



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kibaara (Criminal Case E016 of 2022)
[2025] KEHC 1142 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE E016 OF 2022
LW GITARI, J
FEBRUARY 20, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

SILVESTER GITONGA KIBAARA ACCUSED

JUDGMENT

1. The accused is charged with murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars are that on 26/12/2021 at around 1300hrs at Nthanjeni Village Gikingo Location in Tharaka North Sub-County within Tharaka Nithi County unlawfully murdered Japhet Mureith Kieti. This is vide the information filed in this court dated 23/8/2022. The accused person denied the charge.
2. The brief facts of the case are that on the 26/12/2021 at about 1300Hours the deceased was with others revelers who were taking some traditional brew. This was at the home of Sofia Kanyua who had prepared the traditional brew. The accused went there and stood next to one Mwenda who in turn told the accused to leave. The accused went and stood next to the deceased. All of a sudden, the accused removed a panga and cut the deceased. The accused had concealed the panga under a big shirt which he was wearing. He removed the panga from his waist. The accused cut the deceased on the shoulder. The deceased started running away. The accused followed him. The deceased held on a motor bike but the accused cut him on the hand between the thumb and the index finger.
3. Members of the public chased the accused and he ran to his home and wiped blood from his panga which he had used to cut the deceased. The father of the deceased was informed and he went and rushed him to hospital. The deceased passed away while undergoing treatment. The matter was report to the police. A postmortem was performed on the body of the deceased and the doctor confirmed that the cause of death was Exsanguination secondary to multiple cut wounds. The accused was arrested and charged.



The Prosecutor's Case

4. PW1 Anthony Mutembei Mutethia testified that on 26/12/2021 the deceased was at his mother's house where he was taking traditional brews which the mother had prepared. It was at about 1.00pm when the accused went there and stood next to Mwenda who told him to move. The accused then went to where deceased was and removed a panga from the waist of his trouser which had concealed under his shirt. The accused then cut the deceased on the shoulder. The deceased ran away and the accused followed him and cut him again on the hand using the same panga. He testified that the incident took place at 1.00pm and he was able to see the accused who he knew before. The witness testified that the accused cut the deceased without warning and without provocation. The accused was chased by members of the public and he went to his home where he started wiping blood from the panga. The deceased was taken to hospital but passed away the next day.
5. Sarah Karimi (PW2) testified that she was selling traditional brew which her mother had prepared. While there, the deceased went there and she served him the brew. According to PW2, her mother told her not to sell brews as he was not behaving well. The deceased reported that it was boxing day. The accused went there and after going round the compound he went and stood behind Mwenda. Mwenda told the accused not to stand behind him as a man cannot stand behind another man. There was a commotion and she found that the deceased had been cut and seriously injured on the shoulder and hand. She testified that she came to learn that it is Karish who cut the deceased as she saw him running away and it was in broad day light. The deceased was taken to hospital by his father and the next day she learnt that he had passed away. She further told the court she knew it is the accused who cut the deceased as she saw him wiping away blood from a panga.
6. Sofia Kanyua (PW3) testified that on 26/12/2021 she was home when her child Anthony Mutembei (PW1) called her and informed her that there was something happening outside. She went and saw Muriithi, the deceased had been cut and injured on the hand. She took a piece of cloth from her house and tied him. She realized that he had been cut on the shoulder. She told the court that she saw Karish with a panga that was blood stained and he was wiping out the blood. She then sent for the father of Muriithi who organized for him to be taken to hospital. She told the court that she knew Karish very well as they come from the same village. She confirmed that she saw the accused with a panga and it is the one he used to cut the deceased and was wiping out the blood from that panga.
7. Gerald Kieti (PW4) is the father of the deceased and he testified that one Mbiri Muthanga went to his house on Sunday 26/12/2021 and told him that Sofia (PW3) was calling him. He also told him that the deceased had been cut. He went to the home of Sofia and met Muriithi his son. He saw that he had been cut on the hand and shoulder. He looked for a vehicle to take him to hospital. he also reported the matter to the Police at Mukothima Police Station. He then took him to hospital at Marimanti. He was transfused blood then taken to the theater for the wounds to be stitched. The next day at 6.00am he received a call and was informed that the deceased had passed away. He decided to go to the hospital and confirm. He found the body in the mortuary. He then reported to the police. Later he identified the body of the deceased to the doctor and a Postmortem was performed. The accused disappeared but was later spotted at a place where he was hiding. He was then charged. He told the court that he did not know of any dispute the deceased and he accused had. He told the court that Sofia (PW3) is the one who told him that the deceased was cut by Karish.
8. PW5, Doctor Gitura Dickson a Medical Officer at Meru Level 5 Hospital and holds a Bachelors Degree in Medicine and Surgery from Nairobi University. He testified that he performed the postmortem on the body of the deceased on 4/1/2022. He noted that the body had a deep cut on the clavicle (collar bone) and another deep cut on the joint of the left small finger approximately seven centimeters deep.



