



**Republic v Ntheleku (Criminal Case 40 of 2017)  
[2024] KEHC 17217 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 40 OF 2017  
TM MATHEKA, J  
AUGUST 23, 2024**

**BETWEEN**

**THE REPUBLIC ..... PROSECUTOR**

**AND**

**PAUL MUTHIANI NTHELEKU ..... RESPONDENT**

**JUDGMENT**

1. Paul Muthiani Ntheleku was charged in Machakos HCCR 45 of 2016 with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on the night of 10th/11th December 2016 at Ndononi village Musalala sub-location Kilungu location, Kilungu sub-county within Makueni county he murdered Boniface Kimondiu Ikamba.
2. On 13/2/2017 an order for transfer of the matter to Makueni was made and the matter acquired the new number. It is not until 18/7/2018 that plea was taken – the record shows that the issue of the accused’s mental assessment took up all that time. The accused pleaded not guilty before Hon. C. Kariuki J.
3. Hearing commenced on 24/7/2019 before then Hon. Ong’udi J.
4. PW1 to PW4 testified before Hon. Ong’udi J. They set down the case for the prosecution – that on the material night the deceased was home with his daughter PW1, and his wife. PW1 made supper and they ate. PW1 then moved to her room – where she went to sleep. She was woken up about 10:50 pm by the sound of falling glasses, and she heard someone moving around her bedroom window. Then she heard the accused – whom she identified as Muthiani – call out to her father – telling him to come out. She said the accused was no stranger and she knew his voice as he was their neighbour. She saw her father come to the sitting room while armed with a panga and a stick. By now PW1 was in the sitting room with her mum and they had put on the solar lights. Her dad went outside closing the door behind him. She heard him ask Muthiani what he wanted – she heard no response and after about five



- minutes she and her mum went out while she was at the veranda she saw the accused raising a stick. He was facing the main house and she saw him. They returned inside screaming. She did not see her father though there was moonlight. They went back inside screaming and her mother took a torch and they went outside – where she had spotted accused and that is where they found her dad – he had an injury on the left eye, he lay on the right side and one of his legs “was not straight”.
5. From here they went to house of her uncle – PW3. She rang her brother PW2 who came home with the chief and two police officers.
  6. PW3 also came to the scene.
  7. Both PW2 and PW3 witnessed the arrest of the accused and recovery from inside his house of the two sticks. One was identified as belonging to the deceased and was blood stained.
  8. By the time PW1 and PW3 came back to the scene the deceased had died.
  9. PW4 was woken up by PW3 who was accompanied by his brother. They told him that his brother had been killed. The suspect was the accused and he was arrested.
  10. Hon Dulu J heard PW5, 6 and 7 and formed the view that the accused had a case to answer.
  11. PW 5 Dr. Makau Leonard conducted the post mortem. The body had multiple bruises on the left cheek region and the right knee. On the head, multiple fractures of the skull some depressed with bleeding in the brain. He was of the view that cause of death was cardio – pulmonary arrest due to bleeding in the brain from multiple fractures of the skull possibly caused by a sharp object the other wounds were caused by a blunt object.
  12. PW6 Lucy Warugia Wachira from the government chemist testified that she was a government analyst. She said she received from the police – nail material and blood samples from deceased, and blood samples from the accused. They also received exhibits for examination – two sticks and a trouser lightly stained with blood. Her testimony was that the DNA generated from the stick and from the trouser matched the DNA generated from the blood sample of the deceased.
  13. PW7 PC Eustace Muriithi was the Investigation Officer . He had received the call at around 1:30 am from the OCS Kilungu police station that there had been a murder at Ndamani village – he and his team proceeded to the scene and found the wife of deceased and her family. They were shown where the body was – just outside the main gate with a deep cut wound on the left side of the head.
  14. The IO reiterated the evidence of PW1. He further testified how they went to house of accused and ordered him to open the door. He did not comply and they forced their way in. He testified that he recovered the deceased’s walking stick in the corner and noted that it was blood stained. He attended post mortem, took possession of deceased’s blood stained trouser. He said the government analyst report matched DNA from the stick he recovered from house of the accused. He also produced the sketch plan. He testified that the accused claimed that PW1 was his girlfriend and the deceased was opposed to that friendship. He testified that he did not prepare an inventory but made entries in the OB, that during his investigations he did not establish whether the accused suffered from mental health issues and was on treatment.
  15. I heard the defence case.
  16. The accused made a sworn statement.
  17. He denied the offence. He told the court he did not understand why he was in court, but that had a mental health issue whereby he was undergoing treatment at Mathari Hospital. He produced his



treatment card, a hospital referral letter, and prescriptions. On cross examination he told the court that he had been going to Mathari hospital since 2011 but the documents were not before court. He testified that he was aware he was facing murder charge; he was aware that deceased who was his neighbour had been killed. He denied killing the deceased.

