



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 5 OF 2020

REPUBLIC.....PROSECUTOR

-VERSUS-

RUWA MWARUWA CHIDANGAACCUSED

JUDGMENT

Introduction

1. The accused person Ruwa Mwaruwa Chidanga faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.

2. The particulars are that on the 22nd day of January 2020 at Vyogato village in Kinango sub-location within Kwale County murdered Nzara Chidemu Mtende. The prosecution called 10 witnesses to support its case that the accused person committed the offence herein. Defence did not file submissions for no case to answer and the accused person was placed on his defence.

Prosecution Case

3. PW1, Mwangome Mazera Chidemu stated that Nzara Chidemu Mtende the deceased herein was his mother. The accused Ruwa Mwaruwa is known to him as he is married to his sister. PW1 stated that on 28.12.2019, his sister Nzalambi went home and reported that she had a dispute with her husband. They decided that elders from both sides sit over the matter and PW1's sister stayed at home to wait for elders from her husband's side who were to show up in 3 days' time. On 22.1.2020, PW1 left home very early in the morning to get to work in Muyuni. While at work, a young man who was working for them followed them and reported that his brother-in-law had created a commotion with his wife at home. PW1 accompanied Mazera back home and found neighbours had removed the accused from home and his sister had been locked inside the house. The accused person wanted to stab PW1's sister. He was pursuing her while wielding a knife. PW1 accompanied his sister, Mazera and Balazi to the Chairman's place. The chairman took them to Kinango Police Station to report but while on the way, they received a phone call from PW1's wife Chizi who reported that PW1's mother had been killed. They decided to go back and to the scene where they found the deceased had been made to lie down and covered with a cloth. PW1 stated that the chairman made a call to the area chief who showed up with the police from Kinango Police Station at around 8.00 pm and collected the body which was taken to Kinango Sub-county Hospital Mortuary. PW1 stated that the accused had quarrels from time to time.

4. PW2, Mazera Punga stated that Mwangema Punga is his uncle and that they had worked together in construction. PW2 stated that on 22.1.2020, he was at the home of his uncle where he had been given some construction work. The deceased was at home while Mwanapili had gone to the field to herd cattle. In a short while, PW2 heard Mwanapili crying and saying "Ruwa ananifukuza." PW2 saw Ruwa pursuing Mwanapili while wielding a knife. Mnyuka was ahead of Mwanapili and they were running towards PW2. The deceased also stopped washing utensils and followed PW2 as they ran towards Mwanapili and Mnyuka. Mwanapili fell down

and Ruwa caught up with her and told her to give out his phone. When PW2 raised his hand signaling Ruwa to stop, he lowered the hand with the knife. They then went home together with Ruwa. Mwanapili produced the phone and gave it to Ruwa who removed the line that was in the phone. He returned the phone to Mwanapili. Nzara Chidemu then asked Ruwa “*mkwe wangu, haya unayofanya ni yapi*” Ruwa then said “*kuanzia leo ukwe hakuna.*” PW2 made a phone call to Mwangome who showed up and decided they should report to the chairman which they did at 3.00 pm. The chairman advised them to go and report to the police at Kinango. Later on, Umazi called PW2 and told him that the lady who had been left at home had been found in a thicket. PW2 then proceeded to the scene which was about 10 minutes away. He found the deceased lying beside a foot path in a thicket and the body was covered. The foot path goes up to the shops. The chairman went to the scene and called the area chief who in turn made a phone call to the police officers at Kinango.

