



**Republic v Rutto (Criminal Case E015 of 2021)
[2023] KEHC 450 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL CASE E015 OF 2021
RN NYAKUNDI, J
JANUARY 25, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JULIUS KIBIWOTT RUTTO ACCUSED

JUDGMENT

1. The accused person Julius Kibiwott Rutto, was charged with the offence of murder, contrary to Section 203 as read with Section 204 of the [Penal Code](#), Chapter 63 of the Laws of Kenya. It was alleged that on the 6th day of February, 2013 at Kaptumek Sub-location within Nandi County, he murdered Eliud Kiptum. The accused denied that charge and the Prosecution called 9 witnesses in proof thereof whereas the accused person did not call any witnesses in his defence.

A Summary of the Evidence:

Prosecution Case

2. PW1 Wilfred Arap Lel, testified that he is the father to the deceased and an uncle to the accused. He told the Court that on the material date at around 7:00 am he left his home to go and buy sugar and, on his way, back he saw the accused ploughing his land without his permission and that when he tried inquire why the accused had trespassed on his land, the accused picked up his jembe and panga and rushed to his house.
3. He told the Court that later the accused came back from his house while armed with a bow and arrows and begun shooting at him. He testified that the accused shot six arrows at him buy they all missed and that it was at that time that his children screamed and one of their neighbours called Kiprotich came to their rescue. That the said neighbour grabbed the accused from behind so as to prevent him



- from shooting more arrows but in the midst of that the accused turned and shot the deceased on the left side of his neck.
4. He told the court that the deceased removed the said arrow and was taken to Kobujoi Mission Hospital and was later transferred to Kapsabet District Hospital but he later succumbed to his injuries while undergoing treatment.
 5. On cross-examination, PW1 told the Court that the accused was aiming at him but he then shot the deceased who had tried to come to PW1's rescue.
 6. PW2 Silvester Kibet Mosbei, testified that he is a neighbour to PW1. He told the Court that on the material date, he was at his home when he heard screams coming from PW1's home. On arrival he told the court that he found a young man bleeding profusely from the neck lying next to PW1's gate. He told the Court that he knew the deceased as he was PW1's son. He told the Court that they later took the deceased to Kobujoi Mission Hospital where he was given first aid and was later transferred to Kapsabet District Hospital.
 7. On cross-examination, he reiterated that he knew the deceased as they were neighbours. He told the Court that when he arrived at the deceased's home, he was still alive. He further told the Court that the deceased and the accused come from the same clan. He told the court that he did not see the accused person on that material date and did not see any type of weapon where deceased was lying.
 8. PW3 Peter Kiprop Keny, testified that he is the Assistant-chief Tirikuro Sub-location. He told the court that on the material date, at around 11:00am he received a report that the deceased had been shot by an arrow. He then visited the scene of the incident which was at Kapsia Village and found that the deceased had been rushed to hospital and was informed by the brother of the deceased that the suspect who was the accused had escaped. He told the court that at the scene of the incident he saw nothing and was later informed in the afternoon by the deceased's uncle one Stephen Ruto that the deceased had succumbed to death while undergoing treatment.
 9. On cross-examination, he told the Court that on the material date he was on duty when he received the said report and was attending to a matter in a near by village. He reiterated that he did not witness the incident.
 10. PW4 Dismas Kurgat Maiyo, testified that he is the area chief for Tirikuro Sub-location. He told the Court that on the material date he received a report from PW3 that the deceased had been shot with an arrow. He told the court that he did not visit the scene as he was informed that the deceased had been rushed to hospital. He told the court that he then instructed PW3 to follow up on the matter. He testified that he did not know the deceased but he knew the suspect.
 11. On cross-examination, he reiterated that he did not visit the scene of the incident and that he knew the suspect since birth. He told the court that the deceased and the suspect were cousins.
 12. PW5 Wilson Kiprotich, testified that he is a brother to the deceased and a cousin to the accused. On the material date, he told the court he was at a shop and on returning home he found the accused ploughing his father's land but did not understand why. He further testified that at the time his father, PW1 appeared and inquired why the accused was ploughing his land.
 13. He told the court that the accused person then when for a bow and arrows and shot at PW1 six times but missed. He told the court that one of their neighbours called Geoffrey Kiprotich came to their rescue and wanted to take the bow and arrow from the accused. He testified that the deceased came and the accused shot an arrow at him. He told the court that the arrow shot at the deceased's neck. He testified that the deceased had tried running away but he did not make it far, he fell down and removed



