



**Republic v Bundotich (Criminal Case 92 of 2017)  
[2024] KEHC 11741 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE 92 OF 2017  
RB NGETICH, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MICHAEL KIPSAMBU BUNDOTICH ..... ACCUSED**

**JUDGMENT**

1. The accused Michael Kipsambu Bundotich has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that the accused on the 10<sup>th</sup> day of October, 2017 at Sore village, Sirwa Location in Mogotio Sub- County within Baringo County murdered Victor Kipruto Kimetto.
2. The accused denied the charge and the matter was set down for full trial with the prosecution availed 5 witnesses in support of the charge preferred against the accused and upon being placed on his defence, the accused adduced sworn evidence and did not call any witness.

**Prosecution Evidence**

3. PW1 Hibrant Kimatta a brother to the deceased testified that the accused used to work as a farmhand at Saos and on 10<sup>th</sup> October, 2017 at about 3P.M, he was at Saos when he got a call from a neighbor to the accused informing him that his brother Victor Kimetto had been injured. He called his other brother Harrison Kimetto who was at Solai Centre to go and take the deceased for treatment. He then went to Saos and confirmed that their brother suffered injuries on the head, left eye and the back and was bleeding. They took him to Mercy Hospital Eldama Ravine where he died 10<sup>th</sup> October, 2017 at 10.00 p.m. while undergoing treatment.
4. He stated that while the deceased was being taken to hospital, he was still talking and he informed them that the person who assaulted him was Kimurkwel who is the accused herein. He said they reported



the death at Mogotio police station where they recorded their statements and postmortem was done at Mercy Hospital on 20<sup>th</sup> October,2017 following identification by him and his brother Harison.

5. PW2 Harrison Kiprono Kimetto a brother to the deceased testified that the accused was working for a neighbor Daniel Cheruiyot at Wargeti village, Sore sub-location and on 10<sup>th</sup> October,2017, at about 1:00 p.m, he was at the Sore centre when he was informed by accused's employer Milka that accused had tried to kill himself by taking poison and she requested him to take accused to hospital.
6. He said they took accused to hospital but while on the way, accused disappeared. He later learnt from the chief that other people had found accused and had taken him to Hospital. He went to see the accused in hospital and while in hospital, he learnt from Milka that his Victor Kimetto had been injured and a family member was required as he was in serious condition.
7. He went to Wargeti village and found his brother lying on the bed with blood all over the one roomed house. He said his brother had sustained several cuts on the head, face and the nose. He said he was informed by the people at the scene that it is the accused who cut his brother. He confirmed that together with his brother Ibrahim, they took the deceased to Eldama Ravine hospital where he succumbed to injuries at around 8-9:00p.m. They took the body to Eldama Ravine mortuary and postmortem was performed on 20<sup>th</sup> October,2017 in his presence.
8. PW3 Doctor Wangare Wambugu a pathologist based at Baringo County Referral Hospital. Conducted postmortem on the body of the deceased on 20<sup>th</sup> October,2017 at Mercy Mission Hospital mortuary. She concluded that the cause of the death was bleeding due to multiple cut wounds due to sharp force trauma following assault. She produced the postmortem report as exhibit 1.
9. PW4 Samson Cheruiyot testified that on 10<sup>th</sup> October,2017, he was at his home when people arrived and created chaos. He said the accused who had gone to herd cattle had a pang that they sat in the house and shortly after, the accused arrived and cut the deceased with a panga on the head 3 times. He pushed the accused away and the deceased closed the door. He said the accused left after being pushed out and the deceased went out and inquired where Michael went. He said that the deceased removed from the fire place and followed the accused but while on the way, he left the metal. He said the deceased was taken to hospital and he later received information that the deceased had passed on. He confirmed that it was only him and the deceased in the house during the incident.
10. PW 5 No. 40078 IP Sarah Bogosh testified that on 11<sup>th</sup> October,2017, she was working at Mogotio DCI's office as investigator when a case of murder was minuted to her. She recorded in the occurrence book. She testified that the deceased succumbed to injuries inflicted on 10<sup>th</sup> October,2017 at 11:30 a.m by the accused who had quarreled with deceased while drinking busaa with pw4.
11. She saw the body in the mortuary and confirmed the deceased sustained cuts on the right ear, right side of the head and a cut on the back. She stated that the accused later surrendered to his uncle who presented him to police on 12<sup>th</sup> October 2017 and was placed in custody. She recovered the murder weapon a panga at Sirwa.
12. Upon the closure of the prosecution case, by ruling delivered on 15<sup>th</sup> June 2023, this court found that prima facie case had been established to warrant accused be placed on his defence.

