



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KWALE COUNTY

COURT NAME: KWALE HIGH COURT

CASE NUMBER: HCCRC/E005/2024

REPUBLIC VS RASHID SALIM GUYA

### JUDGMENT

1. The accused person herein, Rashid Salim Guya, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63) Laws of Kenya that on 21st February 2024 around 0140 Hours at Kombani in Matuga Sub-County within Kwale County, killed Binti Hasani Nyuni.
2. The prosecution called seven (7) witnesses to support the charge.
3. PW 1, Janet Kemunto Abuga, is the proprietor of Paradise Bar at Kombani where the incident happened. She was not at the bar at the time and did not witness the incident. She was however called on phone on the material night and informed of the incident by her worker Virginia Muthoni Mugo, PW 4 who was an attendant at the bar.
4. PW 2, Ali Sadi Jumbe was a security guard at the bar and was on duty the night the incident happened. He ushered the accused person and the deceased into the bar at around 11.00 p.m. The bar had been closed at the time though there were customers inside watching football. PW 2 allowed the two inside only for purposes of purchasing take-away drinks. However, the accused person and the deceased proceeded to the back of the bar to a room referred to as chamber and sat there. When PW 2 asked them why they were breaching his instructions that they should only purchase drinks to take away, they told him that they only intended to sit and discuss the drinks to buy then purchase and go away. PW 2 told them that he would allow them two minutes only and then left them. He went outside the bar.
5. After about fifteen minutes, the accused person called out for PW 2 appearing alarmed and panicky. PW 2 went where the accused person and the deceased were and noticed that the accused person was seated on a couch while the deceased was on the ground. He asked the accused person what the matter was and he told him that the deceased had suddenly fallen to the ground.
6. PW 2 observed that the deceased appeared unconscious as she could not talk at the time. He advised the accused person to carry her to hospital. The accused person informed PW 2 that the deceased had some condition of sudden collapse then she would get up. They carried the deceased to hospital.



7. According to PW 2, he was surprised when the accused person failed to go back to the bar and inform them of the condition of the lady afterwards.

8. PW 3, Kassim Mohammed Nyuni, is an uncle of the deceased. He identified the body for post- mortem examination at Coast General and Referral Hospital on 23rd February 2024.

9. PW 4, Virginia Muthoni Mugo, was an attendant at the bar and on duty on the material night. She said that the accused person and the deceased were her regular customers at the bar. They walked into the bar together shortly after the door had been pushed closed at 11.00 p.m. She referred to the accused person as Eboso. He had a plastic bottle in hand. She served them with Keg beer in a mug and they proceeded to the back of the bar to funnel the drink into a plastic bottle that the accused person was carrying. Shortly after, another regular customer came in and ordered for and took his drinks. He went behind where the accused person and the deceased were, greeted them then asked PW 4 to serve each of them with a mug of Keg beer. He also bought for the other customers who were watching football and paid then he left.

10. At around midnight, PW 2 called her and informed her that the deceased, whom they referred to as Masters, had fainted. She closed the counter and proceeded to the enclosure where they were and found the deceased slammed on the couch. She asked the accused person to offer first aid to the deceased. Due to the commotion, PW 4 rushed back to the front of the bar so she could payments from the other customers so that they do not leave without settling their bills due to the evolving situation. She then went back to the enclosure and found two other people unknown to her and who had come from outside the bar trying to give the deceased first aid by pumping her chest. She asked the accused person to rush the deceased to Timbwani hospital. The two assisted the accused person to take the deceased to Timbwani hospital.

11. PW 4 said that the accused person went back to the bar at around 2.00 a.m. with his drinks which he had carried away. He informed them that the deceased had been confirmed dead. They advised him to report to the police. PW 4 called and informed her employer, PW 1 of the incident.

12. PW 4 said that she came to know after the incident that the accused person was also known as Rashid.

13. PW 5, IP Elijah Mwadori, of Kombani police patrol base received the report of the death at the station from the accused person who was in company of two other people. He went to the hospital where the body was and also to the bar where the incident had taken place. He handed over investigations to the DCI officers from Kwale police station.

