



REPUBLIC OF KENYA



KENYA LAW
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Republic v Baya (Criminal Case 29 of 2015)
[2022] KEHC 14675 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14675 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 29 OF 2015

A. ONG'INJO, J

OCTOBER 27, 2022

BETWEEN

REPUBLIC STATE

AND

CRESH MWERI BAYA ACCUSED

JUDGMENT

1. The accused Cresh Mweri Baya is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 of the Laws of Kenya.
2. Particulars are that the accused Cresh Mweri Baya on the August 19, 2015 at Makomboani Village, Kaloleni Location, in Kaloleni sub-county, in Kilifi County within Coast Region murdered Osman Ahmed Omar.

Prosecution case

3. PW 1, Tabu Babu Ngonyo stated that she knew Osman Ahmed Omar, the deceased as he was her husband for two years and they had two children together. PW1 stated that the deceased worked at Markiti in Mombasa where he was supervising a building under construction. PW1 stated that on August 19, 2015, when her husband was at home in Makongowani, their son fell sick and was taken to a herbalist at 8.00 am but did not find the herbalist. That on the way home while a board a motorcycle, they found someone who was the accused person, by pointing at him, digging trenches beside the road. That they reached home at around 10.00 am and her husband left work to go back to Mombasa. PW1 stated that she took clothes to wash and while washing them, her cousin Safari sent his wife to PW1 to relay information that PW1's husband had been killed. PW1 stated that she called her parents as well as other family members including Safari's wife and they went to the scene. PW1 stated that her husband had been killed near a mosque at Makongowani. That his hands were in his pockets and his throat was slit. That they found other people at the scene.



4. PW1 stated that the police from Kizurini Police Station went to the scene and took the body to Kizurini Police Station. That PW1 and the deceased parent's accompanied the said body. PW1 stated that some people at the scene pointed out to the accused person and said that he is the one who killed the deceased. PW1 stated that as she was going to the scene where her husband lay dead, she saw the accused person aboard a motorcycle carrying a panga which was on his laps. That the panga is one edged with a wooden handle and identified by PW1 as the one in court and marked MFI 1. PW1 stated that she later heard that the accused went to the police station before the deceased's body was collected from the scene and also took the panga to the police station. PW1 stated that she did not know the accused before the day she saw him digging the trenches. That the accused was sitting on the ground while digging the trenches. That the next time she saw the accused was when he was aboard a motorcycle. PW1 stated that her husband was 23 years old when he died.
5. PW 2, Irene Furaha Mwaringa, the government analyst from Government Chemist Mombasa branch stated that the report was prepared by George Lawrence Oguda, a colleague based at Kisumu on transfer. PW2 stated that she worked with Oguda for over 8 years and understands his handwriting. She stated that she prepared a report on October 22, 2015 MFI P2. That on August 21, 2015 and August 28, 2015 PC Kipkoech Talam No XXX went to the government chemist department with exhibit memo form on August 21, 2015. That he took the exhibit marked A which was a panga and B which was blood sample. PW2 stated that on August 28, 2015, another exhibit memo form with exhibit buccal swabs from the deceased's son was availed. That the exhibit memo form dated August 21, 2015 MFI P3 and one dated MFI P4. PW2 stated that they were required to carry out DNA analysis of the three exhibits.
6. PW2 further stated that the panga marked A tested positive for human blood and DNA profile generated from the exhibits which were tabulated at the back of her report. She stated that the DNA profile generated from the panga matched the DNA profile generated from the reference blood sample in exhibit marked X. That the buccal swabs DNA profile showed paternal relationship with the DNA profiles generated from the panga and the blood sample exhibits marked A and X. PW2 produced the government analyst report marked Ex P2.
7. PW3, Anderson Kalama Fondo stated that on August 16, 2018, he saw people running and motorbikes riding towards the road to Mariakani. That it was about 11.00 am and on inquiry, he learnt that there was a Somali man who had been killed. That PW3 proceeded to the scene and found the person was lying facing upwards and their hands were inside the pockets of the clothes he was wearing. PW3 stated that he saw the person had been slaughtered and that there was a crowd of people. PW3 stated that he identified the man as he was married to his uncle's daughter. PW3 stated that he went aside and called his wife and told her to tell the deceased's wife that her husband had been killed. That there was a young man in the crowd who was holding a panga and known to him physically, who did not say anything. PW3 stated that he did not look closely at the panga the young man was carrying. That the young man boarded a motorbike and went to the police station. That PW3 then left the scene and went home. That on August 28, 2015, the police from Kaloleni Police Station went and interrogated him and he recorded his statement. That the young man whom PW3 saw carrying a panga is known to him and the one in the dock and that he was his neighbor at home.
8. PW4 David Ruwa stated that on August 19, 2015, he recalls that at around 11.00 am to 12.00 am, he was on duty and when he reached Makomboani, he got his uncle Daniel Kalama who told him that he needed to be taken to Kaloleni. That before they left for Kaloleni, his uncle told him that he heard there was someone who had died in Makomboani. That they went and found a Somali man had died facing up, his hands were inside the pockets of his jacket and there was a cut on the neck. PW4 stated that while at the scene, elders asked if the motorbike belonged to PW4. They then asked him to take



