



**Republic v Mwatela & another (Criminal Case 17 of 2020)  
[2023] KEHC 25968 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 17 OF 2020  
A. ONG'INJO, J  
NOVEMBER 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SWALEH MGALA MWATELA ..... 1<sup>ST</sup> ACCUSED**

**NZOLE CHOMBO ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons Swaleh Mgala Mwatela and Nzole Chombo face a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.
2. The particulars are that Swaleh Mgala Mwatela and Nzole Chombo on the 26<sup>th</sup> day of June 2020 at Lutsangani village, Mwatate Location within Kwale County jointly with others not before court murdered Mangale Kengo Menza.
3. The prosecution called 7 witnesses to support its case that the accused persons committed the offence herein and they were placed on their defence.

**Prosecution Case**

4. PW1, Menza Kengo, testified that on 26.7.2020, he was at home in the evening at around 7.00 pm when he heard screams. That the deceased and PW1's father were staying in the same home but PW1 had his own home. That when PW1 heard screams, members of his family started running towards his father's home and that he followed them. That he found his brother had fallen on the ground, the head had cuts and was bleeding profusely. That his cousin Mangale Kombo who had a car helped in taking the victim to Mariakani Hospital. PW1 said that the victim was referred to Mombasa and that they got an ambulance to take the deceased to Jocham Hospital but on the way to hospital at Mazeras,



- PW1 realised that the deceased had died. That PW1 told the driver about it, that they reported to the police and that they took the body to the mortuary in Mariakani. That Yawa, the deceased person's son, and Chale, the chief, were also in the ambulance. That the next day, the deceased's body was taken to Kinango Hospital Mortuary.
5. PW1 informed court that it was Ngala Mwatela, the 1<sup>st</sup> accused, who had differences with the deceased and that they had quarreled with the deceased about 6 times over land dispute, land which belonged to PW1's father. That the dispute was discussed by elders in Magegeni and it was the 1<sup>st</sup> accused who reported the deceased to the elders twice and the elders resolved that the land belonged to PW1's father. That the 1<sup>st</sup> accused reported to the police in Kasemenyi Mazeras and the matter was also discussed in Taru but no one took action. That when the 1<sup>st</sup> accused was defeated, he swore that if he does not use the land, the deceased could also not use it. That PW1 was present when the 1<sup>st</sup> accused made the utterances and before 2 weeks lapsed, PW1's brother was killed. PW1 said that he did not witness the murder and does not know why Nzole was arrested. That before the body was released to them for burial, they identified it for postmortem.
  6. PW2, Athman Yawa Mangale, said that he is the son of the deceased herein. That on 26.7.2020, he was at home when he heard his young mother Mose Mangale scream and that when he rushed there, he found his mother screaming that "babako ameuliwa". That when he was 40 meters to the home, he lit his torch and saw his father lying on the ground near the door to his house. PW2 said that he was able to identify Nzole Chombo and Ngala Mwatela when he shone the torch and that they were armed with an axe and a panga and that they ran away. That there was a 3<sup>rd</sup> person who did not look at PW2 and that is why it was not possible to identify who it was. That the torch used to identify the assailants was in court. That PW2 made a phone call to Donald Kombo, his uncle, who went with his car and took the deceased to hospital.
  7. PW2 said that on 3.7.2019, when his father went out at night for a call of nature, he found Ngala and Nzole waiting for him. That the deceased informed PW2 about it and they went to Taru Police Station. That Ngala and Nzole were summoned and interrogated but they denied and the police warned that they would be accountable if PW2's father suffered any injuries. That after two months, they had a meeting over land dispute. That PW2 was born when his parents were living on the disputed land. That Ngala is PW2's cousin and that the parcel of land was vacant and he was allowed to use it but when his father wanted it back, the dispute arose. That the chief of Matungi Location, Chale, referred them to the chief of Samburu. That the 1<sup>st</sup> accused refused to have their chief and claimed he was their relative. That then the deceased won the case, the 1<sup>st</sup> accused reported to Mwavumbo Group Ranch chairman known as Mbito Mongo and that at the group ranch, the 1<sup>st</sup> accused was defeated and he reported to the D.O. of Kasemenyi but again he was defeated.
  8. PW2 said that the 1<sup>st</sup> accused again reported to the 2<sup>nd</sup> Group Ranch where deliberations were done and the 1<sup>st</sup> accused won. That PW2's father decided to go for review and William Yawa Chimega the chairman decided in Kalalani that the land belonged to PW2's father. That on 9.6.2020 Ngala was advised that he had 14 days to file suit in court if he was not satisfied. That Ngala did not appeal when he was told about the verdict but told the chairman of the group ranch that even if he did not get the land, Mangale would not use it. That it was after a short time of the 1<sup>st</sup> accused's utterances that his father was murdered.
  9. PW2 informed court he was among those who took the deceased to Mariakani Hospital and that when they arrived in hospital at 10.00 pm, the deceased's condition deteriorated and they were referred to Jocham. That on the way at Mazeras, they realized the deceased had died and they went back to Mariakani Police Station where they booked a report and were issued with an OB. That they took the



