



REPUBLIC OF KENYA



**Republic v Ayabei (Criminal Case 10 of 2019)
[2022] KEHC 13357 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 10 OF 2019
EKO OGOLA, J
SEPTEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

CORRETY JERUTO AYABEI ACCUSED

JUDGMENT

1. The accused person Correty Jeruto Ayabei, was charged with the offence of murder, contrary to Section 203 as read with Section 204 of the *Penal Code*, Chapter 63 of the Laws of Kenya. It was alleged that on the 19th day of January 2019 at Kipsieni Village in Kibendo Sublocation within Elgeyo Marakwet County, she murdered Mercy Cheyech Kapora. The accused denied that charge and the Prosecution called 8 witnesses in proof thereof whereas the accused person called (5) witnesses in her defence.

A Summary of the Evidence:

Prosecution' Case

2. PW1 Jennifer Jeruto Kipyego, testified that she is a sister-in-law to both the deceased and the accused person. She told Court that on the material day that is 9th September 2013, at about 8.00 pm, she was at her parent's home with the deceased, and her younger sister Emmy Chesang and her daughter Michelle Jerop. She explained that they were in the kitchen, seated at the centre of the first room, while Emmy Chesang was preparing supper in the adjacent room. According to her the kitchen was well-lit with the aid of a solar lighting contraption she referred to as D-light; and that the accused suddenly entered the kitchen armed with a panga, with which she proceeded to cut the deceased on the left side of her neck without saying anything.
3. PW1 further testified that she screamed for help, thereby attracting the neighbours, such as Jonathan Kipkemoi Kipyego (PW2), and a Nyumba Kumi elder known as Edwin Kiplagat (PW4); and that it



was PW4 who managed to wrest the panga from the accused and arrested her. The deceased was rushed to Iten County Hospital but died while undergoing treatment.

4. PW2 Jonathan Kipkemboi Kipyego, a village elder testified that on the material night he was at his house when he heard screams emanating from the homestead of one Barnabas Kipyego. He went there and found PW1 holding the accused person and PW1 informed him that the accused person had cut somebody. PW2 further testified that he had a torch with him that enabled him to see a pool of blood at the scene of the incident. He told Court that he then took the accused person to PW5's Paul Kibore Kipyego house as he feared for her safety as many people had arrived at the scene. He further testified that at the scene he saw a woman lying near the door in a pool of blood.
5. PW3 Penax Korir Kipyego, testified that he is the husband to both the deceased and the accused person. He told Court that the deceased had been married to him for one (1) year prior to the date of the incident. He told Court that on the material day he was with the accused during the morning hours and at around 5.00 pm he went to his mother's homestead where the deceased was and that he stayed there up to around 7.00pm when he decided to go back to the accused's house but he did not find her. He further testified that while at the accused's house, he received information from his brother Mathew Komen that the accused had cut the deceased on the neck using a panga. He went to his mother's homestead but found no one there and the door was closed and there was a pool of blood at the door. He then contacted PW1 who informed him that the deceased had been taken to hospital at Iten. He then went to Iten District Hospital where on arrival he was informed that the deceased had died. He saw the deceased's body and noted that there was a cut on the left side of her neck. He further told Court that he had marital disputes with the accused and that the accused and the deceased did not know each other. During cross-examination he testified that he was aware that the accused and the deceased used to quarrel on phone. He further told Court that he used to stay with the deceased at his work place and had only taken her to his mother's place before the incident occurred. It was also his testimony that he had informed the accused that he had married a second wife and she had instructed that her co-wife should not be taken to her house.
6. PW4 Edwin Limo Kiplagat, a neighbour to the accused testified that on the material night, he had screams emanating from the homestead of Barnabas Kipyego. He then proceeded there and on arrival he found PW1 struggling with the accused who was armed with a panga. He disarmed the accused and together with PW2, arrested her and took her to PW5's home and gave the panga to PW5. He further told Court that he saw the deceased and knew her as the wife to PW3. During cross-examination PW4 told Court that he went to the scene with a torch and used the torch light to see. He further told Court that he saw the accused with a panga and that PW1 was screaming that the accused had cut the deceased with a panga.
7. PW5 Paul Kibore Kipyego, the Assistant Chief of Kibendo sub-location testified that on the material night, he was at his home when PW2 and PW4 arrived with the accused and informed him that the accused had cut the deceased who was her co-wife. PW2 and PW4 then handed over to him the panga that had been used to cut the deceased. He then called the police officers who arrested the accused and took the murder weapon, that is, the panga with them. He also told Court that he had known the accused over ten years and only knew the deceased for about a month before she met her death. During cross-examination he told Court that he knew that the accused and PW3 used to have marital differences.
8. PW6 APC Lazarus Kosgey, testified that on the material night at around 9:00 pm he and his three colleagues were instructed to arrest the accused who was at the homestead of PW5 and took her to Tambach Police Station. He also testified that they took the murder weapon being the panga, to officers at Tambach Police Station.



