



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kiptim (Criminal Case 65 of 2017)
[2023] KEHC 18196 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 65 OF 2017**

RB NGETICH, J

MAY 25, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

ZAKAYO KIPKEMEI KIPTIM ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars are that on the 3rd day of July, 2013 at around 19:00 Hours in the evening, at Poror Eldama Ravine, within Baringo County, the accused murdered Joseph Kiptim (deceased).
2. The accused pleaded not guilty to the charge and the matter was set down for full trial where the prosecution availed 7 witnesses who testified in support of the charge against the accused.

Prosecution Evidence

3. Pw 1 Alice Chebet Kiptim testified that on the 3rd July, 2013 at 7:00 p.m, she was at home with her younger sister when her father who was drunk and carrying a hoe/jembe arrived at 7pm and ask them to go and see his elder brother at the neighbor's farm. she said they found their uncle lying dead with blood on his face. They went back running and informed Kevin's mother and Wilson a neighbor whose house they had slept after their father's. She identified the jembe her father carried home in court. She stated that at the time, her mother was at the centre, Poror where she lived. she went to the police station and told them what she had witnessed.
4. Pw 2 one Grace Chekarin Sawe who was the wife of the deceased and sister in-law to the accused testified that on the 3rd July, 2013, she was at home when the accused cut the deceased and sent his child Pw1 together with her sister to go to Zakayo's house so that he could show her where he had killed



- him. She testified that there was blood everywhere including on the clothes and when she screamed, other people went to the scene and the accused who was armed with a jembe asked if he could help them call a taxi to take the body.
5. They took the deceased to Eldama Ravine where he was treated and referred to Nakuru Hospital where he was taken to the ICU but died after 3 days. Together with Jonah, she identified the deceased's body for postmortem examination. She later recorded her statement at the police.
 6. On cross examination, she stated that she did not witness the incident and did not see the accused during the day that date and only saw him at the scene that evening. She testified that the accused and the deceased are brothers and have houses in the same land which are about 50 metres apart. She said the accused and the deceased had quarreled following death of 2 of accused's cattle which consumed deceased's herbicide. She added that the issue had been resolved but she was not aware if it was the cause of the incident.
 7. Pw 3 Brian Kiptim confirmed that he accompanied Pw1 to check on the deceased's body in the farm and went with his mother went to report the matter to police.
 8. He testified that the accused is a younger brother to his father and he is the one who sent Alice to go check on their father. He said the material day, he saw the accused at the centre at around 8:00pm after their father had been taken to hospital. He later learned from their mother that his father had died in hospital.
 9. He said after his father had been taken to Hospital, he saw accused while armed with a jembe screaming at his home saying that he should be left alone to kill.
 10. Pw 4 Wilson Miyenga Chepkonga testified that on 3/7/13 at 8:00p.m, he was at home when a neighbour Grace Chepkorir arrived with her two children and informed him that her husband Joseph Kiptim had been killed in the shamba belonging to Kiprop by the accused who is the brother to the deceased. He accompanied them to the scene and found the deceased's body lying on the ground head facing down with injuries on the head and hand. He used a torch the lady had. He confirmed that they took the victim to Eldama Ravine Hospital. He said he saw the accused from the bush with a jembe after arriving at the scene and he told them the deceased had been waiting for him on the road. They left the accused at the scene as they took the victim to hospital.
 11. Pw 5 Doctor Titus Ngulungu a pathologist who did postmortem examination on the body of the deceased at P.G.H Nakuru on 10/07/13 at 10:00 a.m formed the opinion that the cause of death was severe head injury due to blunt force trauma. The doctor produced the postmortem report in court as exhibit.
 12. Pw 6 Inspector Judith Majimbo testified that on the 6/7/13, she was at the Eldama Ravine police station when she received a call from a lady called Grace Sawe, who reported that her husband Joseph (deceased) had been beaten by Zakayo the accused herein. She sent police officers, P.C Mwangangi in company of other police officers to the scene where they found and arrested accused with blood stained Jembe. The jembe was later taken to Government chemist and suspect charged with offence of assault to court and later that evening she information from the victim's wife that he had died at the P.G.H Nakuru.
 13. Pw 7 PC Wilson Mwangagi confirmed that they received report on 6/7/13 at about 12:00 noon from Alice Jepkorir Sawe the wife of the deceased that her husband had been assaulted and had been taken to Eldama Ravine Hospital.