5. PW3, Dr. Ahmed Mkuche Juma Hassan who was working at Kinango Sub-county Hospital stated that the post mortem report in respect of the body of Nzara Chidemu was conducted by Dr. Edwin Gathembu who was not available and requested PW3 to attend court on his behalf and produce the report on his behalf. PW3 stated that he worked with Dr. Gathembu and he is familiar with his signature and his handwriting. The postmortem was done on 23.1.2020 at Kinango Sub-county Hospital at 2.30 pm and the request for the postmortem was done by the DCI Kinango. PW3 stated that the deceased was dressed in a blue dress and she had a light coloured petticoat. The deceased was of medium body built with a height of 5 feet and the body was refrigerated. The body was having mild signs of decomposition and insects were present but with no maggots. On the external observation, the face was swollen. The left side of the neck going down towards the upper chest had a bluish discoloration and crepitation of the skin. There were multiple bruises on the face and neck. On the internal appearance of the body, the left side had hemothorax, about ½ litre of blood. The patient had haematoma formation around the neck and upper chest. The digestive system was normal. The genital urinary system was normal, the head mandible was dislocated with swelling and bruises. It was concluded that the cause of death was extensive left sided hemothorax accompanied by suffocation (traumatic asphyxia). The deceased suffered trauma to the neck and upper chest. PW3 stated that Dr. Gathendu signed the postmortem report which was stamped by the office superintendent of Kinango Sub-county Hospital. PW3 produced the report as ExpP1.

6. PW4, Mwanapili Zalambi Mazera stated that the deceased was her mother while the accused is her husband. She stated that on 22.1.2020, she was at her mother’s place as she had differed with her husband. On the same day at around midday, she was herding cattle and her husband found her grazing. He greeted her well and told her the children were sick. PW4 told Ruwa that he had been told to bring his parents so that their issues can be resolved but Ruwa told her that his father had refused. PW4 stated that she told him that she could not go back until their issues had been resolved but Ruwa refused to leave. The accused then told PW4 that she was his wife and they should have sex in the field. However, PW4 refused but the accused wanted to force her. PW4 told him to go and wait for her somewhere she would find him later. PW4 left the cows in the field and started going home. When the accused waited and did not see PW4 where she had told him to go and wait, he emerge with a knife and started pursuing her while shouting “*leta simu yangu, leta simu yangu.*” He chased PW4 until she got home where she raised an alarm. PW4 found her uncle Vidawa Punga, PW2, at home who told the accused to go home until he brings his father to resolve the issue between them. PW4 entered the house and the accused remained outside with her uncle and her mother who was washing utensils. PW4 stated that she entered the house and locked it after she had given him the phone and removed the sim card. After PW4 entered the house, the deceased told the accused to go with his parents as agreed instead of pursuing PW4 with a knife. He told the deceased to keep quiet as the relationship between them was ending on that day. While inside the house, PW4 told the accused to go away and come back with his father. PW4 and the accused had a verbal exchange which attracted neighbours. The commotion took about one hour. PW4 stated that when the accused saw the neighbours had come, he left as if he was going home but he went and sat somewhere. When PW4 opened and came out, the neighbours also left. PW4 remained at home with her sister-in-law Chizi, her mother and her uncle. PW4 made a phone call to her brother Mwangome and he came back from work and made a phone call to the chairman who came and PW4 narrated what had happened. The Chairman advised PW4 to go to Kinango and make a report which they did. PW4 left her mother and Chizi at home. Before PW4 and the rest got to Kinango, Chizi called them on phone and asked them to go back as their mother had been killed. A phone call was made to Kinango Police Station who went to the scene at 8.00 pm. PW4 stated that she did not know who had killed her mother.

7. PW5, Chizi Nzaphila Kalimbo and the deceased person was her mother-in-law and her husband is Mwangome Chidemu. PW5 stated that on 22.2.2020, PW5 was at home when Ruwa Mwaruwa went there in the morning and he was quarreling with his wife. PW5 left to take her child to school and left her mother-in-law and sister-in-law Mwanapili. Ruwa was within the farm in the home. PW5 stated that when she returned, she found her sister-in-law Mwanapili crying saying that her husband wanted to kill her. The chairman was called and together with Mwanapili, Mazera Punga, and PW5’s husband left. PW5 stated that she remained at home with her mother-in-law who said that she was going to the shop to buy insecticide for bedbugs. PW5’s mother-in-law left to go to the shop at around 1.00 PM and Mwaruwa was still around the home. After PW5’s mother-in-law left to go to the shop, PW5 did not see Mwaruwa again. PW5 stated that at about 4.00 pm when the cattle were being taken to the field by herders, they came across

the body of the deceased lying in the thicket. They went back and reported. When PW5 got the news, she made a phone call to her husband and told them to come back as her mother-in-law was found murdered in the thicket. PW5's husband and sister-in-law went back with the Chairman and Punga. After her mother-in-law was murdered, PW5 stated that she did not see Ruwa again. PW5 recorded her statement with the police at Kinango Police Station.

