



**Republic v Yussuf (Criminal Case 3 of 2023)  
[2025] KEHC 1993 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1993 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MANDERA  
CRIMINAL CASE 3 OF 2023  
JN ONYIEGO, J  
FEBRUARY 13, 2025  
[FORMERLY MARSABIT HIGH COURT CRIMINAL CASE NO. 8 OF 2020]**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MOHAMED NOOR ABDIRAHMAN YUSSUF ..... ACCUSED**

**JUDGMENT**

1. The accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 10.07.2020 at Corner B Estate in Mandera Town, Mandera East Sub – County within Mandera County he murdered one Martin Muruiki Kiriti.
2. The accused person pleaded not guilty to the charge. The prosecution summoned a total of five witnesses in support of its case while the defence called three witnesses.
3. PW1, Eunice Kathure alias Rose Muthoni, the widow to the deceased testified that on 10.07.2020 at 8.00 p.m., she was in her house together with her husband. With them, was a lady by the name of Esther who was cooking on the verandah who informed them of a person who was looking for a lady by the name of Purity. At that point, the deceased left the house to address the said person. That the deceased told the person that the said purity did not live there but only used to visit Esther and further, Purity had no phone. The said man declined to leave and therefore, she sent her son Nicholas to go inform a man who at that time worked for the County Government and report on what was happening.
4. She went further to state that the man from the county government went to talk to the aggressor but after sometime, he left. That the aggressor said that he wanted to drink blood and so, he charged at them and stabbed the deceased and one Maureen who was standing at her door step. On cross examination,



- she stated that, in as much as she saw the aggressor, the person was not well known to her and only Maureen could identify him as she said that the aggressor was a person well known to her.
5. PW2, Maureen Gakii testified that on 10.07.2020, she was staying at BuruBuru with PW1 as she had a misunderstanding with her husband John Kamau Ngiere. That she had visited a neighbour and on her way back to PW1, she met a man who was well known to her as they knew each other. It was her evidence that the said man used to pass at the bus park where she was working at that time. She further stated that the accused was their customer and therefore, she knew him so well and further, on the night in question, she managed to see him using light from the security lights on top of the wall. She narrated that the accused followed her to the plot in question but managed to reach well before her.
  6. That she met him while he was leaving the plot saying that he wanted two dead bodies. That at that time, the accused left to talk to the employee from the county government and then returned. It was her evidence that the accused sought to know where a lady by the name Purity was but suddenly, he turned against her and stabbed her on the left arm and then turned to the deceased and stabbed him too. She reiterated that she saw the accused person stab the deceased with a knife on the stomach. On cross examination, she said that she knew the accused person as their customer and that she had known him for a period of about 5 months and that she saw him stab the deceased. She further stated that the plot where PW1 lived had no light but from the neighbouring plot, there emanated sufficient light.
  7. PW3, Hassan Abdullahi Sheikh, a clinical officer at Mandera hospital testified that on 13.07.2020, he attended a patient by the name of Maureen Gakii. According to him, the said patient had blood stained clothes and a cut wound on the arm. Upon examination, he learnt that the cut wound had extended up to the shoulder joint. He further stated that the injury was three days old and the same had been caused by a sharp object. He categorised the said injury as grievous harm and further produced the P3 Form as Pex 1.
  8. PW4, No. 68934 IP Felix testified that he was the investigating officer in the case. He stated that on 10.07.2020 at around 10.00 p.m., his DCIO called and informed him of a murder incident which had occurred in the area and so, he accompanied him to the scene at Corner B. Upon reaching the scene, they found police officers and among them, the O.C.S. Inside the said compound were two rooms with different doors and in one of the rooms, the deceased lay dead with a wound on the chest. He stated that a lady by the name of Rose Muthoni informed them that a commotion had ensued when the aggressor, a Somali man claimed that he was looking for his girlfriend.
  9. That upon failing to find the said girlfriend, he drew a knife and stabbed the said Maureen Gakii and the deceased herein. He stated that they took the body to Mandera Referral Hospital and then recorded a witness statement from the said Maureen Gakii who informed them that previously, she used to see the accused at the chang'aa dens within the bus park. That it was Maureen who identified the suspect whom they arrested and thereafter pressed the charges herein. On cross examination, he stated that the accused was arrested on 22.07.2020 hence not on 20.07.2020.
  10. PW5, Dr. Warsame Hussein Abdullahi, stated that on 13.07.2020, he conducted post mortem on the body of the deceased and consequently signed the post mortem report. That rigor mortis had set in and further, there was a cut wound on the left side of the chest. According to him, the cause of death was internal bleeding from a cut which was 6cm deep. That the examination was done three days after death. On cross examination, he stated that the object that caused the injury was sharp. He opined that the cause of death possibly was a penetrating cut wound. On re-examination, he stated that even the clinical autopsy could still assist in determining the possible cause of death.
  11. In his defence, DW1, Mohamed Noor, a businessman from Shafshafey recalled that on the night in question, he was in town working as he had been working from 6.00 a.m. to 5.00 p.m. That upon



