



**Republic v Alukwe (Criminal Case 30 of 2013)
[2023] KEHC 3779 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 30 OF 2013
WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

FESTO MUKOLWE ALUKWE ACCUSED

JUDGMENT

1. 5 witnesses testified in this matter. One of them witnessed the assault on the deceased, by the accused, Festo Mukolwe Alukwe. PW1, Felister Omukanda Yafesi, was at her home on the material day, while the deceased was seated outside his house, metres away, having a meal. It was at around 2.00 PM. The accused came in, carrying a bag, from which he pulled out a panga, and hit the deceased on the head with it. PW2, Samuel Zedekiah Omutanyi Ashioya, was within the vicinity, but he did not witness the assault. It was PW3, Alice Moyi Welimo, who had given the panga, used to assault the deceased, to the accused. PW4, No. 237823 Inspector of Police Phibian Cherop, was the investigating officer; while PW5, Dr. Dixon Mchana Mwaludindi, was the pathologist, who produced the post-mortem report.
2. I put the accused on his defence. He conceded that he was the one who hit the deceased with a panga, but he said that he was acting in self-defence, as the deceased had attempted to hit him with an axe.
3. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
4. On whether the deceased died, I have the evidence of both PW1, PW2 and PW3. They saw his body shortly after the assault. PW5 produced a post-mortem report on autopsy conducted on the body, and the injuries noted were consistent with those described by PW1. The cause of death was said to be severe head injury secondary to assault with a sharp object. The cause of death was linked to the accused, by PW1, who testified to seeing the assault happen. The accused himself also said that he was the one who hit the deceased.



5. The only contentious issue is whether the act by the accused was with malice aforethought.
6. Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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;
 - (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.”
7. Under section 206, malice aforethought is to be inferred where there is an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from lawful custody of a person and in the process a death is caused.
 8. The accused raises the defence of self-defence. That would suggest that his act was not intended to cause death, for all he intended was to deflect an attack from the deceased. If it is established that he acted in self-defence, the effect would be to reduce the offence from murder to manslaughter.
 9. The question then that I have to address is whether the accused was acting in self-defence. Was he under attack from the deceased, which forced him to act in self-preservation? PW1 was the person who testified as an eyewitness. She did not say that the deceased attacked the accused. The accused said the deceased wanted to attack him with an axe. PW1 did not talk of seeing any axe. She described a scene where the deceased was seated outside his house, eating, when the accused came to the scene, and stood before him, and they began talking, and, in the course of that talking, pulled out a panga, from the bag that he was carrying, and hacked the deceased with it on his head. When I put him on his defence, the accused did not call any witnesses, who could testify to seeing the deceased attack him with an axe, and he acting in self-defence. PW1 testified in straightforward manner, and her statement was consistent, and was not shaken on cross-examination.
 10. From the record before me, I do not have any evidence that it was the deceased who first attacked the accused. What emerged was that the accused was the aggressor. He hacked the hapless man while he was seated having his meal. So the issue of self-defence did not arise. He walked into the compound of the deceased, with one mission in mind, to hack him to death with the panga that he carried, concealed in the empty cement bag.
 11. Was there malice aforethought? I believe there was. The injury was on the head. The accused targeted a most vital organ of the body. The injury inflicted was bad enough to cause death instantly, for the deceased died on the spot, according to PW1, PW2 and PW3. The person who aimed at the head



of the deceased intended to cause his death, and a person who used enough force to cause a death instantaneously, must have intended to cause death, or a grievous injury, all of which are evidence of existence of malice aforethought.

12. In view of everything stated above, I do hereby, find the accused herein, Festo Mukolwe Alukwe, guilty of the offence of the murder of Wycliffe Ashioya Shikuku, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I convict him accordingly, under section 322 of the *Criminal Procedure Code*, Cap, 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Shifwoka, Advocate for the accused person.

