



REPUBLIC OF KENYA



**Republic v Mwambala (Criminal Case 57 of 2018)
[2023] KEHC 526 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 57 OF 2018**

**A. ONG'INJO, J
JANUARY 31, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ABBAS ABDALLA MWAMBALA ACCUSED

JUDGMENT

1. The accused person Abbas Abdalla Mwambala is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya.
2. Particulars are that the accused person Abbas Abdalla Mwambala on December 3, 2018 at Ng'ombeni location in Matuga sub county within Kwale county murdered Suleiman Rashid Basho.

Prosecution Case

3. PW1, Ali Athumani Kumala stated that on December 3, 2018 at around 7.00 pm, he was at home at Genyenye Maitho with his mother Mwanaisha Athumani and Mwanahamisi Athumani at the verandah of their house having dinner. He stated that he heard some noise of a person praying in arabic near the house and established that the noise was being made by Suleiman Rashid. PW1 stated that Rashid went up to the house, fell down and told them to call his family members. That Rashid was holding the left side of his stomach of which PW1 saw blood stains. That Suleiman told him, his sister and mother that he was fighting with Abbas who overpowered and stabbed him with a knife. PW1 stated that he went to call Suleiman's family members who included Ayub and Salim Mpasho, his uncle Maanzu, and a neighbor Mzee Joho whom Suleiman told that he had been stabbed by Abbas. PW1 stated that he knew Abbas Abdalla as he was his cousin and neighbor while Suleiman Rashid was his uncle. PW1 stated that Suleiman was not in a good state so they looked for a vehicle and his brothers took him to hospital. That at around 9.00 or 10.00 pm, they were called and informed that he had died. PW1 stated that the deceased was buried the following day but he does not know the cause



- of the disagreement that arose between Suleiman Rashid and Abdalla. PW1 identified Abdalla as the accused in court.
4. PW2, Amina Salim Ubao, stated that on December 3, 2018 at 6.30 pm, he was at home preparing food for dinner. That her husband Suleiman Rashid Basho had come from the mosque and told her that he was taking milk to a man called Babji. She stated that it takes about 10-15 minutes to reach the house. That after about 30 minutes, Ali Athumani (PW1) went and told her that her husband had fallen outside their house and he had asked for his family members to take him to hospital. She stated that she left her house and went with her neighbours and her husband's brothers to PW1's house. She stated that PW1 told them that her husband had been stabbed and she found her husband lying outside on the verandah of PW1's house, a lesso had been tied around his waist and blood was gushing out of his stomach. PW2 stated that she asked her husband what had happened and he told her that Abbas Abdalla Mwambala had stabbed him with a knife in the stomach, close to a bush near PW1's house. PW2 stated that there was a dispute over land between Ali (brother to Abbas) and her husband. PW2 identified Abbas Abdalla as the accused in court. That at one time, the accused person tried to strangle her 15-year-old son until he urinated on himself and that there was a time when Ali tried to shoot the deceased with an arrow. She stated that the family of the accused person is the one that had a grudge against them. PW2 stated that Ali kept saying for all to hear that they had killed her husband and that they would go for her. That PW2 had to shift to Ukunda due to threats from Ali. That 3 days before the deceased was killed, the deceased told her that at the same place where he was stabbed, he saw Abbas Abdalla and his elder brother Ali in the bush by the path but the deceased turned back. PW2 stated that her husband was taken to Manyatta health centre and later on the same day, he was taken to Msambweni district hospital where he died. That after 3 days, they received a call from Kinango police station informing them that the accused person had gone to the said police station. PW2 stated that the land dispute between the deceased and Ali was about a coconut tree outside the deceased's house. That Ali's child climbed the tree and the deceased ordered him to get down. That Ali was with the child when he was told to get down. That Ali went and slapped the deceased, and he went and got a bow and an arrow and shot at the deceased but missed him. That the land where the coconut tree was belonged to the deceased's father. That Ali did not want the disagreement between him and the deceased to be resolved by elders and he kept on saying that he would kill the deceased.
 5. PW3, Ayub Rashid Mwambala stated that the deceased was his elder brother and the accused is his brother's son. PW3 identified the accused in the dock. He stated that on December 3, 2018 at about 6.00 pm, he received a phone call that the deceased had been stabbed. That he proceeded to the scene and found the deceased had been taken to hospital. That prior to the incident, the elder brother to the accused by the name Ali Abdalla went to Suleiman's home to harvest coconut as they were staying on one plot. That a dispute arose over a palm tree when Ali told his son to climb the palm tree to harvest coconut and when he tried, Suleiman restrained him. That Ali started fighting Suleiman and Suleiman's wife raised an alarm. PW3 went and found Suleiman and Ali struggling with each other and that he separated them. PW3 stated that Ali ran to his house and returned with a bow and 3 arrow and PW3 told Suleiman to run into the house. That Ali shot an arrow which struck Suleiman's door. PW3 stated that while they were inside the house, Ali went round the house while uttering insults and claiming that his father had rights over the land and he cannot be stopped from harvesting the coconut. PW3 stated that when Ali was unable to enter the house, he went away saying that he was going to get a panga to cut the door. That when he left, they got an opportunity to escape and they went to the GSU camp where they reported and the GSU officers accompanied them back home.
 6. PW3 further stated that on December 3, 2018 when he followed his brother to hospital, he found he had been stabbed on the abdomen, he could not speak well, he was bleeding profusely, he could not go on talking to him as he had difficulties breathing. PW3 stated that Suleiman told him that Abbas



