



**Republic v Adam (Criminal Case 2 of 2017)  
[2022] KEHC 14280 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL CASE 2 OF 2017  
JK SERGON, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ATHIR ABUBAKAR ADAM ..... ACCUSED**

**JUDGMENT**

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the offence are that, the accused on 18<sup>th</sup> April 2017, at Kakuma Refugee Camp in Turkana West Sub-county within Turkana County murdered Nuon Adam Abdulkarim.
2. The accused pleaded not guilty to the charge and the prosecution called Six (6) witnesses to prove its case.
3. DR. Nur Hussein (PW1) appeared on behalf of Dr. Tony who performed the post mortem on 19<sup>th</sup> April 2017 at the IRC Kakuma General Hospital. He testified that the victim had deep wounds on his neck and slit wound on the throat. Also that the trachea, carotid arteries and jugular veins, the oesophagus were cut. The opinion formed from the post mortem was that the deceased died due to severe haemorrhage (bleeding) from the cut arteries and veins. The Post mortem report was produced as exhibit 1. On cross examination, PW1 stated that they are general surgeon and not pathologist. Also that no blood samples or tissues were taken for test but that the autopsy was conducted to the best standard. On re-examination, this witness confirmed that the facilities at the hospital could not handle further laboratory test.
4. Alinga Sharon Richard (PW2) is the mother to the victim. She stated that she lives in Hong Kong Area in Kakuma Refugee Camp. She testified that on 18<sup>th</sup> April 2017, on her way to fetch water, met with the Accused and had a short chat. Later on, while back at home, PW2 saw the Accused person in their home compound holding the victim and a knife. She then saw the Accused cut her child's throat with



- the knife. She stated that she raised an alarm by screaming that attracted the attention of the security officer in the vicinity, who called police officers. That the police officers found the Accused still holding the knife, and was forcefully disarmed. This witness identified the knife from the availed photographs. That then the police arrested the Accused and took the victim's body away. PW2 identified the Accused in court as the person who killed her then 14 months old child, and further stated that she never had any grudge with the Accused. On cross examination, PW2 testified that they lived in the same compound with the Accused but in different houses, and that the victim was killed outside her house. The witness also stated that she had not disagreed with the Accused.
5. Jackson Onyango (PW3), a child of 10 years old. The Court conducted a *voire dire* and determine that it could take this witnesses unsworn evidence. PW3 testified that on 18<sup>th</sup> April 2017, together with the victim, they were playing at PW2's home. That, without saying anything the Accused cut the throat of the victim who was next to this witness. After witnessing, that act this witness ran away to his aunt and reported what had happened. PW3 identified the Accused to the court. On cross examination, PW3 stated that he was not threatened by the Accused, but maintained he saw the Accused cut the victims throat.
  6. Adam Abdulkarim Musa (PW4) stated that he lived in Hong Kong Area in Kakuma Camp. PW4 and the Accused had at some one point in July 2010 lived in the same house granted by UNHCR in Kakuma. That in 2014, PW4 had told the Accused that he intended to marry PW2, to which the Accused was opposed to since they were not from the same tribe. However, PW4 married PW2 in December 2014. That on 16<sup>th</sup> April 2017, the Accused said to PW4 that he did not want PW2 at his home. Then the next day the Accused informed PW4 that he was about to do something forbidden by God. That on 18<sup>th</sup> April 2017, on his way back home, PW4 met with children who informed him that his child had been killed. On arriving at his home he met the Accused handcuffed by police officers and on talking to him he agreed that that is what he meant doing in their earlier conversations. PW4 had observed his child's lifeless body with cuts on the throat. The Accused was pointed out in the dock, for the court, by PW4. On cross examination, PW4 stated that they were friends with the Accused, who disliked his wife; and that he did not witness the Accused killing his daughter child.
  7. Shaka Heritier (PW5) works as security officer in Kakuma Refugee Camp. That on 18<sup>th</sup> April 2017, heard screams and went to investigate. He found PW2 screaming for help and in the compound saw Accused holding a knife while there was a dead body of a child lying next to the Accused. That PW2 informed PW5 that the Accused had cut the child's throat. The Accused moved towards PW2 and PW5 in a threatening manner but was restrained by some boys who had gathered at the scene. PW5 called the police officers, who came disarmed the Accused and arrested him and took the body away. PW5 knew the Accused since 2010, and that the accused stated that he killed the child because he was not from his tribe. On cross examination, PW5 stated that he had no grudge with the Accused, and did not see the Accused cut the child's throat.
  8. PC Philip Lodupai NO. 88260 (PW6), at the material time he was CID Turkana Kakuma and the investigating officer in this case. That on 18<sup>th</sup> April 2017, while at Hong Kong police post in Kakuma, he received information of a crime that had been committed. He proceeded to the scene of crime where he found a body of a child's throat that had been slit, and the Accused was handcuffed by the police officers who respondent earlier. That the knife used to slit the child's throat, was found at the crime scene. PW6 collected the knife and blood samples for DNA analysis. The knife was produced as exhibit no. 2. DNA analysis reports are yet to be concluded at the government chemist. Photographs of the victim and the knife at the crime scene were also taken. The Accused was taken into custody while the body was taken to the mortuary. That later the next day a post mortem was conducted on the victim's body. Later he recorded witness statements, that reiterated as testified in court by the witnesses.



