



**Republic v Folleni & another (Criminal Case 02 of 2017)  
[2023] KEHC 24628 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 02 OF 2017  
A. ONG'INJO, J  
OCTOBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GEORGE FOLLENI ..... 1<sup>ST</sup> ACCUSED**

**FRANCIS CHARO FOLLENI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons George Folleni and Francis Charo Folleni face a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that George Folleni and Francis Charo Folleni on the 21<sup>st</sup> day of July 2012 at around 8.30 am in Matomane village, within Kilifi County jointly murdered Kahindi Ngawa Katana.
3. The prosecution called 5 witnesses to support its case that the accused persons committed the offence herein and they were placed on their defence.

**Prosecution Case**

4. PW1 testified that while at the funeral of his cousin Daniel Folleni on 21.7.2012 and waiting for burial ceremony, he saw Charo Chome approach where the elders were seated and held the deceased person's hand and told him there was something he wanted to discuss but suddenly he removed a hammer that had an axe and he hit the deceased on the head three times and also pushed him away. That when the deceased fell the accused persons took sticks and started hitting him while claiming he was a witch. That others joined and Abedi picked a stone and hit him on the face injuring the eyes. PW1 said he tried to intervene as mourners ran away but the assailants overwhelmed him as they were many and



- Kahindi Ngawa was killed. PW1 said that it is him, Nathaniel Mumba Kahindi and Hamisi Kahindi who tried to intervene but they were overwhelmed.
5. PW1 said the Assistant Chief arrived at the scene and interrogated him about what happened and he gave out the names of the assailants. That the Assistant Chief made a phone call and reported to the police. That when the police arrived at the scene some assailants were arrested but George Folleni, Charo Folleni and Karisa Kitsao were not traced. That the body of the deceased remained at the scene up to 2.00 am when the body of Daniel Folleni was buried at 3.00 pm. The police collected the body of Kahindi Ngawa and took it to Kilifi Hospital Mortuary. PW1 said the accused persons were his cousins and he knew them since childhood and they stay in the same village. PW1 said both accused persons used firewood to assault the deceased. He said that the accused persons herein and Kitsao went underground after committing the offences and that accused persons were traced after about 2 years. PW1 was also a witness at the time of postmortem.
  6. PW2, Nathaniel Mumba Kahindi testified that on 21.7.2012 he was attending the burial of his cousin brother Daniel Folleni when at 8.30 am he saw the accused person in a group talking. He said those in the group were George Folleni, Charo Folleni, Safari Folleni, Charo Chome, Tabu Folleni, Ngala Charo, Saidi Amin, Baraka Ngawa, Mtawali Amin, Abedi Amin, and Karisa Kitsao. He said he did not know what the group was discussing and when he went to find out, he was told to go and see what would happen.
  7. PW2 said burial was to take place at 2.00 pm. That 30 minutes after he had gone to sit as instructed by the group, he saw Safari Folleni and Charo Chome go to where a group of elders had sat. That Charo Chome held PW2's father by the hand and when the father stood and made one step, Safari Folleni produced a hammer from the overall and hit the deceased thrice on the head. That Charo Chome then pushed the deceased and he fell to the ground. That the 1<sup>st</sup> and 2<sup>nd</sup> accused picked pieces of firewood and together with Tabu Folleni, Ngala Charo, Said Amin beat the deceased randomly all over the body. That as he rushed to the scene, Baraka Ngawa, Karisa Kitsao and Mtawali Amin were kicking the deceased. That Abed Amin used a stone to hit the deceased on the left eye.
  8. PW2 said he was overwhelmed and was not able to intervene and save his father. He said that as he tried to intervene, he was boxed on the left side of the head by Karisa Kitsao and he sustained an injury. That after PW2's father had died, the group went to sit. That after 30 minutes, the Assistant Chief arrived and asked who had committed the offence and he gave names and identified the assailants where they were seated. The Assistant Chief made a phone call to the police and gave the suspects names. That when the police arrived, the names of the suspects he had given were called out and they were arrested except for George Folleni, Charo Folleni and Karisa Kitsao who had escaped. That they were arrested and taken to the police station while the body of their father remained at the scene up to 2.00 am when it was collected by the police.
  9. PW2 said Daniel Folleni's body was buried at 2.00 pm. That after he had recorded statements on 22.7.2012, he accompanied the police to the scene and recovered stone used to injure his father but the firewood had been burnt. He said the hammer/axe used to hit his father was not recovered. PW2 identified the body of his father for postmortem on 26.7.2012. PW2 said that the accused person's father and the deceased were brothers. That there was no dispute between them and the accused persons and he did not know why they planned to kill the deceased.
  10. PW3, Chief Inspector Raymond Karisa testified that on 21.7.2012 while he was at Ganze D.C.'s office, he received a message from a member of the public informing him a man had been murdered at a burial in Malomane village. That in the company of three police officers, he proceeded to the scene and confirmed that Kahindi Ngawa Katana had been killed and the body was lying within the homestead.