14. PW 5 gave some account of how the deceased met her death, alleging that he was informed of the same by the accused person. That one Hassan, a lorry driver and who was a close friend of the accused person and who was also interested in the deceased and wanted to get her from the accused person, went to the bar and found the accused person and the deceased together. Hassan caused a commotion by pushing the deceased who fell down then Hassan left. The deceased became unconscious and accused person and others who were inside started resuscitating her but their efforts did not bear fruits and they took her to the hospital.

15. PW 5 then went to the hospital where he established that indeed the deceased's body was there. The doctor informed him that the deceased was pronounced dead on arrival. According to PW 5, he was satisfied that this was a case of murder and so he detained the accused person and alerted DCI officers from Kwale DCI offices who afterwards took over the investigations.

16. They all went to Paradise bar. They met PW 2 and PW 4 who confirmed to them the incident that had occurred there involving the deceased who was in company of the accused person. PW 5 says that the two however declined to confirm that there had been an altercation there. The scene was not disturbed with no sign of commotion. He took the DCI officers to Timbwani hospital where they were shown the body. The body was later transferred to Coast General and Referral hospital mortuary.



17. In cross-examination, PW 5 conceded that he had not indicated the name Hassan in his statement. He reiterated that the accused person told him that Hassan had pushed the deceased. He also said that the DCI officers did not interrogate him on what he was allegedly told by the accused person. He also said that he had indicated in his statement that one Rajab Mwandori, a friend of the accused person who went with him to the police station had also informed him that the deceased had been hit by a table.

18. PW 5 further said that PW 2 and PW 4 informed them at the scene that the accused person had called them and informed them that the deceased was unconscious and that was when the two noted that there was something wrong.

19. PW 6, Dr. Aisha Ali, of Coast General Teaching and Referral Hospital, produced the post-mortem form dated 23rd February 2024 on behalf of her colleague Dr. Fatma Gharib who conducted the post-mortem and completed the report. The results of the postmortem examination were that the cause of death was severe traumatic head injury with massive subdural hematoma secondary to higher force – blunt trauma to the head.

20. PW 7. PC Bethwel Chebogi Chemutai of DCI Kwale at the time was the investigating officer. His evidence was a reiteration of what the other witnesses said herein as he had gathered from them.

21. The accused person was put on his defence after a finding that there was sufficient evidence adduced by the prosecution making out a prima facie case against him. The accused person gave sworn evidence and did not call a witness.

22. The accused person denied that he committed the offence. He said that the deceased was his lover. They had been staying together for about eight months. They met that evening as usual at their residence, each from his or her place of work, had a meal and proceeded to Paradise bar for a drink as usual. Much of what happened at the bar is as per what PW 2 and PW 4 said in evidence. After they were served a second mug of Keg liquor by PW 4 each of them, the deceased said she wanted to go for a call of nature then stood up, took a step but suddenly collapsed on the side of her body and fell to the ground. The security officer Ali, PW 2, was there and the accused person alerted him. PW 2 called PW 4 who came over and upon touching the deceased suggested that they give her first aid. Eventually the accused person was assisted to take the deceased to Timbwani hospital nearby where she was pronounced dead.

23. The accused person went back to the bar and informed the people whom he had left there. He proceeded to Kombani police station where he made the report. He was detained there to await for officers from DCI, Kwale. He was subsequently charged with the offence.

24. In cross-examination, the accused person said that the room where he went to sit with the deceased was visible from the counter and that the security guard, PW 2 could also see them from where he was.

25. Before he took a plea, a mental assessment report was prepared by one Dr. Janbibi Y. Mohammed, M.Med., a consultant psychiatrist/DDMS, dated 5th April, who declared that the accused person had no mental illness and therefore was fit to plead to the charges.

26. Learned counsels for the accused person and the State made submissions each urging his or her side of the case.

27. Learned counsel for the accused person submits that the issues for determination are:

- a. Whether the prosecution has established all the ingredients of the offence of murder.
- b. Whether the evidence adduced points to the accused as the person who unlawfully caused the death of the deceased.
- c. Whether the defence raised by the accused person introduces a reasonable doubt in the prosecution's case.

28. The prosecution on its part submits that what needs to be established is that the evidence proved the offence of murder as set out under section 203 of the Penal Code and expounded in



various



cases which are cited. I will now consider the evidence in support of the case and the defence by the accused person to determine whether or not the offence of murder has been proved beyond a reasonable doubt against the accused person

29. I have considered the evidence of the seven (7) prosecution witnesses, the defence by the accused person, and the submissions by both learned counsels. The point for determination is whether or not the prosecution has proved a case of murder against the accused person beyond a reasonable doubt.

