



**Republic v Chesoli (Criminal Case 11 of 2020)  
[2025] KEHC 11986 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 11986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 11 OF 2020**

**GL NZIOKA, J  
JUNE 17, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BERNARD KAKAI CHESOLI ..... 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* [Cap. 63] Laws of Kenya. The particulars of the charge are that, on the of 15<sup>th</sup> day of November 2018, in South Kinangop Forest in Kinangop South Sub-County within Nyandarua County he murdered Joseph Mwangi Njoroje.
2. The charge was read to the accused, and he pleaded not guilty thereto whereby the case proceeded to full hearing. The prosecution case is that, the accused was at the material time a Forest Ranger stationed at South Kinangop Forest Station.
3. That on 15<sup>th</sup> November 2018, [PW3] No. 00729 Corporal James Wachira, in charge of South Kinangop Forest Station instructed him and [PW5] Dickson Mutisya Mutiso, to go on patrol duties within Forest. That he was issued a rifle serial No. 74793H with 30 rounds of ammunition for the assignment.
4. That while on patrol at around 3:00pm they noticed that part of the electric fence along the forest was cut and destroyed and there was a fresh human path, an indication that people had entered the forest. That they followed the path for about ten [10] kilometre when they heard trees being felled and upon closer observation, they noted there were five [5] men cutting down trees.
5. That they retreated and laid an ambush for the men, with [PW5] Mutiso positioning himself at the front path while the accused stayed at the rear. That thirty [30] minutes later a person, [herein “the



- deceased”], passed by [PW5] Mutiso and was followed shortly by another. That [PW5] ordered the 2<sup>nd</sup> person to drop the panga he was carrying and sit down and he complied.
6. Apparently the deceased proceeded to where the accused was and what transpired between him and the accused is as much as is told by the accused. In that regard, the accused states that, when he ordered the deceased to surrender, the deceased threw down the posts he was carrying and advanced towards him screaming and raising the panga he had towards the accused’s head.
  7. That the accused shielded himself with the firearm but the panga hit the firearm whereby the force caused the firearm to hit the accused on the forehead. That the deceased advanced again forcing him to fire a bullet in order to neutralize the threat and the deceased fell down. That the accused notified [PW5] Mutiso who apparently had heard the gun shot and when they returned to where the deceased was and they noticed that he 5m, had fell by the riverside and died.
  8. That, [PW3] Corporal Wachira was informed of the incident and he reported the matter at Njabini Police Station, and in the company of [PW2] No. 65447 Corporal Oscar, PC Kioko and PC Mugambi proceeded to the scene. At the scene they found the deceased body lying along the stream, and upon [PW2] Corporal Oscar inspecting it bullet wounds were noted on the chest and jaw area. It was further noted that the accused had an injury on the forehead. That fourteen [14] cider posts were recovered, the body was moved to the mortuary as investigations commenced.
  9. As part of investigation, [PW6] No. 231845 Senior Superintendent of Police Florence Karimi, and a firearm examiner examined the VZ 58 Assault Rifle Serial No. 74793H, and one magazine with 26 rounds of ammunition calibre 7.642x39mm to determine whether; the rifle was a firearm under the *Firearms Act*, it was recently used, and could house and fire the ammunitions. PW6 Karimi testified that she noted that the lower and upper hand guard of the firearm had been cut by a sharp object from the muzzle towards the body but it was in good mechanical condition. Further, it could fire the ammunition of the calibre 7.642x39mm.
  10. Furthermore, she noted that magazine received had a capacity of thirty [30] rounds of ammunition and was in good working order. That she picked two [2] rounds of ammunition out of the twenty-six [26] she had received and successfully test fired them with the subject. In conclusion she formed the opinion that, the rifle and the ammunition were capable of being fired and were a firearm and ammunition as defined under the *Firearms Act* [Cap 114] Laws of Kenya and produced her report as prosecution exhibit No. 7.
  11. On the other part, [PW8] Dr. Julius Ntwiga Murimi testified that he performed a post-mortem on the body of the deceased body 23<sup>rd</sup> November 2018, and noted that there was an entrance wound on the anterolateral aspect of the left neck measuring 7mm in diameter, an exit wound on the lateral aspect of the right proximal measuring 25mm in diameter, and an exit wound on the right mandibular region with irregular margins and fracture of the right jaw bone. That internally, there was massive haemorrhage on the right hemithrax with attendant internal thermal injury associated with right clavicle fracture, and a fracture of the right mandible. He formed the opinion that the cause of death was massive internal haemorrhage secondary to gunshot to the neck and buccal cavity.
  12. Upon conclusion of the investigation, the accused was held to blame for the death of the deceased and charged accordingly.
  13. At the close of the prosecution case, the court ruled that the accused had a case to answer and he was placed on his defence. He gave a sworn testimony to the effect that, on the 15<sup>th</sup> November 2018, [PW3] Corporal Wachira assigned him and [PW5] Dickson to go on normal patrol in the Aberdare Forest, South Kinangop. That they armed themselves and left at 9:00am. That at about 5:00pm while still on