That the child of the deceased identified the assailants and out of the 12 identified and were arrested and charged. That the 3 who were at large were later arrested and charged. PW3 testified that the deceased was known to him as he used to go and report that it was being claimed he was a witch. He said the allegations of witchcraft were made by family members. PW3 said he arrested the accused persons from their homes. That the OCS from Bamba Police Station who investigated the offence had since retired. PW3 produced statements of the former OCS Bamba. He said that accused persons were arrested when they went to the police station for another case. He said he got information in 2017 that accused persons were at home and he went to arrest them.

11. PW4, Hamisi Kahindi Ngawa testified that in 2012, he was a standard 5 pupil and that on 21.7.2012 at 8.00 am, he was at his cousin brother Daniel Folleni's funeral for burial when he witnessed the accused persons herein together with those who had been charged and convicted talking in a group. That after a short while, he saw Safari Folleni and Charo Chome approach where his father was seated and held his hand, lifted him and hit him with a hammer on the head and he fell to the ground. That Abeid Amin picked a stone and used it to hit PW4's father on the head. That George Folleni and Tabu Folleni picked wood and started beating the deceased. That the 2<sup>nd</sup> accused, Charo Folleni and others kicked and stepped on the deceased who was on the ground and made sure they had killed him. That when his brothers Nathaniel and Adam tried to intervene, Mtawali Amin held and pushed Adam away. PW4 said he was the deceased person's lastborn child. He said that when the police came, he gave names of the assailants. That he went home when he saw his father had died and the body was collected in his absence.
12. PW5, Dr. Bernard Otieno Oduor of Kilifi County Hospital produced postmortem report on behalf of Dr. Mallim in which he was of the opinion that the deceased died due to severe head injuries – ExP1. He said the deceased had a depressed skull fracture on the occipital region which could have been caused by a hammer or a fall.

### **Defence Case**

13. Upon close of the prosecution's case, the accused persons were placed on defence and the 1<sup>st</sup> accused gave a sworn statement. He said Kahindi Ngawa was his father's younger brother and that their relationship was good. He said it was not time that he killed the deceased. He said he had all along been at home since 2012 and he was not aware the police were looking for him. He said he used to go to work and return home. He said prior to burial of his elder brother Samson Folleni on 21.7.2012, there was a scuffle and people fought. That he saw Charo Chome hold a stone which he threw and hit the deceased and the deceased fell. That when people moved to where the deceased had fallen, it was found he had died. That Japan Ngawa made a phone call to the police and the police went there at 2.00 am and collected the body and took it to the mortuary. He said he was not involved in the murder. That on 1.1.2017, he went home and slaughtered a goat to eat with his family and that his brother alleged he had slaughtered his goat and called the police known as Karisa who went and arrested him. That he was taken to the police station and the officer said he was going to charge him with a serious offence. That he was brought to Mombasa and charged
14. The 2<sup>nd</sup> accused also gave sworn statement and said his younger brother Samson Folleni had died and on 21.7.2012 when he was at the funeral for burial. He said the deceased herein was his father's younger brother. That before the brother was buried, an incident occurred but he was at his home 200 m away. That when he heard noise at his late brother's home, he proceeded there and found people had dispersed but the deceased was lying on the ground. That he only saw the village elder who has not testified. That he asked the village elder if he had called the police. He said he was arrested 5 years after the incident on 1<sup>st</sup> January 2017. He said he did not leave the village. He said that when 8 people were



arrested and charged, he was not called to record a statement. He said the deceased was his friend and he was not involved in his murder. The 2<sup>nd</sup> accused said he was arrested on allegations of theft of a goat and APC Raymond Karisa of Ganze went and arrested him. That he accompanied the officer while carrying the goat he had slaughtered and he has since not returned home.

