



REPUBLIC OF KENYA



**Republic v Mudogo (Criminal Case 3 of 2014)
[2023] KEHC 966 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 3 OF 2014
PJO OTIENO, J
FEBRUARY 17, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BOAZ SAIYA MUDOGO ACCUSED

JUDGMENT

1. The accused, Boaz Saiya Mudogo, is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on the 10th day of January, 2014 at Nguvuli bridge, Nguvuli village Luanda “K” sub-location, Chesero location in Kakamega North District within Kakamega County, the accused person murdered Boniface Kulecho Shimaka.
2. The accused person pleaded not guilty to the charge and a stage set for full trial at which the prosecution in an endeavour toward the discharge the legal burden of proof tendered evidence from nine witnesses.

The Evidence

3. The case was opened by PW1, Aggrey Shimaka, who testified that on 10/1/2014 at about 7PM he was heading home to Nguvuli from Malaba town in the company of his brother, the deceased, and a friend by the name of Patrick. Patrick insisted that he be dropped home in Luanda since they had a motorcycle. Patrick was the rider, the witness sat at the middle while the deceased sat at the rear of the motorcycle carrier.
4. When the three reached river Isikhu, they saw a person ahead of them and when they reached him, Patrick applied emergency brakes. The witness then heard the deceased exclaim and cry in pain only to learn that the deceased had stabbed the deceased on the stomach and was pulling him off the motorcycle. The same man stabbed the witness on the rib area and jaw bone making the witness to scream and attracting one Rashid to come to their rescue. The deceased was rushed to Malaba, then to



- Kakamega Hospital and eventually to Webuye hospital where he died. The witness said he was able to see and recognize the accused with the aid of moonlight.
5. On cross examination he stated that he did not recognize the attacker as recorded in his statement but later said he had in fact recognized him. He also denied that it was his party who stopped to attack the accused.
 6. PW2, Robert Odinga alias Rashid Abdulrahman, testified that on 10/1/2014 at about 7:55 PM he was at his home taking a shower when he heard screams, was informed by a child that some people were killing each other hence rushed to the scene. At the scene, he saw the accused who was well known to him with a knife at hand and he threatened him. He then stabbed the person he was pursuing by the name of Kulecho four times. He asked him why he was doing that but the accused kept quiet. He then called the area chief and rushed the deceased to hospital where he succumbed to the injuries.
 7. On cross examination he stated that he identified the accused from the moonlight. He also stated that he did not know how the fight started since he only witnessed the fighting ongoing adding that the deceased kept on blaming Patrick for the incident. He identified his daughter Fatma as the child who had told him that people were killing each other on the road. He said the incident was about 100 meters from his home
 8. PW3, No 97071513, Constant Maina testified that on 10/1/2014 he was at the Kimanger AP Camp when at about 1158 hours, two village elders came in the company of the accused and stated that the accused had assaulted someone at Nguvuli. He arrested him and later transferred him to Kabras police station after learning that the victim of assault had died while undergoing treatment. Upon cross examination, the witness told the court that the elders did not tell him why they had effected the arrest.
 9. PW4, Mary Shimatha, mother to the deceased testified that on 10/1/2014 the deceased woke up and left for work. At about 8PM she saw headlights of motorcycle riding into her compound from her son's house heading in the direction of Lwanda. At about 9PM she heard screams from her son PW1 saying that the deceased had been killed. PW1 had cuts on the cheeks and had been stabbed on the ribs and he was taken to Malaba Hospital. On cross-examination she stated that she did not see the people riding the motorcycle into her compound.
 10. PW5, Linet Ayuma, wife to PW1 stated that on 10/1/2014 around 8PM, PW1, one Patrick and the deceased left home to escort Patrick to their home with Patrick insisting to ride the motor cycle and arranging how the passengers would sit. After a short while, PW1 came back home screaming that the deceased had been killed. PW1 had injuries and was taken to hospital by one Benson Mulunda. The witness did not know how her husband got injured and never left home for the road where the incident occurred.
 11. PW6, Edward Sindani Wambulwa stated that on 10/1/2014 at 9PM he was at home when he heard screams on the road from a person crying that he had been stabbed. He left with a torch and rushed to the scene where he found the deceased lying down having been stabbed on the stomach with the intestines out. At the scene he found his neighbor Rashid whom together with Patrick took the deceased to hospital.
 12. On cross examination he stated that he knew the accused and that he was not at the scene when he got there.
 13. PW7, Patrick Anunda Saul testified that he was employed as a boda boda rider and that on 10/1/2014, he was returning the motorcycle to the owner as was routine and at the time he had two passengers that is PW1 and the deceased. He stated that the two offered to escort him home and the deceased rode the motorcycle. On getting to Nguvuli bridge, they were stopped by the accused who was well known



