



**Republic v Kandie & 2 others (Criminal Case 56 of 2017)
[2022] KEHC 14507 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE 56 OF 2017
WK KORIR, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

BENSON ROTICH 1ST ACCUSED

PETER KEMBOI KANDIE 2ND ACCUSED

JAPHETH KERIENY ALIAS KIRINYAGA 3RD ACCUSED

JUDGMENT

1. Peter Kemboi Kandie, the 1st Accused, Benson Rotich, the 2nd Accused, and Japeth Kerieny alias Kirinyaga, the 3rd Accused were all charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. They were said to have murdered Felix Kimutai on 22nd November, 2014, at Pemwai Market, Baringo Central Sub-County within Baringo County.
2. In a ruling delivered on 28th October, 2021 this Court (J.M. Bwonwong’a, J) acquitted the 3rd Accused after finding that no case had been made against him by the prosecution. The 1st and 2nd accused persons were through the same ruling placed on their defence. This judgement is therefore in respect to the 1st and 2nd accused persons.
3. This being a murder case, the prosecution was required to prove that the accused persons were responsible for the unlawful death of the deceased. The importance of proving these ingredients was reiterated in the case of *Republic v Andrew Mueche Omwenga* [2009] eKLR 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 that 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.”

4. The question therefore is whether the prosecution successfully discharged the burden placed upon it as stated above. The death of the deceased on 20th November, 2014 is not disputed by any of the parties. The parties also do not dispute the fact that the deceased lost his life in an unlawful manner. The prosecution assert that the deceased was killed by the accused persons whereas the accused persons claim he was killed by a mob.
5. The death of the deceased and the cause of the death were established by PW4 Dr. David Wekesa Nyarienyia a pathologist at Moi Teaching and Referral Hospital who testified that he conducted postmortem on the body of Felix Kimutai (hereinafter simply referred to as the deceased) and noted injuries behind the head, the right side of the neck, chest, and left hand. When he opened the body, one of the right ribs was broken and there was blood in the brain. He therefore concluded that the cause of the death was severe head injury due to blunt trauma. He produced a postmortem report as an exhibit in this matter.
6. The only remaining question therefore is whether the deceased died in the hands of the accused persons and whether the accused persons had malice aforethought. Where is the nexus between the demise of the deceased and the accused persons? PW2 Francis Cherutich testified that on 20th November, 2014 when he alighted from a matatu at Pemwai Centre at about 2.00pm he heard people calling for the arrest of the 1st Accused who was a bodaboda operator. He then saw the deceased with a knife. People were running towards one part of the market and he followed them. Upon arrival he found the deceased lying on the ground. He also met the 2nd Accused who was bleeding from the head. He assisted the 2nd Accused to a nearby chemist and that is when the 2nd Accused told him that he had been stabbed by the deceased. The 2nd Accused also told him that he had gone to assist the 1st Accused who was being chased by the deceased.
7. Upon cross-examination, PW2 testified that he did not see the deceased chase the 1st Accused although he heard people say the deceased had chased the 1st Accused with a knife. He stated that at the scene he found many people crowding near the deceased. The witness testified that he did not know who killed the deceased.
8. PW3 Japeth Kimutai Chebotibin testified that on 20th November, 2014 at about 1.30pm as he was entering Pemwai Centre he saw people running away. As he went to find out what was happening, he met PW1 escorting the 2nd Accused who was bleeding from an injury on the head. The 3rd Accused was closely following them from behind. The 2nd Accused told him

“anjifanya” and that nobody had been stabbed. On arrival at the scene he found the deceased lying on the ground. He went to relay the news to his boss and on coming back he found the deceased had been taken to hospital. It was then that he heard that the 2nd Accused was the person who killed the deceased. He, however, could not recall the person who told him so.
9. In response to questions put to him by the defence counsel, PW3 stated that there were about 50 people at the scene. He testified that he did not see the 1st and 3rd accused persons at the scene and that he was told it was the deceased who had stabbed the 2nd Accused. He stated that he did not know who killed the deceased and that he could not confirm if he had been killed by the mob.