### **Accused's Defence Case**

13. The accused who testified on oath stated that on 10<sup>th</sup> October,2017, he went to Samson Cheruiyot's(pw4) home to buy busaa so as to drink later after herding cattle. He said he later met



deceased who informed that he had learnt that he(accused)had kept alcohol; and the deceased request to accompany him(accused) to go and drink the alcohol.

14. Accused said he left cattle and sheep and went with the deceased to Pw4's house and he informed Samson that Kipruto Kimetto was to pay and they were allowed to drink. He said after drinking, the deceased beat him up. Accused said he held the deceased and threw him outside and while outside, the deceased got hold of a panga which was outside then they struggled over it. He said the deceased wanted to cut him with the panga but he(accused) pulled the panga and as the deceased tried to push him with the panga, it cut him on the head. He said when he saw the deceased bleeding profusely, he ran to the chief who is deceased's brother and sought forgiveness.

### **Accused's Submissions**

15. In the written submissions filed, the defence counsel submit that the offence of Murder as provided for under Section 203 of the Penal code the crucial elements the prosecution is mandated to prove are as follows:
  - a. The fact of death of the deceased
  - b. The cause of death
  - c. The proof that in causing the death of the accused committed it with malice aforethought.
  - d. That the evidence on record positioning identifies the accused person as the one who killed the deceased.
16. On the issue of the fact of death of the deceased counsel submit that there evidence that the deceased died and the prosecution is required under Section 203 of the penal code to demonstrate before this court that the death of the deceased was a result of unlawful act or omission caused the death of Victor Kipruto Kimetto and relied on the case of Republic vs Silas Magongo Onzere alias Fredrick Mamema 2017 eKLR. Counsel further submit that evidence of PW1, PW2 and PW5 are to the effect that the deceased Victor Kipruto was cut on the head and died while he was in Hospital undergoing treatment but they were not at the scene of the incident and were just informed. That in as much as the PW5 investigated the case she largely depended on what the other witnesses told her.
17. Counsel further submit that PW4 Samson Cheruiyot who was at the scene of the incident testified that the Accused and the deceased started fighting and they were taking alcoholic drink commonly known as "busaa". That from the evidence it is clear that there was a scuffle; that the accused in his sworn evidence and which were not challenged stated that the deceased started assaulting; that he threatening to sodomize him and in the process, he was knocked against the floor and his trouser torn by the deceased, and he then bled as a result of the injury.
18. Further that at that point he sensed danger and he tried to go for a panga which was outside the house but he could not reach the panga as the deceased who is said was huge shoved him off and went for the panga, he pulled it from him and as he was trying to slap the deceased in self defence the panga cut him. Counsel further submit that in his defence the accused deny inflicting injury on the deceased as he inflicted the injury in the course of trying to slap him using the Panga.
19. On whether the prosecution proved malice aforethought against the accused, counsel submitted that the accused said in his defence that he was acting in self-defense after seeing danger and for fear of his life and cited section 17 of the Penal code which provide that subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence



of person or property shall be determined according to the principle of English Law and relied on the case of Republic vs Kevin Aboki Onsom(2021)eKLR.

