



**Republic v Angule & another (Criminal Case 64 of 2014)  
[2023] KEHC 27026 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 64 OF 2014  
PJO OTIENO, J  
DECEMBER 18, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**THOMAS OGOMBE ANGULE ..... 1<sup>ST</sup> ACCUSED**

**VINCENT ISHERIA ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. Thomas Ogombe Angule and Vincent Isheria Alias Jackson Mfupi are 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 13<sup>th</sup> day of November, 2015 at Lurambi area in Shieywe Sub-location, Sichirai location, Kakamega Central District within Kakamega County, the 1<sup>st</sup> and 3<sup>rd</sup> accused person jointly with others not before court murdered Samuel Muturi Kimani.
2. The accused persons pleaded not guilty to the charge and to prove its case, the prosecution called a total of four witnesses towards the duty to prove the case against the two.
3. PW1, Isaac Otieno Odunyo testified that he was a neighbor to the deceased and that on the night of 12<sup>th</sup> and 13<sup>th</sup> November, 2014 at about midnight he was asleep when he heard shouts of ‘thieves! thieves! thieves!’. He switched on the security lights and was confronted by the 1<sup>st</sup> accused person who in attempting to hit him with a metal rod hit his metal door which had grills and asked him to sleep. His son went outside and was hit by the 1<sup>st</sup> accused person on the arm using a metal rod and ordered to go back and sleep. He further stated that the 2<sup>nd</sup> accused was also present and had carried with him an orange gas cylinder and white bedsheets. After the 1<sup>st</sup> accused person and his companion ran away, the witness and his son went to the house of the deceased where they found him lying in bed with blood oozing from his nose and ears. They then carried the deceased to the road which was 300meters from his home and later called for ambulance which rushed the deceased to hospital where he passed on.



4. On cross examination he stated that though he gave the description of the assailants to the police, he was never called for an identification parade and refuted claims that he told the police that he could not identify the two suspects if he was to see them again.
5. PW2, Sophia Awinja testified, wife to PW1, that on the night of 12<sup>th</sup> and 13<sup>th</sup> November, 2016 she was at her home sleeping when at about midnight she heard a man screaming. She woke up, peeped through the window and then woke up her husband who switched on the security lights outside the house and she started to scream 'thieves'. She saw someone coming from the deceased's house carrying a gas cylinder and bedsheets and was wearing a red t-shirt, black trousers and a marvin. She stated that she did not see the color of the gas cylinder or the identity of the person. PW1 then opened the door and they went to the deceased's house which was wide open and on entering the house using a torchlight she noticed that things were scattered and the deceased was lying in the bed wrapped in a blanket with blood oozing from his nose. An ambulance from Masinde Muliro University of Science and Technology then took the deceased to Kakamega County Referral Hospital where he died.
6. On cross examination she stated that she could not identify the person carrying the gas cylinder and the bedsheets since she was in the house peeping through the window.
7. PW3, Isaac Kimani Mathenge testified that he was a brother to the deceased who was on 13/11/2015, informed that the deceased was attacked by thieves and rushed to the hospital in the company of his parents but died. The police then escorted them to the deceased's house where they found the door broken down, house scattered and they noticed that some of his items including phone and gas cylinder were missing. He further stated that he was informed by the police that his brother's phone, which was a black Nokia Asha phone, had been recovered and he went to the station and identified it. He claimed that he was not aware where the police had recovered the phone.
8. On cross examination he stated that when they went to the station he saw the 1<sup>st</sup> accused and police informed that he had been found with the deceased's phone.
9. PW4, Dr. Dixon Mchana testified that he was a consultant pathologist attached at Kakamega County Hospital who he conducted autopsy on the body of the deceased on 15/11/2014. Externally, the nails were blue in color, he had two bruises on the right cheek and a stab wound on the forehead measuring 1.2cm in diameter. Internally, there was extensive bleeding under the skin of the forehead with a complex fracture of the skull bone giving rise to a hole at the right side at the front about 1 cm in diameter. He formed the opinion that the deceased had died as a result of penetrating head injury following assault and produced the post mortem report which was marked as PEXH 1.
10. The evidence of PW4 marked the close of the prosecution case and the court ruled that a prima facie case had been established against the accused persons and they were thus placed on defence.
11. The 1<sup>st</sup> accused testified as DW1 and in his sworn evidence stated that he was a farmer who on the material day woke up, took tea, and set for work as a dubie at the market where he worked until 6PM when boarded a matatu for home. At home he met up his co- worker, the 2<sup>nd</sup> accused. That night he spent at his home with his wife and children who have since left home and relocated elsewhere. He claimed that they were arrested about eight people and since he was unable to raise a sum of Kshs. 50,000/- demanded by the investigating officer by the name of Gladys, he was charged. He further claimed that no identification parade was conducted.
12. On cross examination he stated that he was arrested on 18/11/2014 while at his place of work.
13. The 2<sup>nd</sup> accused testified under oath as DW2 and stated that DW1 was his employer and that on 13/11/2014 he worked till 6PM when DW1 left and he was left behind to sort some things after



