



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mwinzi (Criminal Case 78 of 2018)  
[2023] KEHC 1855 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1855 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL CASE 78 OF 2018  
RK LIMO, J  
FEBRUARY 27, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**JACOB KIMWELE MWINZI ..... ACCUSED**

**JUDGMENT**

1. Jacob Kimwele Mwinzi, the Accused herein, is charged with the offence of murder Contrary to section 203 as read with section 204 of *Penal Code*.
2. The particulars are that on November 11, 2015 at Musavani Location in Tseikuru District within Kitui County he murdered Malia Kioyi, his wife (the deceased herein).
3. The Accused person denied committing the offence and the Prosecution has presented 5 witnesses to prove their case.  
Their testimonies are as follows: -
4. Kimwele Mutemi (PW1) testified that he was at the accused home on the material day. He told the court that the deceased was married to the accused, who is his cousin and that she ran a liquor selling business from their home. The witness stated that he went to that home on material day and the deceased served him some alcohol. He added that there were other patrons in the home and as he was drinking he saw the accused and the deceased quarrelling before the accused attacked the deceased with a knife making her ran towards him for help. He testified that the deceased hit the accused with a stick and the accused retaliated by hitting her on the head upon which she fell down and as he fell, he stabbed her with a knife
5. PW2 Josphat Muthengi Musyimi(PW2) the assistant chief, Wikiluki sub-location stated that he was at the shopping centre with two Administrative Police Officers Mr. Badia and Mr. Oundo when he heard a member of the public saying that a person had been seen going towards the Administration



- Police Camp while carrying a knife. That the three went to the AP camp and found the accused having been arrested by another Officer. That they thereafter went to the home of the accused where he saw the body of the deceased.
6. APC Evans Oundo (PW3) on his part testified that he was based at Tseikuru Sub-County at the material time and that on November 11, 2015, he was at the market in the company of Assistant Chief (PW2) when they got a report that someone had gone to the Administration Police Camp carrying a sword with blood on his clothes. That they went to the Administration Police Camp and found the accused having already been arrested by another Police Officer. He testified that the accused then took them to his home where they found the body of the deceased.
  7. Daniel Mwanzia Musili (PW4) a cousin to the deceased told the court that he identified the body of the deceased to the pathologist on November 21, 2015 at Mwingi Level 4 hospital before Post Mortem was conducted. The witness stated that he was accompanied by Musyoka Kilonzi, a brother of the deceased.
  8. Dr. Kennedy Munyoki (PW5) from Kitui Referral Hospital told the court that he was testifying on behalf of Dr. Titus. The witness told the court that Dr Titus had conducted a post mortem on the body of the deceased on November 21, 2015. The witness stated that he knew the doctor having worked with him since 2017 and that he had handled several post mortems cases together at Mutomo and Kitui Referral Hospitals. He stated that Dr. Titus was unavailable to testify as he had been transferred from Kitui County to Nakuru County. He told this court that he was familiar with Dr. Titus signature and handwriting. The Doctor tendered a Post Mortem Report authored by Dr. Titus report marked as Pexh 1 in reference to the body of the deceased. The witness reproduced the findings as follows, that the body was pale indicating that the deceased lost a lot of blood, there were signs of interference with her breathing, she also had a bruise on the left side of the forehead associated with a swelling of about 15MM, she also suffered a stab wound measuring 50x35MM on her chest. That the stab wound went across her chest involving her left lung and left ventricle measuring 50x10MM. That the deceased also had a blood clot on the right side of her chest. The stab wound on her left lung was recorded to be about 30MM and the cause of death was determined as cardio muscle injury by a sharp force trauma due to a single stab trauma to the left of the chest in keeping with homicide.
  9. When placed on his defence, the accused denied committing the offence. He testified that on the material day, he arrived at his homestead and found people drinking alcohol adding that, Kimweli Mutemi (PW1) was also present taking the traditional brew prepared by his wife (the deceased).  
He testified that PW1 soon picked a quarrel with him and soon a fight ensued. He stated that he knew PW1 had an affair with his wife adding that the deceased herein went between them and joined the fight but took sides with his antagonist (PW1). He stated that he fell down and when he stood up he found that his wife had been stabbed and lying down. He stated that he rushed to Kithiki AP Post to report the incident.
  10. In his written submissions the accused person faulted the Prosecution stating that what was produced in court as a murder weapon was a panga and not a knife. He faults PW1 contending that he could be the one who stabbed his wife. He submits that this is an incident that occurred at the heat of the moment and that he had no intention of harming his wife.
  11. The prosecution on the other hand had submitted that it has proved its case against the accused person beyond reasonable doubt. It submits that reference of murder weapon as a panga, a knife or Somali sword is not fatal to its case.
  12. This court has considered the evidence tendered by the prosecution and defence the prosecution and defence put up by the accused.



