



**Republic v Mwanjala (Criminal Case 12 of 2019)
[2024] KEHC 11369 (KLR) (25 September 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 12 OF 2019
GMA DULU, J
SEPTEMBER 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PERMANUS KIARA MWANJALA ACCUSED

JUDGMENT

1. The accused person herein Permanus Kiara Mwanjala stands charged with murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of offence are that on 3rd December 2019 at around 1900hours at Sagalla Location in Taveta Sub-County within Taita Taveta County murdered Mwaore Mwapinga by slashing him with pangas.
2. He has denied the charges. In their efforts to prove the charge the prosecution called nine (9) witnesses. On his part, the accused person tendered sworn defence testimony and did not call any additional witnesses.
3. PW1 Joyce Mkabili Mwachimbi testified that she was the wife of the deceased. That on 3rd December 2019 she went for a funeral from Sagalla on foot, and the husband now deceased followed later.
4. At 6p.m, she left the funeral place on foot walking back home leaving the husband behind who indicated to her that he would also go back home to pick a jacket and return to the funeral.
5. It was her evidence that as she walked downhill a Probox passenger motor vehicle belonging to one Masenzi bypassed her. Shortly thereafter, she heard screams and calls for help from the direction of the accused's parent's homestead, whom she knew before as living with his parents.
6. The witness then heard Esther call her name, and later learnt that Esther rushed to the children of the witness and told them to close the door. On coming closer, she was told by the mother of the accused person nicknamed "Brush" that "Brush" was carrying a panga.



7. It was her evidence that, as she walked downhill, and on reaching a place called “slaughter”, she found a person lying on the ground and on flashing the light of her mobile phone, she realised that it was her husband lying there with several visible injuries all over the body.
8. It was her further evidence that she then screamed and neighbours gathered to assist. The witness learnt later that the husband (now deceased) had boarded the vehicle of Masenzi which had bypassed her, and that the vehicle which was at the nearby stage, shortly thereafter picked her injured husband to Sagalla clinic where the medical personnel confirmed that he had died.
9. According to this witness, the police took the body of the deceased person to Voi and thereafter she proceeded home. It was her evidence that she did not see the accused person on 3rd December 2019 nor did she know him to be violent.
10. It was her further evidence that on 4th December 2019, together with her son Luis, they proceeded to the mortuary at Moi Referral Hospital Voi where the son witnessed the post mortem examination of the deceased.
11. In cross-examination, she confirmed that Masenzi operated a passenger motor vehicle, and that it was Masenzi who informed her that deceased was a passenger in his vehicle. She stated that she saw the accused person enter the kitchen and close the door violently. She stated that Esther informed her that the accused was in possession of a panga.
12. PW2 George Mwandoto Soghe a businessman and neighbour of both deceased and accused at Sagalla, testified that on 3rd December 2019, he came home from a funeral at Sagalla Trading Centre in the evening. He was then informed of the incident of screams and that glass window panes and rear windscreen of a motor vehicle, had been broken by “Brush”.
13. As he tried to verify the breakings, he met a crowd of people and also saw James (the deceased) injured and writhing in pain. They then got a vehicle from a neighbour (Masenzi) and took the deceased to hospital.
14. It was his evidence that the accused person locked himself in a room and that the police arrived at the scene around 7:00p.m. He also stated that a young man called Alforce Mwasambu tried to enter the house where accused had locked himself, and the accused person cut him.
15. It was his further evidence that police had to throw tear gas in the house, to overcome and arrest the accused person, who was then brought out of the house with a panga.
16. In cross-examination, he stated that the deceased lay on a nearby road junction next to a feeder road leading to the Safaricom Ltd mast. He also stated that he had been called earlier on phone at 6:30p.m and informed about the damage to house window panes, and windscreen of a vehicle.
17. He confirmed that he had not seen any photographs, and that nobody witnessed the killing. He also stated that “Brush” initially wanted to kill his own father, who operated a bar business.
18. PW3 Geoffrey Mwanjala Kiara testified that he was father of the accused, who was not married and had schooled up to Form 4 then proceeded to Kisauni Youth Polytechnic where he joined bad company and then exhibited a habit of bhang smoking.
19. That the accused person appeared to be mentally affected and at times, disappeared at night, and once even threatened to kill Constance. That in 2016, the accused person was taken to Port Reitz hospital for treatment.



