**Republic v Emongiro (Criminal Case E034 of 2022)**
**[2024] KEHC 13137 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13137 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL CASE E034 OF 2022**

**RN NYAKUNDI, J**

**OCTOBER 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LUKE EMORU EMONGIRO ..... ACCUSED**

## JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are on the 4th day of November, 2022 at Kesses Centre in Kesses Sub-location, within Uasin Gishu County murdered Joseph Chila.

2. On being arraigned in court, the accused denied the charge and particulars of the offence necessitating the prosecution to disapprove his innocence to the contrary as provided for in Art. 50(2)(a) of the *Constitution*. At the conclusion of the prosecution's case, the accused was placed on his defence under Section 306 as read with section 307 of the *Criminal Procedure Code* to answer the charge of murder

3. The prosecution summoned the evidence of 7 witnesses to discharge the burden of proof of beyond reasonable doubt within the statutory framework of Section 107(1), 108 and 109 of the *Evidence Act*. The core elements to be proven by the prosecution for the court to make a finding of guilty include the following:

    a. That the deceased has died

    b. That his death was unlawfully caused

    c. That in causing death, the accused person was actuated with malice aforethought.

    d. That it was the accused person who committed the heinous crime.

**The summary of the prosecution's case:**

4. PW1 Evans Mwengu told the court that on the 4th November, 2022, on or about 10:00-10:40 PM, he was having a conversation with some of his friends when he met the deceased person armed with a panga and on inquiry he said it was for self-defense. According to PW1, they walked along together and in the course they met with Fidelis Ngetich who looked abit anxious and uneasy. Further PW1 testified that before he could arrive at the destination another person emerged and fearing for their life, he took flight for his own safety while screaming at the same time. He however managed to arrive at his homestead. He was only to learn later that the deceased person JOSEPH CHILLA had passed on from the injuries sustained during that night encounter.

5. PW2 Fidelis Kipkemboi Ngetich also on oath told the court that he recalled the events of 4th November, 2022 at around 10:30PM when he was travelling home, walking from behind PW1 and the deceased who were ahead of him but in close proximity. That is when a person emerged from the right side in a junction armed with a Jembe and on PW1 realizing the danger to his life, he took flight and the deceased also ran across for his own safety. According to PW2, in that confusion and at the spur of the moment, the person armed with a Jembe took a leap and hit the deceased person and on responding to that incident, he noticed that the victim had suffered physical injuries and needed help to be taken to the hospital. PW2 further told this court that he secured a motor vehicle at a nearby petrol station which he used to drop the victim who later became to the deceased at Kesses dispensary for treatment. The witness then left the victim at the hospital to undergo treatment as he returned the motor vehicle he had hired and on waking up the following day, he was informed that the deceased succumbed to death. In the same breadth, PW2 alluded to the chain of events of the material day of the 4th November, 2022; that he was able to identify the assailant as the accused person who was well known to him, prior to the commission of the offence. In cross examination by the defense counsel Mr. Kipsamo, PW2 reiterated that the whole incident was around plan B, which is a club selling alcoholic drinks. It is from that social evening, PW1 and the deceased were walking to their respective homes when the incident took place. He further told the court that from Plan B, the club to the scene of the attack was approximately 1KM. However, he clearly identified the assailant at a distance of around 20 meters while armed with a wooden Jembe handle, it was also the testimony of PW2 that along the surrounding there were street lights which assisted him to positively capture every detail surrounding the commission of the crime.

6. PW3 Elizabeth Chematia also a witness for the prosecution testified to the effect that on 4th November, 2022 she received information that his brother fought with someone and as a consequence of it, the victim suffered fatal injuries. She was later to be summoned to be one of the persons to participate in the identification of the body of the deceased during the post mortem examination.

7. PW4 Polycarp Lutta testified as the principal chemist based at Kisumu government forensic laboratory on the role he played in conducting scientific analysis of the following exhibits received on 15th November, 2022 from SGT Sofia Ibrahim of DCI-Langas: Blood sample from Joseph Chilla marked as "A" a wooden handle marked as "B", some loose soil in brown envelope marked as "C", a strained swab collected from the scene marked "D". According to PW4, SGT Sofia Ibrahim had requisitioned for a DNA profile match and on examination, he made the following findings; that the blood-stained wooden handle marked "b" soil item "c" and swab item "d" are identical and match the DNA profile of Joseph Chilla. The said government analyst report was marked as Exh 2(a) together with the exhibit memo marked as Exh. 2(b)

8. PW5 Naomi Wangeci who works also as a clinical officer with County referral hospital testified that on the 4th November, 2022 while on night shift, he attended to the deceased who had been brought in by

a good Samaritan. On observation, PW5 saw the victim oozing blood from the head and she decided that this was a referral case to Moi Teaching and Referral Hospital.

9. PW6 Dr. Erick Chesori a qualified pathologist told the court that on the 9th November, 2022 he carried out an autopsy on the body of Joseph Eyanae Chilla which revealed the following: that he had suffered injuries to the face, the head, the scalp, forearm, occipital region, subdural hematoma and intracranial. That from the said injuries he opined that the deceased's cause of death was severe head injury secondary to forced blunt trauma, secondary to assault. The post mortem report was produced as exh. 1 in support of the prosecution's case.

