



REPUBLIC OF KENYA



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**Republic v Ntongai (Criminal Case E024 of 2021)
[2025] KEHC 2808 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E024 OF 2021
HM NYAGA, J
FEBRUARY 11, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS NTONGAI ACCUSED

JUDGMENT

1. The accused, Francis Ntongai, is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the charge are that on 19th March 2021, at Liundu village, Bwathine sublocation Igembe North Sub-county within Meru County, he murdered Daniel Muthuri.
3. The accused denied the charges and the state called seven (7) witnesses. Their prosecution case is summarized as follows.
4. PW1 was Rebecca Kararia, who is the mother to the deceased. She testified that on the material day, the deceased left home at around 11.00 am but never returned. On the following day she embarked on search for her son. In the process, one of her other sons, one Mutethia informed her that he had seen the Accused pour soil and water near his toilet. She went to the accused's home. In the toilet, she spotted her sons clothes. Upon that discovery, she alerted the area chief who called the police. The police demolished the toilet and recovered the deceased's body. The body was dissected into several parts. Some of the body parts were missing.
5. PW2 was Charles Nkunja, the Assistant Chief, Nathu Mutuatu sub-location. He stated that on 19th March 2021, he received a report of missing person, the deceased. He went to the home of the accused, who was suspected to have killed the missing person. Upon entering the accused's home, he saw blood stains. The stains on the ground led them to the pit latrine. Inside it were clothes which were identified as those of the missing person. The toilet was demolished and a severed body was recovered. It was



- identified as that of the deceased. The accused who was hiding in the nearby farm was traced and arrested.
6. PW3 was Eunice Nembare. She stated that she witnessed the retrieval of the body of the deceased from her mother's toilet. She added that she had last seen the deceased days earlier, when he had gone to their home and they served him with porridge.
 7. PW4 was Cypriano Mwendwa, who was a friend of the deceased. He stated that on 15th March 2021, the deceased's mother (PW1) alerted him that he was missing. They searched for the deceased to no avail. They alerted the chief. That one Nelson Ntongai, a brother to the accused, alerted him that he had seen the accused pouring dust and ash in their pit-latrine. In company of one Mutethia, he went there. He peeped into the pit latrine and saw a body therein. He alerted the Chief who called the police. The latrine was demolished and the deceased's body was retrieved. That the accused who was within the compound when he arrived, disappeared shortly after.
 8. Rebecca Kararia (PW 1) was recalled to testify but was erroneously recorded as being PW5. Upon her recall, she stated that the accused's sister had informed her that the accused was with the deceased on the day he went missing. That the accused was a friend to the deceased and the latter used to visit him frequently. She further stated that her son was mentally challenged, but he had never failed to return home before.
 9. PW5 (recorded as PW6) was Dr Sammy Githu Wachira from Nyambene South sub County Hospital. He testified that he is the one who conducted the autopsy on the deceased's body. He estimated that the body had been dead for between 6 to 10 days. The body was severed at several points. There were several cut wounds and some body parts were missing. He formed the opinion that the cause of death was multiple cuts caused by a sharp object. He produced the post-mortem examination report as an exhibit. I will revisit his evidence in details later in this judgement.
 10. PW6 (recorded as PW7) was police corporal James Murithi a scenes of crime officer. He testified how he processed photographs of the body of the deceased and the scene where it was found.
 11. PW7 (recorded as PW8) was Police Corporal Noah Kiplagat. He testified that he was the one who took over the investigations from the initial investigator. He produced the deceased's clothes as exhibits.
 12. At the close of the prosecution case, the court found that a prima facie case had been established and the accused was placed on his defence.
 13. In his sworn evidence, the Accused stated that he did not know the deceased. That he was at home when he learnt of the death of the deceased. Thereafter, neighbours came and arrested him. At the police station he was interrogated over the incident.
 14. In the course of his evidence, the accused departed from the above and further testified that on the material day, his wife had informed him that the deceased had gone to his home while armed with a knife. He went to where the deceased was and tried to disarm him. In the process, the deceased got hurt.
 15. On cross examination, the accused admitted that he knew the deceased. He also admitted that he is the one who put the deceased's body in the latrine. He also admitted that after he disarmed the deceased, he cut his body into several parts. He admitted to killing the deceased but insisted that it was in self-defence.
 16. At the close of the trial the Advocate for the accused filed written submissions.
 17. The advocate for accused submitted that the prosecution has a duty to prove malice aforethought. That the prosecution failed to prove who cut up the deceased's body. That no tool used was ever recovered.



