

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL CASE NO.E022 OF 2024

REPUBLIC.....PROSECUTOR
VERSUS
IRINE LUSIKE
CHESOLI.....ACCUSED

JUDGMENT

1. Irine Lusike Chesoli, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 18/6/2024 at Mitoto Village, Kiminini Sub-county, Trans-Nzoia County she murdered MOSES WANJALA (deceased in this case).
2. The accused person denied committing the offence and the prosecution has called a total of 6 witnesses to prove the charge against the accused. The accused on the other hand has called one witness to support her defence.
3. Duke Mongare **(PW1)** testified that on 18/6/2024 at around 4.30pm he was heading to Mitoto Centre when he heard the accused person screaming at the deceased whom he knew as a friend and neighbour. He stated that he stopped and went to find out what was happening and found the deceased with Brenda assisting him. That the deceased told him that the accused had injured him for asking for his

money which was for water he had sold to her. He stated that the deceased told him that the accused had taken away his Safari boots shoes and a mobile phone. That when he inquired from the accused why she had attacked the deceased, she turned on him and almost attacked him before sending her daughter to bring the Safari boots and the mobile phone.

4. He stated that the items were given to Joseph Wanyonyi and that he then assisted the said Joseph Wanyonyi to carry the deceased back to his home as he could not walk by himself. That when they reached his home, the deceased's mother showed them a room where they placed the deceased and left. That three days later he heard that the deceased had died.
5. He further recalled that the deceased used to live with his in law who was a sibling to the accused and that the accused had thrown out his belongings including the beddings which he found near the road and that they used some beddings to carry the deceased to his house which was about 500 metres away. He further stated that though he did not witness the accused assaulting the deceased, the deceased told him that the accused had hit him with a jembe stick.
6. Margaret Mutua Ipopo (**PW2**), the mother to the deceased on her part testified that she was home on 18/6/2024 after work. That one Mama Veronica went to her and told her that Moses (deceased) had been killed. She stated that she felt

weak and told her to get someone to help. That shortly she saw Joseph Wanyonyi passing by and instructed him to go and help Mama Veronica.

7. She stated that after a while Joseph brought the deceased home with Peter Mongare carrying his belongings. She stated that she applied first aid on the deceased who had injuries on the shoulders and ribs. That the following day she took the deceased to Matunda Hospital where he was treated. She stated that the deceased got some relief and reported to her that it was Irene (the accused) who had assaulted him. That he further told her to go and tell Irene to give her the money for treatment.
8. She stated that the accused was well known to her as a neighbour and that they related well and used to assist her by giving her casual work for pay. She added that the deceased lived with Simon who was brother in law to Irene because Irene was married by a brother to Simon. That the deceased was a caretaker for Simon and used to live in Simon's house and used to buy and sell maize.
9. Samuel Wafula Wanjala (**PW3**), a brother to the deceased stated that on 30/6/2024 he witnessed a Post Mortem examination on the body of his brother (the deceased) and identified his body. He stated that the deceased had been badly injured and saw the injuries during autopsy. He denied the suggestions that deceased was lame.

10. Zaddock Wafula (**PW4**), the investigating officer in this case recalled that on 26/6/2024 he took over the investigations over a murder case reported at Kiminini police station by Samuel Wanjala, a younger brother to the deceased. He stated that he visited the scene at Mitoto village and recorded statements on 30/6/2024 before organizing for a Post Mortem on the body.
11. He stated that the deceased was assaulted using a jembe handle and that his legs and ribs were broken. He stated that an assault report was made on 18/6/2024 before the deceased was taken for treatment. That he however never made it. He stated that he never recovered the jembe handle.
12. He stated that the deceased reported to a police officer on duty that the accused assaulted him. He denied suggestions that the deceased had some disability or was sick at the time. He stated that the accused owed the deceased money for maize and beans sold to her by the deceased.
13. Doctor Godfrey Obalah (**PW5**), the doctor who conducted Post Mortem on the body of the deceased stated that he did so on 30/6/2024. Below are the findings he made;

(A)Externally

- (i) *Cyanosis on the lips and fingernails.*

(ii) Bleeding over the collar bone extending to the right neck (bleeding as a result of bruise).

(iii) Abrasions on the left leg 3cm long.

(iv) Abrasions on the left hip 6cm long.

(v) Fracture of right femur and right humerus.

(vi) Hematoma in the right thigh muscles.

(vii) Hematoma over the anterior chest and right arm.

(B) Internally

(i) Contusions in the lungs (bleeding in the lungs with sign of loss of supply of oxygen).

(ii) Brain swollen.

14. The doctor opined that the cause of death was lung contusions secondary to a blunt object. He stated that he signed the Burial Permit No.0413774 and tendered the Post Mortem report as Pexhibit 1. He added that the body of the deceased looked a bit wasted in terms of nutritional state.