- to them. The accused then hit the deceased on the forehead and he fell to the ground. He then took the motorcycle to park it and that it when he heard the deceased scream that he had been stabbed with a knife. He then heard the hissing sound of a knife and bent down and PW1 was stabbed on the cheek. He started to scream and PW2 and PW6 came to scene and helped him take the deceased to hospital.
14. On cross examination, he refuted claims that he was the one riding the motor cycle at the time of the stabbing or that he turned off the headlights. He said he was able to see the accused using the motorcycle lights and the moonlight but denied ever being arrested by the police or that he had been hesitant to attend court and give evidence.
 15. PW8, Dr Edward Vilembwa, a medical doctor at Webuye County Hospital produced a post mortem report prepared by Dr Mukhabi whom he had worked with and was outside the country. He stated that an autopsy had been done on the body of the deceased on 13/1/2014 whose results showed that the body had multiple cut wound on the right upper side of the abdomen and on the left lower side of the abdomen which had been stitched. The pathologist was of the opinion that the deceased had died due to severe bleeding following stab injuries.
 16. PW9, No 235856, IP Abednego Mbai, was the investigating officer and testified that on 10/1/2014 at 10:45PM he was at the Kabras Police Station when two men walked in and reported an incident where two pillion passengers riding in a motorcycle were attacked by an unknown person. The next day he was informed that the suspect had surrendered at the Kimanget AP camp. They then picked the suspect and took him to the station where they recorded his statement and that of PW7. He went to the scene of the attack in the company of the accused and PW7 and prepared a sketch plan. He later established that PW7 was riding the motorcycle at the time of the attack. He stated that he did not recover the knife used since it was thrown into river Isukhu. On cross examination he stated that the accused went to Kimanget police post to seek refuge since members of the public were looking for him.
 17. With the evidence of the nine witnesses, the prosecution closed its case and the court was satisfied that a *prima facie* case had been established against the accused person and he was thus placed on his defence.
 18. The Defence case was given by the accused himself and the gist was that on 10/1/2014, he went to Malava market after leaving the hospital where he had gone to treat a dog bite. He boarded the bodaboda of one Jacob to head home. On their way Jacob informed him that he had snatched Patrick's girlfriend and he responded that he had stopped seeing the girl. The motorcycle then stalled and he was forced to walk when he was approached by the deceased who was riding a motorcycle and he pointed a finger at him. As he neared the bridge, he saw a motorcycle parked in the shrubs nearby. It suddenly flashed its lights and two people approached him and ordered him to remove his clothes to which he refused. One hit him on the face and the other one held him by the neck and removed a knife. He then got hold of the knife and cut the person who was holding him. As he tried to run away while holding the knife, the deceased held his leg and he fell on him with the knife stabbing him. PW2 then appeared and tried to stab him but instead stabbed the deceased. He then ran away to the house of one Petro Shuto from where he was escorted to the AP camp by a village elder where he recorded his statement and was then transferred to the police station the next day and found PW7 already arrested and in the cells.
 19. On cross examination he stated that he had not brought the treatment notes he got from the hospital on 10/1/2014, but placed himself at the scene will asserting having been attacked and only acted in self defence. With his testimony, the defence was marked close counsel announced no intention to submit and the court invited to come up with a decision from the evidence on record.