9. PW7 Dr. Sharon Anyango, testified that she performed the post-mortem on the body of the deceased and formed the opinion that the cause of death was excessive bleeding caused by a deep cut wound on the left of the neck. She also produced a mental assessment report that had been performed by Dr. Emadau Papa whose findings were that the accused was of sound mind.
10. PW8 Corporal Francis Bundi testified that he was the investigating officer in this matter. He told Court that on 20th January, 2019 he commenced his investigations by visiting Iten County Referral Hospital with the aim of establishing the condition of deceased but on arrival he was informed that the deceased had already died. He then proceeded to the scene of the incident where he found a crowd of people and the area Chief was also present. He made inquiries and also saw a pool of blood at the spot where the deceased fell.
11. At the close of the Prosecution case, this Court ruled that the accused person had a case to answer, and she was put on her defence.

The Defence Case

12. The accused person Correy Jeruto Aiyabei testified that she was married to PW3 in 2009 and has three children with him. She told Court that she did not know the deceased herein and only met her on the night of the incident. She told Court that she was the breadwinner and that trouble in her marriage begun when her husband PW3 got a job in Kapenguria. She told Court that at times her husband would chase her away and later call her back. She further told Court that her husband would sell her things and use the money to drink and when she would ask him about it, he would quarrel her. She testified that her husband used to have many female friends who would abuse her. She told Court that her husband had chased away his first wife and although she was now his current wife, he still maintained many girlfriends.
13. The accused testified that she was very annoyed with the state of affairs. She testified that she used to stay with her sister-in-law who informed her that her husband had married another wife and that she was staying with her mother-in-law. She told Court that upon receiving the said information she left her home for her mother-in-law's home and could not remember what she did at her mother-in-law's home. She further told Court that on the material night she just realized that something had happened that she did not mean to do. She asked for forgiveness and admitted that she cut someone but did not know their name. She asked also for forgiveness from the Victim's family.
14. On cross-examination the accused told Court that she did not know that her husband had married a second wife or that the said wife was pregnant. She also told Court that she had been informed that she was carrying a panga when she left her home for her mother-in-law's home. She also conceded that when she arrived at her mother-in-law's home, she found two people in the kitchen and cut one.
15. DW2, James Chelimo, a village elder testified that he knows the accused person together with her husband. He told Court that the accused person is a good person. He further told Court that there were marital differences between the accused person and her husband. He urged Court to assist the accused so that she could go back home and continue taking care of her children. During cross-examination he told Court that he did not know the deceased.
16. DW3 Luka Kiprono, a brother to the accused testified that there were marital differences between the accused person and her husband. He pleaded with Court to allow the accused to go back home and take care of her young children.



17. DW4 Philemon Kiptoo, a neighbour to the accused person testified that the accused person is good person. He further told Court that there were marital differences between the accused and her husband.
18. DW5 Emily Kiptum, a sister-in-law to the accused testified that the accused person is a wife to his brother and that they lived in harmony until sometime in 2015 when they started having marital differences. She further told Court that the accused's husband was not an honest man and that she later on heard that the accused had cut someone.
19. The defence closed its case and both parties filed their submissions.

Determination

20. I have considered all the evidence adduced by the prosecution and the defence. I find that the only key issue for determination is whether the prosecution has established the charge against the accused beyond a reasonable doubt.
21. Section 203 of the Penal Code defines murder as the unlawful homicide committed with "malice aforethought." It is the killing of a human being by another with malice aforethought.

The Section reads:

"Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder."