- the arrow and dropped it. He told the court that the deceased bled profusely from the wound. He told the Court that one Sylvester Mosibey came and took the deceased to Kobujoi Mission Hospital. He told the Court that later before 1:00pm he heard the deceased had passed on. He told the Court that the accused ran away after he shot the arrow.
14. On cross-examination he reiterated that he is related to the accused. He also reiterated that on the material date the accused was ploughing his father's land.
 15. PW6 Daniel Brown Arusei, testified that the accused is his in-law. He told the court that on the material date he was at the river in his land. He told the court that at the time he was a village elder. He told the court that the accused told him that he had quarrelled with his brothers at home but did not mention names. He told the Court that the accused told person told him to assist him with three things; to commit suicide, to drown himself in the river and or assist him in any other way.
 16. He testified that he then told him he could assist him by reporting the matter to the police and they proceed to Kobujoi Police station where they reported the matter and left the issue with the police.
 17. He told the court that around 4:00pm, he heard someone had died at their home but did not know who had died. He denied having told the police at Kobujoi that the accused person had told him about death. He testified that he did not know how the police connected the accused person with the death of the deceased.
 18. On cross-examination, he reiterated that at the time he was a village elder at Itayo village. He reiterated that on the material date, when the accused person came to him, he told him that he wanted to kill or drown himself in the river. He told the Court that his statement at the police station was never read to him and admitted he does not know how to read and cannot ascertain the correctness of his statement. He told the Court that he did not know that the accused had killed the deceased and that he had taken him to the police station in relation to what he had told him.
 19. PW7 Mary Chesirwa Kosgei, she testified that she a sister to the accused. He told the court that on the material date, she had visited the accused home with view of discussing about a parcel of land that their uncle PW1 had denied them. She told the court that they had report the matter to the District Officer but had been referred back to the area Chief and were informed that they were to meet there, but the parties involved did not attend.
 20. He testified that at around 9:30am, she returned to her home which was not far from her brother's home. That while her home, she heard screams coming from PW1's home. She told the Court that it was her aunt who was the wife to PW1 and her daughter who were screaming.
 21. She testified that on arrival she found one of her cousins looking for a sword. She told the court that the accused person was ploughing the land. She told the Court the court that her cousin was looking for a sword because, he had seen the accused in the land. She told the Court that, they wanted a share of the said parcel of land. She told the court that her cousin gave the sword to his father, PW1 and that PW1 gave his son a panga so that they could chase the accused from the said land.
 22. She testified that the deceased is a son of PW1 and was in his home which was adjacent to his father. She told the court that deceased jumped over the fence and came to where there were screams. She testified that she did not see what happened as there was a huge crowd.
 23. She testified that when the accused was chased away, he went to his house and came back with a sword. She told the court that she screamed but did not see what took place. She told the court that when the deceased was shot with an arrow and people went to help him but did not know who had shot him.



