



**Republic v Masila (Criminal Case 13 of 2017)
[2022] KEHC 16430 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 13 OF 2017
A. ONG'INJO, J
NOVEMBER 24, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

LUKAS MUTUKU MASILA ACCUSED

JUDGMENT

1. The accused Lukas Mutuku Masila 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 Lukas Mutuku Masila on March 5, 2017 at Vigurungani Location in Kinango sub-county within Kwale County murdered Nyerere Mutua *alias* Masokisi.

Prosecution Case

3. PW1, Tsuma Chaka stated that on March 5, 2017 at 8.00 am, he was at home with his family when he met Lukas Mutuku Masila in the company of Nyenje Makeli and Nyawa Mbetsa who were ambassadors. That Lukas told him that he had fought with his colleague and he left the colleague asleep but did not know if he was alive. That the colleague was called Nyerere. PW1 stated that he is the chairman of the village and knew Nyerere. That PW1 went to the scene which was at Nyerere's home and that he went with Lukas and the ambassadors. That when they reached Nyerere's house, they found Nyerere had died in the forest and he had been cut at the back of the head, his shirt had been removed but his jeans were on, and that the left ear was also cut a little. PW1 stated that he did not see any other injuries and that the panga was on the side but the panga had no blood. PW1 stated that the pictures in court marked MFI (a), (b), (c), & (d) were the pictures of the body of the deceased. PW1 stated that he called the Assistant Chief of Makijembe sub-location and waited until the chief arrived when they got help from the police. PW1 stated that the police went and took away Lukas Mutuku and the deceased. PW1 identified Lukas Mutuku as the accused in court.



4. PW2, Nyawa Mbetsa stated that March 5, 2017 was a Sunday and he was in church when he was called outside the church and Mutuku told him that he had fought with Masokisi Nyerere who was not moving. That Mutuku told him that he had hit the deceased twice with a stick. That PW2 told Mutuku to go to his fellow ambassadors of which they went to Nyenje who advised that they go to the chairman. When Mutuku told the chairman what had happened, the chairman told them to go to where Mutuku and Nyerere had fought. PW2 stated that when they went to the forest, there was a small house for charcoal. That they found the body of Nyerere lying down. That the body had a short but no shirt. That he had injuries on the left ear, on the head and right side of the body on the ribs. PW2 made reference to MFI 1 (a), (b), (c), and (d) as photos of the body of Nyerere Masokisi. That the police went and took the deceased away. PW2 identified Mutuku as the accused in court.
5. PW3, Dr Ahmed Mukuche Juma Hassan stated that on March 18, 2017 he was working at Kinango sub - county hospital as a medical officer. He stated that he had the postmortem report in respect to the body of Julius Nyerere and that the body was taken there by the police from Kinango. PW3 stated that postmortem was done on March 18, 2017 at 10.00 am. He stated that the body was in blue denim jeans and right kirikiri sandal. That the body was of an African male about 50 years and well built. That the deceased was in rigor mortis and there were signs of early decomposition of the body. PW3 stated that the time of death was not ascertained but from the state of decomposition, it was more than one hour. That on the external appearance, there was surgical penetrating laceration. That there was a deep cut wound to the head extending from the front to the back, the deceased had left temporal mandibular fractures, left side of the head and jaw. That the deceased had left laceration of the earlobe – cut by a sharp object. The body had hemotympanum – blood coming out of the ear. That there was also fluid from the brain through the nose which meant that the base of the skull was fractured. That injuries to the brain and the nervous system caused the death and that there was bleeding in the brain. PW3 stated that there was a fracture to the head and jaw and there was also a fracture of the base of the skull. That the cause of death was severe head injury secondary to penetrating blunt traumatic blow injury. That the brain was injured by a sharp object. PW3 produced the signed and stamped postmortem report Ex P2.

Defence Case

6. Accused person, Lukas Mutuku Masila stated that on March 5, 2017, he woke up and proceeded to the farm which was 2km away and that it was a Sunday. That when he arrived, he found a tree that was being eaten by termites and that while he was hitting the tree to remove the termites, he saw the deceased arrive. That he went and stood in front of the accused and asked whether he was a real man. That the deceased removed the shirt he was wearing and put it down together with the manila bag and cap. That he then approached the accused while armed with a panga and wanted to fight him. That the accused picked a stick and started swinging it round to keep him off as the deceased was still armed with the panga. That the deceased picked another stick and hit the accused on the shoulder and aimed the panga at him but the panga missed and hit the wall. That the accused got a chance and used the stick that he was holding to hit him on the head. That the deceased threw a kick and the accused again hit his leg with the stick. That the deceased threw the panga at him and to escape, the accused used the stick he had to hit the deceased at the back of the head and he fell on a stump and that is when the accused got a chance to escape. The accused stated that he went and reported to Nyawa Mbetsa who was a pastor and member of Nyumba Kumi. The accused stated that he went and found him in church. That Nyawa Mbetsa told him that he should go to the vice chairman Genya Mwakalu who referred them to chairman Tsuma Chaka. That the accused explained to the chairman what happened and the chairman made a phone call to the police and reported that there was a fight. That the accused, his



mother, Genya and Mbetsa proceeded to the scene and found the deceased had died. That the accused was later arrested and taken to Vigurungani Police Station.

