



**Republic (DPP) v Mbaisi (Criminal Case 23 of 2017)  
[2023] KEHC 21989 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 23 OF 2017  
PJO OTIENO, J  
AUGUST 23, 2023**

**BETWEEN**

**REPUBLIC (DPP) ..... PROSECUTOR**

**AND**

**DERRICK MBAISI ..... ACCUSED**

**JUDGMENT**

1. Derrick Mbaisi ('accused person') is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the June 18, 2017 at Bunjeri village Shikuku Sub-location, Shilele location in Kakamega South Sub-county within Kakamega County, the accused person murdered Brian Avoka.
2. The accused person pleaded not guilty to the charge and to prove its case, the prosecution called a total of seven witnesses.

**The Evidence**

3. PW1, Regina Kogo Paul, a neighbor to the deceased testified that on June 17, 2017 she had attended a 'matanga' at the home of one Victor Munyasa and that she was preparing food for the pastor when the accused came wearing a green jacket and slippers while she was inside the house. The accused then went round the house and she heard a sound 'Pu' and checked through the window. She heard the deceased cry out, "you have stabbed me. You have killed me" while mentioning the name of the accused though she could not remember the name mentioned. She then saw the accused holding a knife on his right hand and he was standing with the deceased. The deceased then walked for a short distance while bent and fell down. The witness called one Mama Victoria who came and asked the accused why he had stabbed his colleague to but the accused remained mute and went away carrying the long knife towards the river. The two, witness and Mama Victoria, screamed and people came and took the deceased, who was at that time bleeding from the chest and food oozing out of his stomach, to the hospital and. The



- witness asserted knowing both the accused and the deceased very well before the incident and that the deceased had sold land to the accused's father.
4. On cross examination she stated that the accused was well known to her as a member of a family which had bought land and settled in the village and that when she heard the sound 'Pu' she checked through the window and saw the accused pulling out the knife from the deceased's chest.
  5. PW2, Roseline Bahati Imbiakha testified that the deceased was her brother in law and that on June 17, 2017 at about 2PM she was attending a 'matanga' when she heard screams from one Mama Victoria and rushed to the scene where she found the deceased having fallen down and bleeding from the stomach. She wrapped a leso on the wound, placed him on a motor cycle and rushed him to hospital. On cross examination she stated that she did not see the accused at the scene.
  6. PW3, Victoria Mukhatia Shimoli gave evidence that the deceased was her grandchild. That on June 17, 2017 she was at home with the deceased on a day Christians were cooking when at about 2PM the accused visited the deceased. The accused removed a knife from his waist and stabbed the deceased on the side of the ribs at the stomach and ran away. The witness followed the accused and on negotiating the first corner, PW2 called her and requested that she provides leso to cover the deceased's wound.
  7. The deceased was taken to Mukumu Hospital where he was pronounced dead the following day.
  8. On cross-examination she stated that she knew the accused since she had sold land to his family. She also stated that they were four people present when the deceased was stabbed.
  9. PW4, Felix Shisakha Asiko testified that he was the father to the deceased and that on June 17, 2017 he was attending a 'matanga' when he was informed by one Mary that his son had been stabbed. He rushed to the scene and took his son to Mukumu Hospital where he was pronounced dead the following day.
  10. On cross-examination he stated that he knew the accused and that he did not see him on June 17, 2017.
  11. PW5, Julius Musungu Shibachi, testified that on June 17, 2017 at 2PM he was attending a funeral when he heard people screaming that the accused had stabbed the deceased. He rushed to the scene and saw the accused escaping. They then took the deceased to Mukumu Hospital where he died the following day.
  12. On cross examination he stated that he did not witness the accused stab the deceased though he saw him run away.
  13. PW6, Evayne Musimbi Khayega, mother to the deceased gave evidence that on June 17, 2017 she was attending a 'matanga' when she heard screams from her home where she rushed to and was informed that her son had been stabbed by the accused. She fainted and next day she was informed that his son had died.
  14. It was the testimony of PW7, Joseph Kyayeka, that on 12/06/2017 he went to Mukumu Hospital where he identified the body of the deceased before post mortem was done.
  15. After the court ruled that a prima facie case had been established against the accused person, he was thus placed on defence and he elected to give sworn evidence. He stated that on June 17, 2017 he was 17 years old and a form three student who was at home for half term at the time. When he got home that day he found that his siblings had attended a funeral nearby. He decided to take a walk with his dog and as he strolled, he encountered the accused who hit his dog with a stone alleging that they had been stalking his family since their families did not have a good relationship because his family had bought land from them but they had caused them trouble. He claimed that the deceased then went to their home and returned holding him from behind. The deceased hit him with a slasher and he struggled



to snatch away from him. Though the deceased over powered him, he managed to throw him down and he saw blood on the ground. The deceased got up and headed to his grandmother's house from which house he had screams and claims that he had killed the deceased. He headed to a football match and thereafter to his step mother's house as advised by his mother. The next day he heard that the deceased had died and he surrendered himself at Malaika Police Station. He further stated that during his struggle with the deceased, he got cut in his left and right hand.