- reaching 5.00 p.m., he left town in the company of Nunow and together went straight to Nunow's home as he was his neighbour. Thereafter, they went to the mosque and after the said prayers, they returned to Nunow's home. He further stated that they went back to the mosque at 8.00 p.m. and further returned to Nunow's house. That they took supper and thereafter left for his house where he was arrested 10 days later. He confirmed that on 22.07.2020, he was at the bus park while walking when he was arrested and then charged with the offence herein. He denied killing the deceased as he claimed that he was simply framed up.
12. DW2, Nunow Mohamed Ibrahim, chairman nyumba kumi testified that he knew the accused before and that on 10.7.2020 during the day, he was at the Bus park in Mandera till 4.00pm. Later, he proceeded to his house in the company of the accused person, who also was his neighbour. That they went to the mosque and after 6.00 p.m. prayers, they went to his house. Again, they left for the mosque at 8.00 p.m. and thereafter, they returned to his house where they took supper together after which the accused left for his home. According to him, he did not see the accused person kill anybody as alleged. On cross examination, he stated that on the night in question, the accused person left his house at about 9.00 p.m.
  13. DW3, Bunow Hassan Mohamed, a clan elder stated that he knew the accused person. That on 22.07.2020, he saw the accused at the bus park as he was in the business of selling fruits. He recalled that the accused was arrested in as much as according to him, he did not kill anybody.
  14. The defence closed its case and parties chose to submit orally. Mr. Wethow stated that the prosecution had failed to prove its case beyond any reasonable doubt. That the cause of death was not established as no autopsy was conducted. Counsel contended that, the weapon that was allegedly used to commit the offence was not produced before this court. It was contended that the whole case was based on mere suspicion as no solid evidence was ever adduced to link the accused person to the offence herein. He thus urged the court to acquit the accused person.
  15. Mr. Kasyoka, Counsel for the prosecution submitted that the 3 elements of proving murder were established. That the prosecution has proved that the accused killed the deceased with malice aforethought. In the same breadth, learned counsel contended that the alibi defence tendered was just but a mere afterthought as the same ought to have been raised at the earliest opportunity possible. It was further contended that the prosecution's failure to produce the murder weapon, was not fatal to the prosecution's case.
  16. I have considered the evidence as adduced by the prosecution witnesses and the defense proffered by the accused person. I have further considered parties' oral submissions. In my view, the main issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.
  17. Section 203 of the *Penal Code* provides that: "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
  18. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR the Court of Appeal held that: "For the offence of murder, there are three elements 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."
  19. In the instant case, this Court is duty bound to make a finding whether the prosecution's evidence as a whole proves beyond reasonable doubt the following elements of murder: that there was the death of the deceased and the cause of the said death; the death was caused by unlawful acts or omission; that



- the accused committed the unlawful act which caused the death of the deceased and that the accused had malice afore thought.
20. On whether there is proof of death and the cause of the said death, PW5 testified that he conducted post mortem on the body of the deceased and consequently signed the post mortem report. According to the doctor, there was a cut wound on the left side of the chest. In his opinion, the cause of death was a penetrating wound of the chest. I therefore have no doubt that the deceased subject of this case indeed died.
  21. The next question is whether the death of the deceased was caused by an unlawful act and by who. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained. Therefore, the act cannot be said to be lawful and further, there was no justification for the said act at all hence an unlawful act.
  22. Article 26 (1) of *the Constitution* of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* or other written law. [See *Gusambizi Wesanga vs Republic* [1948] 15 EACA 65]. The evidence before this Court irresistibly points to an unlawful act that led to the death of the deceased.
  23. On whether the prosecution proved beyond reasonable doubt that it was the accused person and not any other person who committed the unlawful act which caused the death of the deceased, the evidence tendered before this Court majorly is anchored on the testimony of PW2 who allegedly saw the accused person attack the deceased. The prosecution is therefore relying on direct evidence of a single identifying witness to prove its case.
  24. It is trite law that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone. The Court of Appeal of Uganda in *Okwang Peter vs Uganda Criminal Appeal 104 of 1999* held as follows: -

