



**Republic v Mutura (Criminal Case 48 of 2019)
[2025] KEHC 245 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 48 OF 2019
HI ONG'UDI, J
JANUARY 22, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT KINYANJUI MUTURA ACCUSED

JUDGMENT

1. Robert Kinyanjui Mutura the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars being that on July 28, 2019 at Ahero Trading Centre in Nakuru North Sub-County within Nakuru County murdered Stephen Njenga.
2. The accused denied the charge and the case proceeded to full hearing with the prosecution calling a total of four (4) witnesses. PW1 – Dr. Titus Ngulungu a pathologist from Nakuru Teaching Hospital conducted the post mortem. The report is dated 8th October 2019 and was witnessed by Alice Wamaitha and Benson Njenga.
3. His findings are as follows; there were signs of blood loss and lack of oxygen before death, signs of brain damage, ulcers heading to the side of the head and the body was wasted, residue of pneumonia and there was skull fracture, blood stain on the skin and brain contusion. The cause of death was orthostatic pneumonia, head injury and blunt trauma to the head in keeping with fatal assault. The post mortem report was produced as EXB P.1
4. PW2 - Daniel Kingori Mwangi stated that on 28th July 2019 at around 10pm while in a meeting at Ahero trading centre he heard noise, and went outside from where he was told that the accused was beating Mama Brian (PW4). The accused who had a knife in his right hand told him that he was going to kill someone. He snatched the knife from the accused, who followed him while stoning him. He



- also hit the deceased with a stone. He had known both the accused and the deceased, but did not know why they had differed.
5. In cross-examination, he confirmed seeing the accused hit the deceased. The time was 5am and there was also electricity light. In re-examination he stated that about seven (7) people were involved in the fracas but five (5) were removed from the club by the owner.
 6. PW3 - Joseph Githinji Ngugi testified that on 28th July 2019 they had a ceremony at Nector Club and were later joined by Nancy Nduta alias Mama Brian (PW4). She sat at the center and after a while the accused person came and they spoke at the center. Suddenly, the two began quarreling and the owner of the club removed them from the bar to the outside. The deceased who was PW4's friend followed them and they began fighting the accused. The fight was calmed down and the accused went to his car and removed a knife. He was to face the deceased or PW4 but PW2 held him from the back, snatched the knife and threw it away.
 7. After a while they both began hitting the accused's car with stones. The accused got out of the car and threw stones while chasing the deceased who later fell down. The Accused then got hold of a stone and hit the deceased on the head. The witness admitted to knowing the accused but they had never differed. He did not know the cause of the fight but stated that he had seen PW4 go to the counter where the accused was.
 8. In cross-examination he confirmed knowing the accused and that the accused had come to the club alone while PW4 found him at the counter talking to a sales girl. He also confirmed that when the accused boarded his vehicle PW4 and the deceased attacked him.
 9. PW4 - Nancy Nduta Njagi testified that on 28th July 2019 they were in a ceremony as business persons and in the company of the accused. Her boyfriend (deceased) went out and took accused's glass which led to a disagreement. The accused took his beer and went inside the room. They followed him and he called her a prostitute. The accused and the deceased got into a dispute and the bar owner told them to get outside. The accused followed them outside and started pelting them with stones but PW2 held him. The accused then went to his car, took a knife but PW2 took it from him and threw it away. Thereafter, the accused entered his car and followed them but the car fell into a ditch. After a while she heard people screaming that the accused had killed the deceased.
 10. In cross-examination she denied knowing the accused. She stated that the accused was seated when they arrived. She confirmed that the accused called her a prostitute and pelted stones at them. She denied breaking the windscreen/mirror of the accused's vehicle nor pelting stones at him while in his vehicle.
 11. In his sworn defence the accused denied the charge and stated that on 28th July 2019 at 5 am he was at Maili Tisa Bahati where he had been invited to a party at Nectar Bar. When he arrived, he was served with food then beer and while taking it three (3) other visitors (Mama, a young man and young lady arrived). Before finishing his beer, he went to the washroom and upon his return found the young man (the deceased) had taken his beer. They exchanged a bit when he demanded for his alcohol. Those around intervened and the wrangling ended. After a while, the lady (PW4) who had come with the young people came to the door holding a bottle and asking for him in the words "where is that kahii?" meaning "uncircumcised". His friend who had invited him asked him to leave the club as it appeared chaotic.
 12. As the accused left he met the young man (the deceased) who slapped him. PW2 came and held the deceased but he released himself. PW4 then came and bit him on his right shoulder (shows) and his two (2) left hand fingers. The other visitors came and separated them while PW4 and the deceased were chased away. Him and PW2 left at 1.00am but before he started his car the windscreen and lights were



broken by stones. He got out of the motor vehicle and found that it was PW4 and the deceased who had broken the windows.