8. PW6, Begodzo Mweza is a farmer from Vyogato in Kinango. He stated that on 22.1.2020, he was at the area chief's meeting when at about 4.00 pm he got a report from Mwangome that his brother-in-law Ruwa had created a commotion at their home. PW6 is the village chairman of Vyogato. He proceeded to the home of Mwangome and they narrated their complaint. PW6 was told that there was a fight between Ruwa and his wife. PW6 stated that he decided to accompany them to Kinango Police Station. On the way to the police station, Mwangema got a telephone call and he was told they should get back as their mother had been killed. They went back and at the scene found the body of the deceased was covered. PW6 stated that he made a phone call to the area chief who went to the scene and made a phone call to the police who also went to the scene and took the body to Kinango Su-county Hospital Mortuary. PW6 stated that he was present during the postmortem on 23.1.2020. The postmortem report was produced as ExP1. PW6 stated that there was a report made over a dispute between the accused and Mwanapili and PW6 had given them a date when the meeting was to be convened with elders from both sides but the deceased was murdered before the said date. The proposal to meet on 26.1.2020 was given by Ruwa and PW6 told him to show up with his father. Ruwa and Mwanapili frequently had disputes which PW6 was involved in resolving. On 22.1.2020 when PW6 arrived at the Mwangome's place, he saw Ruwa from a distance. Members of the public wanted to pursue him but PW6 discouraged them and told them the police would deal.

9. PW7, Ruwa Ngudo Chidangu, stated that the deceased is his sister. PW7 stated that on 22.1.2020, he got a report that his sister had died. On 23.1.2020 at 2.00 pm, he went to Kinango Sub-county Hospital Mortuary to identify the body. PW7 was told that his sister was strangled.

10. PW8, Mwero Nyanje Kuphuma, resides in Vyogato and deals in livestock trade. PW8 stated that on 22.1.2020, he was in Shimba Hills to buy cattle. At 3.00 pm, he went back home and slept. Ruwa Mwaruwa called PW8 and asked for Kshs. 10,000. Ruwa called PW8 and told him to wait for him at home. PW8 stated that Ruwa is his cousin and he told Ruwa that he only had Kshs. 6,000. Ruwa told PW8 to wait for him at home. He went on a motorbike and asked for the Kshs. 6,000 in exchange for a cow. PW8 said that he could not give him the money until he sees the cow. Ruwa carried PW8 on the motorbike upto Kifyonzo, 2 kilometres away and he saw the cow. PW8 told Ruwa that the cow was too small and PW8 opted to go and sell the cow for him at Kinango. PW8 stated that Ruwa told him to give him some money as he was to go and sell the cow. PW8 gave Ruwa Kshs. 5,000 and they went back to Mbuluni stage. PW8 stated that at Msambiani when the accused alighted, he told PW8 that "*Nimefanya makubwa huko nyuma utayaskia.*" PW8 asked him what he had done and he told him to proceed with his journey and that he will go back and hear what he did. On the way to Lukole, PW8 received a phone call from Mluhe Mbui, his cousin, who told him that he had seen him on the road and that the person he was carrying was suspected of killing a woman. PW8 disconnected the call and proceeded with his journey. After a short while, Mdoe Mwanendwa called him and informed him that there was a woman who had been killed and PW8 had been seen with Ruwa Mwaruwa who was suspected to have committed the murder. PW8 stated that he confirmed that he had carried Ruwa but he did not know what he had done and that he left him in Msaviani and PW8 was in Lukore. PW8 stated that he returned home in Vyogato at 9.00 pm and asked his aunt Mari Kufuma about the murder and she said she heard of the murder. The next day on 23.1.2020, PW8 went to Kinango to the livestock market. He had other animals together with the one Ruwa had given him from Kifyonzo. PW8 stated that he sold the cow and later learnt that he was wanted for harbouring a suspect and assisting a murderer to escape. PW8 went to Kinango CID office and explained what had happened. They asked him if he could get Ruwa and he told them he had his money and could get him. Ruwa called and PW8 told him to wait for him. PW8 was accompanied by the police to Kigangani where he was to meet Ruwa. PW8 was on his motorbike and the police followed him in their vehicle. PW8 went and met Ruwa who was arrested and when they went back to Kinango, PW8 was released.

