

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. E094 OF 2021

REPUBLIC.....
PROSECUTION

VERSUS

AMELIA JACOBETH LIABULE.....
ACCUSED

JUDGMENT

1. The accused, Amelia Jacobeth Liabule, was 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 night of 12th and 13th January 2021 at Shisende Village, Mutaho Sub-location, Shisele Location in Kakamega South Sub-County within Kakamega County, she murdered Benardinah Nabwagu Mutsembi.
2. The accused pleaded not guilty. The prosecution called nine witnesses and produced exhibits in support of its case. After the close of its case, the court found that the accused had a case to answer. The accused gave sworn testimony in her defence.
3. PW1 and PW2 evidence was taken by Lady Justice Farah Amin. PW3 evidence was taken by Justice P J Otieno. I heard the evidence of PW4, PW5, PW6, PW 7, PW 8, PW9 and the accused Defence. The accused did not call any witnesses.

The Prosecution's Case

4. PW1, Samuel Jomo Likalamu testified that he was called by the employee of the deceased, (Benardinah Nabwangu Mutsembi) called Boniface Malanji Anyango. He went to the house of the deceased and found her lying on the floor of the sitting room, bleeding. On touching her, he found that she had already died. He called her co-wife (Beatrice Nwabango) and informed her. Beatrice called the chief and the police. Later, he heard that the accused was arrested and charged for killing the deceased. He further told the court that the accused was the daughter of the deceased. On cross-examination, he told the court that he did not see who killed the deceased. He further told the court that he was aware that the accused had come to visit the mother over the Christmas period.
5. PW2, Beatrice Imbasa Nwabanga, the co-wife to the deceased, testified on how she received the news from PW1. She went to the deceased's house and found her lying on the floor in the sitting room, bleeding from the head. She called the chief and the police and informed other family members. She tried calling the accused number, but it was not going through. On cross-examination, she said the deceased compound was not gated. It was open. She further testified that she had a good relationship with the deceased.

6. PW3, Ezra Andabwa, a brother to the accused, a son to the deceased, testified that on 10th January 2021, a Sunday, he left home for Nairobi. He left the accused with her mother. They had gone to celebrate Christmas and New Year at their mother's home. On Wednesday, he received a call from a neighbour who told him that the mother was seriously assaulted. He tried reaching the accused through her phone but her phone was off. He called his uncle, Charles Nabwawa and asked him to go and check what has happened. Later PW2, called him and told him that his mother had died. Later he called the accused who told him that she was on her way to Nairobi. She also told him that the previous night she and her mother (the deceased) had been attacked by their step-brother, called Micah and as a result she escaped and slept in the sugar plantation. He told the court that later the accused was arrested and charged. It was his testimony that Micah, the step brother would sometimes disturb and become violent especially when drunk. The accused had no good relationship with the mother. He kept on accusing the deceased of being a witch and that she bewitched her not to get a job. On cross-examination, he told the court that his relationship with the deceased was also not good for there were allegations that the deceased and her relatives were witches. Further, his relationship with the accused was also strained for it was rare for them to disclose personal issues to each other. On cross-examination

by Mr. Kombwayo, he told the court that the accused actually sent text messages to his phone telling him of the attack by Micah.

7. PW4, Doctor Gibson Mchana, a consultant pathologist from Kakamega County Referral Hospital, did the autopsy of the deceased on 19th January 2021. He noted the left eye of the deceased was black, the left jaw had a bruise and the back of the head had a cut 8cm long and 3 cm in diameter. The brains were oozing out. On the head, there was a gaping hole. On the back of the skull, from left to the right there was a hole. The bones were missing. There was bleeding in the brain. On the neck, there was bleeding, meaning there was pressure applied on it. The stomach had recent food with an alcoholic smell. He opined that the cause of death was the penetrative head injury following an assault.
8. PW5, Boniface Muhanji, the deceased's farm hand, told the court that on 12th January 2021, he reported at work at 4:00am and left at 4:00pm. That day he spent the day with the deceased and the accused. When he left he left them together. On 13th January 2021, he reported at 4:00 am. He called the name of the deceased repeatedly and there was no answer. He pushed the door of the house open. He saw the deceased's body lying on the floor in the sitting room. She was bleeding from the head. He called PW1, who came with his wife. On touching the deceased, he found she was already dead. He called the chief and the police. Later the accused was arrested and charged for

killing the deceased and that prior to the incident the accused had stayed for one week with the deceased. She had come visiting for she stays in Nairobi. On cross-examination, she told the court the deceased compound was not fenced. The accused had friendly relationship with the deceased and that she had no problem with the accused. And he could not tell who killed the deceased. That sometimes casual workers could come and work in the compound.