10. PW7 Police detective Ali Osman testified to the effect that following the murder incident which occurred on the 4th of November, 2022 he was asked to undertake investigation to establish culpability and collect evidence capable of mounting a prosecution against the suspects. In his testimony, he visited the scene of crime at Kesses and recovered the murder weapon being a wooden Jembe handle, participated during the post mortem examination at Moi Teaching and Referral Hospital and took the blood samples together with the alleged weapon used in the murder for DNA analysis at the government analyst Kisumu Branch. In accordance with the testimony of PW7 and recorded statements from witnesses and on account of the scientific evidence of the post mortem and the analyst report, he recommended the accused person to be prosecuted for the offence of murder contrary to section 203 of the *Penal Code*.

11. Given that background of evidence on the part of the prosecution, a *prima facie* case was established on the part of the accused who was placed on his defense, which he elected to give a sworn statement. The highlights of his defense were that he did not commit the offence as alleged by the prosecution witnesses. He was just arrested as a suspect by false allegation made by PW2, Fidelis Ngetich.

**Analysis and Determination**

12. The key elements to be proven by the prosecution based on the totality of the evidence are as reiterated elsewhere in this judgement. An important consideration at this stage is to evaluate the weight to be attached to the evidence by the prosecution and any rebuttal given by the accused person dependent upon the circumstances of this case. There must be unavoidably evidence to lead to a conclusion by this court that the accused person had committed the murder.

13. The standard and burden of proof in which the prosecution evidence is to be tested, falls within the ambit of the following principles which are now well settled as herein demonstrated in the cases of *Republic v Nyambura and four other* (2001) KLR 355, *Sekitoleko v Uganda* (1967) EA 531, *Msembe & another v Republic* (2003) KLR 521, *Mbuthia v Republic* (2010) 2 EA 311.

14. Similarly, in the case of *Republic v 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 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."

15. Similarly, 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 requires 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....."

16. In *Republic v Ismail Husseni Ibrahim* (2016) eKLR the court on burden of proof in criminal cases stated that:

> "To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of *United States v Smith*, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing *in Re Winship*, 397 U.S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:
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>> "The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable diubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

17. In correlating the facts and evidence from both the prosecution and the defense, the primary issue to be answered by this court is how did the prosecution fair in proving the guilt of the accused person?

**The first element; the death of the deceased**

18. In the instant case, there is no dispute from the prosecution witnesses including the post mortem report produced as Exh. 1 dated 9th November, 2022 that the death of the deceased occurred on 4th November, 2022 while undergoing treatment at Moi Teaching and Referral Hospital. According to the post mortem report, a death certificate No 0324683 is prima facie evidence that the deceased succumbed to death following the injuries sustained on the material day of the offence. In terms of criminal law, the prosecution has established this element beyond reasonable doubt.

**Whether the deceased died from unlawful acts of omission and commission allegedly committed by the accused person.**

19. The starting point on causation of death accrues from Section 213 of the *Penal Code*. The provisions of section 213 of the *Penal Code* which defines causing death to include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;

    a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;

    b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;

    c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;

    d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and

    e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

20. In the case of *R v Gusambisi s/o Wesonga* (1948)15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable, or it falls within the exceptions in sections 17, 207 and 208 of the *Penal Code*. In the instant case, the court supported findings from the evidence of PW1 and PW2 as corroborated by the post mortem report produced as Exh. 1 are that the injuries to the head are the operating and substantial cause of the death of the deceased at the time when he was confirmed dead while undergoing treatment at Moi Teaching and Referral Hospital. As explained by PW2, the real cause of death was when the accused person hit the deceased on the head and those injuries inflicted as the accused walked away, rendered him incapable of escaping from the ultimate outcome of succumbing to death with remote chances of survival. There is no room for dispute that the assault administered at that scene by an accused person emerged armed with a wooden handle and targeting the head which led to the deceased person becoming unconscious played a causative part in his death as confirmed by the autopsy report dated 9th November, 2022. Consequently, the element of the murder as having been unlawfully caused has been proven beyond reasonable doubt.

21. Thirdly, whether in the accused committing the offence, there was malice aforethought as defined under Section 206 of the *Penal Code*. It defines Malice aforethought as follows:

    > " 206. Malice aforethought shall be deemed to be established by evidence proving any one 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 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."

22. The Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR, the Court of Appeal held as follows:

> "Before an 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 subject;
>
> i) The intention to cause death;
>
> ii) The intention to cause grievous bodily harm;
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> 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 consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed....."

23. Two contentions advanced by the prosecution from the single identifying witness PW2 are that, he emerged from the junction armed with a wooden handle which he manipulated by targeting the vulnerable parts of the body as identified by the autopsy report as being the head and inflicting intensive injuries which not only fractured the skeletal frontal but also bilateral and left side temporal, occasioning massive hemorrhage. As a result of the examination, the pathologist opined that the cause of death was severe head injury secondary to blunt force trauma, conclusively identified as having accrued from use of excessive force by the assailant. In assessing the reliance to be placed on the evidence of PW2, it must be emphasized that despite lack of the identification parade, this was a person known to him prior to the commission of the offence. There is absolutely nothing to suggest that in recognizing the accused, there was error or mistake on that identification evidence.

