



**Republic v Masiakana (Criminal Case 64 of 2015)  
[2024] KEHC 6390 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 64 OF 2015  
SC CHIRCHIR, J  
MAY 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JAPHETH WERE MASIAKANA ..... ACCUSED**

**JUDGMENT**

1. Japheth Were Masiakana (the accused) was charged with murder contrary to section 203 as read with section 204 of the [penal code](#).
2. The particulars of the charge are that on 9<sup>th</sup> October 2015, at Ematiti village, Metana sub location in Mumias county within Kakamega County, murdered Evelyne Anne Olwanda.
3. The prosecution called a total of 6 witnesses.
4. PW1 was a cousin to the Accused. He was called by one Cindrella to go home. On reaching home, he was led to the accused's house. On reaching there he found the accused's mother lying down at the accused's house. She was making some strange sounds. He rushed her to hospital where she was pronounced dead on arrival. He took the body to the mortuary. He did not know what killed the deceased. He did not find the deceased on the scene.
5. On her cross-examination he told the court that Cindrella is the accused's brother-in-law. He found the said Cindrella, his cousin Alice, and the accused's wife at the scene. The deceased was lying outside the deceased's house. He managed to identify her, as there was some light from the night stars. He did not talk to the deceased as she was not in a condition to talk. There was no feud between him and the accused.
6. PW2 was the husband of the deceased and the accused's father. He was not present during the incident. He identified the body for purposes of the autopsy



7. PW3 told the court he was cousin to the accused. He was attracted to the deceased's home by screams. He saw the deceased being surrounded by people. The accused was also present. He did not witness the attack.
8. PW4 was P.C. Boniface Nichola, Service no. 233188. He was stationed at Metawa AP camp at Mumias at the time. He told the court that one Pascal Mekokho (PW3) went to the station and reported that the accused was at risk of being killed by members of the public, if he is not rescued. He and his colleagues rushed to the scene. They rescued the accused from the mob. They found him hiding in a cassava plantation. PW3 told them that the accused struck his mother with a blunt object when she attempted to separate the accused and his wife, who were fighting. They did not recover any weapon on the scene.
9. PW5 was the pathologist. He presented an autopsy report by his colleague, one Dr Juma Alayanbi. The postmortem was done at St. Mary's hospital mortuary. The witnesses were Sylvester Masikana and Otinga. On examination, he found that the deceased's spleen had ruptured leading to internal bleeding in the abdomen. He concluded that the cause of death was severe internal bleeding secondary to injury of an organ following assault. He produced the post-mortem report ( PEXB1)
10. PW6 was the investigation officer . He told the court that his investigation showed that the accused was beating his wife-Everlyne Masiakeno when his mother sought to intervene. The accused hit her. He attended the post-mortem.
11. At the conclusion of the prosecution's case, the accused was put on defence.
12. In his sworn statement, he told the court that on the material day he passed by his mother's. He came home from work then then to his mother's and finally to his house. That was about 7pm. At about 8pm, he heard screams and people saying he has killed his mother and that surprised him. He said the crowd did not attack him. He denied that he was fighting with his wife, Everlyne. He denied killing his mother. He stated that he was in good terms with his wife.
13. On cross-examination, he told the court that he only came to know what he was accused of when he had been arrested. He did not know that his mother had been hurt and that he has never tried to find out why or what killed her. He further stated that he always passed his mother's house before heading to his house. He stated that he found 4 people in the house, something which was not unusual, he stated. He admitted that his wife whom he had not called would have been a crucial witness in his defence.
14. None of the parties files their submissions.

### **Determination**

15. Sec 203 of the *penal code* defines murder as follows: "any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder."
16. For the prosecution to secure a conviction it must prove; The death of the deceased and what caused it; that the accused acts of omission or commission caused the death of the deceased and that the killing was accompanied by malice aforethought ( Ref:*Anthony Ndegwa vs Republic*( 2014) e KLR)

### ***Death of the Deceased***

17. On the death of the deceased Dr. Mchana produced a post- mortem report and testified on behalf of his colleague. The body was identified by one stella and Otinga. The pathologist formed the opinion that death was caused by severe internal bleeding, secondary to injury to an organ, following assault. The death of the deceased as well as its cause was therefore proved



***Whether the accused caused the death of the deceased.***

18. None of the prosecution’s witnesses witnessed the killing. The prosecution’s case is therefore circumstantial.

In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal defined circumstantial evidence as : “ evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved..... It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. ( Emphasis added)

19. In the same case, the Court went ahead to set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. 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.”

20. In *Mwangi and Another v Republic* (2004) 2 KLR 32, the Court of Appeal exhorted that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”

21. In the present case, there is not much of circumstances that the court can use to make any inference.

22. PW1 found the deceased lying down after she had been hurt. He never witnessed the attack;PW2, the deceased’s husband was away at the material time; What PW3 told the court in respect to the cause of death of the deceased was all hearsay as he came after the event. Such evidence is inadmissible. He told the court that when he reached the scene , the accused was present but he was not doing anything at that point. PW4 was the arresting officer. He told the court that he and his colleague arrested the accused at a cassava plantation. He was not hurt.

The last witness, the investigation’s officer based his investigation on the witness accounts. He didn’t recover any weapon.

23. The only thing questionable is the conduct of the accused. He was found hiding in a cassava plantation. But that is not enough to infer guilt. The accused was obviously hiding from the members of the public. This can be inferred from the testimony of PW3 who told the court that the accused was at risk of



being killed. If indeed the mob were about to attack the accused , then it would be natural that he would want to hide. It is a self- preservation instinct. It does not necessarily suggest guilt on his part.

24. The other questionable conduct on his part came out in his defence. He told the court that he came to know about the death of his mother at the point of arrest; that he has never tried to find out who killed his mother. This does not sound plausible. The accused was simply being less candid. Thus I have suspicion, and a strong one too , that the accused may have killed his mother. But suspicions are just that , suspicion. However strong they are , can not be a basis of conviction .
25. In circumstantial evidence, there must be a link or a series of events which when linked together excludes the innocence of the accused.( Ref: *Abamad Abolfathi- supra*).  
  
In his case, there are hardly any events to link together. There was no evidence that the accused was the only person have been seen with the deceased. If indeed the accused was fighting with the wife then the deceased was not the only person who had the opportunity to attack the deceased .
26. PW1 told the court that he found one Cinderella, Alice, and the accused's wife at the scene. This tallies With the accused's testimony who told the court that he found 4 people in his house. The the accused's wife was not a compellable witness for the prosecution ,and her absence as a witness would be understood . However it is not known why "Cinderella" and "Alice" were not called as witnesses. As per the narration of PW1 Cinderella was obviously at the scene ahead of PW1. She may have had more and immediate information on how the deceased died.
27. The prosecution has failed to prove that the accused killed the deceased. Consequently, I hereby acquit the accused of the charge in accordance with section 215 of the criminal procedure code. He shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

**S.CHIRCHIR  
JUDGE**