10. PW5 Edwin Kibyegon Barsolai testified that on 20th November, 2014 he was at Pemwai Centre where he worked as a boda boda operator when the 1st Accused and the deceased started quarrelling over tools for mending punctures. The two went towards the outskirts of the Centre as they continued quarrelling. It was then that the 2nd Accused who worked at a hotel arrived with a knife. The 2nd Accused tried to separate the two but the 1st Accused started beating the deceased. PW5 stated that when he tried to intervene the 2nd Accused stabbed him on his arm forcing him to retreat and stand aside. The witness testified that the 1st and 2nd accused persons were using their fists, sticks and a knife to assault the deceased. He stated that he was with one Chebon Cherogony as they tried to stop the fight between the deceased and the two accused persons. PW5 stated that many people arrived and started shouting and that is when the 1st Accused, the 2nd Accused and the deceased stopped fighting.
11. Upon cross-examination, PW5 denied having any grudge against the 2nd Accused. He stated that the deceased was his brother. The witness admitted that there was an ongoing criminal case at Kabarnet Magistrate's Court in which he had complained that the 2nd Accused had threatened to kill him. He also stated that there were about 100 people at the scene at the time the 1st and 2nd accused persons were assaulting the deceased.
12. In response to the prosecution evidence, the 1st Accused testified as DW1 and denied killing the deceased. His testimony was that on the material day the deceased went and forcefully demanded from him puncture repair tools that had been given to him by PW5. He told off the deceased who went away threatening to deal with him. Shortly thereafter the deceased came back while armed with a long knife. He sensed danger and took off. DW3 Alex Cheposwon who was also present counseled him to run for his life. On looking back, he saw one Brian and the 2nd Accused. The 1st Accused testified that he then saw the 2nd Accused on the ground while bleeding from the head. He ran away fearing that the deceased was likely to kill someone. The 1st Accused stated that he later received a call from a police officer telling him to go to Kabarnet Police Station. When he reported at the Police Station the next day he was arrested and informed that the deceased had died. According to the 1st Accused, the deceased was killed by a mob.
13. The 2nd Accused who testified as DW2 also denied killing the deceased. He stated that on 20th November, 2014 at around 2:00 p.m. he was at his hotel when DW4 Brian Chepsergon Kosgei went and told him to go and talk to the deceased who had chased the 1st Accused while armed with a knife. He left with DW4 to where the deceased was. The deceased was his friend. He found about 30 people at the scene. Before he could talk to the deceased, the deceased charged towards him with a raised knife wanting to stab him on the chest. He raised his hand to defend himself. The deceased nevertheless stabbed him on the head and he became unconscious. He regained consciousness in hospital. The 1st Accused testified that upon his discharge he went to report the assault at Kabarnet Police Station and that is when he was told the deceased had passed away. He was arrested and charged with the murder of the deceased.
14. The 2nd Accused also told the Court that he had differences with PW5 when they were growing up. Further, that on 3rd April, 2019 when coming to Court PW5 told the prosecutor that he had threatened to kill him. He was arrested and charged before the Magistrate's Court at Kabarnet but he was subsequently acquitted. The 2nd Accused produced a treatment sheet, a P3 form and a charge sheet as exhibits. He stated he did not know who killed the deceased and still mourns him to date as he was his friend.
15. In response to questions put to him by the prosecutor, the 2nd Accused stated that PW5 lied to the Court when he claimed that he attacked the deceased with the 1st Accused. In order to demonstrate that



PW5 was a liar, the 2nd Accused stated that although PW5 had testified that they stabbed the deceased, the pathologist testified that a blunt object was used to attack the deceased. The 2nd Accused indicated that he did not know where the knife which the deceased had was taken to.

16. DW3 and DW4 reiterated the evidence of the 1st and 2nd accused persons. They stated that it was the mob that killed the deceased. DW4 added that after the deceased became wild and stabbed the 2nd Accused, members of the public armed themselves with stones and attacked him.

17. The evidence adduced by the prosecution and the defence provide two versions of what allegedly took place on the material date. The prosecution insist that the accused persons attacked and killed the deceased. The defence case is that the deceased was killed by a mob after he went wild and started attacking people with a knife. Which then is the true version of the events as can be gleaned from the record?

Unfortunately, I did not have the opportunity of hearing or seeing any of the prosecution witnesses testify. I found the 1st and 2nd accused persons having been placed on their defence. I will therefore rely on the court proceedings as recorded by my predecessors.