the accused to Kaloleni Police Station. That the elders were to pay PW4 but he did not go back to Makomboani. That the accused was carrying a panga and that he did not say anything while he was being taken to the police station. PW4 stated that the panga that the accused was carrying was the one in court MFI P1. That the accused was known to PW4, he was his friend and that they used to play football together. PW4 stated that on August 27, 2015 at about 11.00 am, he stated that he received a call from someone who identified himself as a police officer at Kaloleni Police Station. PW4 stated he went and recorded his statement.

9. PW5, No XXXX PC Kipkoech Talam previously attached at Kaloleni Police Station and the investigating officer herein stated that on August 19, 2015, he was at Kaloleni Police Station when the accused herein arrived at the station carrying blood stained panga. PW5 stated that he did not see if the accused went with anyone. That when PW5 inquired what he was doing with a panga, the accused told him that there was someone who went to his place of work, held him by the collar and threatened to finish him. That the accused said that he felt threatened and since he had a panga which he was using at his place of work, he cut the person. PW5 stated that he took the panga from the suspect and booked his report. That he then placed him in the cells as a murder suspect as he reported himself that he had killed someone.
10. PW5 stated that he accompanied IP Peter Nyamai and other officers to the scene in Makomboani village. That on arrival, they found that what the suspect reported was true. That they established that the deceased's body lay facing up with both hands in the pocket of his jacket that he was wearing. PW5 stated that the only injury was a cut on the neck of the deceased. That there was no sign of struggle at the scene as the area was not disturbed. That the accused had dug holes for poles which was for constructing a house. That they took photographs at the scene but before they could be taken for processing, PW5 was transferred and the officer who PW5 handed over to also did not take them for processing. PW5 stated that the body was taken to Coast General Hospital Mortuary for postmortem. That the following day on August 28, 2015, postmortem was done as the deceased person's relatives wanted to burry in accordance with Islamic tradition. PW5 stated that the postmortem report dated November 2, 2015 was in court MFI P5 and the postmortem was conducted on August 28, 2015. That after the postmortem, the doctor took blood samples for further investigation.
11. PW5 stated that he prepared exhibit memo and forwarded the panga and blood samples to the government chemist on August 21, 2015. That later on August 28, 2015, he prepared an exhibit memo form forwarding blood sample of the deceased person's son. That the panga and blood samples were examined/analysed and report is in court. PW5 stated that the body of the deceased was identified by the father of the deceased and another relative. That PW5 established that the deceased was an alien from Somalia and the father of the deceased and the relative who identified the body are suspected to have gone back to Somalia as they were demanding for air fare to come testify. PW5 further testified that the panga that the accused had was in court and produced as Ex P1. PW1 stated that he traced witnesses and recorded their statements and then arraigned the accused in court. PW5 identified the accused in court as the one who surrendered himself to the police.
12. PW5 testified in court on February 11, 2021 in court. PW6 stated that he had an exhibit memo form dated August 20, 2015 which he used to forward exhibits to government chemist in Mombasa for analysis. That he submitted the blood stained panga and blood sample of the deceased marked A & X respectively and wish to produce it as EX P3. PW6 also stated that he had another exhibit memo form dated August 20, 2015 which is in respect to exhibits submitted to the government chemist. He stated that he submitted the blood stained panga and buccal swabs for the deceased's son and produced them as Ex P4. That the same blood stained panga was submitted for comparison with blood sample from the deceased and buccal swabs from the deceased's son.



13. PW6, Dr Fatma Ahmed from Coast General Hospital stated that she had a postmortem report for the body of Osman Ahmed Omar which was filed by Dr Mohamed who was on study leave. That Dr Mohamed filled the form on August 20, 2015 at Coast General Hospital Mortuary at 2.30 pm. That the body had blue jeans, red t-shirt and black jacket soiled with blood. The body was male gender of African Somali and the apparent age was 22 years, good nutrition, well-built, height of 175 cm, and the body was fresh. Externally, there was anterior cut injury on the neck involving the trachea, oesophagus, anterior blood vessel i.e jugular carotid vessels size cut approximately 7cm by 2cm, blood seen on the neck and nose area. The cut on the respiratory system - trachea was above the 2nd and 3rd tracheal ring. The cut on the digestive system – oesophagus was on the upper 3rd area. The cause of death was hemorrhagic shock due to cut on the anterior neck vessels and trachea. The report was typed, stamped and signed on November 22, 2015 – Ex P5.