- body to the mortuary and the following day to Kinango Hospital Mortuary for postmortem which was done on Friday and the body was released for burial. PW2 said that a police officer accompanied them hospital and PW2 together with his uncle Donald identified the body and after burial, they recorded their statements. That the police summoned the suspects through the assistant chief and that when they went to Taru, Nzole and Ngala were detained.
10. PW3, Mose Mangale Kengo testified that her husband was killed. That on 26.7.2020, she took water to the bathroom for her husband at 8.00 pm and that when her husband went to take a bath, PW3 heard him scream. That when she looked through the window, she saw three people attack her husband. PW3 said that one of the attackers was standing while the other 2 were attacking with pangas and that when her husband ran to the door and fell, the attackers escaped and that PW3 was not able to identify them. That she rushed to the door and found it was locked from outside and that she screamed and people went and opened it.
  11. PW3 said that on 20.7.2020, her husband went out at night for a call of nature but he rushed back immediately and told her he had seen Ngala and Nzole. That the two had a land dispute with her husband. PW3 said that when she raised an alarm, Yawa Mangale responded and that he had a torch. PW3 testified that the land dispute was between the deceased and Ngala Mwatela and that she was married in 2014 and found the land dispute was ongoing. That they used to go to Samburu for the land dispute and that the land belonged to the deceased. PW3 identified the accused persons in court and that they were her neighbours.
  12. PW4, Dr. Edwin Gathendu testified that he was a medical officer from Kinango Hospital and that he conducted postmortem on the body of Mangale Kengo Menza on 30.7.2020 at 1.30 pm. He said that the body was wrapped in bedsheets and that the deceased was male African and elderly of good nutrition with well-built physique, and that the body had been refrigerated. PW4 said that on external examination, there was stiffness on occipital and frontal areas of the head and on touch, he could feel the skull was broken. On internal examination, PW4 said that there was comminuted fractures on the occipital and frontal bones of the skull. That there was multiple hematoma between the skull and the brain and based on the findings, PW4 concluded that the cause of death was severe head injury, primary and secondary brain damage. That he filled the postmortem report and produced it as Pexh-2
  13. PW5, William Yawa Chimega, the chairman of Mwavumbo Group Ranch testified that his duties are to resolve disputes among group ranch members. That Mzee Mangale Kengo went to him and that he had a dispute with his neighbour Ngala Mwatela over land in Lutsangani sub-location. That Ngala Mwatela claimed the land was his and Mangale had documents to show they had gone up to the chief's office with the dispute. That Ngala Mwatela did not agree with findings of the chief that it belonged to Mangale. PW5 said that the chief reported the matter to the chief of Samburu to preside over the matter which Ngala had disagreed with his findings. That the chief of Samburu also resolved that the land rightly belonged to Mangale Kengo. That PW5 wrote to Mangale Kengo and Ngala and instructed them to live in peace and not use the portion of land in dispute until the chairman of group ranch reviews earlier resolutions.
  14. PW5 informed court that on 9.6.2020, they had a meeting where both parties were allowed to bring their witnesses where the history of the land was given and on 22.6.2020, judgment was delivered where it was established that the land belonged to Mangale. PW5 said that after the judgment, Ngala Mwatela told them that they were bribed to give favourable judgment to his opponent and that they would see the unexpected. That PW5 told him that he was not satisfied with the finding, he should appeal in court. That in July 2020, PW5 learnt from the Chief that Mangale Kengo had been killed. That after about 1 ½ months, DCIO Taru went and recorded his statement. PW5 produced the letter and



minutes dated 9.6.2020 containing the judgment as Pexh-3. PW5 identified Ngala as the 1<sup>st</sup> accused in the dock but did not know the other accused person.