11. PW9, Umanzi Mnyika Nguta, a farmer from Vyogato stated that on 22.1.2020 at midday, he was going to water his goats when Mwanapili, PW4, called him and told him that she was at the grazing field when her husband went and demanded to make love to her in the grazing field. PW4 had left her matrimonial home and was at her parent's home after a disagreement. Ruwa wrestled Mwanapili but she raised an alarm and Ruwa left her. PW4 then went home with the cattle and told her sister-in-law Chizi-PW5 about what had happened in the field. PW9 stated that when he was with PW4, he told her maybe Ruwa was still in the vicinity. They suddenly saw Ruwa come out of a thicket and started pursuing them. PW9 said that he ran ahead of Mwanapili who stumbled and fell. Ruwa had a knife in his hand. He caught up with Mwanapili and demanded for his phone. PW9 was 5 metres away from them. Mwanapili produced the phone and gave it to Ruwa who removed the sim card and returned the phone to Mwanapili. Ruwa then told PW9 that "*wewe utakwenda kusema vizuri huko kwa chairman.*" PW9 said that he did not understand what Ruwa meant. PW9, the chairman, the deceased, Mwangame, and Mzee Mtende decided to meet at Chairman's home to discuss the issue before they could go report it. Thereafter, the deceased was left at home with Chizi, PW5. The Chairman, Mwanapili and Mwangame left

to go to the police station while PW9 went back home. Later on, children came back from school and told them they had seen a woman lying in the bush. PW9 then decided to go to where the woman was said to be lying. On arrival they found the deceased and they confirmed that she was indeed dead. She was lying on her back with her head facing on the side. PW9 had parted ways with the deceased at about midday and she was found dead at around 3.00 pm. PW9 stated that before going to the scene, he called the chairman and reported, when PW9 found out that it was the deceased, he informed the chairman who called the area chief. The area chief also went to the scene and called the police from Kinango Police Station who went and collected the body.

12. PW10, No. 79589 CPL James Nzioka, one of the Investigating Officers in the matter stated that on 22.1.2020, he was at DCI Kinango Office when Chief Inspector Wambua instructed him to go and visit a scene of murder in the company of OCS Kinango Police Station within Vyogato village. They proceeded to the scene with Chief Inspector Misiko, P.C. Maiyo, and P.C. Ireri of Kinango Police Station. PW10 stated that the scene of murder was within Vyogato Village, Kifyonzo sub-location in Kinango Sub-county. PW10 stated that at the scene, they found members of the public including the deceased's relatives. The body of the deceased was lying within a grazing field few metres from a foot path heading to Muyuni Trading Centre. The body was facing upwards and was covered partly with lessos. There was no homestead near the scene. The homestead of the deceased was 200m from the scene. Beside the dead body, there were no weapons or any other exhibit. There were some bushes surrounding the place. PW10 stated that the body had minor bruises on the face and the head lay facing one side to the right. PW10 could not notice any other physical injuries and before they collected the body, they interrogated relatives of the deceased and members of the public. The daughter to the deceased Mwanapili informed them that on that day at 12.00 noon, the accused Ruwa Mwaruwa had visited the home and a disagreement arose between him and Mwanapili his wife. Mwanapili had by then returned to her parents' home. Mwanapili further said that the accused found her grazing cattle and demanded to have sex with her but luckily she escaped. She also told PW10 that the accused was armed with a knife and the confrontation drew the attention of Umazi Mnyuka who was going to water her goats. While explaining to umazi what had happened, the accused again appeared and later ran away to the home of the deceased. The deceased intervened and asked the accused why he was behaving badly and the accused was told to leave and avail elders from his home to come and discuss issues between him and the wife. PW10 stated that the accused did not leave. He was seen hovering around the homestead. The chairman advised that they go report at Kinango Police Station. Chizi remained at home with the deceased as Chairman and Mwanapili went to report. PW10 stated that Chizi reported that the deceased decided to go to Muyuni Shopping Centre and left Chizi at home. Umazi met some school children who told her they had spotted a body lying along the way to the Shopping Centre. Umazi called Chaumae to report. She visited the scene and found it was the body of her mother-in-law. The area chief Heinza Risasi was informed and in turn a report was made the OCS Kinango. PW10 stated that they photographed the body and drew a sketch plan. Unfortunately the phone he used to take photographs with broke down. The two sketch plans that he drew are in court. PW10 stated that they took the body to Kinango Hospital Mortuary and the post mortem was done on 23.1.2021 confirming that the deceased died as a result of strangulation. From the interview of Mweno Nyanje during interview at the DCIO's office on 23.1.2020, he shared crucial information that led to the arrest of the suspect herein. PW10 stated that Mweno Nyanje told them that the accused wanted Kshs. 10,000 but he did not have it. Mweno Nyanje said he met the accused at his home and he was shown a cow that the accused wanted to sell. On the material day, the accused did not spend at home but at Msaviani after riding on Nyanje's motorbike. It was after he had parted ways with the accused that Nyanje learnt the accused had murdered his mother-in-law. PW10 stated that in the company of P.C. Maiyo, P.C. Ireri and villagers from Vyogato including Mweno Nyanje, they agreed on how to effect arrest of the suspect. He was in constant communication with Nyanje to take proceeds of the cow sold so he travels towards Tanzania border. PW10 stated that the accused was on board a motor bike when they managed to arrest him. They passed through Mkongani. When the accused saw them, he decided to escape but they pursued him and he was arrested and later charged. PW10 stated that they did not get eye witnesses but relied on circumstantial evidence to charge the accused with the offence of murder. On the material day when the deceased was murdered, the accused was at her home behaving in a violent manner. The accused was armed and even had an argument with his wife Mwanapili.