15. Defence counsel for accused persons were granted a chance to file submissions but there are no submissions filed.

### **Analysis and Determination**

16. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

17. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'

18. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

19. It is not in doubt that on 25<sup>th</sup> day of July 2012 at around 8.30 am the deceased Kahindi Ngawa Katana was murdered. The deceased was attending a funeral for his brother's son when he was attacked in broad daylight where many mourners had gathered in the burial of Daniel Folleni. He suffered a depressed skull fracture in the occipital region when according to PW1, PW2 and PW4 saw Safari Folleni and Charo Chome go to where the deceased was seated and that Charo Chome held him by the hand whereas Safari Folleni produced a hammer and hit him on the head and he fell down. That the accused persons in Criminal Case No. 40 of 2012 as well as the accused persons herein armed with sticks and firewood joined Safari Folleni and Charo Chome in hitting the deceased randomly and Abeid Amin picked a stone which he used to hit the deceased on the head. PW1, PW2 and PW4 tried to intervene to save their father but the assailants overwhelmed them. The death of the deceased was therefore caused by an unlawful act.

20. The accused persons herein were well known to the prosecution witnesses particularly PW1, PW2 and PW4 who said that they were sons to the deceased person's brother. PW1, PW2 and PW4 gave evidence that corroborated each other that the accused persons picked firewood and joined the other assailants in beating and kicking the deceased person after he had fallen to the ground. When the Assistant Chief went to the scene, the prosecution witnesses gave the names of the assailants to him but the accused persons herein escaped from the scene and they were not arrested on the material day like the suspects in Criminal Case No. 40 of 2012. When they resurfaced in 2017, they were instantly arrested and arraigned in court and only one of the assailants, Karisa Kitsao, remains at large.



21. Chief Inspector Raymond Karisa said he went to the scene on the material day in the company of 3 police officers and arrested 8 suspects who were identified by the child of the deceased and that three assailants including the accused persons herein had escaped. The denial by the accused persons that they were not at large has been refuted by the prosecution witnesses. Allegations by the 1<sup>st</sup> accused that he was arrested for slaughtering his brother's goat was not raised when the prosecution witnesses particularly CIP Raymond Karisa who testified as arresting officer as well as on behalf of the arresting officer. The 2<sup>nd</sup> accused also claimed that he was arrested on allegations of theft of a goat but he did not raise the same with PW3. He said that he was not present when the deceased was murdered but his allegations have been controverted by PW1, PW2 and PW4 who were at the scene and PW3 who confirmed that his name was given as one of the assailants but he had escaped when the police visited the scene. The defence by the accused persons is therefore a mere denial and an afterthought.
22. There is therefore no possibility that the identity of the accused persons was mistaken by the prosecution witnesses. This court therefore finds that the accused persons were properly identified as the assailants and culpable for the murder of the deceased.
23. Whether the death of the deceased was actuated by malice aforethought, Section 206 of the Penal Code defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.
24. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of *Isaac Kimathi Kanuachobi v R* [2013] eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

25. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”



26. On the material day of 21<sup>st</sup> July 2012 at 8.30 am, mourners were waiting to burry Daniel Folleni when it was observed that the accused persons herein and others in Criminal Case No. 40 of 2012 and Karisa Kitsao had moved aside and were discussing in hushed tones. When PW1 went to inquire what they were up to since they were his brothers and cousins, he was told to keep his cool. PW2 also said that he went to where the discussions were taking place to find out what they were planning and he was told to go and sit and wait for what would happen. When the suspects stood from where they were seated and discussing, they went straight to where the deceased was sated with other elders and Charo Chome held the deceased person's hand as if to tell him something and Safari Folleni Ngawa who had accompanied him a hammer and used it to hit the deceased on the head and he fell to the ground. The rest of the assailants including the accused persons herein joined in the assault and while using firewood and sticks hit and kicked the deceased, and Abeid Amin used a stone to hit the deceased on the head and he died.
27. The accused persons sat aside from other mourners plotted to kill the deceased on allegations he had bewitched their brother and executed the plot by getting the deceased from among other elders and disabling by hitting his head with a hammer. The weapon used, a hammer/axe, sticks, firewood, and stone, and the parts of the body hit i.e. the head and random kicks as well as the number of attackers makes this court believe that the accused persons were actuated with malice aforethought in committing the unlawful act that led to the death of the deceased.
28. In conclusion, this court finds that the prosecution has proved its case beyond reasonable doubt. The accused persons are found guilty of the offence of murder and convicted under Section 322 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS  
26TH DAY OF OCTOBER 2023**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**

**In the presence of: -**

**Ogwel- Court Assistant**

**Ms. Mwaura H/B for Mr. Ngiri for the State**

**Mr. Oduor H/B for Ms. Odhiang' Advocate for the 1<sup>st</sup> Accused**

**Mr. Oduor Advocate for the 2<sup>nd</sup> Accused**

**Accused person present in person**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**

**Ms. Mwaura: I do not have the police file. I pray for a mention date so that the Investigating Officer can confirm previous records.**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**

**26.10.2023**