13. He followed them and as they ran away the young man jumped into a drainage. The accused jumped over the drainage and fell on the other side. Later the young man was taken to the hospital, while he removed his vehicle and went to report the incident at Bahati police station. While at the station he was informed by the officer of a report of assault against him by a woman. Thus, his own report was rejected.
14. In cross examination he denied knowing the deceased or having heard the PW3 talk of a knife in his testimony. He confirmed that he had been treated at Esther Hospital but he had not brought any documents to confirm the same.
15. In re-examination, he stated that he never hit the deceased with a stone.
16. The parties to filed written submissions after the close of the defence case.

The prosecution's submissions

17. These are dated 31st October, 2024 and were filed by M/s Emmah Okok Principal prosecution counsel. She reiterated the contents of their earlier submissions dated 20th June 2023 on case to answer. She gave a summary of the prosecution witnesses' evidence which she submitted was watertight, credible and consistent, hence discharging their burden of proof.
18. It was also her submission that PW2 saw the accused hitting the deceased on the head using a stone. That PW2, PW3, and PW4 all confirmed that the accused was the aggressor. Further, that the accused was at one point armed with a knife on the material night. That the defence offered by the accused was not strong enough to rebut the prosecution case. She urged the court to disregard the same and convict the accused for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The accused's submissions

19. These were filed by A. Mukira & Associates Advocates and are dated 7th November, 2024. Counsel gave a summary of the evidence of both the prosecution and defence witnesses. He submitted that the death of the deceased did not arise out of an unlawful act by the accused but rather a head injury from a fall which the accused had no control over. The court's attention was drawn to Article 50 (2) (a) of *the Constitution*, section 23 of the Penal Code and several decisions among them being R v Andrew Omwenga [2009] eKLR where the court stated as follows: -

“It is clear from the definition that for an accused person 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 to receive a conviction, They are:-

- a. Death of the deceased and the cause of that death
 - b. The accused committed the unlawful act which caused the death of the deceased.
 - c. That the accused had the malice afterthought.
20. Counsel further submitted that from the evidence adduced by the prosecution it is clear at no particular point was it shown that the accused had malice aforethought to commit the offence. He



cited section 206 of the Penal Code and several decisions among them *Nzuki v Republic* [1993] KLR 171 where the Court of Appeal held as follows:

“before an act can be murder, it must be aimed at somewhere (sic) and must be committed with the following intentions, the test of which is always subjective to the actual accused;

- i. Intention to cause death.
- ii. Intention to cause grievous bodily harm.
- iii. Where the accused knows that there is risk that death or grievous harm will ensue from his acts and amounts therein without lawful excuse.”

21. Counsel submitted that the accused’s action was as a result of an attack from PW4 hence acting in self defence and he was equally provoked. Further, that all the parties to the case were intoxicated at the time of the incident. He placed reliance on section 13 (4) of the Penal Code and the decisions in *Ahmed Mohamed Omar & 5 Others v R* [2014] and *Joseph Kimanzi Munyoki v R* [2006] eKLR where the court cited with authority the case of *Bedford v R* [1988] AC 130. He urged the court to acquit the accused person of the offence charged.

Analysis and determination

22. I have carefully considered the charge, the evidence on record plus the submissions by both counsel. The main issue for determination is whether the prosecution has proved the charge of murder against the accused. Section 203 of the penal code defines murder as follows:

“Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder”

23. Section 204 of the penal code provides for the sentence for murder. It states as follows:

“Any person convicted of murder shall be sentenced to death”.

24. From the above definition a charge of murder may only be proved if the following ingredients are established by the prosecution:

- i. Death of the deceased, and the cause of the death
- ii. Killing of the deceased by the accused (actus reus).
- iii. Intention to kill (mens rea).