18. Counsel raised the defence of provocation as set out under section 207 and 208 of the *Penal Code*. It is submitted that the Accused was provoked and only reacted as any reasonable person would in the circumstances.
19. It was further submitted that since the deceased was mentally challenged, one cannot rule out that he attacked the accused.
20. It is also submitted that while there is not dispute that the accused committed the act that caused the death of the deceased, there are mitigating factors as stated by the accused and which the prosecution was unable to controvert. Therefore, it is submitted, the key ingredient of malice aforethought has not been proven. It is further submitted that it is not enough for the prosecution that the acts of the accused caused the death. Cited was the Court of Appeal decisions in Joseph Kimeru Njau vs Republic [2014] eKLR and Nzuki vs Republic [1993] KLR 171 and the High Court decision in Republic vs James Kioko [2021] eKLR.
21. The prosecution did not make any submissions.
22. I have considered the evidence presented before the court both by the prosecution and the defence.
23. 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.”
24. The Court of Appeal addressed the key elements that have to be proven by the prosecution in Anthony Ndegwa Ngari vs Republic [2014] eKLR held:

“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.”
25. In the instant case, therefore, the questions that the court must answer is whether the prosecution proved:
 - a. That there was the death of the deceased and the cause of the said death.
 - b. That the death was caused by unlawful acts or omission.
 - c. That the accused committed the unlawful act which caused the death of the deceased
 - d. That the accused had malice afore thought.
26. Causing death is defined under section 213 of the *Penal Code* as follows;

A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—

 - (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;



- (b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
 - (c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
 - (d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;
 - (e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.
27. The cause of death of the deceased was found to be multiple cuts to the body. According to the Doctor, the body was in several parts, as confirmed by the photographs that were produced in court. The doctor noted the following. The head was severed at C2. The upper limbs were disarticulated at the shoulder. The lower limbs were disarticulated at the hip joint. The ribs were cut out at T12 and divided into two at the midline. The right side had only eight ribs available. The external genitalia was methodically dissected out and missing. The Heart, liver, lungs, trachea, stomach and spleen were missing.
28. It was the doctor's opinion that the person who dissected the body used a sharp object.
29. It is thus clear that the cause of death was not from natural causes, but from an act by a person who meticulously dismembered the body of the deceased. That act was definitely unlawful.
30. So, who caused the death of the deceased?
31. The evidence adduced by the Prosecution is wholly circumstantial, since no one saw the accused kill the deceased. The parameters of circumstantial evidence are well known.
32. In the celebrated case of *Kipkering Arap Koske And Another vs Republic* (1949) E. A. C. A. 135 PAGE 136, the Court of Appeal stated as follows:
- “As said in *Wills on ‘Circumstantial Evidence’* 6th Edition P. 341 in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.”
33. In the case of *R v Hillier* {2007} 233 A.L.R. 63, *Shepherd v R* {1991} LRC CRM 332 it was held that:
- “The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”



34. Further in Philip Muiruri vs Republic Criminal Appeal No 76 of 2012, the learned judge referred to the South African case of Ricky Ganda V The State (2012) Zafshc 59, Free State High Court, Bloemfontein, which stated as follows;

“.....the proper approach is to weigh up all of the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

35. The prosecution case is that the deceased’s decapitated body was found in the accused’s pit latrine. The deceased’s clothes were also found there. The Are Chief was among the people who went to the scene. He stated that he saw blood stains in the accused’s house. There was a trail of the said blood stains that led them from the accused’s house to the latrine. The grim discovery was confirmed by several prosecution witnesses.

36. From this evidence there is no doubt that the accused was involved in the death of the deceased. There is no way someone else could have entered his house, killed and dissected the body. That process would take time and it is only the accused who had access and time to commit the offence in that manner. There is evidence that the deceased used to visit the accused’s homestead and all indicators are that he went there that day.

37. I find that the evidence irresistibly points to the accused as the person who committed the offence.

38. In his sworn evidence given in his defence, the Accused actually admitted to killing the deceased and dismembering the body. However, he stated that he acted in self-defence as the deceased went to his home while armed with a knife.

39. In light of the admission by the accused, who gave his defence evidence on oath, led by his own advocate, there is no doubt that he is the one who killed the deceased.