- She testified that she did not know whether the accused had a bow and arrows. She told the court that people said that it was the accused who had shot him but she did not witness the incident.
24. On cross-examination, reiterated that PW1 was there uncle and that the land they were claiming belonged to their grandfather.
 25. PW8 Dr. Wanyonyi, produced the post-mortem report as Exhibit 3 that had been prepared by Dr. Limo. The doctor testified that upon examining the body, the deceased there was a wound on the left posterior triangle of neck which was 3cm by 5cm depth, there was no obvious bony fractures, no other external wounds. It was in the opinion of the doctor that the cause of death was hypovolemic shock due to haemorrhage of the jugular veins due to penetrating injury.
 26. PW9 AG IP Kiptoo Kibore, testified that he is the investigating officer in this matter. He told the court that on the material date, PC Geoffrey Ayugu, was on duty. That he informed him someone by the name Daniel Kurgat had brought in the accused as a suspect. He told the court that he was informed that the suspect had quarrelled with his father PW1 over land.
 27. He testified that he was also informed that the suspect had shot PW1's son with an arrow and had injured him seriously and had been taken to hospital. He told the Court that on the same day at around 6:00pm he was informed by PW1 that his son had passed on.
 28. He testified that he then booked the report and informed the OCS Nandi police about the incident. On 7th February, 2013 he then proceeded with his investigations. He testified that he visited the scene of the incident in company of PC Morphat Liboiwa and on arrival he was met by PW1 who showed him the scene of the incident.
 29. He told the court that PW1 informed that the dispute begun when the accused trespassed onto his land and started ploughing. He told the Court that he then marked the scene of the incident and that PW1 gave him one bow and four arrows which were used by the suspect. He told the court that he then took the items to the police station as exhibits and produced them in court as exhibit 1 and 2 respectively. He told the court that one of the arrows had blood stains.
 30. He testified that the suspect later on surrendered himself to the station.
 31. On cross-examination, he reiterated that he had visited the scene of the incident day after it had occurred. He also told the court that the exhibits were handed over to him by PW1. He told the court that the suspect had left the said items behind. He also reiterated that one of the arrows had blood stains

The Defence Case

32. The accused person testified that on the material date he was at home in Cheseot. He told the court that he was with one Kiptum and the deceased herein. He testified that Kiptum requested him to assist him plant his maize as he had already planted his. He told the Court that Kiptum was his cousin. He told the court that when he had begun planting in a small portion that had remained, Kiptum's father came and told him to stop planting until the land dispute was resolved. He told the court that he did not stop but continued planting.
33. He told the court that PW1 came closer and picked a panga that was in farm and went back to his house. He told the court that PW1 then asked his wife where his sons were. He told the court that PW1's wife begun screaming and Kiprotich ran to the homestead and PW1 asked him to get his arrows from the house.



34. He told the court that PW1 begun shooting his arrows and that when he shot the first one, he moved away from the farm and went back home where his wife urged them to run away as they will be killed. He told the court that he told her to run away with the children.
35. He testified that another arrow was shot at them. He told the court that he got into the house armed himself with arrows. He testified that at time people were screaming and urgibg him not to leave not leave the house as he was surrounded by PW1 and his sons. He told the court that he hid behind his house where he had his arrow fastened to shoot. He told the court that he them released his arrow and the arrow got Kiptum. He testified that he had screams that he had shot him. He told the court that Kiptum ran away.
36. He testified that he was shocked and released his arrows. He told the Court that he then went to PW6's home and told him what had transpired. He told the court that while at PW6's home he had screams from the scene and when he asked PW6 what to do, he advised him to report the matter at the police station.
37. He told the court that they then proceeded to Kobujoi police station where they reported the matter and he was arrested.
38. He told the court that there was no enmity between him and the deceased. He told the court that PW1 could have as well shot him. He told the court that the bow that had been brought in court was his but had only used one arrow.
39. He told the court that he had dropped the weapons upon shooting one before leaving. He told the court that they had a land dispute.
40. On cross-examination he told the court that there was a land dispute between him and PW1. He told the court that he had shot an arrow and that the arrow got the deceased but he had intended to shot PW1. He told the court that he never had six arrows but only had three arrows and had shot one. He told the court that he had released the weapons and left.

Determination

41. I have considered all the evidence adduced by the prosecution and the defence. I find that the only key issue for determination is whether the prosecution has established the charge against the accused beyond a reasonable doubt.
42. Section 203 of the Penal Code defines murder as the unlawful homicide committed with "malice aforethought." It is the killing of a human being by another with malice aforethought.