Written Submissions by Accused

7. The accused submitted that the issues to be determined by court were whether the prosecution proved malice aforethought on the part of the accused person beyond reasonable doubt, and whether the defence of provocation and self defence are valid defences available to the accused person.
8. According to the submissions on whether the prosecution proved malice aforethought on the part of the accused person beyond reasonable doubt, it is stated that section 206 of the *Penal Code* provides for circumstances which if manifested in any particular case malice aforethought is deemed to be established. The accused also cited the case of *Rex v Tubere s/o Ochen* (1945) 12EACA 63 where it was held that "... to determine whether malice aforethought has been established, courts should consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident."
9. The accused in the submissions further relied on the case of *R v Moloney* where the court formulated two questions to be answered in the concept of intention and malice aforethought which included whether death or the very serious injury a natural consequence of the defendant's voluntary act or did the defendant foresee that the consequence of being a natural consequence of his act. The accused also cited the case of *Republic v Daniel Onyango Omoyo* (2015) eKLR where it was well settled that the prosecution's duty under section 206 of the *Penal Code* is to prove one or a combination of the existence of the above circumstances to infer malice aforethought.
10. The accused submits that the evidence displayed by the prosecution witnesses shows either direct or indirect intent for the court to conclude that the accused had malice aforethought before killing the deceased. That the evidence relied upon by the prosecution is based on the accused's statement after he ran for his life following the physical altercation with the deceased. That none of the witnesses actually saw the accused person kill the deceased.
11. In the submissions, the accused states that he was not armed at all and that during the fight, his main focus was to block the panga thrown at him by the deceased as he kept questioning what was wrong that he wanted to kill the accused using his panga. That after the deceased fell unconscious, the accused immediately informed the area chairman and the people known to him of what had happened and that he was not sure of the state the deceased was in after the fight.
12. The accused submits on whether the defence of provocation and self defence are valid defences available to the accused person by citing section 17 of the *Penal Code* which provides that '...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.' That the said provision does not prevent the accused from relying on self defence where he believes that someone approaching him is armed with a dangerous weapon.
13. The accused cited the cases of Privy Council *Palmer v Republic* (1971) 1 ALL ER, *Beck Ford v Republic* (1987) 3 ALL ER, *Ahmed Muhammad Omar & 5 others v Republic* Cr Appeal No 414 of 2014, and *Jane Koitee Jackson v Republic* (2014) Cr Appeal No 146 of 2009 by submitting that the prosecution has the evidential burden of proving issues that the accused in using force had no honest and reasonable belief that he was under threat of bodily injury from his attacker, that though the attack was imminent he had an opportunity to retreat, that the use of force was disproportionate to the imminent and immediate danger from the assailant, that the use of reasonable force was not for the sole objective to protect self and some other person.



Analysis and Determination

14. Having considered the evidence of the three prosecution witnesses and the accused person's defence, the issue for determination is whether the prosecution has proved beyond reasonable doubt that the accused person committed the offence.

15. 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.

16. 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”.

The death of the deceased and the cause of the death

17. Death of the deceased and what caused the death are not disputed. PW1 confirmed death of the deceased as he saw him with a cut at the back of the head and that the left ear was also cut a little. PW2 stated that they found the body of the deceased lying down with injuries on the left ear, on the head and right side of the body on the ribs.

18. PW3, Dr Ahmed who conducted the postmortem stated that there was surgical penetrating laceration and a deep cut wound to the head extending from the front to the back. That the deceased had left temporal mandibular fractures, left side of the head and jaw. The deceased had left laceration of the earlobe – cut by a sharp object. The body had hemotympanum – blood coming out of the ear. That there was also fluid from the brain through the nose which meant that the base of the skull was fractured. In the opinion of the doctor, the injuries to the brain and nervous system caused the death of the deceased.

That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought

19. The accused person reported to PW1 and PW2 that he had fought with the deceased in the forest and that the deceased was not moving. PW1 and PW2 together with Nyenje were led by the accused to the forest where they found the deceased lying dead with injuries on the left ear, the head and right side of the body on the ribs. The accused stated that he used a stick he had to hit the deceased at the back of the head in his defence as the deceased wanted to cut him with a panga and he fell on a stump of a tree.

20. The injury was confirmed by PW3 who stated that there was a deep cut wound to the head extending from the front to the back, the deceased had left temporal mandibular fractures, left side of the head and jaw.



21. PW1 and PW2 went to the scene because of the information that the accused had given them. The accused stated that he went and reported to Nyawa Mbetsa who was a pastor and member of nyumba kumi. That Nyawa Mbetsa told him that he should go to the vice chairman Nyenje Makalu who referred them to chairman Tsuma Chaka. That the accused explained to the chairman what happened and the chairman made a phone call to the police and reported that there was a fight. That the accused, his mother, Genya and Mbetsa proceeded to the scene and found the deceased had died. That the accused was later arrested and taken to Vigurungani Police Station.
22. The accused and the deceased were alone in the forest and there was no eye witness who saw the accused person kill the deceased. Whether the accused hit the deceased in self defence or whether he was the aggressor cannot be established in the circumstances of this case as the dead tell no tales. What is not in dispute is that it is the accused person's actions that led to the death of the deceased. He cannot therefore be found guilty of murder but this court finds him guilty of manslaughter and he is convicted under section 322 (2) of the *Criminal Procedure Code*. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 24TH DAY OF NOVEMBER 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for the State

Ms. Musyoki Advocate for the Accused Person

Accused present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Kambaga: We do not have past record. The accused may be treated as the 1st Offender

Ms. Musyoki: We request for pre-sentence report and a day for mitigation

Order: Mention on 20.12.2022 for mitigation, Victim Impact Statement and sentencing

HON. LADY JUSTICE A. ONG'INJO

JUDGE