- There was a deep cut on the palmer aspect of the left hand with a left clavicular fracture, 1st finger fracture of the left hand and multiple fractures of the bones of the left hand.
9. On internal examination, there were severed blood vessels of the left hand. He formed the opinion that the cause of death was excessive blood loss from the deep cut injuries - hemorrhage. He produced the Postmortem Report as exhibit-1
 10. No. 71012, P.C. Dominic Kiptum, a police constable attached at D.C.I. Office Tharaka North testified that on 27/12/2021 he received a call from the D.C.I., Edward Obel, informing him that there was a report of murder reported at Mukothima Police Post and was instructed to investigate the case. He proceeded to Mukothima Police Post and he confirmed the report which was booked in OB 8 of 26/12/2021. He also noted a report, OB 11 of 27/12/2021, which stated that Muriithi Kieti was assaulted by Silvester Kibaara Gitonga. He visited the scene at Nthangeri area which was at the home of Sofia Njeri where the incident occurred.
 11. She informed him that the deceased was attacked by the accused. He went to the home of accused but did not recover the murder weapon. The accused had also escaped. On 4/1/2022 he witnessed the postmortem on the body of the deceased at Marimanti Level 4 Hospital. A Postmortem Form Exhibit-1 was filled. He later received information that the accused was in Meru. He caused the accused to be arrested by officers from Meru Station. He was escorted to Marimanti Police Station where he was later charged with this offence. He established that the accused and deceased used to have personal disputes. The prosecution closed its case and the court found that he had a case to answer.
 12. The accused gave his defence on oath and testified that the deceased had gone to his butchery and kicked a bucket which had potato peels. He damaged the bucket. The deceased then went to eat meat which his customers were eating. When they refused, he damaged the plate. He sent an elder to warn. Later the accused went to the place of Mutethia and bought a cup of brew. As he was taking it, the deceased went there while armed with a stick. The deceased asked him for a cup of the brew. Accused refused. A struggle ensued and as he (the accused) had a panga the deceased was cut on the hand. He told the court that he did not intend to cut the deceased but was trying to defend himself and the deceased had a big stick. The defence cross-examined its case without calling any witness.

Analysis And Determination

13. I have considered the evidence adduced by the prosecution and the defence. The issue for determination is whether the accused caused the death of the deceased with malice aforethought. Section 203 of the *Penal Code* provides as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
14. In order to prove the charge of murder, the prosecution is supposed to prove three elements beyond any reasonable doubts;
 1. That the death of the deceased occurred.
 2. The cause of that death.
 3. Proof that the death was due to an unlawful act or omission on the part of the accused and that the unlawful killing was with malice aforethought.



Proof of Death

15. The prosecution witnesses confirmed that the deceased died. The father of the deceased, PW4 confirmed that after the deceased was injured, he took him to the hospital, and he was admitted. The next day, he was informed that the deceased succumbed to injuries. He went to the mortuary and saw the lifeless body of the deceased. Later, he identified the body to the doctor who performed the postmortem. The doctor, PW6, confirmed that he saw the dead body of the deceased in the mortuary at Level 4 Hospital and performed postmortem.

16. He formed the opinion that the cause of death was a result of loss of blood secondary to multiple cut wounds. The prosecution proved to required standards that the deceased died.

17. Whether the death of the deceased was caused by an unlawful act,

The prosecution is required to prove actus reus as well as mens rea.

The ‘actus reus’ is the unlawful act committed and the unlawful act lead to the cause of death. The right to life is guaranteed in our Constitution. Article 26(1) of [the Constitution](#) provides that -

“Every person has the right to life.”

[The Constitution](#) guarantees every person’s right to life. In this case, the prosecution called PW5, Doctor Gitara Dickson who performed the postmortem on the body of the deceased. The doctor confirmed that the body had injuries which were deep cut wounds on the clavicle and another deep cut wound on the left finger and on the palm aspect of the left hand which also had fractures. He concluded that the cause of death was excessive blood loss from the deep cut injuries. He produced the Postmortem Form as exhibit 1 in this case. The evidence of the doctor was not challenged and there is no dispute that the deceased's body had severe injuries inflicted with an object which caused deep cuts. The prosecution advanced evidence that the injuries were caused by a panga. I find that the prosecution has proved that the cause of death was as a result of unlawful acts.