which he closed the shop and slept. He was arrested on 19/11/2014 with others and when the police demanded Kshs. 20,000/- which he did not give, he was charged.

14. On cross examination he stated that he did not know the place of the incident and that on 13/11/2014 he spent the night at his work place which was his usual residence.
15. The defence closed their case with the parties proceeding to file their respective submissions.

### **Submissions by The Prosecution**

16. It is the submission by that they have proved the offence of murder against the accused persons in that the death of the deceased was proven by PW2 and PW3. PW2 who took the deceased to hospital told the court that on arrival at the hospital the deceased stopped breathing, while PW3 the deceased's brother stated that when he went to the hospital he found his brother already dead. The death was further proved by the production of the post mortem report by PW4.
17. On whether the death of the deceased was occasioned by an unlawful act they submit that it was the opinion of Dr. Dixon Mchana PW4 in the post mortem report that the deceased's cause of death was penetrating head injury secondary to assault which is undoubtedly an unlawful act. On whether the accused persons were identified as the persons who injured the deceased leading to his death, they argue that they were identified by PW1 whom in his testimony stated that he saw the 1<sup>st</sup> accused who hit his metal door with a metal rod and even referred to him as Thomas Ogombe and further stated that he also saw the 2<sup>nd</sup> accused who had bedsheets and a gas cylinder whom he referred to as Samuel Ochieng'. They claim that he was able to see the accused persons with the aid of his security lights hence, his evidence is free from possibility of an error.
18. On the last element of malice aforethought, they argue that malice can be inferred from the injuries sustained by the deceased which include a stab wound on the right side of the forehead measuring 1.2cm long with gapping irregular margins, abrasions on the right cheek with subcutaneous swelling and extensive scalp bleeding with brain lacerations.
19. For the accused, it was submitted that the prosecution's case is pegged on the evidence of PW1 who in cross examination stated that in his recorded statement he indicated that the person who hit his door was wearing a yellowish t-shirt, black trouser and black coat while in his testimony he stated that the 1<sup>st</sup> accused who hit his metal door was wearing a brown jacket which was not covering his head. They submit that the condition under which PW1 encountered the said assailants was not favourable owing to the fact that PW2 who was also watching from the window admits to not have been able to see the assailants. They argue that this court ought to consider the circumstances in which the identification was made to have been difficult and cited *George Mbaya Gitinji v Republic* (2019) eKLR where the court observed as follows;

- “8. The courts in Kenya have consistently relied on the English case of *R v Turnbull & Others* (1976) 3 ALL ER 549, which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special



reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

20. They urge this court to dismiss evidence of the identification of the accused persons at the dock and further submit that Samuel Ochieng’ Ogombe whom PW1 stated was the person who was carrying the gas cylinder and bedsheets is not a party to this case.

### **Issues, Analysis and Determination**

21. The offence of murder is defined in section 203 of the *Penal Code* as unlawfully causing the death of another with malice aforethought. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the *Penal Code* ought to be proved beyond reasonable doubt. Accordingly, the issues that arise for determination by this court must be whether;
- a. Is Samuel Muturi Kimani deceased? If his death was out of unlawful acts or omission by the accused? and
  - b. Whether the accused persons in acting as they allegedly were actuated with malice afore thought?

