



**Director of Public Prosecutions v Kubai (Criminal Case 91 of 2015)
[2023] KEHC 2943 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 91 OF 2015
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

JOSEPH THURANIRA KUBAI ACCUSED

JUDGMENT

1. Joseph Thurania Kubai (Accused) is charged with Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the charge are that:

On December 05, 2015 at around 08.00 pm at Riverside village, Timau in Meru County within the Republic of Kenya murdered Paul Kiome Bundi

Prosecution case

2. On 05th December, 2015, Accused's daughter Joy Kawira (Kawira) left home for fear of the wrath off Accused who had accused her of taking his phone. She went to the home of the parents of her friend Yvonne Gakii (Gakii). Later the same day, Accused went to the shop of Gakii's parents where Gakii was and upon Gakii confirming Kawira was in their house requested Gakii to call her from the house. Before Kawira emerged from the house, one Paul Kiome Bundi (Bundi) went to the shop and bought cigarettes and a match box and started to puff outside the shop. That in the meantime, Accused started getting agitated after Kawira failed to come out and he shouted at Gakii threatening to beat both her and Kawira and he pulled the wire mesh from the shop window. That seeing that Accused was becoming unruly, Bundi tried to calm him down and requested him to wait for Gakii's mother to come and resolve whatever issue he had with the girls and it was then that Accused slapped Bundi. A fight ensued and in the process Accused stabbed Bundi on the head injuring him seriously from which injury he died the following day.



3. That it was Accused that stabbed Bundi was corroborated by Yvonne Gakii and Accused's wife and daughter Ann Kaiyu and Joy Kawira respectively.
4. An autopsy was conducted on the body of Bundi by Dr Riffat on December 08, 2015 and a postmortem form tendered in evidence as PEXH. 1 reveals that Bundi suffered deep penetrating wound over the left mandibular region (5cm deep by 4 cm wide) with fracture of the left mandible bone. An opinion was formed that he had died of severe hemorrhage secondary to deep penetrating wound that severed the jugular vessels (major blood vessels that stretch from your head to your upper chest).

Defence Case

5. In his sworn defence, Accused conceded that he fought a man who attacked him on December 05, 2015 but denied killing the man.

Analysis and determination

6. Section 203 and 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
7. The sections read as follows:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
8. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the said death and that he was actuated by malice.

a. The death of the deceased

9. The postmortem form PEXH. 1 reveals that Bundi suffered deep penetrating wound over the left mandibular region (5cm deep by 4 cm wide) with fracture of the left mandible bone. An opinion was formed that he had died of severe hemorrhage secondary to deep penetrating wound that severed the jugular vessels (major blood vessels that stretch from your head to your upper chest).

b. Proof that accused person committed the unlawful act which caused the death of the deceased

10. The degree of proof in criminal cases was properly established in the classicus English case of *Woolmington vs DPP* 1935 A C 462. Similarly, in *Bakare vs State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just



what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”. (Emphasis added).

11. The prosecution case that it was Accused that stabbed Bundi from which injury he died was corroborated by Yvonne Gakii and Accused’s wife and daughter Ann Kaiyu and Joy Kawira respectively.
12. Accused’s defence that he did not stab Bundi does not cast doubt on the well corroborated prosecution case and it is therefore rejected.

Malice aforethought

13. Lastly the Court of Appeal in [John Mutuma Gatobu v Republic](#) [2015] eKLR stated as follows:

“That leaves the question of malice aforethought. With respect to the appellant’s learned counsel, malice aforethought in our law is used in a technical sense properly defined under Section 206 of the *Penal Code* thus;

“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 cause or not, or by a wish that it may not be caused;
- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

14. The court further stated that:

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.

15. I am satisfied from the nature of the injuries sustained by the Bundi that the Accused did inflict them of malice aforethought

Disposition

16. In the end, I have come to the conclusion that Accused is guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and he is convicted accordingly.

DELIVERED AT MERU THIS 30TH DAY OF MARCH 2023

WAMAE T W CHERERE

JUDGE



Appearances

Court Assistant - Kinoti

Accused - Present

For the Accused - Mr Omari Advocate

For the State - Ms Rita (PPC)