15. When placed on her defence, the accused stated that she knew the deceased well. That on 2/6/2024 the deceased was chased from their home and he went and asked her in law to help him with shelter. That he got shelter and lived at her brother in law's place. she stated that on 18/6/2024 she was called to school where she went and came back at 4pm. That she found the deceased had returned to their home.

16. She denied being indebted to the deceased. She stated that the deceased was diabetic and that his hand had a

disability. That the fingers had been cut. She stated that she related well with the deceased and had no issues with him. That she was framed. She however never gave reasons for being framed.

17. Renny Wabweni Juma (**DW2**) testified that he was a watchman at Mitoto. That he knew both the accused and the deceased because they are his neighbours.
18. He stated that the accused took the deceased to a house belonging to her in law who did not like alcohol. That she later found the deceased had fallen down drunk. That the accused told the deceased that alcohol was not acceptable in that house and took him to the gate from where Duke Mongare carried him to their home. He stated that after a week he heard that the deceased had died.
19. He stated that he was at the scene when Irene dragged the deceased to the gate and that he was with Rose and Duke. He stated that he saw Joseph Wanyonyi collecting clothes belonging to the deceased. He stated that though he was a witness in the incident he did not record a statement with the police but he reported to the Chief about what he saw.
20. Both the prosecution and the defence filed their final written submissions after the close of defence case. I will consider the submissions as I analyze/evaluate the evidence tendered with a view to determining this case.

21. The accused person as observed above is charged with the offence of murder contrary to section 203 of the Penal Code. For a charge of murder to be sustained the following elements must be established and proved through evidence adduced by the prosecution and the standard of proof is needless to say beyond any reasonable doubt. The necessary ingredients or elements as defined under section 203 of the Penal Code are as follows;

- i) Fact of death and its cause.**
- ii) Actus reus or that the unlawful act of commission or omission by the accused caused the death.**
- iii) Malice aforethought or mens rea.**

22. (i) Fact of death and its cause.

The State through written submissions by learned counsel Mark Mugun Principal Prosecuting Counsel dated 11/11/2025 submits that the deceased died of homicide and not through natural causes. I have considered the medical evidence tendered by Doctor Godfrey Obalah (**PW5**) who examined the body of the deceased and authored a Post Mortem report, he tendered at Pexhibit 1. The deceased suffered multiple injures over the right clavicular area extending to the right side of the neck. Abrasions on the left leg and hip joint, closed fracture of femur and right humerus among other injuries. The doctor opined that the deceased died because of lung contusion due to blunt chest injury. The medical evidence corroborated the evidence of **PW1** (Duke

Mongare) and the deceased's mother Margaret Mutua Ipopo (**PW2**). The deceased died and the death was caused by a deliberate act of murder. The fact of death and cause was therefore well established and proved. The big question as to whether the cause is linked with the acts of the accused is the next issue for determination.

23. (ii) **Actus Reus**

This issue is quite contested in this case. While the prosecution relies on circumstantial evidence and dying declaration, the defence through written submissions dated 26/1/2026 through learned counsel M/s Jason Kimani & Co Advocate submits that the prosecution failed to discharge the burden of proof with respect to this element of actus reus. She points out that the murder weapon, said to be a jembe handle was never produced. She further contends that if she was responsible for the assault, she should have been initially arrested for assault, questioning how the deceased died 5 days after the assault on 18/6/2024.

24. She further submits that no dying declaration was ever recorded and that the blood stained clothes were not tendered in evidence. She further contends that she acted as a Good Samaritan by housing the deceased after he was chased away from his house.

25. The State on the other hand submits that the evidence from **PW1** and **PW2** points to a dying declaration that connects or links the accused with murder.

26. This court has considered the evidence adduced by the accused and finds that she has placed herself squarely at the scene of crime. She concurred with **PW2** and **DW2** on the fact that the deceased resided at the house of her brother in law. **DW2** who was a defence witness testified that he saw the accused drag the deceased to the gate telling him that alcohol was not acceptable in their homestead. This is what he said in part;

“I was present at the scene with Rose, Irene and Duke (PW1). I saw Irene dragging the deceased to the gate. Duke then took the deceased from the gate...”

27. The evidence of Duke Mongare (**PW1**) concurs to some extent to the evidence of **DW2**. He said that he heard the accused screaming at the deceased and when he stopped to check he found the deceased down injured. When he inquired from the deceased, the deceased told him that the accused had attacked him and taken away his Safari boots and a mobile phone which she soon returned. This is what he said in part;

“.....Irene (accused) was very hostile to me. She did not want me to ask anything over their affairs. She wanted to attack us. The deceased told me he had been injured by Irene. He could not stand or walk by himself. I confirm Irene was at the scene and I even talked to her.... I knew Irene so well.....”