Abdalla had stabbed him. That when he got to Likoni hospital, the doctor was not there but they went to a private hospital where they were referred to Msambweni hospital as they could not handle the injury. However, while on the way to Msambweni, the deceased died. PW3 stated that when they got to Msambweni, the deceased was confirmed dead and the body taken to the mortuary. He stated that they reported at Kombani police post and the next day they were referred to Kwale police station where they reported and were given a letter to go and have a post mortem done before the body could be released for burial. PW3 stated that he took the letter to Msambweni and a police officer accompanied them for post mortem. PW3 stated that he identified the body for post mortem MFI – P1. He stated that there was a dispute between Ali and the deceased which Abbas joined in saying he could not allow his brother to be oppressed as they had rights over the land. He stated that he has no reasons to fabricate the accused.

7. PW4, Manzu Abdalla Mwamakoko stated that the deceased Suleiman is his uncle and Abbas Mwambala Abdalla is the son to his uncle. He stated that on December 3, 2018 at about 6.00 pm, he received a phone call from Suleiman who told him that he should rush to where he was as he had been attacked and stabbed. That he told him that he was in Mwembe Buda and Suleiman wanted PW4 to take him to hospital. That when he arrived, Suleiman told him that Abbas had stabbed him and told him that was his last day and that he should say his last prayers. That Abbas attacked the deceased and fell him down and stabbed him then Abbas ran away. That Suleiman ran for help into Ali Athman's house. PW4 stated that he took Suleiman to Likoni and later to Msambweni but Suleiman died on the way to hospital. That they recorded statements at Kwale where they were given a letter to go to Msambweni police for escort to the mortuary for post mortem. PW4 stated that he was with Ijumaa and Ayub when they went for post mortem.
8. PW5, Salim Rashid Basho stated that Abbas Abdalla Mwambala is known to him since he was born. He stated that he is his eldest uncle and identified Abbas as the accused in the dock. He stated that Suleiman Rashid Basho was his younger brother and was staying in PW5's parent's home. He stated that on December 3, 2018 at around 7.00 pm, he was at home when Ali Athmani a neighbour went and told him that Suleiman needed him as he had been stabbed by Abbas. PW5 stated that he found Suleiman had been made to lie down in Ali Athman's. That Suleiman told him that he had come from selling milk when Abbas ambushed him and told him that one of them was to die. He stated that Suleiman was overpowered by Abbas who stabbed and injured him. He stated that Suleiman was lying facing down and the cloth used to tie his wound was blood stained. He stated that they arranged to take Suleiman to hospital but before they did so, they reported to the chief. He stated that Suleiman died on the way to hospital and that when they got a report that Suleiman had died, they met and made arrangements for burial the next day.
9. PW6, Mwinyikai Hamisi Selewa stated that he is the chairman in Zibania central village in Ng'ombeni location, Kwale county. He stated that he received a phone call from his son on Monday and was told that Suleiman and Abbas who were well known to him had fought. He stated that Suleiman was his brother's son and Abbas is his grandson. PW6 identified Abbas as the accused in court. He stated that he was informed that Suleiman had died in hospital and burial was to take place the next day on Tuesday. PW6 stated that on Wednesday, he received a phone call to go to Kwale police station where he was interrogated and he confirmed that the portion of land in dispute did not belong to him. He stated that he was also asked whether he knew Manzu and the lady who administered first aid to the deceased and he confirmed. PW6 stated that he was then told that the two were required to record statements and PW6 assisted the police to get the two people.
10. PW7, No 81081 CPL John Kuria stated that on December 4, 2018, at about 10.00 am, he was in the office when his boss informed him that there was a murder incident in Ng'ombeni area. PW7 stated