14. That on the following day 7/7/2013 at 5:00 p.m, they went to arrest accused and recovered a jembe under his bed. He confirmed that accused was charged with offence of assault and later charged with offence of murder after death of the victim. He confirmed that postmortem was done on the body and DNA profile was done by Government analyst and report dated 7/10/15 prepared; that DNA profile generated from the blood stains on the Jembe matched the DNA profile generated from the blood samples item of the deceased Joseph Kibor.
15. Upon closure of prosecution case, the court found that accused had a case to answer in ruling delivered on the 31st day of October, 2019 and he was placed on his defence in accordance with section 306(2) of the *Criminal Procedure Code*.
16. In his defence the accused confirmed that the deceased was his elder brother. He testified that on 3/07/13, he went to the farm then to a drinking joint. On his way from a drinking joint, he reached Kiprop's farm where people emerged and beat him. He said he defended himself with the jembe he had and as the others ran away, the deceased fell down. He discovered he was his brother and went to wake his children and Grace Chepkering and informed them he had killed Joseph/deceased in the farm.
17. He testified that he went back home and slept after the deceased was taken to hospital. The next morning, he went to the home of the deceased to inquire about his welfare. He learnt from the deceased's wife that his brother was in bad state. He said the deceased's wife requested 5,000/= for treatment. He gave her kshs 3,000/= while Chepkering gave her 2,000/=. He was later arrested upon arrest he admitted killing the deceased but later denied.
18. He testified that difference with the deceased arose over death of deceased's cattle as a result of grazing on accused's farm which he had sprayed with herbicides. He stated that they resolved the issue and had no other problem with the deceased. He stated that the deceased was not armed and admitted that he hit the deceased with a Jembe. He prayed that he be acquitted and if the court find him guilty a non-custodial sentence be imposed.

Submissions by the Prosecution

19. In submissions dated 3rd August 2022, the prosecution submits that the accused had malice aforethought to kill the deceased on ground of nature of the weapon used being a Jembe; in that the accused knew that it would inflict fatal injuries resulting in death. Secondly, there was no sudden and grave provocation from the deceased directed to the accused to warrant the accused resorting to use of a lethal weapon against the deceased.
20. Thirdly, the weight of the force applied by the accused on the deceased and the part of the body the accused aimed at is a clear indication that he knew and contemplated the consequences of his act; to occasion fatal injuries and result in the death of the deceased.
21. The prosecution further submits that the evidence adduced by the prosecution witnesses was well corroborated; that there were no material contradictions whatsoever between their evidence. The accused is the one who led the witnesses to the scene and besides his own admission, evidence adduced placed him at the scene of crime; a clear conclusion that the prosecution has proved their case against the accused person beyond reasonable doubt.
22. The prosecution cited the case of Nairobi Court of Appeal, Criminal Appeal No. 586 of 2010 Between *Kyalo Kalan and Republic* as being relevant to this case. The relevance being that in the instant case, the accused person hit the deceased with a Jembe being a fatal weapon and with force that inflicted serious injury on the head leading to the deceased's death. The accused also aimed at the head being a delicate part of the body while the deceased at the time was not armed with any weapon and there



was no sudden provocation by the deceased's; that the accused applied excessive and unwarranted force against the deceased.

23. The prosecution further submits that Pw 4 testified that while he and others were still at the scene, the accused returned with the Jembe and demanded space so that he could hit the deceased again and ensure he was dead but was restrained from doing so.
24. In conclusion, the prosecution submits that they have proved their case against the accused beyond reasonable doubt and urge the court to convict the accused accordingly.

Submissions by the Accused

25. The accused filed submission dated 9th December, 2022. The accused submitted that the offence was committed in the evening being 7:00 p.m when visibility was obscured by darkness and there was no eye witness who could pin-point with clarity and certainty that the accused person killed the deceased; that the evidence was not watertight and it would be dangerous to rely on hearsay evidence to convict the accused.
26. The accused further submit that the essential ingredients of the offence of murder were not satisfied by the prosecution namely mens rea and malice aforethought as provided for under section 204 and 206 of the Penal code as to whether the accused pre-meditated, planned and intended to cause death to the deceased. Further that none of the witnesses alluded grudge between the duo and urged the court to find that the prosecution's case was not proved beyond reasonable doubt and acquit the accused person.

Analysis and Determination

27. I have considered evidence adduced by the prosecution and defence by the accused. I have also considered submissions by the state and accused person. I wish to consider whether the ingredients for the offence of murder have been proved beyond reasonable doubt. The ingredients being:-
 - a. the deceased died,
 - b. that it was the appellant's unlawful act that led to his death, and
 - c. that the murder was carried out with malice aforethought.
28. There is no dispute that the deceased died on 7/07/2013. His death was confirmed by Dr. doctor Titus Ngulungu a pathologist who carried out postmortem examination at P.G.H Nakuru on 10/07/13 at 10:00 a.m and produced postmortem report in court as exhibit 2.
29. None of the witnesses who testified saw accused kill the deceased. Having found that there is no direct evidence I wish to consider whether there is circumstantial evidence linking accused to the offence.
30. In the *R v Taylor, Weaver and Donovan* 1928 (Cr 21 Cr. Appl R2), the principles applicable to circumstantial evidence was enunciated in the following words:-

“Circumstantial evidence is very often the best evidence. It is the evidence of the surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial”.



