



**Nzomo v Republic (Criminal Case 13 of 2016)
[2022] KEHC 14906 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 13 OF 2016
RK LIMO, J
OCTOBER 31, 2022**

BETWEEN

MWENZE NZOMO ALIAS MWALIMU NZOMO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Mwenze Nzomo alias Mwalimu Nzomo 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 as per the information presented to this court are that on March 29, 2016 at Kavuta Location Katulani Division within Kitui County, the accused murdered Mboya Muli.

2. The accused denied committing the offence and the prosecution has presented a total of 8 witnesses.
3. The Prosecution's Case is based on direct evidence. The accused and the deceased were cousins and a dispute over a parcel of land led to a scuffle and a fight between the two resulting in the deceased being stabbed with a knife and as a result of which the deceased later succumbed to the fatal injury sustained. Below is the evidence tendered by the prosecution.
4. Wambua Muli PW1 told the court that he was a brother to the deceased. That on March 28, 2016, he arrived home to find his mother complaining that the accused had untied goats belonging to the deceased from the where they were grazing and that the accused had also removed some building bricks that were being baked. He stated that he and his deceased brother went to the home of the accused to discuss the issue but found him absent but found their aunt Mwikali who advised them to go back the following day. That the two returned to the home of the accused on the following day at 6.00am and found the accused sleeping. He testified that their aunt woke him up and she also tried to mediate over the issue before a fight ensued over the land dispute. The witness stated that the deceased argued that particular parcel of land was ancestral land while the accused argued that it belonged to him. That in



the midst of the argument, a fight broke out and the witness stated that at some point the deceased was on top of the accused but he managed to separate the two men. He also stated that the deceased used a whip and catapult in an attempt to hit the accused as he broke loose from the deceased, and went to his and returned with a knife which he used to stab the deceased as a result of when he was pronounced dead upon arrival at the hospital.

5. PW2 Mwikali Mutwi told the court that she was the aunt of both the accused and the deceased. She corroborated the evidence of PW1 to large extent, adding that the deceased had gone to her house on March 28, 2016 looking for the accused and that she advised them to return the following day as the accused was not home. That the two returned the following day at 6.00am and found the accused sleeping. That she called the accused and went back to her house and she get out shortly after, only to find the two fighting and the deceased on top of the accused. That she screamed, attracting people who came and separated the two and the accused ran back to his house and returned with a knife. She stated that she ran away after this and later learnt that the accused had stabbed the deceased. She also stated that the deceased tried to hit the accused using a catapult and a whip.
6. PW3 Gloria Maua Mboya the wife to the deceased also reiterated that the deceased and PW1 had gone to look for the accused on March 28, 2016 over an issue to do with the tethered goats but they did not find him. That the two went back the following day to the home of the accused after which she received a call from a lady she referred to as Ndanu, informing her that her husband had been stabbed by the accused. She stated that she went to the scene and took her husband to hospital where he was pronounced dead on arrival.
7. PW4 George Maundu Mweke a neighbour told the court that he was home when he heard screams coming from the home of the accused, he went to investigate and when he got there, he found the deceased injured. He stated that he took the deceased in his car together with PW3 and proceeded to Itoleka Police Station where they were advised to take him to hospital where he was pronounced dead.
8. PW5 Kinuka Matiti a cousin to the deceased and the accused stated that he was home on the material day when he heard screams coming from PW2's home. He stated that he went to inquire and he met the accused who was crying and bleeding from the mouth. He stated that he asked the accused why he was crying and the accused informed him that he had been assaulted by the deceased and PW1. That he later saw the deceased injured and PW1 told him that he had been stabbed. He stated that he went to a neighbour with a motor vehicle which they used to get the deceased to the Police Station and to hospital.
9. PW6 Maria Kavuki a relative, also stated that she was home when she heard screams coming from PW2's home. That she went to investigate and found the deceased holding the accused by the neck while PW1 was holding a whip. She testified that the deceased was separated from the accused upon which he ran to his house as the deceased threw stone at him using a catapult. That she ran to her house and only returned after she saw people gathering at the scene. She stated that she saw the deceased bleeding and later learnt that he had died while being taken for treatment.
10. PW7 I.P Alex Mwangi told the court that he was preparing to go to court on the material day when he a group of people went the station to report the incident. He stated that the accused was also in the group and he remained at the police station as the officer escorted the group to hospital where the deceased was pronounced dead. The officer stated that he visited the scene where he found blood stains on the ground as the Assistant Chief Kavuta location handed him the knife used in the stabbing of the deceased. The officer stated that he collected various items at the scene which he tendered as follows:-
 - i. A knife exhibit-1



