



REPUBLIC OF KENYA



**Republic v Kubai (Criminal Case 50 of 2016)
[2022] KEHC 11772 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 50 OF 2016**

**EM MURIITHI, J
APRIL 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

GEORGE MWENDA KUBAI ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to section 203 as read with 204 of the [Penal Code](#) with the particulars that he “on the August 8, 2016 at around 2200 hrs at Athwana location in Tigania West Division, within Meru County jointly with another not before the court murdered John Mugambi Rubere.”
2. The prosecution called five (5) witnesses whose evidence is set out in full below:

“PWI Daniel Rubere. I reside Uthoni, Tigania West Sub-County. Gakiki ward, Ndiro location Kathremi Sub-location. I work as a pastor Kenya Assembly of God. I am also a business man.

On August 15, 2016, I was summoned by CID officers Tigania Police station Headquarters to accompany them to witness a post mortem for my brother John Mugambi Baio, nicknamed Johana. We went to identify the body of my brother at Meru Level 5 Hospital. I was

with the CID officer.

We saw that he had beaten bruises on the hand with cuts on the back, neck elbow, and chest. I was one of the family members. We only seek justice for our brother. The deceased and the accused were friends for a long time



The accused's mother Rose Gachinyiri was a friend to the deceased. Rose is living and they had been friends for over 6 years.

Cross examination by Miss Wamache.

I witnessed the post-mortem.

DPP

No re-examination

PW2 Titus Thiane. I live Tongotwendo, Matiro Sub-Location of Athurane location of Tigania West Sub-county. I am the Assistant Chief.

On August 8, 2016 at 7:00 am in the morning. I received a call by one Moses Mururu. I was at home. I was informed that there were people who were fighting and one of them appear to have died. I was told that and I went to the scene at the home of George Kubai. George Kubai is the accused. I knew George from that date when I went to their home.

When I arrived, I did not find any people but I found the body of the deceased. I learnt that he was Johana Mugambi. The body was lying with head up with blood flowing from the neck.

I called the Chief Andian Nabea and the Assistant County Commissioner (D O) Damaris. When I arrived people started coming to the scene when they saw me. There were many people.

One of the people who came is the one who called me. I enquired what happened. They told me they had heard screams by a child. Police came later after about 1 hour. The police were from police station Bundani Police Station. The body had cuts on the back of the head. The police started investigations in the home. At the time George was not at the home. He had run away. On the roof of George's mother Gachunjiri there was a panga which was blood stained.

The police went into George's room and other areas and then took the body to the mortuary.

At 10:30 pm in the night, I do not recall what happened. I was called by the area manager from Matiro village. This was shortly after the incident but. The area manager called me by phone. He told me that George who

was a suspect of the killing was in the area. I went to the house where he said the suspect was and found that he had gone out. I went to a neighbour's home where I was told he had gone to get food. I was with the area manager. I was going from George's home to wait for him, I went with George who is identified by the area manager as I did not know him. I arrested him and handcuffed. I was with the area manager. I called the OCS. The police came and re arrested the suspect.

When we met George, he looked shocked. He had a bandage on one of his legs. I do not recall which leg. I later recorded my statement.

Cross -examination by Mr Wamache for accused

I went to the home of the accused. I found the body outside the house.

There was a house belonging to the accused and the accused's mother.



There was a fence. I found the body in the compound. George's house and his mother's house are in the same compound. When I arrived there was no one except the body. People started coming in after I arrived.

Moses called me and said there were people who were fighting.

When I went the accused did not try to run away. I spoke to him. He said he had run away because he was afraid of people killing him.

Re-examination

Nil

PW3 Joseph Mworu Rubere.

I reside at Bundini Ribere Sub-location. I work as a cattle herder.

John Mugambi Rutere is my brother. The deceased and the accused's mother were friends- John's wife had died and accused's mother's husband had died and so the two were friends. They had been friends for 2 years.

My brother was a farmer.

