



**Director of Public Prosecution v Gichuru (Criminal Case E055 of 2021)  
[2023] KEHC 22967 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE E055 OF 2021  
TW CHERERE, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... PROSECUTOR**

**AND**

**BONIFACE MUTETHIA GICHURU ..... ACCUSED**

**JUDGMENT**

1. Boniface Mutethia Gichuru (Accused) and another already convicted were jointly charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#).

The particulars of the charge are that on 05th September, 2020 at Githu village Githu Location in Tigania Central Sub-County within Meru County murdered Isaiah Mukabike

2. Accused denied committing the offence and the prosecution called a total of seven witnesses in support of their case.

**Prosecution case**

3. The prosecution case as stated by Kantas Murimi was that on the 05<sup>th</sup> September, 2020, he was in his house about 100 metres from his father's house when he saw Accused who is their neighbor cut his father's leg with a panga. Agnes Kathure, wife to Isaiah Mukabike stated she was in her house on 05<sup>th</sup> September, 2020 and had rushed out when her husband screamed for help to find him lying on the ground with an injured leg. It was her evidence that she saw Accused whom he had seen in the village for about 4 months walking away armed with a panga. She screamed and Kaberia and Murimi arrived at the scene shortly thereafter. Linus Muthaura stated he was 10 metres away from scene of crime and had seen Accused cut deceased with a panga. Amos Mutwiri stated he was 100 metres away from the scene and that after he heard screams, he saw Accused walking away armed with a panga. Kaberia Gitonga arrived at the scene to find Isaiah injured and he stated he saw Accused walking away armed with a panga about 70 metres from the scene. Isaiah unfortunately died on the same date that



he was assaulted and the matter was reported to police on 06<sup>th</sup> September, 2023 subsequent to which Accused was arrested about a year later and charged.

4. The postmortem report PEXH. 1 dated 10<sup>th</sup> September, revealed that Isaiah suffered deep cut on the left distal thigh which left thigh hanging with skin and minimal subcutaneous tissue, cut wound on right arm with fractured humerus, cut on left shin with fracture of tibia and had as a result died of external hemorrhage from the deep cut wounds.

### **Defence Case**

5. Accused in her sworn defence denied the offence and stated he was at his home about 3 kms from deceased's home on the date the offence is alleged to have been committed. He stated that he was framed by his step-mother one Jerusha so that he does not inherit his father's land.

### **Analysis and determination**

6. Section 203 of the Penal Code under which Accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought.
7. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.

#### **a. The death of the deceased**

8. That Isaiah Mukabike died was confirmed by way of a postmortem form PEXH. 1 which reveals that Isaiah suffered deep cut on the left distal thigh which left left thigh hanging with skin and minimal subcutaneous tissue, cut wound on right arm with fractured humerus, cut on left shin with fracture of tibia and had as a result died of external hemorrhage from the deep cut wounds.

### **Proof that accused person committed the unlawful act which caused the death of the deceased**

9. The prosecution has a duty to prove beyond reasonable doubt that the person accused is guilty of the offence charged. (See *Woolmington vs. DPP* 1935 A C 462 and *Bakare vs. State* 1985 2NWLR).
10. Concerning whether the fatal injuries were inflicted by Accused, Kantas Murimi and Linus Muthaura stated that they saw Accused cut Isaiah Mukabike with a panga. Agnes Kathure, Amos Mutwiri and Kaberia Gitonga who were attracted to the scene of crime by screams did not see Accused cut Isaiah but stated that they saw him walking away from the scene armed with a panga.
11. The prosecution case is based on visual recognition of Accused by the witnesses who stated that they knew him before the date of the murder. The Court of Appeal in the case of [\*Joseph Muchangi Nyaga & another v Republic\* \[2013\] eKLR](#) stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.
12. The difference in approach between identification and recognition was expressed thus by Madan J.A in *Anjononi and Others vs The Republic* [1980] KLR;

“.....This, however, was 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 upon the personal knowledge of the assailant in some form or other.”

13. It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error.
14. Although Accused denies that he was at the scene but his alibi defence cannot stand in view of the fact that he was seen at the scene by five witnesses who knew him well. According to the evidence of the five-prosecution witness, the incident occurred around 05.00 pm to 05.30 pm. I am therefore satisfied that the circumstances of identification by recognition were favourable and free from possibility of error and that it Accused and no one else that inflicted the fatal injuries on Isaiah.

### **Malice aforethought**

15. Having found that the prosecution has proved actus reus, the issue for determination is whether malice aforethought can be inferred from the manner in which the murder was executed.
16. In *Morris Aluoch v Republic* Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of *REX vs Tubere s/o Ochen* (1945) 12 EACA 63 with approval where it was in stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.
17. In this case, there is evidence of repeated blows of cuts inflicted by a sharp object on deceased’s left distal thigh which was left hanging with skin and minimal subcutaneous tissue, cut wound on right arm with fractured humerus, cut on left shin with fracture of tibia and had as a result died of external hemorrhage from the deep cut wounds.
18. The injuries inflicted on the body of Isaiah were so severe and Accused ought to have known that such grave injuries could possibly cause grievous harm or the death of Isaiah.
19. Right to life is protected by Article 26 of the *Constitution* and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). The death of Isaack was intentional and unlawful.
20. Having considered all the evidence in this case, I reject the defence and find that the prosecution has proved the charge of murder against Accused and he is found guilty and convicted accordingly.

**DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

### **Appearances**

Court Assistant - Kinoti

Accused - Present

For Accused - Mr. Ngentu Advocate

For DPP - Ms. Rita (PC-1)