40. The next question is whether the plea of provocation or self-defence has been successfully raised.

41. The *Penal Code* makes provision for provocation under Sections 207 & 208 as follows:

“207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes 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.

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(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 whom he stands in a 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.”

42. In *Peter King’ori Mwangi & 2 others versus Republic* [2014] eKLR, this Court addressing the defence of provocation stated as follows:

“We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of *Duffy* (1949) 1 ALL ER 932; provocation was defined as; ‘some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...’

Inherent in this definition at common law, is the requirement of two conditions to be satisfied for the defence to be made out, namely:-

The “subjective” condition that the accused was actually provoked so as to lose his self-control; and the “objective” condition that a reasonable man would have done so.”

43. In deciding a similar situation on provocation the Court of Appeal in the case of *Elphas Fwambatok v Republic* [2009] eKLR held thus:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”

44. As can be seen, a plea of provocation is available to an accused facing the offence of murder. That plea only acts to eliminate the element of mens rea which is malice aforethought. If successfully pleaded then the accused will be found guilty of manslaughter, and not murder.

45. It should also be noted that not every act of provocation will reduce the act of murder to manslaughter. In the case of *Tei s/o Kabaya v. R.* [1961] EA, the Court of Appeal for East Africa, outlined the circumstances which a court should consider in deciding whether certain provocation is sufficient for purposes of Section 207 of the *Penal Code*, to reduce a charge of murder to manslaughter. The Court stated:

“In considering whether provocation was sufficient to reduce the offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”



46. The evidence on record was that the deceased frequently visited the Accused's home. There is not an iota of evidence to suggest that the deceased was armed on that day. The claim by the accused to me is a belated attempt to justify his actions. The knife that the deceased allegedly had was not recovered. In any case, if the Accused managed to disarm the deceased as he alleges, was there need to dissect the body as he did. Guided by the decision in *Tei s/o Kabaya v. R* (supra) I find that the plea of provocation cannot hold.

47. A plea of self-defence is recognized under the law under section 17 of the *Penal Code*, which states that: -

“Subject to any express provisions in this Code or any other law in operation in Kenya, 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.”

48. Once the defence of self-defence is established and proved, it does not only have the effect of justifying an act causing death of a deceased person and which act is unlawful but it has the effect of disproving malice aforethought. A finding that the accused herein acted in self-defence not only disproves the issue as to the act causing death being unlawful but also the issue of the accused having acted with malice aforethought. As such, the question which needs to be answered is whether the contention that the accused acted in his self-defence plausible.

49. The Court of Appeal in *Ahmed Mohammed Omar & 5 Others V. Republic* [2014] eKLR reiterated these principles (principles of English Common Law) and held that: -

“What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in *PALMER v R* [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in *R v McINNES* 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

According to *ARCHBOLD – Criminal Pleading, Evidence and Practice* 2002, paragraph 19-42, the test of whether force used in self defence was reasonable is not purely objective.



“There is no rule of law that a man must wait until he is struck before striking in self defence.” R v DEANA, 2 Cr. APP. R. 75, CCA.....”

20. The Court of Appeal then made the following conclusion: -

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP v MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.....”

.....It is acknowledged that the case of DPP v MORGAN (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also SMITH AND HOGAN’S CRIMINAL LAW, 13th Edition, Page 331.....

.....Just as the Privy Council did in BECKFORD v R (Supra), we must also dispel the fear that “the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence. Each case will have to be determined on its own merit and peculiar circumstances.....”

50. There is no shred of evidence to show that the deceased attacked the accused as alleged. The submission that he may have been violent on account of mental status is mere speculation. No witness described the deceased as being violent. The accused’s own sister testified that the deceased used to visit their home frequently and the last time he was there, just days earlier, he was served with porridge and left. This is not a trait of a violent man.
51. I find that the defence raised is a belated attempt to justify the heinous actions of the deceased, who dissected the deceased’s body like a butcher would on an animal carcass. That defence of self-defence is rejected.
52. Looking at the state of the deceased’s body, there is little doubt that the person who killed the deceased knew what he was doing. It is not clear where the other body parts went. The manner in which the body was dissected suggests that this was a pre-meditated act, hence the element of malice aforethought has been established.
53. After considering all the evidence tendered by the prosecution , and the admission by the accused on oath, I find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) and he is duly convicted.

DATED, SIGNED & DELIVERED AT MERU THIS 11TH DAY OF FEBRUARY, 2025.

H.M. NYAGA

JUDGE