18. Whether the accused caused the death of the deceased.

The prosecution called PW1 who witnessed when the accused cut the deceased on the neck that is clavicle and on the hand. PW1 knows the accused very well and the offence was committed in broad daylight which rules out the possibility of mistaken identity. The testimony of PW1 was corroborated by the testimony of PW2 & 3 who were equally at the scene and knew the accused very well and it was during the day. The two saw the accused walking away from the scene then wiped away blood from the panga. The prosecution proved that it the accused who inflicted the injuries on the deceased which led to cause of his death. The accused himself does not deny that he is the one who cut the deceased. His defence is that he did not intend to cause the death of the deceased.

19. I find that the prosecution discharged the burden of proof that the deceased died as a result of an unlawful act which was orchestrated by the accused.

20. Whether the accused caused the death of the deceased

The evidence by Pw1 shows beyond any reasonable doubts that it is the accused who caused the death of the deceased by inflicting fatal injuries on the deceased using a panga. The evidence was water bright and was confirmed by Pw2 and PW3 wiping out blood from a panga. The prosecution proved that it is the accused who unlawfully caused the death of the deceased. The accused testified that he acted in self-defence as the deceased approached him while he was armed with a big stick. Self defence can



be raised as a defence to a charge of murder. Self defence is an absolute defence even on a charge of murder.

21. In *Mokua v Republic* [1976-80] KLR 1337 the Court of Appeal stated that -

“Self-defence is an absolute defense even on a charge of murder unless in the circumstances of the case the accused applies excessive force.”

The accused admitted that he inflicted the injuries on the deceased using a panga and the injuries on his clavicle and hand led to his death, the question is whether the death was an unlawful act.

22. In *Sharm Pal Singh v Republic* [1962] EA 13 the court noted that;

“Every Homicide is presumed to be unlawful except where circumstances make it excusable, it must have been under justifiable circumstances for example in self-defense or in defense of property.”

23. I have considered the defence of self-defence and find that there is overwhelming evidence to prove that the accused armed himself with a panga and inflicted injuries on the deceased which led to his death. The deceased was unarmed. The actions by the accused were unlawful. In this case the allegation by the accused that the deceased was armed with a big stick is not true. All the witnesses who were at the scene, that is PW1, 2 & 3 testified that the accused had hidden a panga in the waist of his trouser and had concealed it by wearing a big shirt.

24. PW1 on being cross-examined told the court that – “The accused removed a panga from under his waist raised it and cut the deceased on the shoulder...” It was not put to PW1 that the deceased was armed with a stick which he wanted to use on the accused. The defence of self-defence is an afterthought and cannot stand. In any case if it be true that the deceased had a stick, then the accused used excessive force in the circumstances. I reject the defence.

25. Lastly, whether there was malice aforethought on the part of the accused

Section 206 of the [Penal Code](#) defines malice aforethought and provides as follows:

“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;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



Malice aforethought is a key ingredient of the offence of murder. In Joseph Kimani Njau v Republic [2014] eKLR the Court of Appeal held as follows:

“ Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test which is always subjective to the actual subject;

- i) Intention to cause death;
- ii) Intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse with intention to expose potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not as none of the cases does it matter that the act and intention were aimed at potential victim other than the one succumbed.”

26. The accused cut the deceased on the hand and on the neck with a panga. In Republic v Tumbe s/o Odera (1945) 12 EA CA 63 in determining whether malice aforethought was established, considered the following elements;

1. The nature of the weapon used.
2. The manner in which it was used.
3. The part of the body targeted.
4. The nature of the injury inflicted either a single stab or multiple.
5. The conduct of the accused before, during and after the incident.”

The evidence by PW1 is that the accused inflicted the injuries for no apparent reason. He cut the deceased on the neck which is a delicate and vital part of the body. He cut the deceased on the hand, inflicting a deep cut and fractures as testified by the doctor. The accused was then seen wiping out blood from the panga which was never recovered. The accused then escaped and was to be arrested in Meru very far from the scene many days later.

27. I find that the prosecution has discharged the burden to prove that the accused had armed himself with a panga concealed in his clothes and inflicted injuries, which led to the deceased’s death with malice aforethought. The prosecution has proved all the ingredients of murder against the accused beyond any reasonable doubts.

28. I find the accused person guilty of the offence of murder contrary to Section 204 of the [Penal Code](#) and convict him under Section 322 of the [Criminal Procedure Code](#).

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF FEBRUARY 2025

HON. LADY JUSTICE L. GITARI

JUDGE



ORDER

A pre-sentence report be filed by Probation Officer and in-corporate the victim in fact statement.

Mention on 17/3/2025

Dated, signed and delivered at Chuka this 20th day of February 2025

HON. LADY JUSTICE L. GITARI

JUDGE