Issues For Determination

20. The offence of murder is committed, in accordance with section 203 of the penal Code, when a person, of malice aforethought, causes death of another person by an unlawful act or omission. It is thus the obligation of the prosecution in a case of murder to prove the ingredients of murder, beyond reasonable doubt, for a conviction to be realized and attained. The three elements to be proved are; the death of the deceased and the cause of that death; that the accused committed the unlawful act which caused the death of the deceased; and that the Accused had the malice aforethought¹.the court at the end of a trial and in a determination, be satisfied that the three elements are proved to the requisite standards.
21. When the foregoing principles are applied to the fact of this case, the court must determine whether Boniface Kulecho Shimaka did die on the date alleged; whether the accused was the perpetrator of the assault leading to the death, and, whether the accused in executing the acts of assault was propelled by malice afore thought.
22. That Boniface Kulecho Shimaka was injured on the date time and place charged was confirmed by all the prosecution witnesses the, autopsy report and even the defence evidence. In fact, even the cause of the injuries, being a knife was agreed by both sides. According to the post mortem report, the deceased died due to severe hemorrhage occasioned by cut wounds (stab) that severed mesenteric vessels. It is thus a common fact that stirs no controversy and the court find that in deed the deceased died and that the death was out of stabbed wounds.
23. On whether the death was caused by the acts of another is also not in dispute. The dispute is whether the accused ids the person who inflicted the fatal wounds. The accused admits that he did inflict at least one wound but asserts that he did so in self defence after he was attacked by the three who waylaid him at the bridge. In his version I was the deceased who had pointed a finger at him and ordered him to strip off clothes and lie down but he disobeyed and will resisting being assaulted the knife the deceased was holding stabbed the companion of the deceased with whom the deceased was attacking the accused. After the accused companion (pw1) was stabbed he left accused and the deceased still struggling. The accused managed to disentangle himself from the deceased after snatching the knife from him, but as he attempted running away, the deceased held his leg causing him to fall on the deceased and in the process the deceased was stabbed. While entangled with the deceased for the second time, PW2 emerged from the thicket and tried to stab the accused with the knife but the accused ducked and the knife landed on the deceased. It is after that stab that the accused said he took advantage of the confusion and escaped.
24. While there is a bit of incoherence in the order of the events of the night, the court finds the evidence of PW1, PW2 and PW7, to credibly establish that they witnessed the accused stab the deceased. It is worth noting that the accused does not dispute stabbing the deceased admit doing so in self defence. It is the finding of the court that PW1 was an independent witness whose only contribution that night was to assist the injured. He is not alleged to have been in the love web that is alleged to have been the cause of bad blood between the deceased and the accused. The court his account to be forthright and uncontroverted by the version given by the accused. That evidence when added to that of PW1 and Pw7, all of whom the accused admit were at the scene, satisfies the court that the incident occurred as put by those witnesses and not in the version of the accused. For that reason, the court finds that, it was the accused who inflicted the injuries determined by the pathologist to have resulted in the death of the deceased. In coming to this conclusion the court is satisfied that the conditions at the material time was conducive for accurate observation in that all, including the accused were able to clearly see what each was doing.

¹ See, *Anthony Ndegwa Ngari v Republic* [2014] eKLR, *Nyambura & Others v Republic* [2001] KLR 355).



25. The deceased suffered multiple wounds to his abdomen in the hand of the accused and that severity of the attack begs the answer whether there was malice aforethought or if it was indeed a compulsive reaction in self defence. Malice aforethought is established where an act is aimed at someone and in addition, it is committed with any of the intention; to cause death, grievous harm or where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It is immaterial whether the accused desires those consequences, to ensue or not. In none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. It is enough that the accused's conduct is done in the knowledge that grievous harm is likely to ensue even if his conduct is not by itself enough to lead to death.²
26. The intensity of the attack or its viciousness may be the scale to determine absence or presence of malice aforethought. Thus in *Republic v Lawrence Mukaria & another* [2014] eKLR the court observed as follows: -
- “Regarding malice aforethought the court must also consider “whether the accused inflicted a single or multiple blows.”
27. The accused claimed that he stabbed the deceased in self defence. The common law principle on self defence was discussed in the case of *Ahmed Mohammed Omar & 5 Others v Republic* [2014] eKLR citing with approval the decision of the Privy Council in *Palmer vs R* [1971] AC 818 where the court held as follows:-
- “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.”
28. Here, the accused said that he was attacked by the deceased and when he noticed he had a knife he took it and stabbed him. To address the defence by accused, the court must be satisfied that the accused was indeed at the scene as explained by him and not as put forth by the prosecution's case. if in deed the accused was heading home on foot because the motor cycle he had hired had broken down, and not waylaying the deceased on account of the bad blood, why was it not possible to call the rider to reiterate his account of the night. In cross examination the accused admitted that for the attack on PW1, he was

² *Nzuki v Republic* [1993] KLR 171



convicted and given a life sentence. The evidence recorded and the demeanor of the accused observed when he gave evidence, strikes the court that the accused's version was a make-up while that by the prosecution was cogent and credible. The court is satisfied that the accused did waylay the deceased party at a bridge with little room for manouvre with the sole intention to attack the party and when the time came he effected the attack with such gravity that he must be taken to have intended that, at the least, grievous harm is visited upon his victim. That is a demonstrated malice aforethought.

29. It is, in conclusion, the finding and holding of the court that the prosecution has proved, as against the accused, beyond reasonable doubt that on the January 10, 2014, at Nguvuli bridge, Nguvule village, the accused murdered the deceased. On that finding, the accused is convicted as charged.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF FEBRUARY, 2023

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Olucheli for the Accused

Ms. Chala for the Prosecution/State

Court Assistant: Polycap