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”
  25. It is always safer to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact. [ also see court of appeal in the case of *Maitanyi vs Republic* [1986] KLR 198].
  26. In this case, PW2 testified that on 10.07.2020, she met the accused person heading towards where the deceased and PW1 lived and that the accused person was someone well known to her as he used to be their customer. She proceeded to testify that on the night in question, she managed to see him noting that there was light from the security lights on top of the wall. It was her testimony that, it was the accused who stabbed her on the left arm and then turned to the deceased and stabbed him too.
  27. Guided by the foregoing cases, it is my view that the time that the aggressor spent at the very scene was slightly sufficient enough for positive identification. Secondly, the aggressor when he stabbed the deceased and consequently PW2, the duo came face to face and /or at least close to each other thus



enabling recognition as this was somebody known to her before. Thirdly, there was enough light to enable positive identification and fourthly, PW2 told the police(pw4) immediately she reported the matter it was the accused who attacked them.

28. In the same breadth, looking at the evidence of other prosecution witnesses, they seem to be corroborating the evidence of the prosecution's star witness(pw2). For instance, PW1 narrated how the aggressor demanded to know where Purity was but upon his demands being rejected, he sprung and stabbed the deceased and PW2. The said evidence was further corroborated by PW5 who opined that the cause of death was a penetrating wound of the chest while the P3 form of PW2 also supported the same narrative.
29. In my humble view, it remained a mystery why PW2 would want to frame up the accused. They had no grudge before to infer a frame up. From the general demeanour of pw2, she struck me as a honest and reliable witness. I have duly warned myself of the dangers of convicting based on the evidence of a single witness. In the circumstances, and this case I am satisfied that there will be no prejudice occasioned by such reliance. See Abdallah Bin Wendo and another v Republic (1953)20EACA
30. It is also not lost to this court that the accused person denied committing the offence herein thereby relying on alibi defence to the effect that he was never at the scene of crime on the material date. I am fully alive to the fact that the burden of proving falsity of an alibi defence rests squarely on the prosecution. [See Victor Mwendwa Mulinge vs R [2014] eKLR].
31. However, the Court of Appeal in Erick Otieno Meda vs Republic [2019] eKLR while discussing the defence of alibi laid down rules to be applied in considering an alibi defence as hereunder; -
  - “ 23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:  
  
An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.  
  
An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.  
  
The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.  
  
(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. [See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 2014].
32. Upon perusing the evidence by the defence, and specifically the evidence of DW2, it is my humble view that the same was a regurgitation of the evidence of the accused person herein. In the same breadth, the same was introduced later in the day thus lending credence to the prosecution's submission that it was just but a mere afterthought. There is no dispute that the accused person used to spend time at the bus park a fact he admitted that he used to sell items on a wheelbarrow at the said venue. In my view, the fact that he used to be at the bus park leads credence to the evidence of PW2 that she used to see him at the bus park and further, that he was their customer.
33. From the above analysis, it is my humble finding that indeed, the identification of the accused person was by way of recognition and clearly, he caused the unlawful act which led to the death of the deceased person.



34. Finally, on the question whether there was malice aforethought on the part of the accused person, the prosecution had a duty to prove the same by establishing any of the circumstances stated under section 206 of the Penal Code which provides that:

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

35. What can be deduced from section 206 (a-d) is that, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. Various courts in interpreting the provisions of section 206 have repeatedly upheld the position espoused in the classic case of Republic vs Tubere S/O Ochen [1945] 12 EACA 63 where it was held that an inference of malice aforethought can be established by considering; the nature of the weapon used; the part of the body targeted; the manner in which the weapon was used and; the conduct of the accused before, during and after the attack.

36. In the instant case, the evidence adduced by the prosecution showed that the aim of the deceased's attacker was clearly to kill him or cause him grievous harm. This is further established by the nature of the injury suffered by the deceased which was referred to as the penetrating wound of the chest.

37. An attack using a sharp object on one's chest is akin to an attack on the life of a person. In my humble view, the aggressor had in mind the ultimate intention of eliminating the deceased for whatever reason/s. Besides, the accused person's conduct preceding the attack that he wanted to kill somebody and drink blood is sufficient proof that he wanted to kill. Whether he killed the person he initially intended or not is immaterial. The fact is that, he executed his motive of killing. Whether he drank blood or not equally is immaterial. The motive is therefore apparent from his action of stabbing the deceased and his utterances preceding the attack hence no excuse for the act committed.

38. The upshot of it all is that, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt. I do not find merit in the defence advanced hence do dismiss it in its entirety. Accordingly, I find the accused person guilty and consequently convict him of the offence of murder as charged contrary to section 203 of the Penal Code.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. N. ONYIEGO**

**JUDGE**

