



**Republic v Tabiro alias Moses Nandwa (Criminal Case 40 of 2017)
[2023] KEHC 18764 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 40 OF 2017
PJO OTIENO, J
MAY 30, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ENOCK TABIRO ALIAS MOSES NANDWA ACCUSED

JUDGMENT

1. The charge against the accused person alleged that on the October 2, 2017 at Ebukhoko sub-location, Shihanda location in Butere subcounty within Kakamega county, the accused Enock Tabiro unlawfully assaulted the deceased to death by cutting him on the neck. He denied the charge and a hearing ensued at which the prosecution called seven witnesses while the accused

Summary of Prosecution Case

2. PW1, Dorothy Makula and the area assistant chief where the incident occurred testified that on October 2, 2017 at 9.45 pm, she received a report of the deceased's death, proceeded to the scene, she found the deceased's body lying within their compound with blood oozing from a wound on the neck. She informed the chief who in turn informed the OCS Butere police station who on reaching the scene carried some investigation from the public before taking away with the body.
3. It was her further testimony that later in the night, at about 2.00 am, she was notified through a phone call from the area community policing administrator, that the accused had been arrested. She presents that upon interrogating the accused, he told her that him together with Bonface Oloo and another unnamed person are the one who murdered the deceased using a panga. She states that she recovered the panga the accused had used to kill the deceased at the exact place the accused had referred her to; behind the deceased's house. The panga at the time was blood-stained and was picked and taken away by the police.



4. On cross examination, she affirmed that she is the one who recovered the panga behind the deceased's house and handed it to the police after signing a paper to indicate so.
5. PW2 was Simeon Kidusare Ongayi, the area community policing administrator, who stated that he was notified about the incident by the assistant chief of the area. On reaching the scene, he found the deceased dead, body lying outside the house and blood oozing from the cut on his neck. Policemen came and took the body and at around 2.00 am on the same incident night, he was informed that the accused had been arrested by one Samson. He added that it is the policemen from Butere who interrogated the accused as to where the panga he had used to assault the deceased was. From his testimony, he indicates that it is him who was sent to go collect the panga at the accused's father's house following the directives given by the accused and that he retrieved the panga on top of iron sheet roof of the accused mother's house before handing it over to the police. On cross-examination, he insisted that him together with Mathew and Jack are the one who went to collect the panga from the accused's father's house in the absence of the assistant chief.
6. PW3, Samson Oulo Odongo testified he heard screams, he went to the scene and found the deceased's body lying within the compound with a cut wound on the neck. Following the allegations that it is the accused who was responsible for the death, he went looking for him and found and arrested him while keeping a vigil at a funeral in a place called Ikomero. On cross-examination, he confirmed that the accused was present when the panga was being brought and was driven away together with the panga to the police station.
7. Dr Juma Sabastian, PW4 and a medical officer, carried out post-mortem examination on the deceased's body and recorded a 10 cm long deep cut wound on the anterior aspect of deceased's neck with the throat also slit. He formed the opinion that the deceased's death had been as a result of severe bleeding following the assault.
8. PW5, the investigative officer in the matter recalled and testified that on October 2, 2017 at around 10.00 pm, after being notified of the murder incident, he, together his two other colleagues proceeded to the scene where they found the deceased's body lying within the compound and at the time bleeding. They examined the body and on investigation, they were informed that the deceased prior to his death had had a quarrel with the accused. He stated that the accused was arraigned to the station the following morning with a panga which had been given to the officers who went to pick the accused at the chief's office.
9. PW7, Peninah Makonjo Shitanda, an eye witness of the incident stated that on the night of October 2, 2017 after having supper with the deceased, each parted ways to their respective houses to sleep. The deceased house was about 10 meters away from hers. At around 8.00 pm while in her house, she heard the voice of Makabila quarrelling with the deceased and she went and separated them. The accused had a panga and price (sic; pliers?) which he gave to the witness who carried away same to his house. Later at 9.00 pm she indicated having seen two men holding the deceased, the accused being one of them. She avers that it is the light from the moon that enabled her see the accused's counterpart cut the deceased's neck before running away. On opening the door, she saw and spoke to the accused who waved a panga at her and told her that they would look for him. The accused then walked away.
10. On cross-examination and while being referred to the statement recorded with the police, she stated that it is the accused who cut the deceased's neck and that he saw the accused cut him twice before he fell down thereafter cutting the third time while he was lying down. On re-examination, she confessed not to be knowing exactly who cut the deceased on the neck as she couldn't see properly.



Defence Case

11. The accused when put on defence admitted having known the deceased as his uncle but denied the charges alleged against him, asserting that on the material day, he was with the deceased and engaged weeding up to midday when they parted ways. He denied there being a dispute or grudge between him and the deceased's and asserted never knowing Bonface nor Shem talked about by PW1.