that he met the complainants who were brothers and family members/relatives of the deceased. He stated that the deceased was known as Suleiman Rashid Basho. That he interrogated the relatives who said that the death occurred on December 3, 2018 in the evening at around 7.00 pm. That they also informed him that they wanted to bury the deceased. PW7 stated that investigations commenced and he recorded statements of witnesses. He stated that he visited the scene on a foot path in a thicket. He stated that he also visited a neighbour known as Ali Athman and learnt that the deceased ran for help at Ali Athman's home. That on December 5, 2018, the suspect was escorted from Kinango police station to Kwale police station. That the accused had escaped from Ng'ombeni to his uncle's place from where he was escorted to Kinango police station. That the accused and his brothers, father and brothers to his father had long standing land usage dispute. That the deceased was a paternal uncle to the accused. PW7 stated that during investigations, he learnt that the accused had resolved to injure the deceased. That he armed himself with a dangerous weapon, ambushed the deceased in a bush and stabbed him. That after investigations, PW7 preferred charges against the accused.

11. PW8, Dr Enzi Hassan Mwachane stated that he was in court to represent Dr Kalicha Jilo, the doctor who performed postmortem on the body of Suleiman Rashid Basho. He stated that the postmortem was conducted on December 4, 2018 and that Dr Kalicha Jilo was known to him and that he was able to identify his signature and handwriting. PW8 stated that the body was identified by Ayub Rashid Mwambala and Manzu Abdalla Mwamakoko. He stated that the deceased died on December 3, 2018 at 6.30 pm on the way to the hospital and the deceased was stabbed on the stomach. That according to the postmortem report, the body was of a male african. That clothes were brown shirt and light blue tracksuit that was blood stained. He stated that the deceased was 46 years old. Nutrition status and physique were normal. Height was 150.8 cm, postmortem changes - rigor mortis stiffness, external appearance - penetrating abdominal injury and there was gut evisceration, respiratory system – no injuries, cardiovascular – normal, abdominal injury – stab, head- normal, nervous system – normal, and spinal code and column – normal. PW8 stated that the cause of death was penetrating abdominal injury, and produced the report as ExP1.

Defence Case

12. The accused, Abbas Abdalla Mwambala gave a sworn statement and stated that on December 3, 2018, he left home and went to work until evening and at 7.00 pm, he went to the shop and bought some stuff such as flour and sugar among others. He stated that on the way home, at a thicket, he met some people who attacked him and he was able to identify Ayub Rashid Mwambala, Mwalimu Manzu Mwamakoko and Salim Hamisi Mwambala. That when he met the three, they attacked him and started beating him and said that they were revenging. That they emerged from the thicket and used rungus and stones to beat him. That Salim Hamisi had a knife and Mwalimu Manzo told him to stab the accused. The accused stated that he decided to escape and went to report. That he heard that Suleiman Rashid Basho had been stabbed and that he was not present when he was stabbed. The accused stated that he went to the police station the next day and that after he made a report, he was detained to date and that he recorded his statement with the police.