### **Whether Samuel Muturi Kimani Is Deceased**

22. The death of Samuel Muturi Kimani has been confirmed by PW2 who testified that in the company of her sons they escorted him to hospital where he died. PW3 further gave evidence that on getting to the hospital he found that his brother, Samuel Muturi Kimani, had already died while PW4 also stated that he conducted a post mortem on the body of Samuel Muturi Kimani and produced an autopsy report dated 15/11/2014 which captures that the deceased died on 13/11/2014. There is thus no iota of doubt that the person named as the victim of the charged crime is indeed dead as alleged.
23. It was the opinion of PW4, Dr. Dixon Mchana, that the deceased had died as a result of penetrating head injury following assault. Assault unless committed under the sanction of the law is also factio unlawful. Here there was no allegation nor deceased had a justification in law to do so. It is the finding by the court that the assault was unlawful.

### **Did The Accused Persons Kill The Deceased?**

24. The identity of the accused persons is pegged on the evidence of PW1 who lived in the same compound with the deceased and who testified that on the night of the incident he was woken up by screams of ‘thieves! thieves!’ which prompted him to switch on the security lights and opened the front door to his house and before he could open the second metal door which had grills, the 1<sup>st</sup> accused whom he recognized to as Thomas Ogombe came to the door and hit the door with a metal rod. Though it was not clear from PW1’s evidence if the accused persons were known to him before the incident, the prosecution in its submissions stresses the fact that accused persons were known to the witness because in his testimony he referred to them by names.



25. Since the evidence against the accused persons is that of a single identifying witness and the incident occurred at night, this court shall be guided by the principles laid down in *R Vrs Turnbull* 19 2ALL ER (supra) on what the court should take into account when relying on such evidence. In this instance, PW1 testified that he turned on the security lights and stood at the door and that the 1<sup>st</sup> accused came to the door which he hit. The court is thus satisfied that the 1<sup>st</sup> accused came into close contact with the 1<sup>st</sup> accused. PW1 further stated that his son who lives in the same compound equally switched on security lights and he was able to see the 1<sup>st</sup> accused person who hit the said son on the arm. On cross examination it came out that he gave the description of the 1<sup>st</sup> accused as a slim tall man which information was not countered by the 1<sup>st</sup> accused person. It is the finding by the court that with aid of security lights and the fact that 1<sup>st</sup> accused person came into close contact with PW1, the conditions were favourable for PW1 to identify the 1<sup>st</sup> accused person. In coming to that conclusion, the court has warned itself of the need that since PW1 had given a description of the assailants, the police officers ought to have conducted an identification parade. It however takes the view that failure to conduct the parade doesn't render the evidence by PW1 less credible.
26. On the identification of the 2<sup>nd</sup> accused person, PW1 stated that he saw two people at the compound on the night of the incident. He stated, "There were two people whom I saw on the material night. One was carrying white bedsheets and a gas cylinder. He is the 2<sup>nd</sup> accused person, Samuel ochieng'" he further gave his description on cross examination as being a short man. What failed to come out clear was if PW1 saw the face of the 2<sup>nd</sup> accused or did he happen to see him from the back. PW1 further appeared to imply to have known the 2<sup>nd</sup> accused and referred to him as Samuel ochieng'. The said Samuel Ochieng' is not a party to this case. I find that the 2<sup>nd</sup> accused was not properly identified.
27. Because malice a forethought remains a state of the mind, the law codes what set of facts or circumstances would enable the court to draw an inference of such state of mind. Under Section 206, of the penal code, malice aforethought exists where there is; 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; or 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; or an intent to commit a felony.
28. To determine whether or not the killing of the deceased was premeditated by the 1<sup>st</sup> accused this court underscores how the deceased was killed. First, PW1 and PW2 were the first to get to the deceased's house and they stated that the deceased's house had everything scattered and that he was wrapped in a blanket soaked in blood. The extent of the injuries is described by PW4, Dr. Dixon Mchana bring out an extreme and brazen act of cruel attack that must ordinary be deemed to have been intended to occasion at least grievous harm if not death
29. Malice may also be inferred from the part of the body targeted upon deceased. In this case, the 1<sup>st</sup> accused in the company of another stabbed the deceased on the forehead and occasioned complex fracture of the skull. To target the head with the very grave outcome, the accused is inferred to have been actuated by malice aforethought.
30. Flowing from the foregoing, discussions of the evidence the court finds the 1<sup>st</sup> accused person guilty for the offence of murder as charged and convict him accordingly.
31. Against 2<sup>nd</sup> accused, the offence of Murder was not proved to the required standard and he is hereby acquitted. He is set at liberty forth with unless otherwise lawful held.



**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023**

**PATRICK J O OTIENO**

**JUDGE**

