



**Republic v Amboko (Criminal Case 36 of 2021)
[2024] KEHC 14916 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 36 OF 2021
JN KAMAU, J
NOVEMBER 26, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PAUL OTEMO AMBOKO ACCUSED

JUDGMENT

Introduction

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 21st day of March 2021 at Emanyoya village, Ebusikhale Sub-Location within Luanda Sub-County murdered Richard Osilu Nyandoya.”
2. The Prosecution’s case was heard on diverse dates between 19th October 2022 and 18th April 2023 when it closed its case. The matter was previously handled by P.J Otieno J. The Learned Judge took the evidence of Josephine Andeso (hereinafter referred to as “PW 1”), Jackson Nyadoya (hereinafter referred to as “PW 2”) and No 67638 Corporal Francis Matheka (hereinafter referred to as “PW 3”).
3. This court took over the matter on 18th April 2023 and parties asked it to proceed from where the matter had reached. It took the evidence of Leonora Afande Nyandaya (hereinafter referred to as “PW 4”).
4. On 15th June 2023, it found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. His defence case was heard on 19th March 2024.



5. The Prosecution's Written Submissions were dated and filed on 19th April 2024 while those of the Accused person were dated and filed on 26th April 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Richard Osilu Nyandoya (hereinafter referred to as the "deceased") died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased's death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof of Death of the Deceased

8. The Prosecution submitted that it was not in doubt that the deceased died. The Accused person did not submit on this issue but alluded to his death. As both the Prosecution and Defence witnesses were in agreement that the deceased died, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

II. Proof of Cause of the Deceased's Death

9. The cause of the deceased's death was a pertinent issue. The Accused person did not submit on the question of proof of the deceased's death. On the other hand, the Prosecution submitted that PW 4 (sic) produced an autopsy report which confirmed the deceased's death.
10. PW 3 tendered in evidence a Post mortem Report dated 26th March 2021 in respect of the deceased herein. The attendance of the Pathologist was dispensed with during the Case Conference that was held on 19th July 2022. It was agreed by consent of the parties that PW 3 would produce the said Post mortem Report as an exhibit in this case. According to the said Post mortem Report, the Pathologist formed an opinion that the cause of the deceased's death was penetrating head injury due to sharp force trauma following assault.
11. It was therefore clear that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

III. Identification of the Perpetrator Of Deceased's Death

12. The Accused person did not deny having had an altercation with the deceased on the material date of 21st March 2021. However, he denied having injured, beat and/or killed him. However, in his Written Submissions, he admitted that he cut the deceased with a panga in his defence as he (deceased) was the one who first attacked him with the panga.
13. On its part, the Prosecution submitted that it had linked the Accused person to the murder by establishing that his unlawful act with malice aforethought had led to the death of the deceased.



14. The Accused person's testimony was that on the material date of 21st March 2021, he returned home from work and went to the bar at PW 1's home to have drinks. He found the deceased at the bar and a quarrel ensued between them. The deceased left and came back with a panga. As he left the bar, he met the deceased holding a panga. He grabbed it and ran away. He went home and slept. He stated that he did not know what happened thereafter. His evidence was that he was not very drunk at the material time.
15. PW 1 testified that on the material day she, the deceased and their mother were at the home of their brother, one Josam Amoli. The Accused person came and cut their mother with a panga. He then touched PW 1 on the breast. Her mother told him not to do it. He then removed a panga from his trouser and cut the deceased on the head once and fled. The next day the deceased was taken to the hospital. He, however, succumbed to his injuries before receiving treatment as they were unable to get transport to take him to hospital.
16. PW 2 testified that at about 10.00 pm, he was asleep in his house when the deceased came to him asking for a weapon. He went out and found him bleeding from the back of his head. The deceased told him that he had been cut by the Accused person. He also stated that they waited until morning to take him to hospital because they could not get any transport to take him.
17. PW 3 was the Investigating Officer. His evidence corroborated that of PW 1 and PW 2. He added that after the incident, villagers burnt the Accused person's house. The Accused person ran to the Police Station at Maseno where he reported that he had killed.
18. PW 3 attended the Post mortem examination of the deceased. He took a piece of the deceased's nail and the Accused person's blood-stained shirt and T-shirt for DNA analysis at the Government Chemist. He received a Report from the said Government Chemist on 9th June 2021 which indicated that the DNA generated from the blood-stained shirt and T-shirt of the Accused person matched the DNA profile of the deceased. He produced the said Report dated 9th June 2021 as exhibit in this case. The Accused person did not object to him producing the said Government Analyst Report.
19. PW 4 testified that she was the deceased's sister. She stated that on the material day, she was in her house preparing supper when she heard noises from outside. When she went to check what was happening, she found the Accused person quarrelling with the deceased. She informed the court that she saw the Accused person remove a panga from his trouser and cut the deceased on the head. She added that she was able to witness the incident as there was enough light from the solar lighting in the house.
20. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 4 saw the Accused person cut the deceased on the head with a panga that he was carrying at the material time and date. PW 2 saw him bleeding from the back of his head.
21. PW 1, PW 2 and PW 4 saw the Accused person on that material night and hence placed him at the scene of crime. Although the incident happened at night, there was sufficient light that was favourable for his positive identification from the paraffin lamp in PW 1's house and solar lighting from PW 4's house. They were neighbours and knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition.
22. This court was thus persuaded to find and hold that PW 1, PW 2 and PW 4 positively identified the Accused person as having been the person who cut the deceased on the head on that material date.
23. The Accused person did not demonstrate that there was any motive for PW 1, PW 2 and PW 4 to have colluded to frame him as the person who unlawfully caused the deceased's death on that material date.



24. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find his evidence to have been watertight enough to have weakened the inference of guilt on his part.
25. Consequently, it was this court's finding that the Accused person's defence was mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3 and PW 4.

IV. Malice Aforethought

26. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.
27. He submitted that there was no proof of malice aforethought on his part as he was only trying to defend himself from being cut by the deceased. He pointed out that he had a bad relationship with the deceased as PW 2, the deceased's father, had warned him over having an affair with PW 1 and had even slapped him at one time. He was categorical that it was the quarrel that ensued between him and the deceased that triggered the incident.
28. He was emphatic that he only acted in self-defence and did not intend to kill the deceased. In this regard, he relied on the case of *Palmer vs Republic (1971) AC 814* where the court held that it was both good law and good sense that a man who is attacked may defend himself but only do what is reasonably necessary.
29. On its part, the Prosecution placed reliance on the case of *Nzuki vs Republic (1993) KLR 171* where it was held that malice aforethought was drawn from the actions of a person such as intention to cause harm, grievous bodily harm, commit a felony and where there was a risk that death or grievous harm would ensue from his acts and commits them without lawful excuse.
30. It was its case that it had established malice aforethought on the part of the Accused person due to the injuries occasioned on the deceased and the fact that the Accused person arrived at the scene while armed.
31. This court had due regard to the case of *Morris Aluoch vs Republic [1997] eKLR* which cited the case of *Rex vs Tubere s/o Ochen [1945] 12 EACA 63* where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted. It was further held that in determining existence or non-existence of malice, one had to look at the facts proving the weapon used, the manner in which it was used and part of the body injured.
32. Section 206 of the Penal Code provides the definition of malice aforethought and it reads as follows:-

“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.”



33. The ingredient of malice aforethought could therefore be express or implied. It could be deemed to have been established by evidence which proved an intention to cause death of or to do grievous harm to any person, whether that person was actually killed or not.
34. The evidence showed that the Accused person cut the deceased on the head. The deep cut from the panga could only have been intended to kill the deceased. A perusal of the Post mortem Report indicated that the deceased had an oblique cut wound on the scalp measuring 6 x 0.3 cm. This was evident that he suffered greatly before he died.
35. This court was thus persuaded to find and hold that the injuries the deceased sustained could not be said to have been bereft of malice aforethought on the part of the Accused person. It was clear that he had intended to cause the deceased harm which led to his death.
36. The Prosecution presented cogent evidence to prove that the Accused person intended to do grievous harm to the deceased. The serious injuries that the deceased sustained was proof that he had knowledge that the act or omission would probably cause the deceased's death or grievous harm which were ingredients of malice aforethought. It was immaterial that the Accused person had a bad relationship with the deceased and that his father had warned him against having a relationship with PW 1.
37. Having analysed the evidence that was adduced by both the Prosecution and the Accused person, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt, that the act of unlawful killing of the deceased herein was by the Accused person herein. The same was with malice aforethought and the ingredients that had been set out in Section 203 of the Penal Code had been proven:-
 - a. Proof of the deceased's death
 - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
 - c. Proof of malice aforethought in the unlawful actions and/or omissions.

Disposition

38. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