Accused Submissions

13. The accused submits that the issues for determination are whether the standards required to show that the accused, with malice aforethought caused the death of the deceased, and whether the declaration made by the deceased is sufficient to implicate the accused person.
14. On the former issue for determination, the accused submits that that the prosecution called witnesses to lay a basis of existing conflict that led up to the murder of the deceased. That however the witnesses who alluded to the existence of a conflict that is PW2 and PW3 all pointed out that the conflict was



- between the deceased and Ali. That in fact PW2 stated that during one altercation Ali threatened the deceased physically and verbally. That PW3 testified stating that it is the accused who intervened during one altercation and PW2 also stated that she had not had a problem with the accused. The accused submits that from the conduct of the deceased during previous events, and his relationship with the deceased and PW2, there is no indication of a direct conflict emanating from the accused. That the accused was a reconciler at best but the deceased may have harbored ill intentions against Ali and his kin.
15. The accused submits further on the above that the prosecution also did not have any eye witnesses to the offence being committed. That the eye witnesses called only stated that the deceased said that he had been attacked by Abbas. He submits that according to the witnesses, the deceased had been attacked at around 6.30 pm and passed away at around 11.00 pm in the night, that he was able to speak and communicate but he did not give the full names of his attacker or his description for further verification which casts doubt as to the identity of the perpetrator of the alleged offence or the truthfulness of the witnesses.
 16. According to submissions by the accused, the investigations done were partial since no further investigations were conducted upon the arrest of the accused on the basis of the information given by the deceased's kin. That the investigations did not go to the scene and thus no sketch plan was produced and no evidence was led to demonstrate the efforts to retrieve the weapon used to inflict the injury upon the deceased. That this is despite the fact that the accused informed police officers, when he went to make his report that he had been attacked by three people of which he knew one as the deceased.
 17. The accused submits that circumstantial evidence ought to be devoid of any co-existing circumstances or factors which would weaken or destroy the inference of guilt. That the above illustrated circumstances weaken an inference of guilt and without further evidence to counter the doubts, it would be unsafe to convict the accused person of murder. The accused cited the case of *Musili Tulo v R*, Cr App No 30 of 2013 where the Court of Appeal laid down the test to be applied in considering circumstantial evidence. The accused submits that the prosecution has not satisfactorily discharged the three conditions set out in *Abanga alias Onyanggo v R*, Cr App No 32 above to safely convict on the basis of circumstantial evidence.
 18. On the latter issue for determination, the accused submits that the prosecution called witnesses who testified and stated that when the deceased fell inside PW1's homestead, he stated that he had been stabbed by Abbas. That the witnesses admitted that no further description or second name was given. The accused submits that in cross-examination, the witnesses admitted that in the area, there were several people who bear the name Abbas and therefore a second name or further description would suffice to distinguish one Abbas from the other.
 19. The accused submits that all the witnesses who testified were related to the deceased in one way or the other and despite the fact that they stated that other neighbours came into PW1's homestead, none of those neighbours were called. That this calls into scrutiny of the conduct of the investigations that were partial and the fact of an existing conflict. That the witnesses were cherry picked to push a narrative and incriminate the accused person.
 20. The accused submits that his statement when he went to report his assault, that there were three people who attacked him was not further investigated. That the possibility that one of the other two people stabbed the deceased as they jointly attacked the accused has not been dispelled. The accused submits that it would be unsafe to convict the accused person on account of the dying declaration by the deceased. That in the case of *Phillip Nzaka Watu v R* (2016) eKLR, the court stated that while it is not the rule of law that a dying declaration must not be corroborated to find a conviction but the trial



court must proceed with caution to and get the necessary assurance that a conviction founded on a death declaration is indeed murder.

Analysis and Determination

21. In consideration of the evidence of 8 prosecution witnesses and in consideration of the accused person's sworn statement and submissions, this court is to determine whether the ingredients of the offence of murder as provided for under section 203 of the *Penal Code* chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
22. Section 203 of the *Penal Code* chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
23. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
 - i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That there was malice aforethought; and
 - iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

Death Of The Deceased

24. The fact of death of the deceased is not in doubt. PW3 stated that while they were on the way to Msambweni hospital, the deceased died and when they got to Msambweni, he was confirmed dead and the body taken to the mortuary. PW3 also identified the body of the deceased for postmortem. PW4 also states that he took Suleiman to Likoni and later to Msambweni but Suleiman died on the way to hospital. He stated that he was with Ijumaa and Ayub when they went for postmortem. Additionally, PW8, Dr Enzi produced a postmortem report – ExP1 in court that had been prepared by Dr Kalicha which showed that the cause of death was penetrating abdominal injury.

