



**Republic v Ekai (Criminal Case 6 of 2017) [2023] KEHC 3397 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3397 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 6 OF 2017  
AC MRIMA, J  
APRIL 27, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**JAMES EKAI ..... ACCUSED**

**JUDGMENT**

1. James Ekai, the accused herein, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on January 25, 2017 at Kitale Farm Prison within Trans Nzoia County, he murdered Elvis Wafula Simiyu.
2. When the accused was arraigned in Court, he pleaded not guilty to the offence. The trial followed and after the close of the prosecution’s case, this Court found that a *prima facie* case had been established to place the accused on his defence.
3. The accused gave a sworn testimony and called no witness.

**The Trial:**

4. The prosecution lined up 6 witnesses to place the accused as the perpetrator of the offence. The prosecution’s case was that on January 25, 2017 at around 11:00 a.m., PW1 one Peter Wafula Barasa, a remandee since 2012 was at the entertainment mess with Martin Nyongesa Wanyonyi PW2, (a prisoner that had served 10 years) and the accused who was serving a 15-year sentence. They were watching Television.
5. The deceased then walked in the room. While on his feet, the deceased stepped on the accused who was seated ahead of him. This action led to an altercation between the accused and deceased.
6. Although the deceased apologized by saying “pole”, the accused instantaneously punched the deceased on the neck. This broke into a fight wherein the deceased hit the accused causing a cut to his lip. The fight continued because none of them wanted to yield. PW1, PW2 and several others separated the



- two as to stop the fight. However, the accused managed to escape the hands of one of the prisoners that held him and hit the deceased again. This flurry of assault caused the deceased to fall down. The accused left the scene.
7. Meanwhile, PW3 PC Benjamin Kirwa, who was the kitchen janitor was on duty about thirty meters from where the entertainment mess was. At the same time, PW4 PC Allan Romeo Bundi was also on duty as a prison warden. PW3 and PW4 heard the commotion. They rushed to the mess. Upon reaching, they found the deceased on the floor unconscious. The deceased was taken to the dispensary within the prison. Realizing that he had sustained serious injuries, the deceased was rushed to Kitale County Referral Hospital. He was rushed to Hospital where he was pronounced dead on arrival.
  8. The accused was also treated at the dispensary.
  9. The incident was reported at Kitale Police Station and was investigated by PW6 PC James Theuri. Witness accounts were recorded. Police officers proceeded to the scene arrested the accused. He was later charged with the instant offence.
  10. The post mortem examination was conducted on January 31, 2017 by Dr Moses Okumu. He observed that the deceased had good nutrition and physique. Externally, he suffered bruises on the left anterior chest and forehead. Internally, his respiratory system suffered massive hemothorax on the left side. He also had hematoma in his scalp. He formed the opinion that the cause of the deceased's death was hemothorax and head injury secondary to assault. He filled in a Post Mortem Report which was produced by his colleague Dr Denis Nanyingi who testified as PW5.
  11. After close of the prosecution's case, the Court found that the accused had a case to answer. His sworn testimony was that he was serving a 15-year sentence when the incident occurred. He stated that he had inadvertently caused an accident on the deceased that he apologized. However, in a fit of rage, the deceased hit him. The impact caused him to fall on the ground. In retaliation, the accused arose and hit the deceased. They were both separated. After the fight, the accused was taken to the Dispensary where he was treated for bleeding from the nose and mouth. He produced treatment notes to that end. To his surprise on his return, he was informed that the deceased had passed on. He was then arrested and charged with the present offence.
  12. Parties thereafter left the matter to the Court for judgment.

#### **Analysis:**

13. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No 352 of 2012 *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
14. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

#### **The death of the deceased:**

15. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap 80 of the Laws of Kenya).



16. In this case, the death of the deceased is not in doubt. It was proved through the evidence of PW5, a Medical Doctor who produced a Post Mortem Report on an autopsy conducted by his colleague on the body of the deceased.
17. The cause of death was deduced as haemothorax and head injury secondary to assault.
18. This Court, therefore, finds and hold that the death of the deceased in this case was proved to the required standard.

**Whether the accused committed the unlawful act which caused the death of the deceased:**

19. There was ample evidence of the fight between the accused and the deceased. That was by PW1, PW2, PW3 and PW4. Further, the accused also alluded to the fight.
20. In the cause of the fight, both the accused and deceased got injuries. Whereas the accused was taken to the Prison's Dispensary for treatment, the deceased was rushed to the Kitale County Referral Hospital for further treatment.
21. The deceased was then pronounced dead on arrival. The autopsy confirmed that the deceased suffered fatal injuries out of an assault.
22. There is no doubt that the deceased was engaged in a fight with the accused. That was immediately before he was pronounced dead. Since the deceased never fought with any other person save the accused, and he died out of injuries caused through assault, then it goes without say that it was the accused who caused the fatal injuries.

**Whether there was malice aforethought:**

23. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
24. Section 206 of the *Penal Code* defines 'malice aforethought' as follows: -
  206. 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.
25. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.



26. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

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, the test of which is always subjective to the actual accused; -

- 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 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 does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs Director of Public Prosecutions* (1975) AC 55". (emphasis added).

27. In the case of *Nzuki vs Republic* (supra), the accused had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to there having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed as follows: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

28. This Court will now juxtapose the above with the facts in the case.
29. The evidence did not allude to any prior dealing between the accused and the deceased. The fight was spontaneous. In such circumstances, the aspect of malice aforethought is apparently missing.
30. By applying the subjective test in *Joseph Kimani Njau vs Republic* case (supra), this Court is unable to find malice aforethought in the circumstances of this matter. Whereas the accused caused the



fatal injuries, there is no proof of malice to the required standard. The killing only amounted to manslaughter.

31. The foregoing analysis does not, therefore, support a conviction in respect of the information of murder. The accused is, hence, found not guilty of the murder of the deceased.
32. However, it is apparent that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.
33. In view of the provisions of Section 179(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya and given the state of the evidence on record and as analyzed hereinbefore, this Court finds the accused guilty of the offence of Manslaughter contrary to Section 202 of the Penal Code and he is accordingly convicted accordingly.
34. Orders accordingly.

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

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court in the presence of:**

**Mr. Nyamu, Learned Counsel for the Accused.**

**Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.**

**Regina/Chemutai – Court Assistants.**