20. It was his further evidence that on 3rd December 2019, he left the accused person at home and proceeded to Voi and returned home at 12:00 noon and while at his bar, the accused person approached him and asked for 10/=, which he declined to give him.
21. At around 4p.m to 5p.m, however, one Nathan informed him that “Brush” (the accused person) had broken the windscreen of his motor vehicle. On approaching he found the accused person throwing stones at everyone including the mother, and Nathan thus drove the witness to the nearby police post.
22. It was his further evidence that he was later informed that the accused person had cut a man, and then he and two police officers boarded Nathan’s vehicle, and proceeded home and on arrival found that the injured person had been taken to hospital. They also found that the accused person had locked himself in the home and he had already injured Alfonse.
23. It was his evidence also that the police brought tear gas, threw it in the house and that the accused person was arrested after he fainted. It was his evidence that the accused person initially wanted to kill this witness (his father), as they had previous quarrels over telling the accused person to stop smoking bhang.
24. In cross-examination, he admitted that he did not record the demand for Kshs. 10/= by the accused person in his witness statement. He also did not witness the accused person cut the deceased, and nobody did so. He agreed that no photographs were shown to him in court. He stated further that though police saw pangas, no blood stains were noted. He maintained that the accused person threw stones when he was asked about that damage he had done to a vehicle windscreen.
25. PW4 Andrew Mwanyika Mwandoto a son of George Mwandoto, and a neighbour of accused, testified that on 3rd December 2019 he heard noise and on peeping through the window, saw the accused person walking.
26. It was his evidence that he called his uncle Nathan and together, went to meet the father of “Brush” the accused person. That shortly thereafter, the wife of the deceased screamed and when the witness proceeded in that direction, he found the deceased lying on the ground with several cut wounds on the head and legs.
27. It was his evidence that Masenzi took the deceased person to hospital and that at that time, the accused person was in the house and refused to come out, and that the accused cut and injured a person who attempted to bring him out of the house.
28. It was his further evidence that the police arrived later and used tear gas to overcome and arrest the accused person. He stated that he did not know where the accused person hid the weapon.
29. In cross-examination, he stated that it was the activation of the motor vehicle alarm that caused him to peep outside. He stated that nobody saw the accused person cut the deceased. He however denied a suggestion that the death of the deceased was not connected to the accused person.
30. PW5 Louis (Luis) Mwandoto Mwaure, a son of the deceased testified that the accused person was their neighbour and an uncle. That on 3rd December 2019 at 5:30p.m, while at Voi, he was phoned by Soghe who informed him that his father had been seriously injured by the accused person also called “Brush”.
31. He then proceeded to hospital at Voi where a police officer called Mohamed showed him the body of the deceased at the mortuary. Next day, he went to the police station to record a statement. On the same 4th December 2019, he attended post-mortem examination of his father at Voi. It was his evidence that he was not present when the accused person was arrested and confirmed that he was not shown any murder weapon.



32. PW6 Valery Kandi Mwanjala, the mother of the accused person, testified in court that on 3rd December 2019, the father of the accused person informed her that the accused person had broken a motor vehicle mirror or windscreen.
33. It was her evidence that when she went to find out the details, the accused person Permanus threw stones at her and that she ran away with her children and grand children. That shortly after, she heard screams and later she met the wife of the deceased near the deceased who lay on the ground.
34. It was her evidence that the accused person was at that time in the house with no weapons. It was her further evidence that the accused person only smoked cigarettes, but that his behaviour had changed and that he even talked of making chapatis up the hill.
35. In cross-examination, she confirmed that she saw the damage to the window/door glass of the house of George. She maintained that she saw the accused person only carry stones and not other weapons.
36. She stated also that she did not witness the killing and nobody else did. She maintained that the accused person only smoked cigarettes and not bhang, but became mysterious and at times said that people wanted to kill him.
37. PW6 was PC George Nzamba of Sagalla Police Post, whose evidence was that on 3rd December 2019 at 7:20p.m while at the police Post, Senior Sergeant Mohamed Gerongo and PC Brian Koech left with him to an assault scene in a Probox vehicle with the father of the alleged culprit, who had already reported the assault incident involving the culprit (accused) to the police.
38. On arrival near the scene, which was hilly, they left the vehicle downhill, and walked to the scene where they found a crowd of people surrounding a house in which the alleged culprit had locked himself. They noted that the person inside held a panga, and there was another panga in the kitchen.
39. It was his evidence, that the police decided not to use weapons, and instead settled for teargas and threw a teargas canister in the house, which overcame the suspect and they then opened the door and arrested him.
40. The police then took possession of two (2) pangas (machettes) therefrom, which he identified in court. They also learnt that one Alfonse had already been injured, and that another person Mapinga had been injured and was dead. He did not see the dead body. He identified the accused person in court, as the person they arrested.
41. In cross-examination, he stated that the longer panga (machete) had blood stains, but that the handling of the pangas could only be explained by the investigating officer. He agreed that there was no eye witness to the killing.
42. PW7 Senior Sergeant Mohamed Ali Gerongo testified that on 3rd December 2019, he was the Deputy OCS of Sagalla Police Post, when he received a call from Paul Kiara at about 7:30p.m about a motor vehicle windscreen broken by the caller's son.
43. Shortly after, the caller phoned again to say that his son had cut an old man by the name Mapinga with a panga.
44. They then met with the reportee at the Police Post, and the vehicle whose windscreen had been broken, drove them to the scene at Kanyago Trading Centre where they pacified a crowd and noted that the suspect, who was in a locked house had two pangas. They were then informed that a member of the public who had earlier tried to enter the house was cut on the head by the suspect.