patrol, they heard movements of people in the forest but did not know the number of illegal loggers and they decided to lay an ambush.

14. That sometime later, two people approached them carrying red cider post and armed with a panga and were ordered them to surrender peacefully. That one of the loggers surrendered, however, the logger on his side threw down his posts and advanced towards him screaming having raised his panga high while aiming at his head. That he shielded him with his firearm and the panga hit the firearm and the force caused the firearm to hit him on the forehead. That the deceased advanced again forcing him to fire a bullet in order to neutralize the threat and the deceased fell down.
15. That he notified [PW3] Corporal Wachira and [PW3] Wachira and police officers arrived at the scene at 10:00pm by which time the deceased had succumbed to his injuries. That, he handed over the pangas and five [5] cider posts to the police officers and they took the deceased's body to the mortuary. In the meantime, he was treated and issued with a P3 form. That he did not intend to commit the offence.
16. At the conclusion of the trial, the prosecution chose to rely on the evidence on record while the defence in submissions dated 17<sup>th</sup> September 2024, cited section 63[2][iii] of the *Forest Conservation and Management Act*, 2016 which provide that a uniformed and disciplined officer when authorized by the Chief Conservator of Forest may use a lawfully issued firearm in enforcing the provisions of the Act, against any person who attempts to prevent the lawful arrest of himself or any other person.
17. Further, that section 62[3][b] states that a firearm shall not be used unless such officer has reasonable grounds to believe that, he or any other person is in danger of grievous body harm or effect an arrest.
18. That in the present case, the deceased was an illegal logger who had trespassed into a gazetted and protected government forest to cut cider trees. That when confronted by the accused who was on official duty, the deceased attempted to escaped by attacking him while armed with a machete. That, the accused shot the deceased in a bid to prevent grievous harm to himself.
19. That, the deceased was the aggressor who attacked the accused with a dangerous weapon and that the accused acted reasonably within the law and shot him in self-defence. The case of; *Ahmed Mohammed Omar & 5 Others v Republic* [2014] eKLR was cited where the Court of Appeal cited the decision in; *Palmer v Republic* [1971] AC 814 where the Privy Council stated that, it is both good law and good sense that a person who is attacked may defend himself but only do what is reasonably necessary in the particular facts and circumstances. That if an attack is so serious that it puts immediate danger then immediate defensive action may be necessary.
20. The accused further relied on the case of; *Republic v Kevin Aboki Onsom* [2021] eKLR where the High Court quoted the case of; *Mokwa v Republic* [1976 – 80] 1 KLR 1337 where the Court of Appeal stated that;  

“Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force.”
21. The accused argued that his action in the circumstances were reasonable and not excessive and urged the court to acquit and set him free.
22. At the conclusion of the entire case, I note that the offence of murder herein is provided for under Section 203 as read with Section 204 of the *Penal Code*. The subject provisions read as follows: -

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



23. Pursuant to the afore, the ingredients of the offence are settled. In that regard the Court of Appeal in the case of; *Joseph Gitbua Njuguna v Republic* [2016] eKLR stated as follows: -

“Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are: [a] the death of the deceased and the cause of that death; [b] that the appellant committed the unlawful act which caused the death of the deceased; [c] and that the appellant had harboured malice aforethought. See *Milton Kabulit z<sup>o</sup> 4 others v Republic* [2015] eKLR.”

24. Based on the foregoing provisions of the *Penal Code* and the Court of Appeal decision, the ingredients of the offence of murder can be summarized as follows; a] 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.