Death of the deceased person

25. Dr. Titus Ngulungu (PW1) carried out the post-mortem which was witnessed by Alice Wamaitha and Benson Njenga. He produced the post mortem report as P. EXB 1. He found the cause of death to be orthostatic pneumonia, head injury and blunt trauma to the head in keeping with fatal assault. There is therefore no dispute in respect of the fact of death, and its cause.

Whether the accused killed the deceased (actus reus)

26. From the evidence adduced by PW2 and PW3, the accused hit the deceased with a stone after they had an altercation. They also testified that the accused had a knife and wanted to attack PW4 but PW2 managed to snatch it from him and threw it away. PW4 testified that the accused chased her



together with the deceased while pelting stones at them. That the accused later entered his car and started following them but his car got into a ditch. She was later informed that the accused had killed the deceased.

27. The accused in his sworn defence explained in great detail what allegedly happened between him, PW4 and the deceased. He admitted that he had been involved in an altercation with them but the deceased died as a result of falling into a ditch as he was chasing them after being provoked. This evidence was not supported by any of the witnesses.
28. With all the evidence on record, I find that the accused's unlawful act of hitting the deceased with a stone on the head caused the injury that led to his death as found by the doctor who conducted the post mortem. He did not fall into any ditch as alleged by the accused.

Intention to kill (mens rea).

29. Counsel for the accused (Mr. Mukira) submitted that the accused acted in self defence after being provoked. The Penal Code defines under sections 207 and 208 what provocation is. Section 207 provides as follows;

“When a person who unlawfully kills another under circumstances which, but for the provisions for this section, would constitute a murder, does the act which caused death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of manslaughter only”.

30. Further, Section 208 provides as follows:

- (1) The term ‘provocation’ means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to a woman who stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing and assault is not provocation to that other person for an assault.
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality”

31. The Black's Law Dictionary defines provocation as “such conduct or actions on the part of one person towards another as tend to arouse rage, resentment or fury in the latter against the former”. I am further guided by the Court of Appeal decision in the case of Peter Kingori Mwangi & 2 others V Republic [2014] eKLR on the necessary ingredients to prove provocation. These are:



- i. The 'subjective' condition that the accused was actually provoked so as to lose his self-control: and
 - ii. The 'objective' condition that a reasonable man would have done so.
32. From the evidence adduced by PW2, PW3 and PW4 there is no doubt that the accused, PW4 and the deceased were involved in a fight while at a club where they were all drinking alcohol. According to the testimony of PW2 both the accused, PW4 and the deceased fought with stones. PW3 on the other hand testified that PW4 and the deceased are the ones who started throwing stones at the accused after they were separated and the fight stopped. He further testified that when he held the accused and snatched the knife from him, the accused went to his car but PW4 and the deceased began hitting his car with stones.
33. PW4 who was the deceased's lover gave evidence trying to exonerate the deceased from blame. She however said it was later she learnt of the deceased's death.
34. The accused in his sworn defence placed blame on the deceased and PW4. He had been advised by his friend who had invited him as things were getting chaotic. However, as he left he met the deceased who slapped him as PW4 bit him on his shoulder and two (2) left hand fingers. That the deceased and PW4 also pelted his car windows with stones.
35. After weighing all this evidence, I find that the intention to kill has not been proved. The accused chose to walk away the first time a dispute arose between him, PW4 and the deceased but the two kept throwing stones at him to a point of assaulting him and damaging his vehicle. PW4 even went to a point of insulting him by calling him uncircumcised. However, the accused person may have been provoked but he should not have acted the way he did. He should have left the time he was advised to leave by the person who invited him. It is also not lost to the court's mind that all these people had been taking alcohol, and may not have been in the right state of mind.
36. My finding is that the accused's action of hitting the deceased on the head with a stone was not intentional. He acted after a lot of provocation by PW4 and the deceased. I therefore find that the charge of murder has not been proved. What is proved is the charge of manslaughter. I therefore reduce the charge to manslaughter contrary to section 202 as read with section 205 of the penal code, and convict the accused accordingly.

DELIVERED, DATED AND SIGNED THIS 22ND DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