16. On cross examination he stated that he did not know what stabbed the deceased as he saw him rise holding his chest. He claimed that he did not see the slasher and assumed that the deceased had left with it. He also stated that he went to watch football with his injuries and did not seek medical attention. He refuted claims that he attacked the deceased.
17. The testimony of the accused marked the close of the defense case and the parties proceeded to file their respective written submissions.

### **Accused Person's Submissions**

18. In summary, it is his submission that it was the deceased who accosted him, went back to their home and fetched a slasher which he used to attack him with. It is his defence that he defended himself against the onslaught attack by the deceased out of which the deceased unfortunately fell on the slasher he himself had brought to the scene and sustained serious injuries to which he succumbed to. He claims that he acted in self defence devoid of malice aforethought. He further claims that the fact that the deceased lost his life should not deny him the right to rely on self defence and places reliance on the case of *Republic v Joseph Kibet* (2010) eKLR for the proposition of the law that the issue of what the force used must result is not material.

### **Submissions by The State**

19. The prosecution submits that it had proved all the elements of the offence of murder against the accused in that a post mortem report was produced which confirmed the death of the deceased and that the report further indicated that the deceased death was due to a stab wound to the deceased's stomach. On the identification of the accused as the person who stabbed the deceased, the state submits that PW3 witnessed the attack and that PW1 also saw the accused enter the compound while armed with a knife and heard the dying declaration of the deceased when he shouted and names the accused as the person who had killed him and that PW5 saw the accused leave the compound in a rush. They argue that the attack happened in broad day light and the accused was a neighbor to the witnesses hence a familiar face.
20. On whether the accused had malice aforethought when he committed the crime, the state submits that the weapon used, in this case a knife and the extent of the injuries which were inflicted on the deceased imputes malice. They place reliance on the case of *Duncan Mugesu Masera v Republic* (2019) eKLR where it was held that by stabbing the deceased in the stomach, the appellant knew or was indifferent that such an act would result in the death or caused the deceased grievous harm.
21. On the defense of self-defense as raised by the accused, the state claims that evidence shows that it was the accused who was armed and he was the one that attacked the deceased who was not armed and had not posed any danger. They also question how the accused who claimed to have been injured and presumably bleeding would not go and seek medical attention but first choose to go and watch football.



## Issues for Determination

22. The offence of murder is defined by section 203 of the Penal Code to be committed when any person, who of malice aforethought, causes death of another person by an unlawful act or omission. by that definition, therefore, for the prosecution to achieve a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond reasonable doubt. For this matter, the court discerns for issues to isolate for its determination. The issues that arise for determination by this court are as follows; -
- a) Is Brian Avoka deceased?
  - b) Was the death of the deceased alluded to by unlawful acts or omission?
  - c) Did the accused person kill the deceased?
  - d) Whether the accused was actuated with malice afore thought in causing the death of the deceased

## Whether Brian Avoka is deceased

23. The death of the deceased has been confirmed through the production of the post mortem report prepared by Dr. Dixon Mchana which shows that the deceased died on 18/6/2017.

## Whether his death was alluded to by unlawful acts or omission

24. The right to life is protected and guaranteed under Article 26 of the Constitution of Kenya, 2010 and any action that tends to take the life of another is unlawful.
25. The autopsy report shows that the deceased's cause of death was septicemia due to empyema thoracic following a stab wound and this makes the actions leading to the death of the deceased not only unnatural but also unlawful.

## Did the accused person kill the deceased?

26. This is a case where there is an eye witness to the killing of the deceased and a dying declaration by the deceased.
27. PW3 narrated to have seen how the accused stabbed the deceased by stating as follows; "On June 17, 2017 at 2PM. I was at my home. I was in the kitchen. There was a matanga at the home. Christians were cooking at the home. I was with Brian Mbaisi, the accused in the dock came to see him. We were standing outside the kitchen when Mbaisi came. I thought he had come to see Brian. He removed a knife from his waist. He then stabbed Brian with the knife on the side of the ribs at the stomach. He ran away."
28. PW1 in her testimony reiterated that the deceased made a dying declaration in which he named the accused as the perpetrator. The admissibility of a dying declaration is governed by the stipulations of section 33(a) of the Evidence Act cap 80 Laws of Kenya which provides as follows:-

"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of



death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

29. The admissibility, permissibility and reliance of a dying declaration was addressed by the court of Appeal in *Philip Nzaka Watu v Republic* [2016] eKLR where it was held as follows: -

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements...