On August 9, 2016, I was at Manyatta where we herd cattle at a place called Nachebere . I was telephoned and informed that John had been found at the home of George's mothers' home dead. I was called by Judith Gachuru, my wife.

When I was informed of this development, I could not leave the cattle and I was only able to go after 2 days that I was unable to come home. I later recorded my statement with Ngundune Police Station.

I know the accused. I knew him for all the time lived with his mother. I used to graze their cattle.

Cross Examination by Mr Wamache for accused.

I know the accused very well. Deceased and accused's mother had a relationship. The deceased and accused's mother used to live together.

From the home of the deceased and the home of accused is about 2 Kilometers. I did not see the events of the case. I was informed about it.

Re- examination

Nil

PW4 Dr Betty Kinyua medical officer Meru Level 5 hospital have worked for 1 year 5 months with graduation from University of Nairobi 2010, MB ChB.

Postmortem report of John M'Kimbayamba dated June 15, 2015 by Dr Paul Wambugu.

Internal appearance

Temporal-frontal subdual haematorra with shift of the brain.

Cause of death was severe head injury secondary to traumatic wounds.

Postmortem of Dr Paul Wambugu of August 15, 2015 is marked PEX No 1.

Cross examination by Mr Wamache for accused.

What weapon. It has to be a blunt object. For this case a jembe could have



caused the said injury.

Re-examination

Nil

PW5 No 73396 PC Josphat Musimi currently attached at DCI Tigania West performing investigations.

In this matter investigation officer was PC Macharia who is currently at Nyeri Central DCI office. I wish to testify on his behalf. I took over the matter in August 2018. When he preceded on transfer. I have made efforts to bond him and even taken summons but he could not come to court for reason on his engagements. I only got a postmortem report. The other exhibits I have no explanation to say whether I saw the exhibit or not.

On August 9, 2016 as per the statement of the initial Investigation officer he received a photograph of somebody who had been murdered and the body was lying in the homestead of one Rose Gachungi Kubai who happened to be the accused's mother.

At scene when visited the body was found with deep cuts on the head and arm later the body was moved from the scene to Meru Referral Hospital Mortuary awaiting the post mortem.

Postmortem was conducted and immediately investigation into the matter commenced. The accused was later arrested on a date in the same month after the investigations revealed that there was a fight between accused's mother and the deceased that prompted the accused mother to raise alarm. That is the time when the accused came out and appeared with a panga attacked the accused. The deceased was over powered and died instantly of the injuries he sustained.

Upon conclusion of investigation accused was taken to court and charged with the offence before the court.

I do not recall when the accused was arrested. That is all.

Cross examination by Mr Wamache for accused.

I am not the investigation officer. I did not investigate the case.

The relationship between the accused and the deceased? I did not get to know. The investigation officer got to know that the deceased and the accused's mother were friends, they were lovers. Any eye witnesses? There were persons who were at the scene.

When did the deceased go to accused's mother's place? It was at night about 10:00pm.

I did not get to know where the deceased lived and how far it was from the accused's mother.

I have only produced the post mortem as exhibits in this case.

Re-examination

Nil.”

3. At the close of the case for the prosecution, counsel for the defence indicated that he did not wish to make any submissions and the counsel for the DPP relied on the evidence adduced before the court.



Issue for Determination

4. In accordance with the section 306 of the *Criminal Procedure Code*, the court is at the stage of close of the prosecution evidence required to make a determination on case to answer in terms as follows:

“ 306. Close of case for the prosecution

1. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
2. When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact
3. If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

[Act No 33 of 1963, First Sch, Act No 20 of 1965, s 33, Act No 5 of 2003, s 86”

