



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mucheke (Criminal Case 15 of 2015)
[2022] KEHC 11851 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 15 OF 2015**

**A ALI-ARONI, J
AUGUST 18, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

PATRICK MUTWIRI MUCHEKE ACCUSED

JUDGMENT

1. Patrick Mutwiri Mucheke the accused person herein has been charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63) Laws of Kenya.
2. The particulars of the offence are that on August 3, 2015 at Garissa Township within Garissa county, the accused murdered James Muthiane.
3. The accused pleaded not guilty and the matter proceeded to full hearing. The prosecution called five witnesses in support of its case whereas the accused gave an unsworn statement.
4. The first prosecution witness Pw1 Joshua Mutia testified that he was known to both the deceased and the accused as they all lived in the same area and that on August 3, 2015 as he was heading back to his *kibanda* from the *miraa* market a person informed him that “their young person” who lived Mutembei had been stabbed. Mutembei lived with both the deceased and the accused. It was not clear which one of the two had been stabbed. He proceeded to scene where he found the James Muthiane had been stabbed in the neck with a knife; he was bleeding. He took the deceased who was still alive to Mutembei’s house and together with Mutembei they took him to Garissa Nursing home.
5. It was his further testimony that the deceased informed them that Mutwiri had stabbed him. He then left in search of Mutwiri with one Solomon as they learnt that he was at the Garissa Police line. They found him with the knife he had used and took him to Garissa Police Station.



6. Further he stated that later at 1 p m, he learnt that the deceased had died. He identified the accused person in court. He did not know why the accused person stabbed the deceased.
7. Pw2 Julius Kinyua, brother to the deceased testified that on August 3, 2015 he was learnt from one Meme M'twaramba of his brothers' death and on August 4, 2015 he came to Garissa and identified his brother's body. He also witnessed the postmortem conducted in the presence of Mutembei and a police officer.
8. Pw3 Solomon Muthuri Mutura testified that he was informed by his wife that the deceased had been stabbed. He rushed to the scene in his boda boda which was 200 meters from his home, where he found Pw1, Mutembei and others at the scene. The deceased had a stab wound on the neck and rib cage, he informed them that he had been stabbed by the accused.
9. Pw1 and Mutembei took the deceased to hospital. He later joined them at the nursing home. And together with Mutembei decided to look for the accused person. They found the accused at Garissa Police Line still holding the knife. He hit the accused with his boda boda and PW1 held him as he was wielding the knife. They took him to the police station and recorded their statements.
10. He informed the court further, that the deceased, accused person and Mutembei resided and did business in the same area. He did not know of any problem between the deceased and the accused.
11. Pw4 corporal Vincent Obure sought to produce the postmortem report but the same was objected to by the defence.
12. PW5 Dr Abdullahi Abdi a medical officer previously attached to Garissa Referral Hospital presented the post mortem report. It was his testimony that on August 6, 2016 he conducted a postmortem on the deceased. At the time the deceased was approximately 18 years old, 5 ft tall and of good physique. The deceased entire body was blood stained. There was an injury 7cm on the neck and a small laceration on the arm.
It was his opinion that the cause of death was severe injury on the neck that damaged blood vessels as the stab wound was a penetrating injury that damaged the blood vessels.
13. In cross-examination, he told the court that though he did not open the area of the injury, he was sure the bleeding was the cause of death through physical examination of the injury and the body generally.
14. Pw6 P C Douglas Wambua the investigation officer narrated the course of the investigation. He told the court that on August 3, 2015 while at Garissa police station John Mutembei, Solomon Muthuri and Joshua Mutia brought a person to the police station whom they had arrested with an allegation that the said person had stabbed another on the neck and the injured had been taken to Garissa hospital.
15. He re-arrested the accused and placed him in the police cells and thereafter rushed to the hospital where he found the victim being attended to. The victim's condition deteriorated and he passed on after a short while and the body taken to Garissa mortuary.
16. On August 6, 2015 the deceased relatives arrived and a post mortem was conducted by PW5. The doctor informed them that there was excess bleeding due to damaged vessel.
The deceased had a stab wound on the right side of the neck, and was bleeding excessively from the wound. He identified the accused as the person who was brought as the aggressor.
17. He further testified that in the course of his investigations he learnt that the accused and the deceased worked as casuals and had engaged in an argument over some money.



18. He visited where they two lived. Was informed that he argument was outside and he saw the ground was disturbed.
19. As regards the recovered knife; the weapon of crime, the same was given to the police by one Mutembei . At the time the same was blood stained. John Mutembei informed him that he had snatched the knife from the accused.
20. At the close of the prosecutions case the court found that the prosecution had raised a *prima facie* case against the accused person and therefore placed him on his defence.
21. Dw1 Patrick Mutwiri Mucheke gave an unsworn statement. He testified that on August 2, 2015 he stayed late out at night with the deceased, Mutembei and Solomon Mutura. On August 3, 2015 he went to receive miraa that had been sent from Meru. Thereafter he passed by the police line to buy cigarettes as he headed to Garissa Ndogo. That as he was walking he received a call from Solomon asking where he was. The call was then disconnected.