28. The evidence of **PW1** linking the attack to Irene is corroborated to some extent by evidence of **DW2** who saw the accused at the scene together with **PW1**. The accused cannot therefore say that she was not at the scene of the attack. She was at the scene, going by the evidence of **PW1, DW2** and to some extent the evidence of **PW2** and **PW3** both of whom heard the deceased say that the accused had assaulted him and this was few days before he succumbed to the injuries.
29. The other issue linking the accused with the murder is the dying declaration. The defence states that the declaration was not recorded but there is no legal requirement for such. So what amounts to a dying declaration and when it is admissible in evidence?
30. A dying declaration is a statement made by a person who may or may not believe that he/she is about or likely to die owing to the circumstances of their impending death. The evidence of a dying declaration is admissible as an exception to the rule against hearsay evidence. Section 33(a) of the Evidence Act provides as follows;

“Statements, written or oral or electronically recorded, 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—

(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."

31. From the above it is clear that a dying declaration in Kenya need not be documented or recorded to be admissible. In this matter three witnesses **PW1**, **PW2** and **PW3** all heard from the deceased that the accused was responsible for the serious injuries inflicted on him. In the a case of **Philip Nzaka Watu -vs- R (2016)eKLR** the court found that the circumstantial evidence corroborated the dying declaration from the deceased and that the evidence was compelling to find that the accused committed the offence.

32. In this matter, the evidence tendered by the prosecution and admitted by the accused indicates that the deceased was residing in the homestead of the accused, though a different house but same homestead. **PW1** saw the accused screaming at the deceased who was down

injured. **DW2** her own witness saw her dragging the deceased towards the gate from where **PW1** and one Joseph Wanyonyi picked him up and took him to his mother (**PW2**) who corroborates the same account. So though no witness saw the accused hit the deceased, the circumstantial evidence coupled with dying declaration are compelling and links the accused with the acts that caused the death of the deceased.

33. Circumstantial evidence can be as good or reliable as direct evidence but before such evidence is used to render a conviction, it must satisfy the following conditions which were well laid out on the case of **Abanga Alias Onyango - vs-Republic (Criminal Appeal NO.32 of 1990)** where the Court of Appeal stated;

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy 3 tests.

- (i) The circumstances from which inference of guilt is sought to be drawn, must be cogent and firmly established.*
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the 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 above decision was cited in the case of **Ahamad Abolfathi Mohammed & Anor -vs- R (2018) KECA 743 (KLR)** where the court further held as follows;

“.....the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just like direct evidence.”

The court also observed referencing **Sawe -vs- R (2003) KECA 182 (KLR)** that in addition to the above the prosecution’s case must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt.

34. Flowing from the above decisions and positions taken by the Court of Appeal, this court finds that the circumstances obtaining in this case as proved by the evidence tendered shows that the accused was with the deceased at the material time. **PW1** says that he was attracted by the commotion as he passed by. He went to check and found deceased lying down injured. The accused was in a foul mood and even threatened to attack **PW1** who was asking questions and inquiring what had happened. The

incident had just occurred and that is confirmed by none other than **DW2** who says he saw the accused dragging the deceased to the gate where **PW1** picked him up and carried him home.

35. This court finds that the evidence of **PW1** is given credibility even more by what he witnessed or heard the deceased saying. He says he heard him saying it is the accused who injured him. And there he was seated seriously injured and unable to walk on his own. The accused wanted to paint a picture that the deceased was drunk and could have fallen but the injuries inflicted could not have been caused by a fall. The doctor listed several injuries in the Post Mortem report.

36. This court finds that the period from the time the deceased was assaulted and dragged to the gate with all his belongings to the time the eye witnesses (**PW1** and **DW2**) witnessed was proximate enough to draw an inference that the accused alone and no one else who injured the deceased.

37. The dying declaration made by the deceased to his mother (**PW2**) and his brother (**PW3**) simply solidified the prosecution case and the proof of the element of actus reus.

38. (iii) **Malice aforethought**

The prosecution failed to produce the murder weapon in this case but nevertheless from the medical evidence tendered, it is quite clear that the deceased suffered multiple serious

injuries. The injuries listed by the doctor in the Post Mortem report (Pexhibit 1) including bleeding of the collar bone extending to the neck, abrasions on the left leg and hip, fractures of femur and humerus, hematoma on the right thigh muscles, swollen brain and bleedings in the lungs shows that the person who caused these sort of injuries intended to cause maximum damage or injury to the deceased. In such circumstances malice is inferred under section 206 of Penal Code.

“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.”

39. This court finds that the prosecution’s case has established and proved the element of mens rea through inference as stipulated under section 206 of the Penal Code.

40. This court finds that the prosecution’s case against the accused has been proved beyond any reasonable doubt. She may have disliked the drinking habit of the deceased but

that was no way to deal with the issue. She must have been driven by extreme ill will against the deceased to inflict the sort of injuries noted by the doctor. She is found guilty as charged and she is hereby convicted of murder accordingly.

DELIVERED, DATED and SIGNED at KITALE this10th day ofMARCH....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mugun for the State

No appearance for Kimani for the accused

Accused -present

Duke/Joseph/Chemosop- Court assistants