25. In regard to the first ingredient as to whether the death occurred or not, both the prosecution and the defence have conceded thereto therefore, there is no dispute to the same. Similarly, as to the cause of the death, [PW8] Dr. Julius Ntwigah Muiruri confirmed the deceased died due to massive internal haemorrhage secondary to gunshot to the neck and buccal cavity.

26. The next question is whether the accused caused the death of the deceased. This is a rather straight forward issue. The accused has admitted in his evidence in chief that he fired the fatal shot. Further, it is in evidence that, the deceased died as a result of gun shot. Furthermore, [PW6] SSP Florence Kirimi confirmed that, the bullets that hit the deceased were discharged from a firearm which had been assigned to the accused. The accused has not denied the same.

27. The next issue is whether the shooting was lawful and or legally justifiable? In answer to the afore question, the accused testified that he shot the deceased in self defence. That the deceased advanced towards him welding a panga and in deed, the panga cut the firearm he used to shield himself.

28. It is not in dispute that indeed the VZ Assault rifle serial No. 74793H which is the subject of this matter was cut on the lower and upper hand guard and was cut by a sharp object. That was confirmed by [PW6] SSP Kirimi the firearm expert.

29. However, the key issue remaining, has the accused satisfied the threshold of self defence? The defence of self-defence is provided for in section 17 of the *Penal Code* which provides, inter alia as follows:

“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.”

30. The said common law principles were spelt out in the case of; *Palmer v. Republic* [*supra*] in which the court stated that:-

“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 only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then 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 in a mediate defensive action may be necessary. If the moment is out 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. That may be no longer any link with a necessity of disproof, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out 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.”

31. Notably, from the afore and other authorities herein by the Court of Appeal, self-defence in criminal law allows the use of force to protect oneself or others from an unlawful attack. This defence is generally applicable when the force used is deemed reasonable and necessary to repel the attack. The key elements include; an imminent threat, a reasonable belief in the need for force, and a proportionate response to the perceived threat. It suffices to that it is an affirmative defense, meaning the defendant bears the burden of proof to demonstrate these elements.
32. To revert back to this matter it suffices to note that, no civilian witness who was at the scene testified in this matter. The key witnesses at the scene and who testified were the accused and his colleagues [PW5] Mutiso. Further, the dead tell no tales.
33. That said, the evidence by [PW8] Dr. Nthigwa reveals that, there were minor injuries noted on the deceased’s right hand, wide spread abrasion marks on the anterior aspect of the clavicle and abrasion scars on the anterior aspect of the proximal humerus. The question is where did the abrasion come from? The accused argues that they were sustained during the illegal logging. That may be so or otherwise.
34. However, significantly is the finding that the accused shot the deceased on the neck and buccal cavity. In research as to what buccal cavity entails and it is revealed that it is another term for oral cavity or mouth. It’s the space within the skull bordered by the lips, cheek, hard and soft palates and tongue. That the buccal cavity contains the teeth, tongue hard and soft palates and inner lining of the cheeks. It is also noteworthy that, the victim suffered a fracture of the right mandible.
35. Pursuant to the afore, it is evident the accused targeted the deceased’s mouth and neck. Why not the legs, hand or any other less vulnerable body part that would probably immobilize the deceased but allow him an opportunity to be tried in a court of law.
36. Taking into account the body part targeted and the fact that, the accused is an officer who understands how lethal a firearm is, he cannot be said to have applied reasonable force to the eminent danger he was facing. On that ground the defence of self defence collapses.
37. On the issue of malice aforethought I note that, the accused was not known to the deceased prior to that fateful day and it is unlikely that he had any malice aforethought. He may have been provoked by the deceased when he advanced towards him with a panga and even cut his firearm and caused him to shot at the deceased, but there is no indication of mens rea to commit the offence.
38. Indeed, under section 207 of the [Penal Code](#), provocation is a defence to murder. That section provides as follows:

“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.”

39. I therefore find the accused not guilty of murder as charged but guilty of manslaughter and convicted accordingly.

**DATED, DELIVERED AND SIGNED THIS 17<sup>TH</sup> DAY OF JUNE 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms. Chepkonga for the State

Mr. Machage for the accused

Accused present virtually

Ms. Hannah: court assistant