Malice aforethought is deemed to be established by evidence proving any one of the following circumstances provided for under Section 206 of the CPC

- 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 happen.
 - c. An intent to commit a felony
 - d. An intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.
22. To prove murder, the prosecution is required to establish the following ingredients beyond a reasonable doubt.
 - a. The fact and cause of death of the deceased person.
 - b. That the death of the deceased was as a result of an unlawful act or omission on the part of the accused person.
 - c. That such unlawful act or omission was committed with malice aforethought.

Proof of death of deceased and cause thereof

23. The death of the deceased is not in dispute. The evidence on record clearly shows that the deceased, Mercy Cheyech Kapora died on the night of 19th January, 2019 after being cut on the left side of her



neck. PW1 an eye witness testified that she was at the scene of the murder and saw the deceased being cut on the left side of the neck. PW3 also testified that when he arrived at the hospital, he saw the deceased's body and noted that there was a cut on the left side of the neck. The death of the deceased was confirmed by PW7 Dr. Sharon Anyango who testified that she performed the post mortem on the body of the deceased and formed the opinion that the deceased died as a result of excessive bleeding due to a deep cut wound on left side of the neck. He produced the post-mortem form as exhibit 2.

Whether it is the accused person who killed the deceased

24. PW1 an eye witness testified that she was with deceased at her mother's homestead in the kitchen when the accused suddenly came in while armed with a panga and cut the deceased on the left side of the neck. PW4 also testified that when he arrived at the scene of the incident, he found PW1 struggling with the accused who was armed with a panga. During cross-examination, the accused conceded that she left her home and proceeded to her mother-in-law's home where she found two people in the kitchen and cut one. In their testimonies, PW1, PW2 and PW4 all place the accused at the scene of crime a fact that is also not denied by the accused. From the evidence adduced I find that the prosecution has proved that it is the accused who caused the death of the deceased by cutting her on the left side of the neck with a panga.

Proof of malice aforethought

25. Malice aforethought is one of the elements which has to be proved in order for the offence of murder to be established. Under Section 206 of the [Penal Code](#), Malice aforethought is the intention to kill or to cause grievous harm.
26. The Court of Appeal in the case of *Nzuki vs Republic* (1993) KLR stated:-
- “Malice aforethought is a term of art and emphasized that:-
- Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions: -
- (i) The intention to cause death
 - (ii) The intention to cause grievous bodily harm.
 - (iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from these acts and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts.”
27. Malice aforethought can be inferred from the circumstances of the case. In *Republic vs Tubere S/O Ochen* (1945) E.A.C.A 63, the court stated that malice aforethought can be inferred from the following factors:-
- a. The nature of the weapon used.
 - b. The part of the body targeted
 - c. The manner of killing or in which the weapon was used.
 - d. The conduct of the accused, before, during and after the attack.
28. Applying the above principles to the present case, I find that the malice aforethought was proved. The accused testified that prior to the incident, her husband had not slept home for several days. She further



testified that her sister-in-law who used to stay with her had informed that there was a change in her husband's behaviour because he had married another wife who was staying with her mother-in-law. The accused person also told Court that on learning about this she was annoyed. On the material date, PW1 testified that she was at her mother's homestead when the accused person suddenly arrived there while in possession of a panga and cut the deceased on the left side of the neck. Further the accused person testified that she did not know the deceased. However, by her own admission the accused stated that on the fateful day she had entered her mother-in-law's kitchen where she found two people before proceeding to cut one. At this particular point one would wonder how the accused herein was able to properly identified the deceased as her co-wife having denied that she knew her. The evidence on record clearly shows that the accused cut the deceased on the left side of her neck using a panga. It is also not disputed that prior to the incident, the accused and her husband had had marital differences with the accused blaming her husband for extra marital affairs. Flowing from the above, it is without a shadow of doubt that the accused herein intended to kill the deceased. The type of weapon used and the part of the body target is a clear indication of her intent to harm the deceased.

29. From all the evidence on record and after a careful analysis of the same as above given, I am satisfied that the prosecution has proved all the ingredients of the offence of murder as provided under section 203 and 206 of the [Penal Code](#). I accordingly find Correy Jeruto Aiyabei guilty of the murder of Mercy Cheyech Kapora as charged and convict her of the same.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST OF SEPTEMBER, 2022.

E. K. OGOLA

JUDGE