18. The narrative that emerges from my analysis of the evidence is that on the material day the deceased had an altercation with the 1st Accused over tools used to repair punctures. The argument was occasioned by the 1st Accused's decision not to release the tools to the deceased because they allegedly belonged to PW5. At this point some untruthfulness emerges from the evidence of the 1st Accused. His claim that the tools belonged to PW5 is not correct. In my view, the tools belonged to the deceased and not PW5 and that is why PW5 was not cross-examined about the tools. The fight attracted other actors including the 2nd Accused and PW5. The 1st and 2nd accused persons were on one side whereas PW5 was on the side of the deceased.

19. Much as the members of the public gathered at the scene, they did not join the fight until the point that the deceased was seriously injured. Although the 1st Accused claimed that he took off when he saw the deceased approaching with a knife, his evidence was contradicted by PW2 who stated that as he entered the shopping centre, he heard people calling for the arrest of the 1st Accused. That means that the deceased had been wounded by the 1st Accused who was running away from members of the public. PW3 confirmed that when he met the 2nd Accused, the 2nd Accused without any prompting denied stabbing someone. PW3 also stated that he was told that it was the 2nd Accused who stabbed the deceased.

20. The claim that the deceased had a knife is also false. PW5 stated that it was the 2nd Accused who came with the knife from his hotel. That explains why the knife was not surrendered as an exhibit. Indeed, the 2nd Accused during cross-examination stated that he did not know where the knife went to. It is obvious that the knife could not be recovered because he is the one who had it.

21. Although the 1st and 2nd accused persons testified that they did not stab the deceased as alleged by PW5, the evidence show otherwise. That the accused persons are the ones who injured the deceased is confirmed by the fact that the 2nd Accused without prompting told PW3 that the deceased was pretending that he had been stabbed. When PW3 arrived at the scene he found the deceased lying on the ground. It is also noted that PW2 also found the deceased already on the ground.

22. It is also observed that the untruthfulness of the 2nd Accused and his witness (DW4) was exposed by their testimony that the 2nd Accused lost consciousness on the spot when he was stabbed by the deceased. This was contradicted by the testimony of PW2 and PW3 who informed the Court that the 2nd Accused was walking and talking. The attempt by the 1st and 2nd accused persons to remove



themselves from the scene at the time the deceased received the injuries that subsequently led to his death is therefore unbelievable. The 1st Accused ran away after the deceased had been seriously injured. The 2nd Accused did indeed suffer an injury in the fight but the deceased came off worst as he died of the injuries sustained in the fight.

23. Considering the evidence on record, I find that the 1st and the 2nd accused persons killed the deceased. They were the primary actors in the killing of the deceased.
24. The question is whether the 1st and 2nd accused persons had malice aforethought. Did they have any justifiable excuse for their actions? The evidence shows that the fight arose from a dispute between the deceased and the 1st Accused over some tools. The 2nd Accused who had gone to intervene ended up in joining the 1st Accused in beating the deceased.
25. The question therefore is whether any of the two accused persons had the intention to cause the death of the deceased. From the evidence on record it is clear that there was an element of provocation. Tempers had risen. In such circumstances it cannot be said that any of the two accused persons had malice aforethought. That the deceased did not die without putting up a fight is confirmed by the fact that the 2nd Accused sustained a cut on his head.
26. Taking into account the injuries sustained by the deceased, it is clear to me that the force used was excessive. The pathologist testified about multiple injuries on the body of the deceased.
27. The prosecution having failed to establish malice aforethought which is an integral element of the offence of murder, I find and hold that the charge of murder was not proved. However, the evidence on record establishes the lesser charge of manslaughter.
28. The actions of the 1st and 2nd accused persons were unlawful, dangerous and caused the death of the deceased. I therefore substitute the charge of murder with that of manslaughter contrary to Section 202(1) as read with Section 205 of the [Penal Code](#). Each accused person is found guilty and convicted in respect of the lesser charge.

DATED AND SIGNED AT NAKURU THIS 24TH DAY OF OCTOBER, 2022.

W. KORIR, JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27TH DAY OF OCTOBER, 2022.

H. K. CHEMITEL, JUDGE

