



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mili (Criminal Case 38 of 2021)  
[2024] KEHC 14858 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE 38 OF 2021**

**JN KAMAU, J**

**NOVEMBER 26, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MELIKIZEDEKI JIMWA LABAN ALIAS MILI ..... 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 8<sup>th</sup> day of June 2019 at around 18.00p.m at Gunguvuni village, Wodanga Location in Sabatia Sub-County within Vihiga County murdered Jenifer Mbone.”
2. The Prosecution’s case was heard on diverse dates between 18<sup>th</sup> October 2022 and 22<sup>nd</sup> February 2023 when it closed its case. The matter was previously handled by Musyoka J. and P.J Otieno JJ. P.J Otieno took the evidence of Valerie Lunayo (hereinafter referred to as “PW 1”), Beverline Muhonja (hereinafter referred to as “PW 2”), Laban Mkala (hereinafter referred to as “PW 3”) and No 110868 PC Peter Ngumbi (hereinafter referred to as “PW 4”).
3. On 23<sup>rd</sup> February 2023, P.J Otieno J. found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence.
4. This court took seize of this matter on 25<sup>th</sup> July 2023 where parties indicated that they wished to proceed with the matter from where it had reached. The defence case was heard on 19<sup>th</sup> March 2024. This court therefore took the evidence of the Accused person. He did not call any witnesses.



5. The Prosecution's Written Submissions were dated and filed on 8<sup>th</sup> April 2024 while those of the Accused person were dated and filed on 24<sup>th</sup> 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 Jenifer Mbone (hereinafter referred to as the "deceased") died?
  - b. If so, was her 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. Notably, the Prosecution submitted that it was not in dispute that the deceased was dead. On the other hand, the Accused person did not submit on this issue but referred to her death. As both the Prosecution and Defence witnesses alluded to her death, 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 produced an autopsy report which confirmed her death.
10. PW 4 tendered a Post mortem Report dated 12<sup>th</sup> June 2019 in respect of the deceased herein as an exhibit in this matter. After conducting the post mortem examination, the Pathologist had formed an opinion that the cause of death was epidural and subdural haematoma secondary to blunt and sharp force trauma due to assault.
11. It was therefore clear from his evidence 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 her death.

#### **III. Identification of the perpetrator of deceased's death**

12. The Accused person completely denied having been with the deceased on the material day of 8<sup>th</sup> June 2019. He raised an alibi defence and denied having been at his mother's house on the material date.
13. He submitted that PW 1, PW3 and PW 5(sic) did not see him commit the alleged offence and that PW 1 relied on the information she was given by PW 2. He added that PW 1 did not say that she found him at the scene of the crime. He pointed out that PW 3 did not establish the circumstances that led to the offence as he did not reach at the scene of crime but that he found the deceased away from the homestead with PW 1 and PW 2 and he proceeded to take her to hospital. He argued that the Prosecution evidence was obtained in a manner that would render the trial unfair if this court relied on the same.



14. He invoked Article 50(4) of *the Constitution* of Kenya, 2010 and argued that as PW 1, PW 3 and PW 5's (sic) evidence was hearsay and that the same should not be admitted herein. He reproduced the evidence of PW 2 and contended that none of the witnesses stated that he had previously engaged in a quarrel with the deceased that provoked him to cut her and cause her death.
15. He further contended that as he had testified that on the material day he was not at home, then it was upon the Prosecution to prove that he committed the offence. He was categorical that he had a good relationship with the deceased and had no reason to have injured her. To buttress his point, he relied on Section 109 of the *Evidence Act*.
16. He questioned why the incident was not reported immediately as PW 4 stated that he got the report on 11<sup>th</sup> June 2019. It was his case that the Prosecution had not proven its case beyond reasonable doubt. In that regard, he placed reliance on the case of Pius Arap Maina vs Republic (2013) KLR where it was held that the prosecution must prove a criminal charge beyond any reasonable doubts. He urged the court to withdraw the charge against him and acquit him.
17. On its part, the Prosecution reproduced the evidence of PW 2 and submitted that it was clear from the evidence of its witnesses that the Accused person inflicted injuries on the deceased which led to her death.
18. The Accused person's testimony was that on the material day of 8<sup>th</sup> June 2019, he was at his work place in Kakamega. He had spoken to his mother, the deceased on 14<sup>th</sup> February 2019 through a phone call and had agreed to meet physically to talk about how he could get a partner and/or wife. On 16<sup>th</sup> February 2019, he was given permission from work to go and see the deceased. When they met, the deceased told him that she knew of a girl who had one (1) child, a daughter to her friend whom they worshipped together in church who could make a good wife. He told her that he would meet the said girl in July 2019. They also talked about the harvesting of maize that was ongoing at the time and the intended construction of his house.
19. He stated that he returned to Kakamega the same day. He pointed out that after two (2) weeks his phone fell and got damaged when he was working in a construction site. He averred that he was therefore not able to communicate with the deceased.
20. He was arrested on 16<sup>th</sup> June 2019, taken to Kakamega Police Station and charged with the offence of murder. In his cross-examination, he was emphatic that he was not at home on the material day. He stated that he could not trace anyone who was working with him on the said date to come and testify and corroborate his alibi evidence.
21. In the Black's Law Dictionary, 10<sup>th</sup> Edition, alibi is defined as "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
22. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The East Africa Court of Appeal came to a similar conclusion in the case of Republic vs Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145.
23. It is also trite law that once a respondent raises an alibi defence, the onus shifts to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.



