



**Republic v Mutua (Criminal Case 33 of 2019)  
[2022] KEHC 13238 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 33 OF 2019  
TW CHERERE, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JAMES KILEMI MUTUA ..... ACCUSED**

**JUDGMENT**

1. James Kilemi Mutua (accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the charge are that:

On April 4, 2019 at Kirima village, Ankamia Location in Tigania Central Sub-County within Meru County murdered John Mutwiri Mungania (John).

**Prosecution Case**

2. PW1 Diana Kagendo stated that the material date, he found his son John at Meru Hospital. That she noticed that he was in a lot of pain and had injuries on the throat, and back of neck and was unable to walk and talk. That he was admitted in hospital for 4 days and before he died informed her that he had been assaulted by Kilemi. PW2 Justine Kimathi identified the body of John to the doctor that conducted a postmortem on April 15, 2019. A postmortem tendered by PW3 Dr Dennis Mugambi reveals that John suffered 3 cm laceration on the shoulder, 3 laceration grazing the buttocks measuring 8 cm, swelling on the occipital, 12 cm cut on the foot and leg measuring 1 and 2 cm, 2 lacerations on anterior-superior spine. The doctor formed an opinion that John died of intracerebral and subdural hemorrhage as shown on the postmortem form PEXH1. PW4 Millicent Gatakaa, John's brother stated that she went to visit him on March 30, 2019 and remained with him until April 1, 2019. That accused who is brother to their father visited the home of John on April 1, 2019 and when John confronted him inquiring why he had caused their father to be jailed, Accused asked to be paid KES. 200,000/- so that their father could be released. That Accused who was armed with a panga hit John on the neck



felling him to the ground from where Accused continued to assault him with a stick. That John was taken to hospital where he succumbed to the injuries. PW5 PC Stanley Kipchumba, the Investigating officer recalled that on April 1, 2019, PW1 reported that his son John had been assaulted by his uncle James Kilemi and that the victim was admitted in hospital. On April 8, 2019, PW1 went back to the police station and reported that her son had succumbed to the injuries inflicted on April 1, 2019. After investigations, accused was arrested and charged.

### **Defence Case**

3. Accused in his sworn testimony denied the offence. He stated that on March 31, 2019, he was informed that John had assaulted his brother's wife Regina Kimaiyo with a hammer. That he proceeded to the home of Regina and found her lying injured while John was standing about 50 metres away armed with a small stick. That he gave KES 1000/- to one Nkatha and requested her to take John to hospital and he later received information that he had died. DW1 Regina Kimaiyo testified that she was assaulted and injured by John on March 31, 2019. DW2 Esther Nkatha confirmed he was given KES. 1000/- by accused to take John to hospital. It was her evidence that John fell thrice from the motorcycle and was injured. That the following day, he escorted John to hospital again and later received information that he had died. DW3 Protus Kobia was informed by accused on March 31, 2019 that John had assaulted Regina and he advised that she be taken to hospital.

### **Analysis And Determination**

4. Section 203 and 204 of the [Penal Code](#) under which the accused is charged provide for the offence of murder and the punishment for it. It requires that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person who is convicted of murder shall be sentenced to death.”

5. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that Accused committed the murder and that he was actuated by malice. (See [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR).

#### **a. The Death Of The Deceased**

6. A postmortem form PEXH 1 reveals that John suffered 3 cm laceration on the shoulder, 3 laceration grazing the buttocks measuring 8 cm, swelling on the occipital, 12 cm cut on the foot and leg measuring 1 and 2 cm, 2 lacerations on anterior-superior spine. The doctor formed an opinion that john died of intracerebral and subdural hemorrhage.

#### **(b) Proof That Accused Persons Committed The Unlawful Act Which Caused The Death Of The Deceased**

7. Whereas accused denies that he assaulted John, he concedes that he met John on March 31, 2019 when he was allegedly assaulted. PW5 in her evidence explained in greater detail that he was with her brother john when he was assaulted by accused with a panga and a stick causing him injuries, From accused's evidence, there was a motive for the assault in that John had allegedly assaulted accused's brothers wife causing her injuries. From the foregoing, I reject accused's defence that he did not assault John or that



John had fallen off a motor cycle as stated by accused's second witness. I find that accused caused the injuries that led to John's death.

**(c) Malice Aforethought**

8. The offence of murder is complete when, "malice aforethought" is established if, pursuant to section 206 of the Penal Code evidence proves 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) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

9. In the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that:

“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack”

10. The injuries inflicted on John were concentrated on the head. The fact that accused instructed his 3<sup>rd</sup> witness to take John to hospital after he was injured in my considered view demonstrates that the death that resulted from the assault was not premeditated and I therefore find accused not guilty of murder but find him guilty of a lesser offence of manslaughter contrary to section 202 (1) of the Penal Code as read with section 205 of the Penal Code and both are convicted accordingly.

**DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**



**WAMAE TW CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Kinoti

Accused - Present

For the Accused - Ms Nyamu hb for Muna Advocate

For the State - Ms Mwaniki (PPC)