13. It is quite evident from the evidence that a fight that broke out between the accused person, and his wife (deceased) and the underlying feud was the claim by the accused person that his wife had an affair with PW1. It is also not disputed that at the time, there was alcohol at the homestead of the accused. This have contributed to emotions going high and the contention by the accused that the incident occurred at the heat of the moment.
14. Having made the above observations, the prosecution was required to prove the following elements to sustain a charge of murder against the accused;
  - i. Death of deceased and the cause.
  - ii. Actus reus- Tant accused committed the unlawful act which caused the death of the deceased.
  - iii. That the accused harboured ill motive to cause harm, or death of the deceased.

#### **i) Cause of death**

15. The fact of death and the cause of death are not in dispute. The body of the deceased after being taken away by the police was identified by PW4 Daniel Mwanzia Musili (her cousin) to Dr Titus Ngulungu who conducted a post mortem and prepared a report in reference to the deceased. The report dated November 21, 2015 was produced in court as PEXH 1 by PW5 confirmed that the deceased died from cardio muscle injury by a sharp force trauma due to a single stab trauma to the left of the chest in keeping with homicide. The fact of death and its cause were clearly established and proved beyond doubt.

#### **(ii) Actus Reus**

16. Evidence from PW1 was to the effect that he was at the home of the accused taking alcohol in the company of others when a fight broke between the accused and the deceased. That the deceased went to where PW1 was and the accused followed her with a knife asking her why she had abused him. That the accused hit the deceased on the head and deceased picked a stick and hit him back. That the accused retaliated by hitting her, she fell to the ground and he proceeded to stab her. PW1's testimony is corroborated by medical evidence. The medical report was to the effect that the deceased had a bruise on the left side of the forehead associated with swelling of 15MM which corroborated the evidence that the accused hit the deceased on her head and she retaliated by picking a stick and hitting him back.
17. In his defence, the accused attempted to shift blame to Kimwele Mutemi (PW1) stating that the PW1 was having an affair with his wife. He insists that PW1 picked a fight with him, and the deceased joined in and as the three were fighting he suddenly heard his wife saying that she had been stabbed. He then added that, PW1 then told him that he had done what had brought him to the home of the accused. Although the accused tried to implicate PW1 in the murder, he failed to mention whether he actually saw PW1 with the murder weapon. It also beats logic as to why PW1 whom he claimed had an affair with the deceased could attack his lover. He as a matter of facts insisted that the two were fighting him.
18. The evidence by PW2 (Assistant Chief) and PW3 (AP) shows clearly that the accused went on his own vocation and surrendered to the Police because he knew what he had done.

His contention that the incident occurred at the heat of the moment may be true but it goes to show that he was connected to the unlawful action that caused the death of the deceased.
19. I am satisfied that the prosecution has proved the crucial element of *actus reus* and connected it with the accused person.



**(iii) Mens Rea/Malice aforethought**

20. Malice aforethought can be established by evidence proving an intention to do grievous harm to any person whether that person is actually killed or not. Medical evidence confirmed that the deceased died from cardio muscle injury by a sharp force trauma due to a single stab trauma to the left of the chest homicide. The deceased suffered injuries including a stab wound across her chest involving her left lung and left ventricle measuring 50x10MM and bruise on the left side of the forehead associated, with a swelling of about 15MM. The attack with a knife was vicious and was intended to do grievous harm on the deceased or cause her death.
21. Malice aforethought can be presumed from the actions of the offender and the weapon used. section 206 of the Penal Code states 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...”
22. This court finds that the action by the accused was reckless and dangerous. The medical report that the Post Mortem report indicates that the deceased was viciously attacked given the number of injuries recorded on the Post Mortem Report (P Ex 1). Although the cause of death was a single stab wound on the chest, the other injuries on the head which had a swelling indicates that the acts were not an accident but deliberate perhaps owing to the bitterness harbored by the accused due to the alleged affair between her and PW1.
23. It’s true that the murder weapon was not recovered or tendered in evidence but that in itself is not fatal to Prosecution’s Case because the medical evidence (post mortem) corroborates the witness account that the deceased was attacked with a knife or a sharp object.
24. This court finds that the element of mens rea was established and proved beyond reasonable doubt.
25. From the foregoing, this court finds that, the Prosecution’s case against the Accused is simply overwhelming. He should have controlled himself and his anger rather than committing a heinous crime. He is hereby found guilty as charged and is convicted accordingly.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. JUSTICE R. K. LIMO**