Defence case

14. Accused person, Cresh Mweri Baya, stated that he saw the deceased on two occasions but they were not friends. He stated that on August 19, 2015 on a Wednesday, he woke up and went to his place of work where he was constructing a house and at 11.00 am a person who was known to him physically went to him and he was having hands in his jacket pockets. That the person asked whether the accused was Kadzani. The accused stated that Kadzani was his uncle and that he told the person that he was not Kadzani. That the person did not greet him when he went there. That the person asked where Kadzani was and the accused told him that Kadzani was not at home. That the person asked whether the house was Kadzani's and the accused told him that Kadzani had not constructed a house. That the accused asked the person why he was asking many questions, the person became angry and said it appeared the accused was Kadzani. That the person said 'wacha nikumaliza'. The accused stated that the person wanted to remove his hands from the pockets and the accused feared he had a weapon. That the accused picked the panga he was using and for construction and threw it at him to defend himself. The accused stated that his intention was to defend himself but by bad luck the panga went directly to his neck and cut him and he fell. That members of the public went and discussed and agreed that he goes to the police station.

Written submissions by accused

15. The accused person's submissions dated August 23, 2022 were to the effect that although the deceased died as a result of an unlawful act committed by the accused, the accused person did not possess the necessary mens rea that could be construed to have been actuated with malice aforethought. It was therefore the accused person's submissions that the prosecution had failed to prove the ingredients of murder beyond reasonable doubt.

Analysis and determination

16. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya provides: -
Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
17. In *Republic v Andrew Omwenga [2009] eKLR* it was held as follows: -
' It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:



- (a) The death of the deceased and the cause of the death,
 - (b) That the accused committed the unlawful act which caused the death of the deceased; and
 - (c) That the accused had the malice aforethought'.
18. The fact that the deceased Osman Ahmed Omar died is not in dispute as it is confirmed by both the prosecution and the accused person's witnesses. According to the postmortem report prepared by Dr Mohamed Badbass and produced by PW6 Dr Fatma Ahmed, the deceased died as a result of hemorrhagic shock due to cut anterior neck vessels and trachea.
19. The act was committed by the accused person when allegedly defending himself was unlawful. Evidence was adduced by PW1, PW3 and PW4 that when they went to the scene the deceased was lying facing up and his hands were still in the pocket of his jacket while the accused person was holding a panga. There was no weapon recovered from the deceased person's pockets to prove that the accused's perceived fear was not real. This court therefore finds that the accused person committed an unlawful act that led to the death of the deceased.
20. On whether the accused was actuated with malice aforethought, section 206 of the Penal Code defines malice aforethought as follows: -
- ' Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony'.
21. In the case of *Isaac Kimathi Kanuachobi -vs- R (2013) eKLR*, it was held: -
- ' There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic v Stephen Kiprotich Leting & 3 Others [2009] eKLR High Court at Nakuru Criminal Case 34 of 2008).'
22. The evidence on record shows that the accused was digging trenches for construction of a house beside the road. PW1 said she saw him while they were on a motorbike on the way home. PW1 the wife of the deceased did not know the accused. PW5 PC Kipkoech Talam also confirmed that the accused had dug holes for poles which were for constructing a house. PW1 testified that the deceased had left



to go back to Mombasa but it is not understood how he went back to where the accused was except for the explanation given by the accused and his two witnesses. There was no other eye witness and it is because the offence occurred where the accused was working and the accused person went and reported that he had killed someone and it was known that he had committed the offence, and he was arrested and charged.

23. In conclusion, this court finds that the element of malice was not proved to the required standard and this court finds that the evidence on record can only prove manslaughter. The accused person is therefore found guilty of the offence of manslaughter and is convicted.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 27TH DAY OF OCTOBER 2022**

HON LADY JUSTICE A ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr Ngiri for the State

Ms Musyoki Advocate for the Accused Person

Accused present in person

HON LADY JUSTICE A ONG'INJO

JUDGE

Mr Ngiri

We have no previous records.

Ms Musyoki

We can take a date for mitigation.

Order: Mention on November 3, 2022 for presentence report and mitigation

HON LADY JUSTICE A ONG'INJO

JUDGE