Determination

5. The court has considered the evidence presented by the prosecution in this trial, and at this stage of decision on case to answer pursuant to section 306 (1) of the *Criminal Procedure Code*, finds that the evidence is not sufficient to call upon the accused to make his defence there being not established a *prima facie* case within the meaning of *Bhatt v R* (1957) EA 332.
6. The evidence of the prosecution was that PW1, the deceased’s brother identified the body of the deceased at the post mortem when he noted that the deceased “had been beaten on the head with cuts on back, neck, elbow and chest.” PW2, the Assistant Chief, received information on August 8, 2016 that “there were people who were fighting and one of them appear to have died” and upon going to the scene at the accused’s home found only the body of the deceased lying with head up with blood flowing from the neck and was later joined by many people. Later in the evening at 10.00pm, he was called by the area manager and told that the suspect of the killing accused herein was in the area and upon being identified by the area manager PW2 arrested the accused. PW3 another of the deceased’s



brothers said he was on August 9, 2016 “telephoned and informed that informed that John [deceased] had been found dead at the home of George’s mother dead.” He said he had been telephoned by his wife Judith Gachuru. He further testified that “the deceased and the accused’s mother were friends – John’s wife had died and the accused’s mother’s husband had died and so the two were friends. They had been friends for 2 years.” PW4 Dr Betty Kinyua testified as to the Post mortem examination report of John Mugambi conducted by Dr Paul Wambugu which gave the cause of death as “severe head injury secondary to traumatic wounds.” PW5, the current investigations officer testified on behalf of the initial Investigations officer that “investigations revealed that there was a fight between the accused’s mother and the deceased that prompted the accused’s mother to raise alarm. That is the time when the accused came out and armed with a panga and attacked the deceased. The deceased was overpowered and died instantly of the injuries he sustained.” The witness said he had only received the post mortem and no other exhibits. On cross-examination PW5 testified that “the Investigating Officer (I O) got to know that the deceased and the accused’s mother were friends. They were lovers. Any eye-witnesses? There were persons who were at the scene. When did the deceased go to he accused mother’s place? It was at night about 10.00pm. I did not get to know where the deceased lived and how far it was from the accused’s home.”

7. If there were any eye-witnesses they were not called as witnesses and the court cannot rely on the hearsay statements of the investigations officers that the accused killed the deceased upon an alarm raised by his mother during a fight with her deceased lover. The two informants, respectively the area manager and PW3’s wife Judith Gichuru, who informed PW2 and PW3, as to the killing were not called as witnesses. The circumstances of the killing and the involvement of the accused were not testified to with sufficient positivity as would call for inference of malice aforethought under section 206 of the *Penal Code*, even if it were assumed that the accused did cut the deceased with a panga in the circumstances described by the investigation officer. The defence of provocation, in terms of section 207 of the *Penal Code*, by the act of the deceased’s beating the accused’s mother, would appear warranted. However, as the prosecution had not proved that the accused committed the act that caused the death of the accused, the further inquiry as to the necessary mens rea does not arise. In terms of section 306 (1) of the *Criminal Procedure Code*, there is consequently, no evidence that accused and or others caused committed the offence of murder as charged.
8. All the evidence proved was the fact of death but not the other ingredients of the offence of murder, namely, the act of the accused caused the death and that the accused was driven by malice aforethought. See section 203 of the *Penal Code* and Etyang, J in *R v Nyambura & 4 Others* [2001] KLR 355 and *R v Gachanja* [2001] KLR 428. There was, in law, no evidence that the accused committed the offence of murder as charged.

Orders

9. Consequently, the court having found in the terminology of section 306(1) of the *Criminal Procedure Code* “that there is no evidence that the accused or any one of several accused committed the offence”, therefore, enters a finding of not guilty for the accused on the murder charge contrary to section 203 as read with 204 of the *Penal Code*. The accused is accordingly acquitted.
10. As the accused has been out on bond pending trial, the bond and surety shall be discharged and the security returned to the depositor.
11. Order accordingly.

DATED AND DELIVERED THIS 28th DAY OF APRIL 2022.

EDWARD M. MURIITHI



JUDGE

Appearances:

Mr. Wamache for the Accused.

Ms. Kitoto for the DPP.