9. PW5, Donald Musungu Kabuchi, the then area chief of Shisele Location testified she got a call from PW2. He went to the deceased's home and confirmed that the deceased had died. He interrogated the step-son, Micah who told him that he never heard any screams. The DCI took over the matter. Later the accused was charged as present that he cannot tell who killed the deceased. The step-son (Micah) of the deceased was also arrested but later released.

10. PW6, Jane Abututo Waya, a government chemist analyst, produced a report. She meant after analyzing exhibits received from PC Japheth Alfred Wevela which are contained in exhibit memo. She produced as exhibit also. She told the court that she was requested to analyze whether the stomach contents contained any alcohol. She told the court that it was not possible to do such analysis but she did the analysis of the urine and humous and found that they contained alcohol.

11. PW7, Micah Andangwa, the step-son to the deceased testified that he had good relationship with the deceased and the accused. They stayed in the same compound. His house was 15 meters from the deceased's house. He stays alone. In the morning of 13th January 2021, he heard screams coming from the deceased's house around 6 am. Shortly, the area chief went to his house and told him not to go to the deceased's home. He decided then to go to the market. While at the market, the chief came and arrested him as a suspect for causing the death of the deceased. He denied killing the deceased. He was later released without a charge. On cross-examination, he admitted that he was annoyed by the deceased action of removing an anthill in his house. They quarreled but generally he had a good relationship with the deceased and the accused. He also admitted that the deceased had stopped him from collecting rent from rental houses belonging to his father.
12. PW 8, Salvine Cheruto Katukoi, a government chemist analyst, produced the report she made after analyzing the exhibits she received from DCI Kakamega. The exhibits are contained in the exhibit memo form. After analyzing the exhibits, she found there was no connection between the exhibits and the accused person.
13. PW9, the investigating officer, Japheth Wevela, testified on how they did the investigations and finally the accused was charged. He took the exhibits mentioned in exhibit memo form to government

chemist for analysis. The results are contained in two reports produced as exhibits by the analysts.

Defence Case

14. The accused person denied committing the offense. She told the court that she is the lastborn daughter of the deceased and that the deceased was her good friend. She further testified that the Christmas period of 2020, she had visited her mother. She was at home with Ezra and Micah, her blood brother and step-brother. On 12th January 2021, Ezra left without telling him where he was going. Micah was within the compound. Later in the day, she went and booked a bus ticket at Khayega town, where she was to travel back to Nairobi the following day. In the evening, she went back home Ezra was not there. She prepared dinner and they ate. The farm hand was there also. While in the house, someone banged the door and entered. It was Micah, he was drunk. He started quarrelling with the deceased about the anthill complaining that the deceased had demolished the anthill, which was in his house. She got scared and started to pick her belongings but Micah tried to restrain her. However, at last she managed to sneak outside and rushed and hid in the sugar plantation. She texted Ezra telling him that Micah had attacked them and that she had fled. Ezra responded to the text, telling her she should not always be opinionated on everything. While in the sugar plantation, she could hear Micah shouting. In the morning, she went and boarded the bus. On the way,

her aunt called her and told her that she was wanted home. The area chief also called her and told her the same. She boarded another bus at Naivasha back to Kakamega. The chief told her to alight at Sigalagala. On alighting at Sigalagala, the chief arrested her. He was with a relative who is a retired army colonel. She was taken to his home. Policemen came. She was interrogated and later was charged as present.

15. The parties were to file submissions. Only the defence filed. I have looked at the submissions and the evidence on record.

Issues for Determination

16. In offence of murder, the prosecution has to prove

1. The death of the deceased

2. The cause of the death

3. Whether accused unlawfully caused the death of the deceased, that is harboured malice aforethought.

17. In the court of appeal in the case of; **Joseph Githua Njuguna vs Republic (2016) eKLR**, stated as follows:

“Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove

beyond reasonable doubt to secure a conviction for the offence of murder: These are;

a. The death of the deceased and the cause of that death;

b. That the appellant committed the unlawful act which caused the death of the deceased;

c. And that the appellant had harboured malice afterthought.