While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

30. It was the testimony of PW1 that the deceased was crying within her hearing, in the presence of the accused and stating that it was the accused who stabbed him. In her evidence PW1 stated: -

“I heard Brian crying out ‘you have stabbed me. You have killed me’. He had mentioned the name of the accused and told him that he had killed him. I forget the name that was mentioned. I saw the accused holding a knife on the right hand.”

31. In addition, PW5 gave evidence that he saw the accused running from the scene of crime. When put on his defense, the accused testified that it was the deceased accosted him and during the confrontation, the deceased fell to the ground and the accused suddenly saw blood on the deceased. His testimony puts him at the scene of crime and is a confirmation that he was the last person to see the deceased without a stab wound and the first person to see the deceased bleeding from a stab wound. There was no evidence of the presence of a third party in the company of the accused and the deceased. That evidence by the accused adds that the deceased fell to the ground and accidentally fell on the slasher he was holding yet, the same accused assert that he had managed to snatch the slasher from the deceased. the court finds the evidence by the accused to be less credible and unsafe to be believed. To the contrary, the evidence of PW1 that he saw the accused hold a knife, heard the deceased cry that the accused had killed him and saw the accused ran away with the knife to be more cogent and credible of what actually took place. In total, the evidence of the prosecution witnesses is so overwhelming to lead to the conclusion that it was the accused who stabbed the deceased leading to his death.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

32. Section 206 of the *Penal Code* stipulates that 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.”
33. The provision was discussed and interpreted by the by the court of appeal in *Nzuki v Republic* [1993] KLR 171 where it was observed 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 rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous 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 the intention were aimed at a potential victim other than the one who 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 v DPP* [1975] AC 55).”

34. By his conduct disclosed from the evidence on record, malice aforethought as the propellant of the unlawful acts of omission sufficiently proved the guilty mind in the accused.

35. A review and analysis of the accused’s evidence tacitly asserts that the death of the deceased was as a result of his acts in self defence after being accosted by the deceased. It was the position of the court in *Sharm Pal Singh v R* [1962] EA 13 and *Guzambizi Wesonga v Republic* [1948] 15 EACA that an act of homicide is excusable under justifiable circumstances such as self defence by holding as follows; -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

36. The defence of self-defence is coded in Section 17 of the Penal Code that criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law. The said common law principles are discernible from case law and the commonly quoted decision is that of *Palmer v Republic* [1971] AC 814 where it was held as follows: -

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous; others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If



the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

37. In the circumstances of this case, can it be said that the accused in imminent danger that needed averting by use reasonable force? It was the testimony of PW3, an eye witnesses to the stabbing of the deceased, that the accused approached the deceased, never said a word and simply stabbed him. It appears there was no confrontation before the attack and the deceased was unarmed. In his defence, the accused claimed that there existed a dispute between his family and that of the deceased over land. He claimed that the deceased was troublesome and occasionally disturbed their occupation of the land. In his testimony he appeared disgruntled by the actions of the deceased and the court concludes that, for the goal of revenge, the accused armed himself with a knife to attack the deceased for the troubles he had caused his family. That was wholly unlawful and inexcusable. It certainly falls far away from semblance of defence of the person or his property.
38. That conduct invites the inference of malice aforethought can be inferred from the manner of the killing and the weapon used. As observed by Eastern Court of Appeal in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, the court in determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.
39. This observation was buttressed by the court of appeal in the case of *Abanga alias Onyango v Republic* Cr. Case No. 32 of 1990 where it was held that where the deceased was stabbed severally with a sharp object, apparently the knife subsequently recovered, a lethal weapon, and demonstrated by the postmortem report that the accused targeted the head, neck anteriorly and posteriorly, malice aforethought was proved. In that case the court said: -

“The medical doctor described the interior stab wounds in the following manner:

3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.

On the right shoulder a 5 cm and 7 cm deep stab would on the dorsten of the right hand and 3 cm long stab wound.

There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted.”

40. According to the autopsy report in this matter, the deceased suffered a stab wound measuring 3x0.5cm below the rib which attack and resultant injury led to his death. The weapon used was a knife which is known to have deadly effects especially when aimed at the ribcage known to house delicate and sensitive organs. The manner in which the deceased was attacked imputes the existence of malice aforethought on the part of the accused in that the extent of potential injury would only be reasonably expected to result in nothing but grievous harm.



41. It is thus the court's finding that the prosecution has proved beyond reasonable doubt the offence of murder against the accused with the inevitable conclusion that the accused is therefore guilty as charged and convicted.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF AUGUST, 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Ms. Chala for the Prosecution

Mr. Otsieno for the Accused

Court Assistant: Polycap

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