31. Further in the case of *Mwangi v Republic* [2004] 2 KLR 28 the court stated as follows:-
- “It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example *Rex v Kipkering Arap Koskei & Another* (1949) 16 EACA 135.”
32. For circumstantial evidence to secure a conviction, the circumstances surrounding the death should be cogent and well established to the extent that when all evidence is considered in totality, it points to the accused’s guilt. The circumstances should form a chain so tight to arrive at an inescapable conclusion that the accused caused the deceased’s death.
33. From evidence adduced by Pw1 who is accused’s daughter, it is accused who informed her that he had killed his brother and asked her to go and see Kiprop’s farm where the deceased was. Together with Pw2, they went and saw the body; he asked her to go and inform his family. They found the deceased at the place the accused told them. The accused appeared at the scene when they were still there while armed with a panga which he had used to inflict injuries on the deceased. DNA analysis by Government chemist found that the DNA of blood in the jembe recovered by Pw7 from under accused’s bed matched the deceased’s blood
34. The Witnesses adduced corroborative evidence which provide a chain of events linking the accused to the death of the deceased. Further, the accused in his defence in court admitted to hitting the deceased and even though he said he was with others who wanted to attack him, he confirmed that the deceased was not armed; the accused was not therefore defending himself as a result of any provocation from the deceased.
35. In view of the accused directing Pw1, Pw2 and Pw3 to the scene of the murder and being armed at the scene, recovery of the jembe from under his bed and DNA analysis in the jembe matching deceased’s blood, there is a clear and unbroken chain of events in the circumstantial evidence that emerges; the totality of which all point to the accused as being responsible for the deceased’s death. There is no doubt that it is the accused who unlawfully caused the death of the deceased herein.
36. As to whether the appellant had the intent to kill with malice aforethought, section 206 of the [Penal Code](#) defines the circumstances that constitute malice aforethought as;
- “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)



(d)”

37. In the case of *R v Tubere S/O Ochen* (1945) 12 EACA 63 the Court set out the prerequisites for establishing malice aforethought thus;

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

38. And in the case of *Nzuki v Republic* [1993] KLR 171 the court of Appeal specified the basis upon which malice aforethought is established when it stated as follows:-

- “ a) Intention to cause death;
- b) Intention to cause grievous bodily harm;
- c) Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievously 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.”

39. No doubt malice aforethought has been established in the present case when the accused viciously struck the deceased's on his head with a Jembe thereby injuring him and eventual led to his death. By so doing, the accused must have known that he would grievously injure the deceased or worse still, kill him. As such, I am indeed satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the accused, conclusively established malice afore thought.

40. The accused person's defence was that while on his way home, he was attacked by several people including the deceased and that he was acting in self defence when he hit the deceased with the jembe he had.

41. The Court of Appeal considered the law regarding self defence in *Abmed Mohammed Omar & 5 others v Republic* NRB CA Criminal Appeal No 414 of 2012 [2014] eKLR and stated as follows:

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in *DPP v Morgan (supra)* it was held that:...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”



42. In *IP Veronica Gitabi and another v Republic* MSA CA Criminal Appeal No 23 of 2016 [2017] eKLR, the Court of Appeal once again reiterated the common law position regarding self-defence as follows:

“The common law position as regards the defence of self defence was well articulated by the Privy Council in *Solomon Beckford v The Queen* [1987] 3 ALL ER 425. After a comprehensive review of previous decisions, the Council rejected the view that for an accused person to be availed the defence of self defence, his belief that he was in imminent danger should not only be genuine but also based on reasonable grounds. Instead, they approved the view that if the accused person held the belief, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant and that the accused had to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view reasonable or not.”

43. Therefore, the question to be answered on self-defence put forth by the accused person herein is whether the force used by the accused person was reasonable and necessary in the circumstances.

44. In *Mokua v Republic* [1976 – 80] 1 KLR 1337 it was stated that:

“Self defence is an absolute defence even on a charge of murder unless, in the circumstances of the case the accused applies excessive force.”

45. The first test applicable in this case is whether the accused exceeded the bonds of self-defence. From Dr Ngulungu’s report, there is no doubt that the accused hit the deceased more than once and with excessive force. He also targeted sensitive organs. The force in my view rules out self defence. There is no doubt that the intention was to inflict fatal injuries on the deceased.

46. I therefore find that the prosecution proved malice aforethought within the meaning of section 206(a) of the *Penal Code*, beyond reasonable doubt.

47. From the foregoing I find that the prosecution has proved the charge against the accused person beyond reasonable doubt. I proceed to find accused guilty of the offence of the murder of Joseph Kibor Kiptim as charged.

Final Orders:-

48.

1. The Accused Zakayo Kipkemei Kiptim is hereby convicted of the offence of murder contrary to section 203 as read together with 204 of the *penal code*.
2. Right of Appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF MAY 2023.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Terer for Accused.



Accused present.