18. Section 203 of the Penal Code states, "***any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***"

Determination

19. **Proof of death**

The prosecution proved indeed the deceased died through the evidence of PW4. Postmortem report was produced as exhibit.

20. **Cause of Death**

PW4 doctor Dickson Mchana told the court that the cause of death was a penetrating head injury following assault. Therefore, the prosecution has proved the cause of death.

21. **Who caused the death?**

There was no eyewitness. The forensic examination of the exhibits collected from the deceased's house and the exhibits collected from the accused did not link the accused to the deceased in any manner. Thirdly, the murder weapon was not recovered and produced as exhibit. Therefore, the prosecution's evidence is only premised on the doctrine of last seen and circumstantial evidence.

22. The doctrine of last seen presupposes that any person who was last seen with a deceased person is the one who caused the death unless he gives a plausible explanation. This doctrine is intertwined with the doctrine of circumstantial evidence.

23. *In the case of **Republic V Irungu & another (Criminal Case 51 of 2018) [2024] KEHC 1493 (KLR) (Crim) (9 February 2024) (judgment), GRACE L. NZIOKA*** stated that

The doctrine of last seen was discussed in the case of **Kimani vs Republic (Criminal Appeal 41 of 2022) [2023] KECA 1390 (KLR) (24 November 2023) (judgment)** where the Court of Appeal stated that:

“...The doctrine of ‘last seen’ alive is based on circumstantial evidence where the law prescribes that the person last seen with

the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened...”

In the Nigerian case of ***Achie State (1993)***, the court relied on the case of ***Ismeni vs State (2011) Kuktan JSC*** on the doctrine of ‘last seen’ and expressed itself as follows:

“In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death, and the accused is expected to provide an explanation of what happened.”

(emphasis mine).

24. In the case of ***Abanga Alias Onyango vs. Republic CR. App No. 32 of 1990 (UR)*** as follows:

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

- i. The circumstance 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 possibility the crime was committed by the accused and no one else.”

In **Sawe vs. Republic [2003] KLR 364** this court reiterated that in order to justify conviction on circumstantial evidence.

“ the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the accused.” (emphasis mine)

25. It is clear that when the doctrine of last seen alive and circumstantial evidence is invoked, the legal burden shifts to the accused to explain exonerating circumstances. In this case, the conduct of the accused prior to the murder, during the murder, and after the murder comes into focus. **However, the doctrine does not stand alone, but rather it reinforces circumstantial evidence, including corroboration as court look to exclude other hypotheses.**

26. The accused person told the court that she left home and went to hide in the sugar plantation after the step-brother, Micah attacked them. She even sent a text message to her brother Ezra, a fact which Ezra confirmed. The prosecution has not tendered any evidence to show that this act of sending a message was a calculated move by the accused to cover what she had done. Further, the act of the accused person cutting short her journey to Nairobi when she received a call from the chief to me, this is inconsistent with a person who had committed the alleged murder. Therefore, her conduct does not connote guilt on her part.
27. There is evidence that the deceased was not with the accused alone in the compound. There was a farm hand, Boniface Muhanji, the step-son, Micah Andangwa. And again, this was a homestead that was not fenced off; anyone could access. Therefore, it is not only the accused who had the opportunity to commit the murder. There is no evidence of obvious grudge or enmity between the deceased and the accused.
28. From the above analysis, the prosecution did not fully discharge its burden in view of the defence offered by the accused. It's case is purely based on suspicion.

29. Suspicion however strong does not amount to evidence. Addressing this issue, the Court of Appeal In the case **Joan Chebichii v Republic [2003] eKLR**, the court of Appeal held thus:

*“The suspicion may be strong, but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made it clear in the case of **Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998)** (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”*
(emphasis mine)

30. In nutshell, I find that the prosecution has failed to prove its case beyond reasonable doubt against the accused. The accused is found not guilty of the offence of murder and I hereby acquit the accused. She is set free unless lawfully held.

31. Right of Appeal within 14 days.

DATED, SIGNED AND DELIVERED IN KAKAMEGA LAW COURTS IN OPEN COURT THIS 13TH DAY OF APRIL 2026.

S. N. MBUNGI

JUDGE

In the presence of;

CA: Velma/Ang’onga

Miss Kadenyi for the accused present

Miss Emily Prosecutor