Death Was Caused By An Unlawful Act Or Omission

25. It is no doubt that death of the deceased was caused by an unlawful act which was not self-inflicted. The deceased told PW1, PW2, PW3, PW4, and PW5 that he had been stabbed by Abbas. PW2 stated that she found her husband lying outside on the verandah of PW1's house, a lesso had been tied around his waist and blood was gushing out of his stomach. PW3 stated that when he followed his brother to hospital, he found that he had been stabbed on the abdomen, he could not speak well and was bleeding profusely. The postmortem report prepared by Dr Kalicha and produced by PW8, Dr Enzi, showed that there was penetrating abdominal injury of a stab with gut evisceration.



Malice Aforethought

26. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

27. In respect to the above, the court in [Isaac Kimathi Kanuachobi v R](#) (Nyeri) Criminal Appeal No 96 of 2007 (UR.) held as follows: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

28. Evidence of the prosecution witnesses show that there was express malice aforethought. PW2 in her testimony stated that the family of the accused person is the one that had a grudge against them. PW2 stated that Ali kept saying for all to hear that they had killed her husband and that they would go for her. That PW2 had to shift to Ukunda due to threats from Ali. That there was a time when Ali tried to shoot the deceased with an arrow. That 3 days before the deceased was killed, the deceased told her that at the same place where he was stabbed, he saw Abbas Abdalla and his elder brother Ali in the bush by the path but the deceased turned back. PW2 further stated that Ali did not want the disagreement between him and the deceased to be resolved by elders and he kept on saying that he would kill the deceased.

29. According to the evidence of PW7, the accused and his brothers, father and brothers to his father had long standing land usage dispute. He stated that the accused had resolved to injure the deceased and he armed himself with a dangerous weapon, ambushed the deceased in a bush and stabbed him. PW3 confirmed that there was a dispute between Ali and the deceased which Abbas joined in saying he could not allow his brother to be oppressed as they had rights over the land.

Participation Of The Accused In The Commission Of The Alleged Offence

30. The accused person in his submissions pleaded that circumstantial evidence cannot be relied on as the prosecution did not satisfactorily discharge the three conditions to safely convict on the said basis.



However, on the issue of participation of the accused person in the commission of the alleged offence, this court relies on section 33 of the *Evidence Act* which provides: -

“statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases: -

- a. relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”

31. In *Philip Nzaka Watu v Republic* [2016] eKLR, it was held: -

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. while it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

32. PW1 stated that the deceased told him, his sister and mother that he was fighting with Abbas who overpowered and stabbed him with a knife. PW1 also stated that after calling the deceased’s family members, Ayub and Salim Mpasho, his uncle Maanzu, and a neighbor Mzee Joho who also went to PW1’s home, the deceased told all of them that he had been stabbed by Abbas. The deceased also told PW2, PW3, PW4, and PW5 that he had been stabbed by Abbas.

33. PW2 stated that 3 days before the deceased was killed, the deceased told her that at the same place where he was stabbed, he saw Abbas Abdalla and his elder brother Ali in the bush by the path but the deceased turned back. PW4 stated that on December 3, 2018 at about 6.00 pm, he received a phone call from the deceased who told him that Abbas attacked him, fell him down and stabbed him. That Abbas then ran away. Further, PW7 confirmed that after the incident the accused escaped from Ng’ombeni to his uncle’s place from where he was escorted to Kinango police station. The accused in his evidence confirmed having been at the scene of crime. This court therefore finds that there was direct evidence that connects the accused person to the offence.

34. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and is convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 31ST DAY OF JANUARY 2022**

HON. LADY JUSTICE A. ONG’INJO



JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Ms. Shiundu holding brief for Ms. Oyier Advocate for the Accused Person

Mr. Omuya Advocate for family of deceased

Accused Person present in person

Order: Mention on 22.2.2023 for mitigation, Victim Impact Statement and sentence. Notice to Ms. Oyier Advocate.