As he walked, he suddenly heard a motor bike behind. He stopped for it but the motor bike hit him and tossed him up. He lost consciousness until when he heard a doctor speak to him asking if he was okay. He saw many people in the Hospital including Solomon and Joshua. They left the hospital with Solomon, who got a taxi. He thought were headed to Garissa Ndogo but he was taken to the Police Station where he was later charged with the offence of murder yet he did not kill or fight with anyone.

Submission of the parties.

22. At the close of the defence case, counsel for the accused indicated that he would not file any submissions but would rely on the testimony of the accused. The respondent filed written submissions wherein it submitted that the prosecution had satisfied the ingredients required to prove a murder charge. That the defence raised by the accused did not rebut the strong evidence adduced by the prosecution witnesses. The following cases were relied on. [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR, Republic v Tubere 1945 EACA 63, & [Nzuki v Republic](#) [1993] KLR 171.

Analysis and determination

23. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients. Firstly, that a death occurred, secondly, that the accused unlawful action or omission caused the death of the deceased; and thirdly the unlawful act or omission was laced with malice aforethought. See *Anthony Ndegwa Ngari v Republic (supra)*.
24. On the fact of death PW5 presented the postmortem report. It was his opinion that the cause of death was severe injury on the neck that damaged blood vessels. Pw3 and Pw6 were present during the conduct of the postmortem report. The postmortem report equally opines that the cause of death was severe hemorrhage following stab wound on the neck severing major blood vessel.
25. On whether the accused person committed the unlawful act which caused the death of the deceased. None of the prosecution witnesses saw accused commit the unlawful act that caused the death of the deceased. The evidence before court is the statement of the deceased to various persons as to how he received the injuries; what we may refer to as the deceased dying declaration.
26. The law on dying declarations is found in section 33 of the [Evidence Act](#), cap 80 Laws of Kenya which states as follows:

“ 33. Statement by deceased person, etc.,



When statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”

27. In *Abanga alias Onyango v Republic* CA CR A NO 32 of 1990 (UR), the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

28. Pw1 testified that he found the deceased with a stab wound on the neck. The deceased informed him that it was the accused who had stabbed him. Pw1 and Pw3 searched for the accused and found him with a blood-stained knife seemingly the murder weapon. The injuries sustained by the accused as alleged by Pw1 and Pw3 correlate with the cause of death in the evidence of Pw5.

29. Pw6 in his investigation learnt that the deceased and the accused who lived together had an argument over money outside where they lived, when the deceased sustained the fatal injury, the ground was disturbed. This is the very ground that Pw1 found the deceased.

30. In his evidence the accused only made a mere denial but never sought to explain why he was sought after by Pw1 and Pw3. Neither did he rebut the allegation that he was found in possession of the knife and render an account why Pw3 would hit him with a motorcycle and thereafter secure his arrest.

31. There is need of being cautious when relying on the evidence of a dying person and the need to ensure there is corroboration of the same. The deceased in this case mentioned the name of the accused as the perpetrator who stabbed him, the said dying declaration placed the accused at the scene of crime, together with the recovery from him of the knife used to stab the deceased, and positioned alongside the injuries the deceased sustained is a clear and unbroken chain of events, the totality of which all point to the accused as being responsible for the deceased's death.



32. The court therefore finds that the facts unerringly point to the accused as the person who committed the unlawful act which caused the death of the deceased.
33. On malice aforethought. Section 206 of the [Penal Code](#) defines the circumstances that constitute malice aforethought as;
- “Malice aforethought shall be deemed to be established by evidence proving any one 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 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;
 - (c) ...;
 - (d)”
34. In the case of *R vs Tubere S/O Ochen (1945) 12 EACA 63* the Court of Appeal set out the perquisites for establishing malice aforethought thus;
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.
35. In the case of *Nzuki vs Republic (supra)* this Court of Appeal specified the basis upon which malice aforethought is established when it stated thus;
- a. Intention to cause death;
 - b. Intention to cause grievous bodily harm;
 - c. Whether the accused knew that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It doesn't matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is one in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”
36. Having considered the weapon used and the nature of the injuries the court finds that malice aforethought was established in the present case when the accused viciously struck the deceased on his neck with a knife thereby severing major blood vessel. By so doing, he must have known or ought to have known that he would grievously injure the deceased or cause his death as such.
37. The court is indeed satisfied that the circumstances leading to the death of the deceased and the nature of the injuries inflicted by the accused conclusively established malice afore thought.
38. Consequently, the court finds the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.



DATED SIGNED AND DELIVERED THIS 18TH DAY OF AUGUST 2022

ALI-ARONI

JUDGE

