
30. This is a situation where the only person present at the scene was the Accused and he tenders an explanation which the Doctor has disapproved, ruling out a simple domestic accident based on his findings on the nature and site of injury.
31. The duty of the court is to determine whether the Pathologist's testimony should be accepted as the correct finding on the cause of the injuries that caused the death.
32. The Consultant Pathologist's testimony is expert testimony. In **Dhalay v. Republic [1997] KLR 514**, the Court of Appeal held that:-

**“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so...”**

33. It has been held that before the court can reject expert opinion, it must have a proper and cogent basis for its rejection. In **Ndolo v. Ndolo [1995] KLR 390**, the Court of Appeal rendered itself thus:-

**“The evidence of P.W. 1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision.”**

34. In **Republic v. Samwel Kinyua Njiru [2016] eKLR**, the court considered how expert opinion should be treated and held as follows:-

**“57. In Republic Versus Eric Mutua Daniel High Court Criminal Case No. 30 of 2012 I dealt with the issue of doctors’ opinion and the value of same to the court, and quoted extensively from a 2003 case in which I presided namely: REPUBLIC Vs. KAMLESH MANSUKLAL DAMJI PATTNI alias PAUL PATTNI [2005]eKLR.**

**“In the cited case, I quoted from a text, Sarkar’s Law on Evidence 15<sup>th</sup> Edition Vol. 1, the opening remarks under the title *Medical opinion and its value* thus:**

**“The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death.’**

**In same text, SARKAR ON LAW OF EVIDENCE (Supra) I relied on a case quoted from TANVIBEN PAKAJIKUMAR DIVETIA Vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551 where it was suggested:**

**“The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded.’**

**In same case, REPUBLIC VS PATTNI, (supra), I quoted REPUBLIC Vs. LANFEAR 1968 1 ALL ER 683 where DIPLOCK, L. J. gave the correct English position in regard to doctors evidence thus:**

**‘... Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court.’”**

35. The Pathologist is an expert witness whose competence and independence was not challenged. He is well experienced, with specialized training on conducting post-mortems to determine the cause of death. It was not put to him that he lacked independence in his work or was influenced by extraneous factors to arrive at the conclusion that he did.
36. Aside from the Pathologist's evidence, PW3's evidence did not tally with that of the Accused regarding the circumstances under which the deceased sustained the injuries. Notably, according to PW3, the Accused informed her that the deceased fell and hit his head against the wall. However, the Accused claimed that the deceased hit his head on the bedroom sink then fell and hit the floor with his head, a claim which vastly contrasted with what he had told his wife, PW3. Secondly, PW3 did not allude to having wiped the floor and left it wet as she went to the shops. Further, whereas PW3 stated that the Accused informed her that he had called the deceased to inquire about the missing money, the Accused denied intending to ask the deceased about the money.

37. The apparent contradictions in the Accused's defence with the explanations he had given his wife, point to a lack of credibility in the two witnesses. It is worth noting that PW2 was not put to task over his testimony that when he arrived at the deceased's home, PW3 informed him that the Accused had assaulted the deceased. This raises further doubt on the truthfulness of PW3 and the Accused. In the end, for reasons aforesaid, I find the Pathologist's finding as to the cause of death to be more believable.

38. PW2's testimony provides circumstantial evidence linking the Accused to the assault as an unnamed lady reported to him that the Accused had beaten the deceased over missing money and on arrival at the homestead, PW3 told him that the Accused had beaten the deceased, a motive supporting intent.

39. The Accused was the last person to be seen with the deceased and he was therefore under duty to explain how the deceased came by the injuries. Section 111 (1) of the Evidence Act 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:**

**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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

40. The Accused did not dislodge the prosecution’s case as he did not explain how the deceased sustained the injuries being the graze above the deceased’s eye, contusions noted on the deceased’s forehead, and trunk adequately if the deceased only fell.

41. It is in my view that the Prosecution has therefore proved that the Accused caused the unlawful death of Robinson Lisangare.
42. In regard to the final ingredient, malice aforethought can be inferred from the deliberate infliction of injuries leading to death, especially where motive (punishment for alleged theft) is established.
43. Whereas it is evident from the evidence that the Accused assaulted the deceased, the court finds that it is possible that the Accused tried to inflict punishment on the deceased for the loss of the money but the punishment went awry. There is no evidence that the Accused used any weapon. Also, the injuries sustained by the deceased are not suggestive of irrational assault. It could be that in his moment of anger, the Accused assaulted the deceased and unfortunately hit his vulnerable part, which is the head, thereby occasioning bleeding in the brain. There was no fracture to the skull. The actions of the Accused once the deceased sustained the injury are inconsistent with the deliberate intention to inflict grievous harm. The Accused took the deceased to hospital after he sustained the injury and

he voluntarily took himself to the police station after the death.

### **Conclusion**

44. Having examined all the evidence and applying the law, the Court finds that the Prosecution has failed to prove all elements of murder.
45. The Accused is hereby not found guilty of murder. However, he is found guilty of killing the deceased without intent and convicted for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Dated, signed, and delivered at Kakamega, this 18<sup>th</sup> day of November 2025.

**A. C. BETT  
JUDGE**

**In the presence of:**

Ms. Chala for the Prosecution

Mr. Munyendo for the Accused

Court Assistant: Polycap