



REPUBLIC OF KENYA



**Republic v Kinuthia (Criminal Case 15 of 2020)  
[2025] KEHC 4929 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4929 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 15 OF 2020  
GL NZIOKA, J  
MARCH 10, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BENARD WANG'ENDO KINUTHIA ..... ACCUSED**

**JUDGMENT**

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on 17<sup>th</sup> day of June 2020, at Malewa location at Kipipiri Sub-County within Nyandarua County he murdered Robert Munga Muchai.
2. The accused pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution's case is that the deceased had employed the accused as a herder.
3. That on the day of the offence, the accused called (PW5) Susan Gathenia, a neighbour and informed her that the deceased's cow unwell but he was afraid to inform the deceased since the deceased had accused him of mishandling the cows as one had died and another gave birth prematurely.
4. PW5 Susan Gathenia testified that she called the deceased who came to her compound and she informed him that his cow was sick. That, the deceased was angry and complained a lot and requested they go to his home for further discussion.
5. That at the deceased's home, PW5 Susan attempted to reconcile the deceased and the accused, but the deceased was quite upset and told the accused that nine (9) of his previous employees who wronged him had died through witchcraft.
6. That on hearing of the death of these previous workers, the accused became unsettled, stood up and said that he wanted to leave employment and left the deceased speaking to PW5 Susan. It is in evidence



- that, a few minutes later, the accused returned holding an axe and demanded that the deceased give him his salary.
7. That the deceased informed the accused he did not have any money and at that point, the accused hit the deceased on the head with the axe and the deceased fell down. PW5 Susan testified that she was horrified as to what she saw and ran away screaming that the accused had killed the deceased. That when she turned back and saw the accused running away towards a small river near the deceased's land.
  8. That the incident was reported at Kipipiri Police Station. PW7 No. 77034 Corporal Stephen Ngulalei, the investigating officer, received the report and visited the scene where he found the deceased lying in a pool of blood with a blood-stained axe next to the body. The scene was processed wherein, photographs of the scene were taken and the body taken to J. M. Kariuki Hospital mortuary for the post-mortem exercise.
  9. The post mortem was conducted on 29<sup>th</sup> June 2020, by PW3 Dr. Patrick Kiruki who established that the deceased had an open skull fracture with exposed brain tissue on the front part of the head below the eye. The doctor concluded that the cause of death was severe trauma to the head and exposed brain tissue.
  10. PW6 Margaret Wahu Maina conducted a DNA test on the blood-stained axe and observed that the blood sample of the deceased she received from the DCI was darkish in colour and therefore could not generate a DNA sample and requested for a sample from either a parent or child of the deceased. That, she received a buccal swab from Kennedy Muchai Munga, the deceased's child, and conducted the DNA test on the axe and concluded that the blood on the axe belonged to the deceased.
  11. In the meantime, the accused had run away and was traced at Elburgon, Nakuru County, one (1) month after the incident by tracking his cell phone number through his Safaricom (K) Limited, arrested and charged accordingly.
  12. At the conclusion of the prosecution case, the accused was placed on his defence. He testified vide a sworn defence and admitted that he was employed by the deceased at Kipipiri as a herder. That he worked well from November 2019 to April 2020 when a disease struck the cows he was taking care of and they started dying one after the other.
  13. That the deceased was apprehensive of calling a veterinary doctor as it would be expensive and would expose him to double loss in the event the cows died after treatment. That the deceased directed him to use traditional herbs, however, two (2) more cows died between May and June. All this while the deceased never blamed anyone and continued to pay his salary.
  14. That on 17<sup>th</sup> June 2020, he had tea with the deceased and thereafter went to take care of the cows and noticed that one of the cows was sick and asked PW5 Susan to treat it. That PW5 Susan called the deceased and informed him of the sick cow and they went to the deceased's residence to discuss treatment of the herd of cows.
  15. The accused testified that he told the deceased that he did not want to work for him anymore and wanted his salary and at this point, the deceased blamed him for the loss of the previous cows and informed him that he did not have any money. Further, the deceased told him that all his former employees died and that he (accused) would die within two (2) years.
  16. That he became angry and confused and took the axe and hit the deceased on the head and went home. That, it was only after he was arrested that he learnt the deceased had succumbed to his injuries. He urged that he did not intend to kill the deceased and prayed for forgiveness and leniency.



17. At the conclusion of the formal hearing of the case, the prosecution chose to rely on the evidence adduced, while the accused filed submissions dated, 21<sup>st</sup> May 2024 and argued that he did not plan or intend to hurt and/or kill the deceased but it was an accident. That, there was no evidence of any disagreements between him and the deceased save for the deceased holding him responsible for the death of the cows on the fateful day.
18. The accused reiterated that PW5 Susan attempted to reconcile the difference between him and the deceased, however, tensions escalated when the deceased refused to pay him his salary and threatened that he would die due to witchcraft. That feeling threatened and infuriated, he reacted in the heat of the moment and attacked the deceased, cutting him on the face with a panga. That upon realizing that he had injured the deceased, he panicked and fearing for his life he fled.
19. The accused submitted that no evidence was adduced to rebut his evidence and that the prosecution failed to prove malice aforethought. He cited the case of; Tubere S/O Ochen vs Republic EA (1954) 12 ECA 63 where the East Africa Court of Appeal stated that in determining whether malice aforethought was established the court should consider the weapon used, the manner it was used, part of the body injured and conduct of the accused before during and after the attack.
20. Further, in Morris Aluoch vs Republic Cr. Appeal No. 47 of 1996 (UR) the Court of Appeal held that malice aforethought can only be presumed where an injury was inflicted by repeated blows. That he established a proper defence and therefore the charge of murder ought to be reduced to manslaughter.
21. At the conclusion of the case, I note that offence of murder the accused is charged with is provided for under section 203 of the [Penal Code](#) which states: -

