



**Republic v Jacob (Criminal Case E001 of 2020)
[2022] KEHC 13039 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E001 OF 2020
KW KIARIE, J
SEPTEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

JAMES NYANJUA JACOB ACCUSED

JUDGMENT

1. James Nyanjua Jacob is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the September 13, 2020, at Ndiru village Rangwe Sub County of Homa Bay County, murdered Richard Oding Nyingilo.
3. According to the prosecution witnesses, the accused blocked the motor cycle the deceased was using with his motor cycle. He immediately chased the deceased who fell down. He then stabbed him using a kitchen knife he had.
4. In his defence James Nyanjua Jacob, the accused, contended that the deceased was in company of some four men. They stopped him. The deceased asked him what he was after with his wife. In the process he was hit with a stone and he fell down. This is when the deceased went to stab him with a knife he had. Since the road was under construction, the deceased slid and fell and the two started to struggle over the knife the deceased had. This is when the deceased was injured.
5. The issues for determination are:
 - a) How did the incident occur;
 - b) Whether the accused acted in self defence ;and
 - c) Whether the offence of murder was established.



6. Washington Alloys Okoth (PW1) testified that at about 3.40 pm the deceased who was his friend called him. He wanted him to take him to Manyatta chief's camp. They had a motor cycle. The accused blocked them using his motor cycle. When the accused removed a knife from his waist, they jumped off their motor cycle and started to run away. As the deceased was running away, he fell down and the accused went and stabbed him.
7. The version of the accused was that the deceased was with some four young men when he met them standing along the road. The deceased asked him what he was doing with his wife and approached him while armed with a knife. A struggle ensued over the knife and in the process, the deceased was stabbed.
8. The version of Washington Alloys Okoth (PW1) is not convincing. He did not testify of other people in their company; he only testified of witnesses who came after the fact. One such witness he said was Simeon Ochuoga.
9. When Odhiambo Simeon Ochuoga (PW4) testified, he said they were going to Manyatta on two Motor bikes. His was in front with one Caleb Odieny. They turned when Caleb Odieny informed him that somebody was attacking the deceased. He testified that they found the accused at the junction with Chief Okoth.
10. If indeed Chief Okoth was at the scene, he ought to have witnessed the incident. He was not called as a witness and the court was not informed why this was so.
11. Secondly, since Washington Alloys Okoth (PW1) did not testify of other people in their company, it is clear that the prosecution witnesses were not candid as to what transpired.
12. The evidence of Odhiambo Simeon Ochuoga (PW4) was that when they were at a distance, the accused and the deceased were standing facing each other and it appeared like they were engaged in a fight. This contradicts the evidence of Washington Alloys Okoth (PW1) on how the incident occurred.
13. I am therefore persuaded to believe the version of the accused as to how the incident occurred.
14. The accused contended that the deceased was injured as they were struggling over the knife. This may not be absolutely true. He however did not have any burden to prove how it happened. The injuries noted during post mortem suggest otherwise. However, the DNA report indicated that the knife had blood from the deceased and another male. This gives credence to the contention of the accused.
15. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In *Black's Law dictionary*, 10th Edition malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
16. Section 206 of the *Penal Code* gives instances when malice aforethought may be proved. It provides:

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) 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.
17. The accused contended that he acted in self defence. Section 17 of the [Penal Code](#) states that:
Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.
18. The Court of Appeal while addressing what these principles of English Common Law are, stated as follows in the case of [Ahmed Mohammed Omar & 5 others v Republic](#) [2014] eKLR:
The classic pronouncement on this issue and which has been severally cited by this court is that of the [Privy Council in Palmer v R](#) [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in [R v McINNES](#), 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the board, said:
“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”
19. In view of the explanation that the accused gave in his defence and since the prosecution did not prove to the required standards that it was the accused who had the knife, I find that the action of the accused was justified in the circumstances. He had all the right to defend himself. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF SEPTEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