24. The guidelines are as postulated in the case of *Abdullah Bin Wendo v Republic* (1953) EACA 166, *Roria v Republic* (1967) EA 583 and finally in *Maitanyi v Republic* (1986) 1 KAR 75. The principle set out in those cases is trite law but it can bear repetition: -

> "Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing out to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

25. Moreover, in this case it has got to be borne in mind that the wooden Jembe handle recovered at the scene with blood stains was subjected to a forensic analysis at the Government Chemist laboratories

in Kisumu in which PW4 confirmed that the stains matched the blood sample of the deceased Joseph Chilla. In my view, the evidence of PW2 as corroborated by the forensic evidence on the DNA profile of Pw4 has not been

26. controverted by any defense testimony given by the accused person.

27. This therefore was a case of murder proven beyond reasonable doubt to make a finding of guilty and conviction against the accused person contrary to Section 203 as punishable under Section 204 of the *Penal Code*.

**Verdict On Sentence**

28.

1. The accused in this case has been convicted of murder contrary to section 203 and as punishable under Section 204 of the *Penal Code*. This court conducted a mini trial to take submissions from the accused person for purposes of imposing an appropriate sentence. The Learned Prosecution Counsel submitted on the aggravating factors whereas Learned Counsel Mr. Kipsamo filed his mitigation submissions dated 16th October, 2024. According to learned counsel, the accused person is from a humble background and he has been doing menial work to earn a living before he was charged and he is a person of good character. It was a further submission by counsel that the accused person is a first time offender and urged the court not to impose a maximum penalty. That the accused is a young person with a bright future ahead and he has been suffering from ill health. That the victim had threatened to kill him and a panga belonging to the deceased was recovered from the scene. It is instructive in this case to recollect the footsteps for the accused person; he was accused and now convicted of inflicting fatal injuries on the deceased person on 4th November, 2022 at Kesses Centre in Kesses Sub-location, within Uasin Gishu County. According to the autopsy report, the injuries were inflicted on the head occasioning intensive injuries which not only fractured the skeletal frontal but also bilateral and left side temporal, occasioning massive hemorrhage. I must admit that throughout the trial, sentencing is the most difficult part which involves reviewing the facts and evidence of the case and invoking the sentencing methodology to pass a sentence for society to conclude that justice has been done and served to this individual case. The instinctive synthesis takes shape in view of the specific facts of a particular case and to structure a sentence, which means the criterion of sentencing objectives and principles. Fixing the bounds of a range within which a sentence in a particular face should follow is not a mathematical exercise but one which a trial judge has to balance the many different and conflicting features to break them down into some set of component to arrive at a just and proportionate sentence of the offence. It also follows that the trial judge in sentencing an offender without necessarily knowing he/she draws from his professional experience, intuition and both subjective and objective judgment to arrive at a fixed term of custodial or non-custodial sentence. I think that is the reason the Supreme Court rules that a trial judge must be afforded a significant margin of sentencing in discretion.

2. The provisions of Section 204 of the *Penal Code* provide for a death sentence for the offence of murder. However, in the case of *Francis Muruatetu v Republic* (2017) eKLR, factors were identified on sentencing an offender found culpable under Section 203 of the *Penal Code*. The applicable factors include:

    a. Age of the offender

    b. Being a first offender

c. Whether the offender pleaded guilty

d. Character and record of the offender

e. Commission of the offence in response to gender-based violence

f. Remorsefulness of the offender

g. The possibility of reform and social re-adaptation of the offender

h. Any other factor that the court considers relevant.

3. In *Veen v The Queen (No 2)* (1987-88) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson & Toohey JJ – High Court of Australia stated that:

> "However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of a criminal punishment are various: Protection of Society, deterrence of the offender an of others who might be tempted to offend, retribution and reform. The purposes overlap and none of the can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. they are guideposts to the appropriate sentence but sometimes they point in different directions."

4. Having assessed the mitigation and aggravating factors in this case there is no doubt given the seriousness of the offence, that this was committed negligently, recklessly and all intentionally with the sole intention of causing death or grievous harm to the victim.

5. It is also well at this state to lay down the sentencing policy guidelines which comprises of the objectives and principles to concretize sentencing in the criminal courts. Thus in the accused's case, the balance of mitigating factors with the aggravating factors is not reflective of compelling and exceptional circumstances in which this court might apply to reduce the final verdict against the offender.

6. Following this staged approach to sentencing guidelines, it is in my judgment that the accused person be imprisoned to 15 years with a residual enhanced credit under Section 333(2) of the Penal Code with effect from 14th November, 2022.

7. 14 days right of appeal.

**DATED AND SIGNED AT ELDORET THIS 30TH DAY OF OCTOBER, 2024**

**R. NYAKUNDI**

**JUDGE**