Defence Case

13. The accused, DW1, was placed on defence, gave an unsworn evidence, and stated that his name is Ruwa Mwaruwa Chidanga. He stated that on 22.1.2020, he was at home in Vyogato. At 9.00 am, he went to school to pay school fees and on his way back, he met his wife herding cattle and told her that some children were unwell but she was under instructions not to talk to him until their dispute had been resolved. DW1 told her it was okay and that henceforth he would not report anything about the children. She told him to go and give her sim card so that they could communicate on phone. DW1 stated that he gave it to her and she told him to wait for her as she looked after cattle so they could not stray before she comes back for them to talk. DW1 stated that when she went after cattle, she ran away and did not come back. He was surprised and decided to go to his wife's home. On the way, DW1 found her standing with her sister-in-law who was 'Balozi wa nyumba kumi'. She was telling Balozi that she was going to delete messages from the sim card. When DW1 arrived and overheard her, he told her to give him the sim card since she had a different motive. DW1 stated that they ran away and went to say that he had a knife. When DW1 arrived home, his mother-in-law told his

wife to give him the sim card so that he could go home to prepare lunch for his children.

14. DW1 further stated that at about 1.00 pm, he made a phone call to Mweno Nyanje if he was at home and he confirmed that he had arrived. DW1 stated that he went and asked if he had Kshs. 6,000 and he told him he had the money but he could not give him the entire amount but Kshs. 5,500. DW1 told Mweno to accompany him so that he could go and show him the cow he wanted to sell. He was to sell and give him the proceeds less what he had given him. DW1 then went back home and told Mweno to take him to Musamani. He left DW1 to Musamani and went on his way. At 6.30 pm, Mweno Nyanje called DW1 and told him that he should switch off his phone. DW1 asked why and he was told that something big had happened. DW1 asked whether what had happened concerned him or Mweno and he was told to just switch off his phone. DW1 stated that he could not switch off his phone as he had children at home and he also expected that Mweno could sell the cow and remit the proceeds. The next day, Mweno sold the cow and DW1 told him to take his money and the balance to be put in a business and make profits for him but he declined and insisted on giving him the money. Mweno took the money to DW1 and when he arrived, he was with another person on the motor bike whom DW1 did not know and he told DW1 to board the motor bike. When they arrived at the function, the motorbike was stopped and they alighted. That is when DW1 heard people saying ‘*ni huyu, ni huyu ameua.*’ DW1 stated that when they started attacking him, his brother Mwangolo Ruwa intervened and they stopped. DW1 was arrested and taken to Kinango Police Station.