Analysis and Determination

12. Upon careful consideration of the prosecution evidence, the defence case availed before this court as well as the submissions offered by both sides, the duty of the court is to determine whether the prosecution has proved its case beyond reasonable doubt to justify and merit a conviction against the accused.
13. The accused is charged with offence of murder contrary to sections 203 as read with 204 of the [Penal Code](#). It bears repetition that for an accused to be convicted of the offence of murder, the prosecution must prove beyond reasonable doubt all the four elements of murder being; (i) death of the deceased; (ii) Whether the death was caused by unlawful act; (iii) whether it is the accused's unlawful conduct that caused the deceased's death; and (iv) whether the accused's unlawful conduct was actuated by malice aforethought.
14. From the totality of the evidence, the fact and cause of the death of the deceased is not in dispute herein. From testimonies of all prosecution witnesses, it is evident that the deceased on the night of October 2, 2017 was found dead, body lying within their compound having a deep cut on the neck. The post-mortem reported presented by PW4, a qualified medical practitioner confirmed the deceased having sustained a 10 cm-long deep cut wound on the anterior aspect of the neck as well as a cut throat. It was his findings that the deceased's death was as a result of severe bleeding following the assault.
15. That being the undisputed position, it remains apparent that the crux of matter for determination herein is therefore whether the prosecution proved that it was the accused who assaulted the deceased occasioning the death and that the accused person in executing the assault did so with malice aforethought. The connection between the accused and the assault thus emerges as a pivotal question in order to bind the accused to the facts proving the offense in every criminal case. The court has to satisfy itself before conviction that the identification is free from mistake. The evidence on identification must leave no doubt that the suspect was the real perpetrator of the offence to prevent any slightest possibility of there being injustice to the accused which are not infrequently done through honest but mistaken identifications.
16. In this case, the only witness who testifies to have witnessed the assault is PW7 and as a result, it is only her evidence that can be relied on to link the accused to the murder offence. The evidence tendered by all other prosecution witnesses were grounded on suspicion and going by decision set in [Sawe v Republic](#) [2003] KLR, suspicion, however strong, cannot provide the basis of inferring guilt upon the accused. The guilt must be proved by evidence beyond reasonable doubt.
17. That only one witness proves a fact is never fatal to the prosecution's case. a sole witness suffices but, the law requires the trial court to carefully scrutinize evidence of a single identifying eye-witness, as in this case, and only proceed in convicting if satisfied that it was free from possibility of error or mistake. In [Wamunga v Republic](#) [1989] eKLR, quoted with approval in [Kariuki Njiru & 7 others v Republic](#) [2001] for the proposition that where the only evidence against a defendant is that of identification and recognition, the court ought to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from any error before safely making a conviction.



18. Evidence by PW7, the only prosecution eye-witness shows affirmatively that on the night of October 2, 2017 after having supper with the deceased, each parted ways to their respective houses to sleep. The deceased house was about 10 meters away from hers. At around 8.00 pm while in her house, she heard the voice of Makabila quarrelling the deceased and she went and separated them, taking away the panga the deceased was holding. Later at about 9.00pm, through the window and with help of moonlight, she saw two men holding the deceased, the accused being one of them. She indicates that it is the accused's counterpart who cut the deceased's neck before running away after she opened the door. She was however able to identify the accused when she went to where the deceased was lying down and even spoke to the accused. Even though the witness appears to have contradicted herself on who, between the accused and the counterpart, cut the deceased, that contradiction is to court flimsy and not substantial to render the evidence incredible. The evidence is to court not only candid, but equally cogent on the presence of the accused at the scene of the offense. That the witness was a relative and a neighbour to the accused and that she walked to where he was with the deceased and spoke to him, aligns the evidence to be that of recognition rather than identification. The court is thus fully, and beyond a scintilla of doubt, satisfied that the witness properly recognized the accused because even in cross examination she said there was moonlight and that there was no rain. Since *Anjononi v Republic* [1980] KLR 59 by the Court of Appeal, the law has always been: -

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in one form or other.”

19. It is thus the holding of the court that the evidence of PW7 clearly places the accused at the scene of murder and depicts him irrefutably to have taken an active role in the assault.

20. On the issue of the part played by the accused, the shows he was seen holding the deceased as the counterpart cut him. Even if he did not deliver the fatal blow, he was an aider to the deliverer. He is by dint of section 20 of the *Penal Code* a principal offender. Principal offender includes the one who committed the actual act, one who abets or aids or omits to do something for purposes of aiding or abetting the commission of an offence. In *Antony Kinyanjui Kimani v Republic* [2011] KLR the Court of Appeal held and said:

“...section 20 of the *Penal Code* makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender.”

21. It is the finding of the court, therefore, that the accused, even in the absence of evidence of him actually cutting the deceased, acted in concert with the person who cut the deceased, and is therefore, in terms of section 21 of the penal code, deemed to have had a common intention with that other person. Under that provision, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. In applying and interpreting that provision, the court in *Liningushu & others v Republic* [2005] 1 E.A 229 held, and was upheld by the Court of Appeal, of a wife who organized for the killing of her husband whose defence had been that she did not participate in the killing; -

“She was the mastermind of the operation to eliminate her husband. She procured the killers and agreed to pay for their services. At the scene, she directed the operations although she



did not strike the fatal blow. She paid part of the agreed price after the work was done. She was a principal offender and therefore guilty as charged.”

22. The participation of the accused in the assault is thus proved beyond reasonable doubt and thus issues i), ii), iii) and iv) stand answered in the affirmative and only the issue of whether there was malice aforethought outstands.
23. The accused must be taken, as held above to have had common intention with his accomplice who evaded arrest and was thus aware and if not, ought to have been aware of the inevitable consequences of the assault. The deceased died of cut wound of which a reasonable person would have knowledge that would cause grievous bodily harm if not death. Any person in the position of the accused must be deemed to have the necessary knowledge of such consequence which by itself amounts to malice aforethought. I find that the accused in holding the deceased at the back as his accomplice cut him, had malice aforethought in terms of section 206 of the *Penal Code*.
24. In conclusion, the court holds that the prosecution has proved against the accused all the ingredients of the offense of murder for which reason the accused is convicted for murder as charged.
25. For purposes of sentencing, let a pre-sentence report be filed by the probation officer within 30 days from today. Mention on June 23, 2023.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Ms. Chala for the Prosecution/State

No appearance for Mr. Ondieki for the Accused

Court Assistant: Polycap