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder’.
22. Pursuant thereto the ingredients of the offence of murder have been settled vide several court’s decision including the Court of Appeal decision in Joseph Githua Njuguna vs Republic (2016) eKLR, where the ingredients were stated as: a) proof of occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.
23. In the instant case, the occurrence of the death of the deceased was confirmed by PW1 Kenneth Muchai Munga the son who testified that he viewed the deceased’s body at the morgue and realized that, the deceased had been seriously injured on the head.
24. Similarly, PW2 Sospeter Mwangi the deceased’s son, and PW4 Benson Kariuki Muchai, the deceased’s brother, and PW3 Dr. Kiruki identified the body and attended and/or carried out a post-mortem on the body of the deceased.
25. On the cause of death, the post-mortem report by Dr. Kiruki reveals that, the deceased suffered injuries of an open skull fracture with exposed brain tissue on the frontal, zygomatic region exposed. Brain tissue with cerebral haemorrhage.
26. The afore finding of the doctor is corroborated by PW1 Kenneth who stated that when he viewed the deceased’s body he saw the head had been cut until it was open and eyes were out. PW4 Benson also stated that he saw a cut across the face, described as an injury on the head and it was evident it was occasioned by an axe.
27. The next question is who cut the deceased to death? In that regard, the chronology of events on how the deceased was killed were detailed by PW5 Susan, an eyewitness who saw the accused cut the deceased



with an axe in her presence. In addition, government analyst PW6 Margaret confirmed that the blood on the axe belonged to the deceased. Furthermore, the accused has accepted that he cut the deceased with an axe. Consequently, there is no dispute that the accused cut the deceased to death.

28. The next question is whether the accused had malice aforethought. The provisions of section 206 of the *Penal Code* gives the circumstances when malice aforethought is deemed to exist and states 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.”

29. The Court of Appeal in *Odio v Republic* [2024] KECA 1544 (KLR) stated that: -

“20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In *Nzuki vs. Republic* [1993] eKLR, this Court defined malice aforethought as:

...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237.”

30. Furthermore, in the case of; *Tubere s/o Ochen* {1945} 12 EACA 63 the court in considering whether there was malice aforethought, stated that the trial court should look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted



whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also *Dafasi-Magayi v Uganda* {1965} 1 EA 667).

31. In the instant case, the accused hit the deceased once but the gravity and magnitude thereof was so heavy that the deceased did not even reach hospital. He died on the spot. Furthermore, the weapon was crude and lethal.
32. It is in evidence the accused had opted to leave employment and that he went, took an axe and demanded his salary from the deceased and when the deceased said he did not have money, the accused insisted and hit the deceased on the face.
33. At this point it is noteworthy that the accused left PW5 Susan and the deceased seated and armed himself with an axe. He did not opt for any other object but chose an axe which he understood well was lethal. Furthermore, he demanded for his salary and when told it was not available he attacked the deceased, so it was not heat of the moment as alleged.
34. In addition, PW5 Susan testified that when she looked behind she saw the accused run towards the small river near the deceased's farm. He did not attempt to assist the victim if it was an accident. Even more the accused hit the deceased on the head knowing very well it was an easy target to kill him. He did not go for any other body part that could spare the deceased's life. Finally, the accused was only arrested through tracking his phone with help of Safaricom, the service provider.
35. It is also noteworthy that before the accused called PW5 to intervene, he complained that the deceased had accused him of killing his cows and so the accused was not happy. It does appear that the mention of nine (9) deceased people who were victims of witchcraft was just the trigger or final blow that hit the camel's back that set the accused in motion. His action of hacking the deceased to death was not accidental. He had an opportunity to withdraw from the scene, cool off and leave. He did not.
36. I have looked at the photos of the deceased body and the injury occasioned on his body is to say the very least very brutal. The deceased was old, aged 80 years. But for whatever worth his age may have been, the accused cannot have attack him so brutally. PW1 described the injuries on the deceased as "very serious" and said that the deceased was killed brutally been evidence that the suspect had the intention to kill the deceased. Furthermore, PW3 described the scene as bloody and Dr. Kiruki testified to open skull fracture with exposed brain tissue.
37. Consequently, it is the finding of this court that the circumstances of this case clearly supports the element of malice aforethought. Therefore, I find the accused guilty as charged and accordingly convicted him.
38. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 10<sup>TH</sup> DAY OF MARCH 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms Chepkonga for the State

Mr Wairegi for the accused

Accused present virtually

Ms Hannah: court assistant