24. In this case this court noted that defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-
- “If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
25. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the alibi evidence of the Accused person to have been watertight enough to have weakened the inference of guilt on his part.
26. PW 1 testified that the Accused person was her elder brother while the deceased was her biological mother. She stated that on the material of 8<sup>th</sup> June 2019 at about 6.00pm she was in the kitchen cooking when she heard her sister, PW 2 shouting and wailing. When she went to see what was happening, she found the deceased down on the ground, outside of the house but within the compound and bleeding from the head. She had a cut on the head and the cheek. PW 1 assisted her to wake up and walked up to the road. The deceased was able to talk and she told her that it was the Accused person who had cut her. While she helped the deceased, PW 2 called their father, PW 3 who joined them and they took the deceased to hospital.
27. She further stated that the Accused person disappeared and that she was seeing him for the first time in court. She added that where she found the deceased lying, there was a panga which she handed over to the police. In her cross-examination, she pointed out that she later got news that the deceased had died. She did not know the motive for the attack. She added that at that time, the deceased had brought a lady in the home that the Accused person had married.
28. PW 2 testified that she was a sister to the Accused person. She stated that on the material day, she was at home outside the house and the deceased was looking after a calf when the Accused person came and entered his house before emerging and going to where the deceased was. She told the court that the Accused person then took a panga from the house, went to where the deceased was and they talked although in a low tone. She suddenly heard a sound like a panga cut and when she looked their direction, she saw the Accused person cut the deceased for a second time. The deceased fell down and he put the panga down and walked away. She assisted the deceased to get to the road together with PW 1 and PW 3 took her to hospital. She said that the deceased died in hospital after two (2) nights. She added that by the time the police took the panga it had rust and blood stains.
29. PW 3 testified that he was the husband to the deceased and the Accused person’s father. He stated that on the material day at about 6.00p.m, he was at the centre at Ngungurami when he received a call from PW 2 vide the deceased’s phone, informing him to rush home because the deceased had been cut. On his way home, she met the deceased being held by PW 1 and PW 2 as they supported her to walk. When the deceased saw him, she cried bitterly telling him that the Accused person had killed her by cutting her with a panga. He pointed out that he did not know the motive behind the attack but that on the material day he left the Accused person at home.
30. PW 4 was the investigating officer herein. He reiterated the evidence of PW 1, PW 2 and PW 3. He produced the panga and the Postmortem Report as exhibits in this case.
31. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 2 saw the Accused person cut the deceased on the head with a panga on the material date. PW 1 saw her bleeding from the head and added that she had a cut on the head and cheek. PW 1 and



- PW 2 saw the crude weapon the Accused person was carrying at the material time. PW 1 and PW 3 pointed out that the deceased told them that it was the Accused person that had cut her on the head with a panga.
32. PW 1, PW 2 and PW 3 were Accused person's siblings and father respectively. PW 1 and PW 2 placed the Accused person at the scene of crime. They each spent sufficient time at the scene where the Accused person had attacked the deceased at the material time. The incident happened during daytime when there was sufficient light that was favourable for the positive identification of the Accused person. This could not have been a case of mistaken identity.
  33. This court was thus persuaded to find and hold that PW 1, PW 2 and PW 3 positively identified the Accused person as having been the person who cut the deceased on the head on that material date. Identification was by way of recognition.
  34. The Accused person did not demonstrate that there was any motive for PW 1, PW 2 and PW 3 to have colluded to frame him as the person who unlawfully caused the deceased's death on that material date.
  35. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find his alibi evidence to have been watertight enough to have weakened the inference of guilt on his part.
  36. 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**

37. 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. He did not submit on this issue.
38. 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.
39. 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.
40. 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.
41. 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.”
42. The ingredient of malice aforethought can therefore be express or implied. It can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.
43. The evidence showed that the Accused person cut the deceased on the head. PW 2 saw him bleeding from the head. The seriousness of the injuries that he sustained was confirmed by the Post mortem Report. A perusal of the Report indicated that the deceased had a sutured wound on right parietal region with another linear sutured wound on the left jaw, epidural and subdural haematoma noted below the fracture site. This was evident that she suffered greatly before she died. The deep cut from a panga could only have been intended to kill her.
44. This court was thus persuaded 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 her death.
45. 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.
46. The Prosecution presented cogent evidence to suggest 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.

## **DISPOSITION**

47. 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).
48. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF NOVEMBER 2024**

**J. KAMAU**

**JUDGE**