The Section reads:

"Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder."

Malice aforethought is deemed to be established by evidence proving any one of the following circumstances provided for under Section 206 of the CPC

- 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 happen.

- c. An intent to commit a felony
 - d. An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.
43. To prove murder, the prosecution is required to establish the following ingredients beyond a reasonable doubt.
- a. The fact and cause of death of the deceased person.
 - b. That the death of the deceased was as a result of an unlawful act or omission on the part of the accused person.
 - c. That such unlawful act or omission was committed with malice aforethought.

Proof of death of deceased and cause thereof

44. The death of the deceased is not in dispute. The evidence on record clearly shows that the deceased, Eliud Kiptum died on 6th February, 2013 after being shoot on the left side of his neck.
45. PW1 an eye witness testified that he was at the scene at the murder and saw the deceased being shoot with an arrow on the left side of the neck. The death of the deceased was confirmed by PW8 Dr. Wanyonyi who testified and produced the post-mortem report on behalf of Dr. Limo that indicated that the deceased had died as a result of hypovolemic shock due to haemorrhage of the jugular veins due to penetrating injury.

Whether it is the accused person who killed the deceased

46. PW1 an eye witness and the father to the deceased testified that on the material date, the accused left his house with a bow and arrows. He told the court that the accused had tried shooting six arrows at him which he all missed and when a neighbour named Kiprotich tried to intervene, the accused turned and shot the deceased on the left side of his neck.
47. PW5 also an eye witness and brother to the deceased testified that the accused person had rushed to his house and when he came back, he was armed with a bow and arrows and begun shooting at PW1. PW5 told the court that he shot six arrows at PW1 but they all missed and when of their neighbour tried to grab the accused, he wiggled out and shot the deceased on the neck.
48. During cross-examination, the accused person conceded that he was aiming at the PW1 when the arrow the he shot struck the deceased. Further, PW1, PW5 and PW7 all place the accused at the scene of crime a fact that is also not denied by the accused. It worth noting that the accused person admits the bow that was presented in court as evidence belonged to him. He testified that he left the weapons behind upon releasing the arrow. He also stated that he heard screams that he had shot the deceased.
49. From the evidence adduced I find that the prosecution has proved that it is the accused who caused the death of the deceased by striking him with an arrow on the left side of his neck.

Proof of malice aforethought

50. Malice aforethought is one of the elements which has to be proved in order for the offence of murder to be established. Under Section 206 of the Penal Code, Malice aforethought is the intention to kill or to cause grievous harm.



51. The Court of Appeal in the case of *Nzuki -v- Republic* (1993) KLR stated: -

“Malice aforethought is a term of art and emphasized that: -

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: -

- (i) The intention to cause death
- (ii) The intention to cause grievous bodily harm.
- (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from these acts and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.” See also Criminal Appeal No. 1 of 2004, *Robert Ochiri Ogeto vs Republic* (2004) eKLR

52. Malice aforethought can be inferred from the circumstances of the case. In *Republic -v- Tubere S/O Ochen* (1945) E.A C. A 63, the court stated that malice aforethought can be inferred from the following factors: -

- a. The nature of the weapon used.
- b. The part of the body targeted
- c. The manner of killing or in which the weapon was used.
- d. The conduct of the accused, before, during and after the attack.

53. Applying the above principles to the present case, I find that the malice aforethought was proved. The accused testified that prior to the incident, there was a land dispute between him and PW1. He told the court that on the material date, he had rushed into his house where he took his bow and arrows. He told the court that he heard neighbours shouting that he should not leave his house as he was surrounded by PW1 and his sons. He however, told the court that he hid behind his house where was able to release an arrow that struck the deceased on the neck. He told the court that he wanted to strike PW1 but instead he shot the deceased.