30. The offence of murder is provided for under section 203 of the Penal Code as follows:

“S. 203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

31. In the case of Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR) the Court of Appeal said thus regarding the ingredients of the offence of murder:

“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. (See Nyambura & Others-vs-Republic, [2001] KLR 355).”

32. In this case, there is no dispute that the deceased died from severe traumatic head injury with massive subdural haematoma secondary to high force blunt trauma to the head. This was the evidence of the post-mortem examination of the deceased’s body as carried out by Dr. Fatma Gharib of Coast General Teaching and Referral hospital conducted on 23rd February 2024. The report was produced on her behalf by her colleague Dr. Aisha Ali, PW 6.

33. There was no dispute on those findings and on the first ingredient of murder, that of actus reus, I find that the death of the deceased and the cause of death were established by the prosecution beyond a reasonable doubt.

34. The next issue for determination is whether the prosecution has proved that the death was unlawful and that it was caused by an act or omission of the accused person through malice aforethought.

35. The prosecution submits that every homicide is presumed to be unlawful unless it occurs as a result of an accident or is one authorized by law. Learned counsel cites the case of Republic v Boniface Isawa Makodi [2016] KEHC 162 (KLR) where the case of Gusambizi Wesonga v Republic [1948] 15 EACA 65 is cited for the holding that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

36. Learned prosecution counsel then submits that the deceased herein was found to have died from severe head injury due to assault. Further that given the nature of injuries, it is unlikely that they were self-inflicted and that from the witnesses’ evidence there is no indication that there was a fall and therefore it can be safely concluded that the death was unlawful as it was unauthorized by law.

37. However, some of the assertions and conclusions being made by the learned prosecution counsel in her submissions are not supported by evidence or she is ignoring other evidence on record. For instance, there was no evidence tendered by either the prosecution or the defence pointing to the fact that the deceased was assaulted. The meaning of assault as variously defined in law books is: Black’s Law Dictionary 9th Edition at page 130:-

“the threat or use of force in another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an imminent battery by means of an act amounting to an attempt or attempt to commit a battery.”



38. From this definition, it follows that there must be proof of one person threatening or using force to cause another to have a reasonable apprehension of harm from the other. There was no such evidence, at least from an eye witness or even circumstances obtaining of such a situation involving the deceased and the accused person. I therefore agree with the submission by learned counsel for the defence that there was no witness who testified to seeing the accused person assault the deceased. Further the submission that there was no evidence of a fall cannot be correct because the accused person's evidence was that the deceased fell down after standing up and walking a few steps while heading to the washrooms. Of course unless the learned prosecutor was of the view that evidence could only be what was stated by prosecution witnesses which would be erroneous.

39. The allegations made by PW 5 that the deceased had been pushed by one Hassan and that she had hit a table were never substantiated by any witness, not even the accused person. The allegations were therefore hearsay and worthless. In any case, even if it were true, it did not show that the accused person had assaulted the deceased.

40. The investigating officer, PW 7 said that he noted that the accused person gave contradictory stories of what had transpired. The first was that at the hospital, he had said that the deceased fell while they were at their house. However, PW 7 never mentioned the name or produced a witness from the hospital who allegedly told him what the accused person had said there. The second was that at the police station, the accused person said that the deceased had been pushed by one Swaleh who had bought them drinks at the bar. This seems to be the story that PW 6 also told the court even though PW 6 referred to the person as Hassan and not Swalleh. Neither PW 6 nor PW 7 confirmed the existence of this person and whether he was one and the same person or different people especially since PW 2 and PW 4 never mentioned that there was any commotion at the bar on the material night involving the accused person, the deceased and a third person.

41. Assuming that indeed the accused person made those contradictory statements, would that be sufficient to turn them against him and find that he was the one who pushed the deceased to fall, thereby causing her the fatal injuries? I do not think so for the reason that, as found elsewhere herein, there was no evidence of any altercation, commotion or even quarreling or raised voices between the accused person and the deceased from which one could conclude that he could have hit the deceased in jest.