15. PW6, Leonard Mkembi Kombo said that on 26.6.2020 at 8.15 pm, he was at home sleeping when he got a phone call from Yawa Kengo, the deceased's son, who informed him that his father had been killed and that he should rush. That he went and found people crying and that the deceased was lying on the ground. That when PW6 arrived, he advised that they should take the deceased to hospital and that the deceased was crying and bleeding from the front and back of the head. PW6 said that he found the deceased some meters from the door of his house and several lessos had been used to tie the cuts on the head but they were soaked with blood. That they rushed the deceased to Mariakani Hospital where they were admitted at emergency room and first aid was administered. That they were then referred to Coast General Hospital. That it was around 1.00 am and the deceased was carried in an ambulance and PW6 followed with his car. That when they got to Mazeras, PW6 found that the ambulance had stopped at the road block and that Mangale had died. That police officers at the road block advised them to go back to Mariakani Hospital since the patient had died. That at Mariakani Hospital, they were advised to go and report to the police. That the following day the body was taken to Kinango Hospital Mortuary where postmortem was done and PW6 recorded his statement at Taru Police Station.
16. PW7, No. 236419 Chief Inspector Abdi Sadik DCIO Samburu Kwale County produced statements of Sgt. Dickson Omamia who retired. PW7 produced exhibits recovered during investigations and that the exhibits were forwarded to scenes of crime personnel. That Sgt. Omamia was performing general investigations and investigated the murder herein. That on 27.7.2020, the retired officer took over the investigations into the murder case that was reported Pexh-4. PW7 also produced photographs of the deceased Pexh-1(a), (b), (c), and (d) as well as medical notes from Mariakani Sub-County Hospital Pexh-5, and sketch plan of the scene Pexh-6. He said that the suspects before court were the ones arrested for murder.

## Defence Case

17. DW1, Swaleh Ngala Mwatela testified that he is a livestock trader and that on 25.6.2020, he got a call to go and buy cattle. That it his nephew Mayaya Nyamawi Mwatela who went to call him as he was to accompany him to the livestock market. That on Sunday, he went and bought 2 cows that he was to take to the market the following day. That thereafter, he went to the river to check on his vegetables and that he arrived at the river at 11.30 am where he met Mzee Ngala. DW1 testified that he took a bath and they went together to Mangweni where they bought fish and took mnazi. That they stayed at Mangwe for over 3 hours and bought 5 litres of palm wine and proceeded to DW1's home where they continued drinking up to 8.30 pm, ate supper and continued drinking up to 9.30 pm when Fredrick Ngala went to his home. That on 26.6.2020, DW1 slept up to 3.00 am and when he woke up, he woke Kombo Ngala Mwatela so that they could go and take animals to the market and that a child at Nyamawi's house assisted them to the road. That he got to the market at 9.30 am and sold the cows.
18. DW1 said that Julius Kamanza Beja gave him information about death in the village and that the deceased had been cut with pangas but did not tell him whether the assailants were arrested. That on 28<sup>th</sup>, the assistant chief gave him a letter which indicated that he had trespassed and was required at Taru Police Station on 29.6.2020 and that the letter was addressed to him and William Nyamawi Shauri. That he found the 2<sup>nd</sup> accused at the police station and that they were placed in the cells and interrogated. That him and the 2<sup>nd</sup> accused were detained whereas the other 2 were released. That when they asked what the issue was, they were told it was because they were murder suspects. DW1 said he had not seen the deceased for about 2 months.