Written Submissions by Accused

15. The Accused person’s submissions were to the effect that the test to be proved in circumstantial evidence upon which the charge against him is founded had not been fulfilled and he blamed the investigative agencies for the failure. He relied on the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR which laid out conditions to be satisfied when a case rests entirely on circumstantial evidence as follows:-

“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 accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, 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 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 Accused further cited the case of *Neema Mwando Nduzya v R* [2008] eKLR where it was held that circumstantial evidence must be examined very closely before forming a basis for conviction. He also relied on the 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 which 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.

16. According to submission by the Accused, other obvious gaps in the evidence tendered exonerate the Accused and dents drawing of the inference of guilt. For instance, according to the Post Mortem Report and the evidence of PW3 – Dr. Amed Mkuiche Juma Hassan, the death was caused by strangulation and the knife that the Accused had was not the weapon that was used to cause the death.

17. It was further submitted that evidence of the witnesses was contradictory and unreliable whereby while PW1 alleged that the Accused was wearing a blue t-shirt, PW4 alleged that the Accused was wearing a white t-shirt, PW5 alleged that the Accused was wearing a black t-shirt, while the Accused in his unsworn statement stated that he left the deceased’s homestead immediately after he was given his phone and went back to his home to prepare lunch for his children who were returning home from school.

18. The Accused stated that while he was walking around the village, he was within his area of normal abode. That no inference of ill motive can be drawn from a person walking normally within his normal area of residence. The Accused further submitted that though he had marital disputes with PW4, the same did not extend to the deceased as confirmed by PW10. PW6 further confirmed that despite being wronged, the Accused had been pursuing peace and reconciliation. That all the witnesses also confirmed that the

Accused had no bad blood with the deceased and despite the statement made by the Accused that the deceased will no longer be his in-law, there was no exchange between the two and that it is the deceased's intervention that soothed the Accused from the dispute he had with PW4.

19. The Accused person's submission was to the effect that the deceased was killed on her way to the shopping centre and evidence confirmed that he was not aware of the deceased's schedule for the day nor her intention to leave her homestead to go to the shopping centre.

20. The Accused stated that when the body of the deceased was discovered, it was covered in a lessso but instead of inviting forensic experts to the scene, PW10 only collected the body and that had the scene been properly handled, the identity of the cruel murderer would have been revealed by forensic evidence.

21. The Accused submitted that PW9 confirmed that it was normal for the Accused and his family to sell cows to him which corroborated the Accused's unsworn statement that he was selling the cow to pay school fees for his children and himself. In further submission, the Accused stated that his travel out of the village on the material day was just a few kilometres away and he had not mentioned to PW9 that he was fleeing to Tanzania as alleged by PW9. That the Accused's stay in the village until past 3 pm is proof of his innocence and lack of knowledge of what had taken place.

22. The Accused submitted that a statement allegedly made to PW9 by the Accused person that he had done 'makubwa' was explained by the Accused that PW9 called him after dropping him to the nearby village telling him to switch off his phone because "kuna makubwa yamefanyika" but he declined because he had young children at home to take care of. In further submission, the Accused stated that PW9 proved to be unreliable in his evidence that the Accused had switched off his phone when they were to meet the next day after sale of the cow. The Accused also submitted that PW10 ought to have traced phone signals of the Accused to disclose whether the Accused was at the scene or location of murder and helped this court in resolving the issue of murders that had frightened residents of Vyogato village. The Accused then urged the court to acquit him under Section 215 of the Criminal Procedure Code.

Analysis and Determination

23. In consideration of the evidence of 10 prosecution witnesses and in consideration of the Accused person's unsworn statement and submissions, this court is to determine whether the ingredients of the offence of murder as provided for under **Section 203 of the Penal Code Chapter 63 of the Laws of Kenya** have been proved beyond reasonable doubt by the prosecution.

24. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows:-

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'

25. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic [2014] eKLR* to include:-

- i. That the deceased died;**
- ii. That the death was caused by an unlawful act or omission;**
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and**
- iv. That there was malice aforethought.**

Death of the deceased

26. The fact of death of the deceased is not in doubt. Her body was found lying dead besides a foot path shortly after she had left her home to go to the nearby shopping centre. PW1, PW2, PW4, PW6, PW9, and PW10 went to the scene and witnessed the

deceased lying on the ground having been murdered. PW7 went to Kinango Sub-county Hospital Mortuary on 23.1.2020 at 2.00 pm and identified the body as that of his sister Nzara Chidemu Mtende who had indeed been murdered. PW3 - Dr. Ahmed Muche Juma produced Postmortem Report in respect of the body of Nzara Chidemu conducted by Dr. Edwin Gathembu on 23.1.2020 at 2.30 pm at Kinango Sub-County Hospital and formed the opinion that the deceased died as a result of extensive hemothorax (left) accompanied by suffocation (traumatic asphyxia). The first element of the offence has therefore been proved by the prosecution in accordance with Section 203 of the Penal Code Chapter 63 of the Laws of Kenya.

Death was caused by an unlawful act or omission

27. Under the Common Law principles, proof of voluntary conduct under the law that applies to the commission of crime can be found in the persuasive precedent by the **South Africa Supreme Court in *S v Cunningham* [1996] 1 SACR 631** where it was held as follows:-

“That in discharging this onus the state is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged *actus reus* and involuntary, that this was attributable to some cause other than mental pathology.”

28. Criminal law requires proof of acts and omissions at the very least on the part of the accused that take the form of an act of assault, striking, beating, shooting or stabbing in order to bring the conduct within the element of unlawfulness in the offence of murder. According to the evidence of PW3, there were multiple bruises on the face and neck, and the mandible was dislocated with swelling and bruises. PW3 concluded his evidence by stating that the deceased suffered trauma to the neck and upper chest. However, the Accused in submitting disputed the possibility of being the cause of the deceased’s death as the knife that it was alleged he was armed with was not the weapon used to cause the death. However, this court finds that the circumstances in the prosecution evidence show that the deceased died out of unlawful acts of assault and suffocation that led to her death.

Participation of the accused in the commission of the alleged offence

29. Evidence of the prosecution witnesses show that no one witnessed the accused killing the deceased. This then brings in the issue of circumstantial evidence upon which this case was based. In using circumstantial evidence to prove this case, the prosecution was required to satisfy the test of a negative inference against the accused person as was set out in the case of ***Musoke v R* (1958) EA 175** where the court cited the decision in ***Teper v R* (1952) ALL 480** as follows:-

“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

30. The Court of Appeal in the case of ***Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR** stated as follows:-

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to 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 as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows 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 which, by intensified examination is capable of proving 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, which are designed to ensure that it unerringly points to the Accused 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 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.

31. According to prosecution evidence, on 22.1.2020 when the deceased was killed, the accused had an altercation with his wife Mwanapili who is the daughter of the deceased in the deceased's home. This position was confirmed by the evidence of PW1, PW2, PW4, and PW5. The evidence of PW2 shows that when the accused chased his wife Mwanapili from the grazing field to the home of the deceased while wielding a knife, the deceased asked the accused "*mkwe wangu, haya unayofanya ni yapi*" The accused then answered the deceased by saying "*kuanzia leo ukwe hakuna.*" PW5 – the daughter-in-law to the deceased stated that on the material day when the deceased was murdered, PW6 – the village Chairman, PW4 – the accused's wife, PW2 – Mazera Punga, and PW1 – the deceased's son had left to go to Kinango Police Station to report the threats and harassment committed by the Accused against the wife PW4.

32. PW2 witnessed the Accused pursuing PW4 while wielding a knife and signaled him to stop. PW4 said that the exchange between her and the Accused attracted neighbours and it took about one hour before the Accused left but continued hovering around the homestead. The Accused took PW4's phone, removed the SIM card and threw it to her after which he told the deceased that their relationship had ended. PW5 testified that by the time the deceased was going to the shops at around 1.00 pm, the Accused was still around the homestead passing by within the cashew nuts plantation and it is after the deceased left to go to the shop that she did not see him again.