42. I therefore find no evidence to prove that the deceased's death was caused by an unlawful act.

43. Malice aforethought is the mens rea or the intention to cause unlawful death as provided for under section 206 of the Penal Code which provides for the instances under which malice aforethought is deemed established thus:

"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;
- c) An intent to commit a felony;
- d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

44. The issue then is whether the evidence on record establishes the requisite mens rea on the part of the accused person.

45. On this ingredient of malice aforethought, the Court of Appeal, in the case of Bonaya Tutu Ipu & another v Republic [2015] KECA 335 (KLR) held thus:



"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX V. TUBERE S/O OCHEN (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick..."

46. The learned prosecution counsel submits that the injuries the deceased sustained were severe and could not be said to be accidental. That they are a clear indicator that whoever attacked the deceased knew or ought to have known that the injuries inflicted would cause harm. Learned counsel for the defence submits that the evidence on record is that oen from the accused person that the deceased sustained the injuries from an accidental fall.

47. Indeed, as submitted by learned counsel for the defence none of the prosecution witnesses saw what happened to the deceased. PW 2 and PW 4 both came around while she was already on the ground. The submission by learned counsel for the prosecution that whoever caused the injury to the deceased must have intended that they would cause harm is mere speculation. There is no direct or circumstantial evidence that anybody, let alone the accused person was the cause of her being on the ground.

48. In determining whether malice aforethought has been established the court has to consider all the circumstances surrounding the death of the deceased.

49. There is no dispute that the accused person was at all material times in company of the deceased. Similarly, there is nothing in the entire evidence to show that he caused the severe injuries upon the deceased. As submitted by learned counsel for the defence, his conduct absolves him of any guilt. He came into the bar with the deceased and they sat together. Neither PW 4 who served them drinks twice nor PW 1, the security guard, gave evidence of any unbecoming or suspicious conduct by the accused person towards the deceased that would betray his innocence. When the deceased collapsed, he immediately called for assistance from PW 2 and PW 4. PW 2 said that when the accused person called him out for help he appeared to be alarmed and panicky. He took her to hospital and even reported the incident to the police. That was conduct inconsistent with guilt.

50. Before he called PW 2 and PW 4 there is no evidence that there was any form of commotion from the place where they were seated. The accused person said that the place was visible from the counter where PW 4 was serving customers and that PW 2 could also have been able to see them. There were about four other people in the bar watching football. The question is, what possibly could the accused person have done under those circumstances to inflict the injury upon the deceased?

51. There is no evidence of any weapon used to inflict the injuries upon the deceased. According to the evidence of PW 6, the external injuries found on the deceased's body were bruises on the left facial side. There was no indication that these were caused by human hands. The body had a blood stained nostril. Internal examination showed fracture of the neck of sternum with muscular hematoma massive lung fibrosis. There was also brain edema and massive subdural hematoma.

52. There was no evidence from the prosecution of the possible cause of these injuries. The only explanation was from the accused person who said that the deceased fell down as she was taking



steps to go to the washrooms. The doctor said that the injuries sustained would be consistent with a fall. There was no other evidence to counter that or offer another possible cause of the injuries attributable to the accused person.

53. Consequently, I find that there is no evidence, not even suspicion, to conclude that the deceased met her death through homicide, that is, that there was human intervention in her death leave alone by the accused person. The deceased was in the process of taking alcoholic drinks. It appears that they had taken one round and a friend came in and added them more and they continued taking. The possibility that as she stood up, she lost balance and fell to the ground thereby causing fatal injuries to herself cannot be discounted.

54. In the circumstances, I find that there is no evidence to show that the accused person caused an unlawful act that caused the death of the deceased or that malice aforethought has been established against him in terms of Section 206 (a) and (b) of the Penal Code.

55. I find from the evidence tendered that the prosecution has not discharged its burden to prove beyond a reasonable doubt that the accused person, unlawfully caused the death of Binti Hassan Nyuni, the deceased herein. Consequently, I find the accused person not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He is hereby accordingly acquitted.

56. Orders accordingly.

Judgment dated, signed and delivered in Open Court this 9th day of March 2026.

HON. ANDAYI W. F.

JUDGE

In the presence of: -

The accused person present in court.

Mbwiza for the accused person.

Ms Vallerie for the State.

Ummu - Court Assistant

SIGNED BY/FOR:  
HON. JUSTICE ANDAYI W.F.