19. DW2, Nzole Chombo Mwananjira, the 2<sup>nd</sup> accused said that he has his own farm and that on 26.6.2020 at 8.00 pm, he was at Mbetsa Ndegwa, his neighbour, watching TV. That the village elder, Kadzena Nyundo, who used to listen to the radio at his home accompanied him to Mbetsa Ndegwa's home. That on the way, Bora Ndegwa whose house is on the way welcomed them and told them time for the news was not yet. That Mbetsa Ndegwa's house was about 500m away. That they later went to Mbetsa Ndegwa's home and watched news and football. That he left at midnight and went to sleep immediately.
20. DW2 said that in the morning, Bora went and told him that Mzee Mangale had been attacked and killed at night. That he woke his brothers and told them about the death. That he also woke up his mother and in the company of Bora and Mbetsa, they proceeded to the scene at 6.00 am. DW2 said that on arrival at the scene, they found that the deceased was taken to hospital where he died while undergoing treatment. That at the scene they learnt that the murderer was dressed in black jacket but it was not known who it was. That they also found the assistant chief Nyawa and Mwananjira and that they discussed to have the body transferred from Mariakani to Kinango. That at 10.00 am, he went and took his goats to the field and then went to the farm.
21. DW2 said that on 28.6.2020, he went to the farm and in the evening went to watch TV at Mbetsa's house and when he returned to his house, he learnt that the assistant chief was looking for him and that he was required at Taru Police Station at 2.00 pm but he decided to go in the morning but the police told him to go back home because there was no letter summoning him and that they would write him a letter if he was required. That later, he looked for the assistant chief's number with no success and at 11.45 am, he saw 3 people including the 1<sup>st</sup> accused and that he went to ask what they had gone to do and that he was told that they had been accused of trespass. That the DCI told them to go to his office where they were interrogated and that the two people with summons were Mzee Ngala and William Shauri. That DW2 and Mzee Ngala remained in the office and they were asked for their ID numbers which they wrote down after which they were told to go to the cells because they were murder suspects.
22. DW2 said that he was not related to the deceased, he had no differences and that the deceased lived 1.5 kilometers away. That it is at the police station that DW2 learnt the deceased had been killed because of land dispute. DW2 testified that he had never been to the land in dispute although in 2018, there was a sitting over land dispute which he attended and explained to the committee the background.
23. DW3, Fredrick Ngala Lewa said that Swale Ngala Mwatela is his nephew and that on 26.6.2020 at 11.00 am, he met Swale at the river where he had gone to take a bath. That they then proceeded to Chizupwa to a palm wine den where they drank up to 3.00 pm. That when they felt hungry, they decided to go home where they arrived at 3.30 pm.
24. DW4, Amina Mnyasi testified that Nzole Mwananjira is his uncle and that on 26.6.2020, they watched news with Nzole and that her father Bora Ndegwa and mother Mboze Nyawa were also present. That Nzole was at their home up to midnight and had been there for 3 days from 26.6.2020 at 7.00 pm. That he left the following day at 8.00 am on 27.6.2020. DW4 said that there was someone who had been cut and her uncle and father went to the scene on 27.6.2020 and that they heard from neighbours about the person who had been cut. That when her father and uncle got back, they did not tell them about who it was that had been cut. That they then went to attend a meeting for division of land.

### **Analysis and Determination**

25. In consideration of the evidence of 7 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.

26. 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.’

27. 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.

#### **Death of the deceased**

28. There is no dispute as to the death of the deceased.

#### **Death was caused by an unlawful act or omission**

29. PW1 and PW2 said that the deceased had cuts on the head and he was bleeding profusely when he was found lying at the doorstep to his house. PW3, Mose Mangale Kengo, the wife to the deceased said she heard the husband screaming and she looked through the window, she saw that the husband had been attacked by three people but she was not able to identify them because of the way they had dressed but when she went to open the door she found that it had been locked from outside. PW4 Dr. Edwin of Kinango Hospital examined the body of the deceased and found that he had a broken skull on the occipital and frontal bones of the skull with multiple hematoma between the skull and the brain. His opinion was that death was caused by severe head injury with primary and secondary brain damage.

30. From the evidence of these witnesses, it is obvious that the injuries were not self-inflicted and they were not accidental. The injuries were inflicted by third parties and they were not justified and therefore they were as a result of an unlawful act.

#### **Participation of the accused in the commission of the alleged offence**

31. PW3 the wife of the deceased said that she saw three people attack the husband but she did not identify them because of the way they were dressed. She however said like PW1, PW2, PW5, and PW6 that the 1<sup>st</sup> accused person was suspected to have committed the murder because he had a land dispute with the deceased and he had sworn during the dispute resolution before the Mavumbo Group Ranch Committee chaired by PW5 that if he could not get the land, he would do something that was unexpected. PW5 said that before they could deliver the verdict, they learnt that the deceased had been attacked and killed.