20. Counsel submit that the accused had no intention of killing the deceased as they had gone to the house of PW4 Samson Cheruiyot to enjoy "busaa" drink and it is the accused who had booked the drink and the deceased was not happy when he was told the drink was finished and what remained was for the accused and the deceased looked for the accused and requested him to share the drink and promised to pay for it and they agreed to drink together but unfortunately, they did not finish as there was a disagreement resulting to a fight.
21. Counsel submit that from the circumstances leading to the fight, the accused and deceased were friends and were in good talking terms; that the accused was a herder and he carried with him a Panga which he was using to cut and harvest maize as he was herding his bosses' cattle and had kept the Panga beside the door as they were enjoying the busaa drink.
22. Counsel submit that it is clear that the accused had no malice against the deceased, he agreed to share the busaa drink with him but the deceased attacked him but he calm all through until when the deceased picked the panga which was out of the house and if he was malicious, he would not have left the panga out of the house and he would also not have been remained calm all along as accused assaulted and threatened him. He submits that the accused acted in self defence and used the necessary force to protect himself from the danger he was facing. He relied on the case of Republic vs Ismail Hussein Ibrahim (2018)eKLR. Further pw4 testified that the deceased run after accused armed with a metal bar which demonstrates that the intention of the accused was to secure himself and run for safety. He further submits that the deceased was indeed prepared to harm the accused, he run after him with a metal bar when the Panga was taken away from him.
23. In conclusion counsel submits that malice aforethought has not been proved beyond reasonable doubt and urge this court enters a verdict of not guilty and the accused be unconditionally discharged from the offence.

### **Analysis and Determination**

24. Section 203 of the penal code sets out the following as the three ingredients for the offence of murder: -
  - a. proof of death, the cause of that death,
  - b. proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and
  - c. that the unlawful killing was with malice aforethought.
25. Further, in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, the court listed the elements of the offence of murder as follows:
  - i. The death of the deceased occurred;
  - ii. That the Accused committed the unlawful act which caused the death of the deceased; and
  - iii. That the Accused had malice aforethought.
26. Similarly, in the in the case of Republic Versus Andrew Omwenga (2009) eKLR the court held that:-

“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder 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 the 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".

27. From the foregoing, the prosecution is therefore required to prove the above three ingredients beyond reasonable doubt. It is trite law that the burden of proof in criminal cases rests on the prosecution and the burden never shifts. The Accused has no burden to prove his innocence. In the case of Joseph Kimani Njau V Republic [2014] eKLR the Court of Appeal stated:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution”

28. In view of the above, I will consider each of three ingredients for the offence of murder below.

#### **a. Proof of death of the deceased**

29. From the evidence adduced, there is no doubt that the deceased died. This was confirmed by PW3 Dr. Wangare Wambugu a pathologist based at Baringo County Referral Hospital who conducted post mortem on the body of the deceased on 20<sup>th</sup> October, 2017 at Mercy Mission Hospital mortuary Eldama Ravine. She formed the opinion that the cause of death was bleeding due to multiple cut wounds due to sharp force trauma following assault. She produced the postmortem report as exhibit 1.

#### **(b) Proof that the Accused committed the unlawful act which caused the death of the deceased**

30. Pw4 who was with the deceased testified that he was taking busaa with the deceased when accused who had earlier quarreled with the deceased arrived and after drinking together, a fight ensued and in the process the accused cut the deceased. On the other hand, the accused said they struggled over a panga and the panga which the deceased had first grabbed with intention of hitting him, cut the deceased. From evidence adduced, the accused placed himself at the scene of the offence. He also confirmed that him and the deceased were drunk after taking busaa and the two had a disagreement leading to a fight.

31. From the foregoing, I am convinced that the accused was the person who unlawfully caused the death of the deceased herein by cutting him with a panga. The 2<sup>nd</sup> ingredient for the offence of murder was therefore proved beyond reasonable doubt.

#### **(c) That the Accused had malice aforethought**

32. Section 206 of the Penal Code on Malice aforethought states that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances 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.

33. From evidence adduced, it is clear that both the accused and deceased were drunk. They disagreed and fought leading to serious being inflicted on the deceased resulting in his death. From the evidence on record, there is no indication that the accused planned to kill the deceased. The fight arose following a quarrel between the two while they were drunk. From the evidence adduced, I am not convinced that the accused planned or had intention in his mind to kill the deceased. From the foregoing, the ingredient of malice aforethought was not therefore proved beyond reasonable doubt. I proceed to find the accused guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code and convict him accordingly.

**Final Orders: -**

34.

1. Accused is hereby convicted for the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.
2. Right of appeal 14 days.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

CA Elvis.

Ms. Ratemo for state.

Mr. Kiptoon counsel for the accused.

Accused present.