54. From the witness’s testimonies on record, there is no doubt that the deceased, the accused and PW1 are all related. The deceased is the accused cousin. Both PW1 and PW 5 told the court that on the fateful day, one of their neighbours had by the name Geoffrey Kiprotich had tried to grab the accused from behind when the accused person wiggled out and shot the deceased on the left side of his neck.

55. The accused person testified that PW1 and his sons were shooting at him before he decided to rush back into his house and come with a bow and arrows. The issue of self-defence was discussed in the case of *Ahmed Mohammed Omar & 5 Others v Republic* [2014] eKLR where the court held as follows: -

“What are the common law principles relating to self-defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in *Palmer vs R* [1971] AC 818. The decision was approved and followed by the Court of Appeal in *R vs MCINNES*, 55 Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular



facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

The Court of Appeal further held that

““The common law position regarding the defence of self- defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan*[1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.

56. One thing that really raises doubt from the accused person’s chronology of events is the fact that, on the material date, the accused person testified that the when PW1 found him ploughing his shamba, he picked the panga that was in the shamba before returning into his house and coming back with a bow and arrows. To my mind at this point in time if the PW1’s intention was to harm the accused person then he would have done so with the said panga. The evidence on record points to the accused as the aggressor. The attack on deceased was so vicious that one would really wonder if the same was done out of self-defence. I am not persuaded that the accused person acted out of self-defence. By aiming at the deceased’s neck the accused person knew that he would cause the deceased grievous harm or death. The comparative jurisprudence it’s also consistent with our legal frame work on self-defence and attended provocation. In the case of *Mwango –vs- the people SCZ Appeal No 171 of 2015* the Supreme Court of Zambia affirmed as follows: it goes without saying that a person accused of an offence and on trial begins to build his or her defence right from the time of apprehension and from the first prosecution witness by asking questions in cross examination. Where an issue or defence is only raised when the accused is on the stand, the court cannot be faulted for treating it as an afterthought and an explanation which cannot reasonably be true. In this case the appellant was represented by counsel and had the opportunity to instruct his counsel regarding his defence which he should have raised from his apprehension or at the earliest time during trial.....”
57. Thus our section 17 of the penal code is fortified by the principles elucidated by Black’s Law Dictionary Eighth Edition by Bryan A. Garner at p.260, which defines extenuation as: ‘Mitigating circumstance, means a fact or situation that does not Justify or excuse a wrongful act or offence, but that reduces the culpability, and this may reduce punishment. A fact or situation that does not bear on the question of a defendant’s guilt, but that is considered by the court in imposing punishment and especially in lessening severity of a sentence.”



58. Flowing from the above, it is without a shadow of doubt that the accused herein intended to kill the deceased. The type of weapon used and the part of the body target is a clear indication of his intent to harm the deceased.
59. From all the evidence on record and after a careful analysis of the same as above given, I am satisfied that the prosecution has proved all the ingredients of the offence of murder as provided under section 203 as read with section 204. of the Penal Code
60. My finding in dismissing any claim for self defence is in consonant with the principles in: *Sowedi Dossier versus Uganda.*, Supreme Court Criminal Appeal No. 28 of 1989 in which the court held that when:-
- a. The death must have been caused in the heat of passion before there is time to cool
 - b. The provocation must have been caused by wrongful act or insult
 - c. The wrongful act or insult must be of such nature as would be likely to deprive an ordinary person, of the class to which the accused belongs, of the power of self-control. It is obvious from this that any individual idiosyncrasy such as for instance that the accused is a person who is more readily provoked to passion than an ordinary person is of no avail
 - d. Finally: the provocation must be such as to induce the person (by whom) provoked to assault the person by whom the act or insult was done or offered. :
.....”
61. Taking the evidence at it’s highest I agree with the submissions by the prosecution counsel that the case for the prosecution has established all the ingredients for the offence of murder for the accused person to be convicted accordingly without any reference to the provisions of section 17, as read conjunctively with section 207 and 208 of the penal code.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2023.

R. NYAKUNDI

JUDGE