32. PW2, Athman Yawa Mangale, said that on the material night, he heard his mother screaming and that he rushed to the home and when he was 40 meters away, he lit his torch and saw his father lying on the ground near the door to his house. PW2 also said that when he shone the torch, he identified Nzole



- Chombo and Ngala Mwatela who were armed with an axe and a panga and that they ran away. He said that there was a 3<sup>rd</sup> person who did not look at him and that is why it was not possible to identify him. PW2 testified that on 3.6.2019 prior to the death of the deceased, the deceased went out at night for a call of nature and found Ngala and Nzole waiting for him. The deceased informed PW2 about it and they went and reported at Taru Police Station. He said that Ngala and Nzole were summoned and interrogated but they denied and the police warned them that they would be accountable if the deceased suffered any injuries.
33. From the evidence of the witnesses, it is only the 1<sup>st</sup> accused person who had a land dispute with the deceased and he had sworn that he would do something unexpected if he did not get the land in question. The 1<sup>st</sup> accused and the 2<sup>nd</sup> accused were found outside the deceased person's house on 3.6.2019 at night waiting to attack the deceased but he ran back to the house and went to report at the police station the following day. The animosity between the 1<sup>st</sup> accused and the deceased, the evidence that the 2<sup>nd</sup> and 1<sup>st</sup> accused were found laying an ambush for the deceased at night, the utterances of the 1<sup>st</sup> accused person when he was unsuccessful before the Chief, D. O. and the Chairman of Mavumbo Group Ranch, PW5, coupled with the evidence of PW2, that he was able to identify the 1<sup>st</sup> and 2<sup>nd</sup> accused person when he arrived at the scene and that they were armed with a panga and an axe makes this court believe that the accused persons herein together with one who was not identified committed the unlawful act that caused the death of the deceased.
34. The defence by the accused persons was not raised with the prosecution during investigations or even when witnesses were testifying and the same is an afterthought. The 2<sup>nd</sup> accused person claimed that on the material night of the attack of the deceased, he was a Mbetsa Ndegwa's home watching TV at 8.00 pm in the company of a village elder Kadzena Nyundo and Bora Ndegwa and that he only went back to his house to sleep at 11.45 pm. The 2<sup>nd</sup> accused's witness DW4, Amina Munyasi on the other hand testified that the 2<sup>nd</sup> accused stayed in their home having arrived on 26.6.2019 at 7.00 pm and left on 27.6.2020 at 8.00 am. She said that they watched news together with the 2<sup>nd</sup> accused as well as her father Bora Ndegwa and her mother Mboze Nyawa. This contradicts the 2<sup>nd</sup> accused person's evidence that they were watching TV at Mbetsa Ndegwa's home and not at Bora Ndegwa's home. One would have expected that the mother or father of DW4 to come to court and testify instead of a minor being made to testify on the whereabouts of the 2<sup>nd</sup> accused on the material night.
35. The evidence of the 1<sup>st</sup> accused refers to 25.6.2020 and 27.6.2020 whereas the deceased was attacked and killed 26.6.2020 between 7.30 and 8.00 pm. The 1<sup>st</sup> accused person's whereabouts on 26.6.2020 when the deceased was attacked and killed is not accounted for and the evidence of PW2 that he saw him and the 2<sup>nd</sup> accused at the scene of murder has not been refuted.
36. From the evidence that has been analysed above, it is apparent that the accused persons committed the unlawful act that caused the death of the deceased.

### **Malice aforethought**

37. 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”.

38. 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 -vs- 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.”

39. 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.”

40. PW1 said that the deceased had cuts on the head and was bleeding profusely. PW2 who identified the assailants at the scene said that they were armed with an axe and a panga. PW3 also said that when she looked through the window, one of the attackers was standing while the other two were attacking the deceased with pangas. PW4, Dr. Edwin Gathendu, observed that the skull was broken, there was comminuted fractures on the occipital and frontal bones of the skull, there was multiple hematoma between the skull and the brain and the cause of death was severe head injury, and primary and secondary brain damage.

41. The multiple injuries inflicted on the deceased, the part of the body injured and the weapons used, the fact that the accused persons had made an attempt on the life of the deceased before are proof of malice aforethought on the part of the perpetrators.

42. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused persons are found guilty of the offence of murder and convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 28<sup>TH</sup> DAY OF NOVEMBER 2023**

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

**JUDGE**

In the presence of: -

Ogwel- Court Assistant



Mr. Ngiri for the State

Ms. Shiundu & Mrs. Omondi Advocates for the 1<sup>st</sup> Accused

Mrs. Omondi H/B for Mr. Memia Advocate for the 2<sup>nd</sup> Accused

Accused persons present in person

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

**JUDGE**

Ms. Anyumba: We have no records. I pray for pre-sentence Report and Victim Impact Assessment before Mitigation.

Mrs. Omondi Advocate: I pray for a copy of the judgment. I also pray for pre-sentence Report.

Order: Mention on 11.12.2023 for Pre-Sentence Report and Victim Impact Statement.

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

**JUDGE**