On cross examination, PW6 testified that there was a language barrier between the Accused and the Investigating Officer. He further stated that he did not take finger prints since the knife handle was made of skin. PW6 stated that he did not know the Accused before and had no grudge with him. On re-examination, PW6 stated that the DNA analysis report and finger prints are not mandatory considering the Accused was positively identified by eye witnesses whose evidence is sufficient enough.

9. When the accused was placed on his defence, he elected to give an unsworn testimony with no witnesses to call. In his defence, the Accused stated that he was conducting his charcoal selling business when he was arrested by police officers, who later took his finger prints and also charged with the offence.
10. At the close of the case, neither the prosecution nor the defence counsel wished to put in any submissions.

The Only Issue for Consideration Is Whether the Prosecution Proved Its' Case Against the Accused Beyond Reasonable Doubt.

11. The offence of murder is provided for in Section 203 of the [Penal Code](#) that provides:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
12. The Court of Appeal in [Joseph Gitbua Njuguna v Republic](#) [2016] eKLR outlined the ingredients of the offence of murder and stated that,

“ Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See [Milton Kabulit & 4 others v Republic](#) [2015] eKLR.”

#### **a) Death and Cause of Death**

13. On this issue, PW1 testified that the post mortem conducted indicated that the deceased died due to severe haemorrhage (bleeding) from the cut arteries and veins. PW2 testified that she saw the Accused cut the victim's throat with a knife, and identified the Accused in court as the person who killed her then 14 months old child. PW3 testified that he saw the Accused cut the throat of the victim, who was next to him (PW3). Further, PW4 had testified that while back at his home, he observed his child's lifeless body with cuts on the throat. To that end, the Prosecution proved beyond reasonable doubt that the deceased died due to an unlawful act of assault.
14. Assault is an offence provided for in the Penal Code and is therefore an unlawful act that is punishable in law. Indeed, the cause of death of a person is an unlawful act except in circumstance authorized in law as was held in [Republic -vs- Boniface Isawa Makiod](#) [2016] eKLR that referred to the case of [Gusambizi Wesonga -vs- Republic](#) [1948] 15 EACA 65 where it was held: “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence of property.”



## **b) Whether the Accused Caused the Death of the Deceased**

15. PW2 testified that she saw the Accused cut the victim's throat with a knife, and identified the Accused in court as the person who killed her then 14 months old child. Additionally, PW3 testified that he saw the Accused cut the throat of the victim, who was next to him (PW3).

## **c) Whether the Accused Person had Malice Aforethought.**

16. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the [Penal Code](#) provides circumstances from which malice aforethought may be inferred. They are

- (a) An intention to caused 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 cause; (c) An intention to commit a felony; (d) ...

17. In determine whether the accused persons had malice aforethought, the court must take the surrounding evidence into account as was held by the Court of Appeal in *NM W v Republic* [2018] eKLR when it relied on the case of [Bonaya Tutu Ipu & another vs. Republic](#) [2015] eKLR:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit V. Uganda, Cr. App. No. 95 Of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

18. PW4 testified that on 16<sup>th</sup> April 2017, the Accused said to PW4 that he did not want PW2 at his (PW4)'s home. That on 17<sup>th</sup> April 2017 the Accused informed PW4 that he (Accused) was about to do something forbidden by God. On 18<sup>th</sup> April 2017, arriving at his home PW4 met the Accused handcuffed by police officers and on talking to him (Accused) agreed that that is what he meant doing in their earlier conversations.
19. PW3 stated that without saying anything the Accused cut the throat of the victim who was next to this witness. Also, PW2 stated that she saw the Accused person in their home compound holding the victim and a knife. She then saw the Accused cut her child's throat with the knife. PW5 stated that he found PW2 screaming for help and in the compound saw Accused holding a knife while there was a dead body of a child lying next to the Accused. The Accused moved towards PW2 and PW5 in a threatening manner but was restrained by some boys who had gathered at the scene.
20. It can be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under Section 206(b) of the [Penal Code](#).
21. I form the opinion that the accused person's defence is a mere denial that does not displace the prosecution's case. The prosecution has proved its case against the accused beyond reasonable doubt



and in the premise the accused found guilty for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He is hereby convicted.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**J. K. SERGON**

**JUDGE**