- ii. A shirt exhibit -2
 - iii. Green t-shirt marked as exhibits 3
 - iv. A shirt marked as exhibit 4
 - v. A vest which the deceased was wearing marked as exhibit-5
11. The officer stated that he was informed by PW2 that there was hostility between the families of the deceased and the accused over land and the deceased and PW1 had gone to PW2's house to complain about the accused. That he also learnt that the deceased had a whip and catapult but he could not tell what they were used for.
 12. Dr Muriithi Miano PW 8 told the court that he was a medical doctor with a bachelor's degree in medicine and surgery from the University of Nairobi and that he was at the material time working at Kitui General Hospital. He testified on behalf of his colleague Dr. Cosmas Mutisya whom he stated had performed a post-mortem on the body of the deceased but was unavailable to testify as he had left the hospital to further his studies. The doctor produced a post mortem report dated April 4, 2016 as P Ex. 1. The report indicated that the body of the deceased was pale indicating that he had lost a lot of blood. That he also had abrasions on the right cheek, right and left knees and that internally, he has a cut on the jugular vein and carotid artery on the right side of the neck. The cause of death was indicated as hemorrhage from cut right jugular and internal carotid artery caused by a sharp object.
 13. When placed on his defence, the accused testified on oath and denied committing the offence. He stated that the deceased and PW1 were brothers and his uncles. That he was woken up in the morning on the material day by Mwikali (PW2), his aunt with information that the deceased and PW1 were looking for him. That after washing his face, he sat down for a conversation with them and a discussion on land ownership came up. That Wambua Muli (PW1) informed the accused that he was the owner of a parcel of land which was close to a hill but the accused told him that that parcel was actually his. That his uncles threatened him and told him that that was his last day following which a fight ensued and his uncles started beating him. He stated that the deceased laid on top of him as Wambua (PW1) held his legs. That PW2 started screaming and PW6 came and asked why the accused was being beaten and PW1 told her that the when a man makes a mistake he should be killed so PW6 ran away. That PW6's son Malonza came and tried to rescue the accused by holding back the deceased but the deceased was stronger and he chased the accused while attacking him with stones and catapult. The accused stated that he hid behind PW2's house but the deceased went to where he was and struck him on the head. That the accused fell down and PW1 came with knife ready to attacked him but he dodged and PW1 stabbed his brother instead. He stated that he did not have any weapon on him. He also stated that the land ownership dispute ensued because he laid a claim on his mother land which his uncles objected to.
 14. The accused conceded under cross examination that there was a land dispute between him and his uncles because he had claimed a share of his late mother's share a claim that was hotly contested by his uncles including the deceased herein. According to the accused his grandfather had given his later mum that disputed portion. He also conceded that Mwikali Mutiwii (PW1) her aunt had called him and the deceased to try and iron out their difference but that in the process a fight broke out. He insisted that he was the one who was attacked and that the attack happened near his house where he had run away to take refuge.
 15. This court has considered both the prosecution's case and the defence case. This is a case of murder. The Prosecution was obligated to establish and prove the following elements: -
 - i. Fact of death and cause.



- ii. That the accused committed the unlawful act that caused the death of the deceased (*Actus reus*)
 - iii. Mens rea – That the unlawful action that caused the death was ill motivated.
16. The death of the deceased and the cause of that death are not disputed. It is a fact that the deceased died and the cause of death was established to be hemorrhage from cut right jugular and internal carotid artery caused by a sharp object. The same is documented in a post mortem report dated April 4, 2016 tendered as P.Ex1.
 17. The only issue for determination is whether the accused was the one who caused the death of the deceased by stabbing him and whether he had malice aforethought. The accused denied stabbing the deceased and instead blamed PW1 for stabbing his brother while PW1 blamed the accused of stabbing the deceased.
 18. Evidence from PW1 was that he had gone to the home of the accused with the deceased a day before he died because their mother had informed him that the accused had untied some goats belonging to the deceased from where they were grazing. That upon arriving to the home of the accused, they were informed by PW2 that he was not around and she advised them to return the following day. The witness stated that they returned the following in the morning at 6.00am and PW2 called the accused for them. He stated that a fight ensued between the deceased and the accused and that he tried to separate them. He stated that the deceased was on top of the accused but he disengaged and the accused ran to his house, came out with a knife and stabbed the deceased.
 19. There is no doubt based on the evidence tendered that, there existed a land dispute between the accused on one hand and the deceased and his cousins on the other. This court finds from the evidence of PW2 that there was an attempt to resolve the dispute but in the process of resolving the dispute a quarrel and a fight broke out where the accused appearing to have been overpowered ran to his house and came back with a knife which he used to fatally stab the deceased on the neck.

The deceased and PW1 appears from the evidence that they also went for the reconciliation meeting armed because PW2 and PW6 the eye witness saw the deceased using a catapult and whip chasing after the accused.
 20. This court finds the testimony of the accused that PW1 sterilized the deceased to be evasive and unbelievable. This is because the protagonist in the fight were only two him and the deceased. It is apparent from the evidence of PW6 that when Malonza (son to PW6) went and held the deceased as the two wrestled, the accused managed to get away from the grip of the deceased and rushed to his house armed with a knife tendered as P Ex1 by PW7 Inspector Alex Mwangi.
 21. The Prosecution’s case has established and proved the element of *actus reus* beyond reasonable doubt.
 - 22.

(iii) *Mens rea*

There is no dispute that owing to the weapon used, the accused person intended to cause serious injury to the deceased to immobilize him. The provisions of Section 206 of the [Penal Code](#) provide: -

“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;.....”

23. This court has considered the defence put forward by the accused and in particular the fact that he was attacked by both the accused and PW1 and PW1. That fact is corroborated by PW2 and PW6. The above in my view shows that though the accused cannot escape the culpability of causing death, the element of *mens rea* was negated by the action by the deceased.

24. In *Republic v Stanley Mutbike Tiire* [2018] eKLR, the court held as follows;

“In a charge of murder, it must be shown that the accused’s conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.”

25. Provoked the accused, they attacked him. PW2 and PW6 testified that the deceased strangled the accused and that the two men were armed with a whip, stones and a catapult. PW1 told PW6 that they had come to finish their mission, which was his response when she asked him why they wanted to finish the accused. The accused only got away from the grip of the deceased following intervention from Malonza and even then, the deceased still ran after the accused while attacking him with stones and catapult.

26. From the foregoing, this court finds that the charge of murder against the accused cannot be sustained. He is however found guilty of a lesser charge of manslaughter. Contrary to Section 202 of the *Penal Code* he is hereby convicted accordingly.

DATED, SIGNED AND DELIVERED AT KITUI THIS 31ST DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