He said there was no reason why he would kill the deceased, neither was there any reason why the witness would lie against him. He denied killing the deceased. DW2 was his mother. He testified that on the material night about 10:00 pm she came home from a wedding and the accused came out of his house to see who had arrived at that time. He went back to sleep. About 4:00 am she heard people surrounding her son's house. She said his house was very close to hers. If he coughed she would hear. She asked who it was and they said police. She told the court that accused had an issue as he would talk to himself. That accused began to talk to himself in 2011 and left school. That in 2014 they took him to Mathare. She said she came out of the house and her other son told her that accused was being arrested from killing Kimondiu. She said the police left with her son. The next day she went to speak to Kimondio's wife and she told her that the previous night her husband was late coming home – she said Kimondio's wife told her she did not hear any quarrel or insults she said her son's clothes had no blood that the police took away the clothes he had on. She said her son was still with the undergoing injections for his mental health issues. She said that he would speak to himself then unleash insults.

18. On cross examination she said that Kimondiu's home was like 30 minutes' walk from her home. She said Mwangangi's brother of Kimondiu said that the accused killed him yet he never saw it.
19. Defence closed and parties agreed to file submissions.
20. It was stated in court by counsel for the accused that submissions had been uploaded on the court's CTS. I visited the CTS a few times and did not find the submissions. It indicates "error" when I click on the icon to open the file.
21. The only issue for determination is whether upon consideration of all the evidence - for the state, and the defence - whether the prosecution has proved the case beyond a reasonable doubt to warrant the conviction of the accused person.
22. The ingredients for murder were set out by the Court of Appeal in Antony Ndegwa Ngari vs R [2014] eKLR
  - a. Death of the deceased and the cause of death
  - b. That the accused committed the unlawful act which caused the death of the deceased.
  - c. That the accused had the malice afore thought.
23. From the evidence on record no one saw the deceased actually hit the deceased. PW1 testified she heard an exchange of words between the voice of someone who she identified as the accused and her father then saw the accused lifting a stick minutes before she and her mother found him lying down with injuries that resulted in his death.
24. The evidence is that the deceased went out of the house responding to what was said to be accused's voice. That he went armed with a stick and a panga. PW1 had deceased ask the the accused what he wanted but there was no response. However PW1 testified that she actually saw the accused raising a stick while facing the man house.
25. PW3 testified that when the accused was arrested he was found with blood on his face and ears, and that the deceased's walking stick and rungu were found in his house.



26. This testimony confirmed the testimony of the investigating officer that he recovered the deceased's walking stick and another stick both blood stained from the accused's house.
27. PW4 also confirmed that he was present when the police entered the house of the accused, and recovered the two sticks from therein.
28. The accused's defence is that he did not kill the deceased, adding that he did not understand the case against him. He told the court that there was a time "akili ilikuwa imeruka kiasi" and that he had been going for treatment. His mother confirmed this position - that her son had a mental health issue where he used to talk to himself and unleash insults at people.
29. She introduced an alibi for the accused saying that he could not have committed the offence at the alleged time because he was at home sleeping. She testified that she came home at 1000 pm, the accused came out of his house to see who it was, and went back to sleep . Later at 4.00am, he was arrested, she did not witness the recovery of the 2 pieces of stick. She was clear that her son's clothes had no blood stains and that is correct because none was found on his clothes - it was on the stick recovered from his house.
30. This evidence must be looked at together with that of PW1. She said she was woken up by falling glasses in her bedroom - someone had broken her window. It was about 10:50pm - that appears to be within range of the time it would have taken to walk from the home of accused's to home of deceased.
31. From the foregoing I form the view that it was probable for accused to walk from his home to the home of deceased after his mother arrived and went to sleep; it is also evident that the accused was well known to the family of PW1 - and to PW1 in particular. She heard both his voice and saw him from a distance of 7-10m and knew he was the one. See *Anjanoni & others vs R (1976 -80) 1 KLR 1566* where the court stated recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other.
32. I find that the evidence of PW1 places the accused at the home of the deceased on the material night.
33. There is additional evidence. The deceased left his house with a panga and walking stick. His walking stick was recovered from the house of accused together with another stick on the material night. Both blood stained - and according to the Government analyst - with the blood of deceased.
34. The evidence of PW1, that her father left the house with a panga and a stick, the recovery of the stick with deceased's blood, the connection is made between the injuries on the deceased, and the sticks found inside the house of the accused some hours after the occurrence of the incident.
35. The injuries on the body of the deceased - included multiple skull fracture "secondary to assault from possible blunt and sharp objects" – leading to cardio pulmonary arrest resulting from the said injuries.
36. It is noteworthy that the deceased left the house with a panga and a stick. The injuries appear to have been caused by these weapons which include the deceased's own stick, one the accused had and though the panga was not recovered in the house of the accused the injuries do corresponds to the weapons that were at the scene at the time of the offence.
37. The foregoing demonstrates the circumstantial evidence that is before me - In *Joan Chebii Sawe vs R [2003]eKLR* the Court of Appeal stated

"As we have already pointed out the evidence in this case was entirely circumstantial in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts



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

38. In this case I did not find any other co-existing circumstances to lead me to the exclusion of the hypothesis of innocence on the part of the accused. He was placed at the scene – his alibi does not hold out - one of the murder weapons was recovered from his house a few hours after the incident. Hence the circumstantial evidence points directly at him.
39. I am satisfied that on the circumstantial evidence placed before me, the accused killed the deceased.
40. The last issue is whether accused had malice aforethought. The Court of Appeal in *Peter Kiambi Muriuki vs R* [2013]eKLR citing Section 206 Procedure Code stated malice aforethought is;
- a. “An intention to cause 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 omissions causing death will probably cause the death of or grievous harm to some person whether that person is the person 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 be caused.”
41. The same court cited *Nzuki vs R* (1993) KLR 171 - “Before act can be murder it must be aimed at someone and in addition, it must be an act committed with one of the following intentions the test of which is always subjective to the actual accused .
- i ...
  - ii ...
  - iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequence to ensue or not and is none of these cases does it matter that the act and intention were aimed at a potential victim other than the one who succumbed...
42. The facts here were that the accused called out to the deceased. PW1 does not say that there was any threat in the call - the accused simply called out to deceased and told him to come out of the house. The fact that her window was broken is not highlighted in the PW1’s testimony as to what could have happened or whether she had any exchange with the accused.
43. However, she saw her father leave the house while armed with a panga and a stick. In that scenario it appears to me that he went out as the aggressor? She heard her father ask only one question - what is it? She did not hear a response. The next time she saw the accused he was raising a stick. Between her father leaving the house and the next she saw the accused - she did not see exactly what happened. What emerges from her evidence is that her father went out armed to confront the accused person.
44. There is nothing before me to show that the accused intended to kill the deceased or either harm him. There was no quarrel. There was no grudge. The aggression demonstrated by the deceased probably aggravated the situation leading to the confrontation that led to the injuries on the deceased.



45. In Nzuki's case the Court of Appeal substituted the charge of murder with manslaughter observing that there was complete observe of motive, and noting on the record to draw the conclusion ...
- “ that the appellant had any one of the intentions for malice aforethought when he unlawfully assaulted the deceased with fatal consequences.”
46. The Court of Appeal was of the view that the trial court ought to have directed itself to the fact that the burden of proof of the necessary intent was always on the prosecution , and whether in the circumstances of the case, the same had been discharged. Applying that to this case it is evident that the motive for the killing was never raised or discussed by the prosecution through any of the witnesses.
47. The suggestion by the investigating officer that it had anything to do with a relation between the PW1 and the accused that was forbidden by the deceased was not developed through evidence to amount to a motive.
48. The Court of Appeal concluded;
- “Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt...the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted to manslaughter.”
49. It is my view, that applying the same principles it would be not be sustainable to make a finding of guilt for the office of murder against the accused in this case. I am minded to adopt the words of that court
- “... the appellant was armed with the stick remains unclear. In the absence of motive, it remains a matter of guess work whether or not the appellant knew that there a serious risk that death or grievous bodily harm would ensure from hitting the deceased on is head, possibility therefore that the appellant killed the deceased by an unlawful assault but without the intent necessary to constitute malice aforethought requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excluded.”
50. I therefore substitute the charge of murder with manslaughter Contrary to Section 202 as read with 206 OF THE Penal Code.
51. The accused person raised the defence of insanity - that he had a mental illness at all times - and did not know what he was being accused of.
52. The record shows that on 1/2/2018, he was examined by the Psychiatrist Dr. Mucheru - Wangombe at Mathari National Teaching & Referral Hospital – the report shows that he had been there on 20/4/2017 - then he told them that he had been undergoing treatment for mental illness from 2011.
53. When he attended hospital on 1/2/2018, it was pursuant to a court order related to the record of 20/4/2017. However this time he was not accompanied by his father as required – But of significance to this case he was found fit to plead as all the parameters were normal.
54. As evidenced by the documents he produced, the accused attended Mathari Hospital after he was released on bond. Prior to that there is no medical record to show that he was unwell and was attending hospital – but the two Pre Bail Reports that were made before he was released on bond indicated that he had suffered a mental breakdown while in school, dropped out, left home for Makindu - and whenever he came home he exhibited bouts of aggression when the moods were out. The reports also allege that the accused was attracted to PW1, which attraction was not reciprocated – hence the aggression of breaking the windows.



55. However the evidence before me is such that there is nothing to show that at the time of the offence the accused was under the grip of the alleged mental illness.
56. I find therefore that the defence of insanity would not hold.
57. Having found that there was no proof of malice aforethought, I find that he is guilty of manslaughter contrary to Section 202 as read with 206 of the [Penal Code](#) and convict him accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY ON 23RD AUGUST 2024.**

**MUMBUA T. MATHEKA**

**JUDGE**

Ms Mwanatumu Court Assistant Accused present

Ms. Nyakibia for state

Mr. Hassan for the accused

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-08-23 18:44:30**