45. As the suspect appeared to be aggressive and violent, they sent PC Brian (now deceased) who brought teargas, which they used to overcome the suspect and arrested him. According to him, they threw teargas to overcome the suspect and recovered two pangas (machettes), which he identified in court. At that time the deceased had already died.
46. It was his evidence also that they were informed that the suspect or accused person had damaged house window glasses. He handed over the two machettes to CID officers.
47. In cross-examination, he said that both machettes were blood stained.
48. PW8 Dr. Christopher Mliwa Mbogho testified that he conducted post mortem examination of the body of the deceased Mwaore Mwapinga at Moi Referral Hospital Voi on 4th December 2019. He noted several injuries on the head exposing brain tissue. There were also deep cut wounds on the left forearm and a fracture of radial ulna, all of which appeared to be defensive wounds. There were also several cut wounds on the legs.
49. It was his evidence that the cause of death was cardio pulmonary arrest, due to severe injuries due to cut wounds with a sharp object. He produced the signed post mortem report form as an exhibit.
50. In cross-examination, he stated that excessive force was used to inflict the injuries, and that internal examination of the body was not done.
51. PW9 Sergeant (retired) Joseph Ringine testified that he was the investigating officer and that on 3rd December 2019, he was instructed by Deputy DCIO to proceed to the scene herein.
52. On arrival, he noted house window glasses broken and gathered that the accused person was proceeding to his father's bar when he met the deceased, and cut him. He rearrested the accused person from Sagalla Police Post, and also took the deceased body from Sagalla Health Centre to Voi.
53. It was his evidence that on observation, he noted that the accused person appeared to be mentally disturbed. He confirmed that he was present during post-mortem examination of the deceased, and identified the accused person in court. He produced 2 pangas (machettes) as exhibits.
54. In cross-examination, he stated that the Scenes of Crime Officers took photographs. He stated also that he personally saw the damaged motor vehicle and the damaged house window glasses. He stated further that photographs were taken by IP Kyalo, who had left station before processing same. He stated also that the murder scene had no lights and that some unknown people said that they witnessed the incident of cutting of the deceased. That was the prosecution evidence.
55. When put on his defence, the accused person tendered sworn defence testimony. He admitted damaging the vehicle of George Mwandoto with stones. He denied killing the deceased and said that people merely followed him, and while in the house, they threw something that overcame him and then took him out of the house and poured water on him.
56. He maintained his denial to killing the deceased, but admitted seeing him that day. He stated that the machettes were domestic items, and that one of the machettes relied upon was not in his possession and was brought by other people. He asked that the charge be dismissed.
57. In cross-examination, he admitted going to his father's bar at 11a.m, but denied chasing his mother and sister. He insisted that Mwapinga the deceased was alive. He denied using drugs and said that the evidence on his use of bhang was a lie.
58. In re-examination, he maintained that the deceased was still alive at Sagalla.