33. At around the same time that the body of the deceased was found lying beside the foot path leading to the shops, PW8 stated that he had come back from his livestock trade when the Accused called him to borrow Kshs. 10,000 but he only had Kshs. 6,000 that he could give him in exchange for a cow. PW8 insisted on seeing the cow but it was not equivalent to the money that the Accused had borrowed. He opted to sell the cow on behalf of the accused and give him an advance of Kshs. 5,000. PW8 was going to Lukore and the Accused accompanied him and he was left at Msaviani 5kms away from home as PW8 proceeded ahead. When they were parting ways, the accused told PW8 that "*Nimefanya makubwa huko nyuma utayaskia*" but he did not disclose what he meant. It is when Mluhe Mbui, PW8's cousin and Mdoe Mwahendwa called him that he learnt that the Accused whom he had carried on the motorbike was suspected to have committed a murder in the village. The following day when the Accused called PW8 to ask about proceeds from the sale of his cow, he was now in Kigangani which was 5kms away from his home in Vyogato. It is in Kigangani that the Accused person was traced and arrested. PW10 the Investigating Officer confirmed that the Accused was arrested towards the direction of Tanzania border.

34. The Accused person did not explain in his unsworn statement why he was selling the cow and the submissions that it was for purposes of paying school fees and meet medical needs for his children and himself are an afterthought on the part of the defence counsel and cannot be regarded. He did not also explain why he left the village late in the evening to go to Msaviani and later to Kigangani when the mother-in-law whose daughter he had an altercation with during the day had been murdered. Contrary to his claims in his unsworn statement that he went back home to prepare lunch for his children, evidence shows that he was hovering around the deceased's homestead and it is after the death of the deceased that he decided to go 5kms away from the village and he did not come back until he was arrested.

35. Although the Accused person claimed that it is PW8 who called and told him to switch off his phone because something big had happened in the village, PW8 only communicated to the Accused when he wanted to lead the police to where he was as it was alleged he had harboured a suspect and/or assisted him to escape. He also wanted to give him the proceeds of the sale of his cow. Nowhere in cross examination of PW8 did it come out that he called the Accused on 22.1.2020 to tell him to switch off his phone "as something big had happened back in the village". The unsworn statement of the Accused person cannot challenge the evidence of PW8 as to his movement and conduct around the time that the deceased was murdered particularly because there was no bad blood between them.

36. This court finds that the circumstantial evidence presented by the prosecution points to no other conclusion rather than the fact that the Accused committed the unlawful act that led to the death of the deceased person herein.

Malice aforethought

37. **Section 206** of the **Penal Code** defines malice aforethought as follows:-

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

38. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of *Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007 (UR):-*

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

39. From the opinion of Dr. Gathendu Edwin who performed the postmortem, the deceased’s death was caused by extensive hemothorax accompanied by suffocation. There were bruises on the face and the neck with discoloration of the skin which was a sign of deep tissue bleeding and in the respiratory system, large left sided hemothorax was observed with ½ litre of blood pooled. On the cardiovascular system, there was haematoma around the neck and upper chest. On the head, it was observed that the mandible (jaw) was dislocated with swelling and bruising on jaw line. The injuries inflicted on the deceased who was killed in broad daylight are such that the perpetrator is shown to have intended to kill her. There was express malice aforethought on the part of the Accused person in the manner he executed the offence.

40. In conclusion, this court finds that the prosecution has proved the charge of murder against the Accused person beyond all reasonable doubt. The accused is found guilty and convicted accordingly.

Dated, signed and delivered in Open Court/online through MS TEAMS, this 10th day of February 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga for the State

Mr. Onyango Isaac for the Accused Person

Accused present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Mr. Onyango Advocate: We pray to be supplied with certified copy of judgment. I pray for a date for mitigation before sentence.

Ms. Kambaga: We do not have past records, he may be treated as first offender.

Order: Mention on 10.3.2022 for victim impact statement and mitigation. Accused remanded in custody at Shimo la Tewa GK Prison

10.2.2022



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