59. After the closure of the prosecution and defence evidence, the defence counsel and the Director of Public Prosecutions filed written submissions, which I have perused and considered.
60. This is a murder case. The burden was on the prosecution to prove all the elements of the offence against the accused person. This legal burden is codified under Section 107, 108 and 109 of the Evidence Act (Cap.80), see also Sawe v Republic [2003] eKLR.
61. This being a criminal case, the standard of proof is beyond any reasonable doubt – see the English Miller v Minister of Pensions [1947] 2 ALL ER 172 wherein in distinguishing proof on the balance of probabilities and proof beyond reasonable doubt, Lord Denning stated as follows:-
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probabilities. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt.... Suppose the evidence is so strong against a man to leave only a remote possibility in his favour which can be dismissed with the sentence. In that case it is possible, but not in the least probable, that the case is proved beyond reasonable doubt. Still nothing short of that will suffice.”
62. The key elements of the offence of murder are contained in Section 203 of the Penal Code. They are four. First, whether the deceased died. Secondly, whether the death was unlawful. Thirdly, whether the accused person caused the death. Fourthly, and lastly, whether the death was caused with malice aforethought.
63. Did the deceased die? The evidence of the prosecution witnesses on record, including PW1 Joyce Mkabili his wife, and PW8 Dr. Christopher Mliwa Mbogho is that on 3rd December 2019 the deceased was found lying on the ground in the evening seriously injured with many visible cuts injuries on the head and other parts of the body. He was alive but later declared dead on arrival at Sagalla Health Centre.
64. Post mortem examination was then conducted on the body of the deceased Mwaore Mwapingaon 4th December 2019 by PW8 Dr. Mliwa Mbogho. The cause of death was established to be cardio respiratory arrest due to severe injuries due to cut wounds with a sharp object.
65. Thus, though the accused person insisted throughout his sworn defence, that the deceased was alive, I find that the prosecution proved beyond any reasonable doubt that the deceased person herein died of cardio respiratory arrest due to severe injuries inflicted by a sharp object.
66. Was the death unlawful? No lawful reason has been suggested or given for the infliction of the many and severe injuries on the deceased resulting in his death. I thus find that the death was unlawful.
67. Was the death of the deceased caused by the accused person? Nobody saw the accused person inflict the injuries. Nobody testified to seeing the accused person at the scene at the cross-roads where the deceased lay seriously injured. It is thus a case of circumstantial evidence.
68. In the case of Republic v Kipkering arap Koske 16 EACA 135 the defunct Court of Appeal for Eastern Africa, stated inter alia that in order to sustain a conviction on circumstantial evidence –
- “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 no one else.”



69. In the present case, in my view the prosecution failed to establish such complete circumstantial evidential chain. Firstly, Masenzi who was said to have dropped the deceased from his commercial vehicle was not called by the prosecution to testify on where he dropped the deceased, and whether he dropped him alone. This left an unexplained gap in the chain of circumstances.
70. Secondly, though two machettes were produced in court as the murder weapons said to be in possession of the accused person, none of those machettes was taken to the Government Analyst for tests to establish whether they had any blood stains, which could connect those weapons to the injuries suffered by the deceased.
71. Thirdly, neither a sketch of the scene, nor photographs were testified upon in court, to describe the scene, as well as where the weapons were recovered from.
72. Fourthly, though no witness stated that the accused person changed clothes or took a bath, no evidence was tendered that his clothes or body or both had traces of blood stains from the vicious injuries suffered by the deceased.
73. In the result, it is clear to me that no attempt was made by the prosecution to connect the accused person to the killing through evidence, except his earlier disagreement with his father, and the breaking of a neighbour's house windows and car windscreen, all using stones and not machettes, and the allegation that he chased his mother and sister with machettes or pangas.
74. In my view, the mere allegation that the accused person chased his mother and sister with machettes, does not connect him to this offence wherein the deceased was fatally cut with a sharp object severally.
75. In my view also, with the evidence on record about his state of mind and his restive behaviour that day, and the immediate cordoning or containing him in the locked room, it was not possible for him to take a shower or wash his clothes. Thus the police should have found out if his clothes or body had blood stains, which they did not do.
76. I thus find that the prosecution did not prove beyond any reasonable doubt that the accused person caused the death of the deceased by cutting him, on the circumstantial evidence on record. The result is that the prosecution failed to prove an important element of the offence charged against the accused person.
77. Was the death of the deceased herein caused with malice aforethought? Malice aforethought is defined under Section 206 of the *Penal Code*. In short, it is an intention to cause death or to do grievous bodily harm.
78. In my view, with the vicious cut injuries inflicted on the body of the deceased, it was obvious that death would occur anyway. I thus find that malice aforethought was proved beyond reasonable doubt.
79. To conclude, since I have found that the prosecution did not prove beyond reasonable doubt that the accused person inflicted the injuries which caused the death of the deceased, I find that the prosecution did not prove the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* against the accused herein. I thus find him not guilty and acquit the accused of the offence of murder charged herein accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE



In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Sirima for State

Mr. Mwazighe for accused

Accused

