



**Republic v Piru (Criminal Case E003 of 2022)
[2024] KEHC 1073 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E003 OF 2022**

A. ONG'INJO, J

FEBRUARY 8, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

MANGALE MWERO PIRU ACCUSED

JUDGMENT

Introduction

1. The accused Mangale Mwero Piru faces a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that Mangale Mwero Piru on 23rd day of September 2021 at Mkuduru B Village, Dzombo Location in Lungalunga Sub-County within Kwale County murdered Mwero Piru Nyawa.
3. The prosecution called 8 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Rama Mwatsuma Chipholo, the village chairman, said that on 23.9.2021 at 6.50 pm, he was at home, about 150 meters from the scene when Tsuma Mwero went to report that he arrived at home and found his father had been cut to death. That PW1 accompanied Mwero to his home where Mwero led him behind Mangale's house where there was burning charcoal. PW1 said that the body was covered with a mat and that he called the Chief and the police who instructed him not to touch it. That later, the chief told PW1 to remove the mat and identify the body and that PW1 confirmed it was Mwero. He said that there was a v-shaped cut from the mouth towards the ear on the right side, another cut from the cheek towards the ear and the 3rd cut was on the neck.



5. PW1 said that Tsuma knew about the incident from his step mother Mulongo and that PW1 called and interrogated her. That Mulongo said the deceased was with his son Mangale behind Mangale's house and that they were burning charcoal and that when Mulongo went looking for him, she found him dead. PW1 said that the police from Mamba Police Post and Lungalunga went to the scene and removed the body to the mortuary. PW1 informed court that on 25.9.2021 at about 4.30 pm when members of the public were seated to discuss funeral arrangements, a girl by the name Kuva Piru was sent to check if Mangale was in the house when she got a *panga* used to kill the deceased.
6. PW2, Aisha Piru, testified that on 23.9.2021 at 9.00 pm, she received a phone call that his brother Mwero had been killed and that the next day she went home and confirmed. PW2 said that on 25.9.2021 while members of the family were meeting, they asked themselves who could have killed the deceased. She said that Mangale was the deceased's 2nd born son but he was not at home and that his house was locked with a padlock. She said that after the death of the deceased, Mangale disappeared. That PW2, Juma (Mangale's younger brother), Nyundo (the deceased person's uncle), and Kupha (Mangale's aunt) were sent to Mangale's house to see what was inside as he had locked it. PW2 said that they got suspicious and broke the door, and upon entry found a blood-stained *panga*. PW2 identified the *panga* in court.
7. PW3, Tsuma Mwero also known as Tsuma Chigale Piru, said that on 23.9.2021, at about 6.00 pm, he was informed by his step mother that Mangale had cut his father. PW3 said that he went to the Village Chairman's home and reported. That on 25.9.2021, they broke into Mangale's house and recovered a blood stained *panga*. PW3 said that the accused went underground on the same day that the deceased was murdered.
8. PW4, Nyundo Piru, testified that on 23.9.2021, he was informed through a co-worker that his elder brother had been killed. That PW4 went home and confirmed that his brother had indeed been killed. PW4 said that he found the body had been covered with a mat and that he had been cut on the neck. He said that a blood stained *panga* was recovered in Mangale's house and PW4 was his sitters during the said recovery. He identified the *panga* in court.
9. PW5, Douglas Mwamumbo Ndani, said that he had employed the accused as a herder and that he worked from 23.10.2021 to 28.12.2021 when he disappeared. That after 2 days, PW5 got information that Mangale had been arrested and later the CID went and interrogated PW5 on how he knew the accused, and that PW5 explained and recorded his statement.
10. PW6, No. 21xxxx PC Benard Mburu from Mamba Police Station testified that he was the arresting officer herein. He said that on 29.12.2021 at around 6.30 pm, he received a phone call from a member of the public who told him that the murder suspect in OB No. 09/23/9/2021 had been seen in Mwawanyamara area in a palm wine den. That PW6 organized with PC Mulinda, PC Maina and PC Mariga to effect the arrest. That they found the accused, arrested him and escorted him to Mamba Police Station where he was detained. PW6 said that the police from Lungalunga went and collected him.
11. PW7, Dr. Abdalla Mzungu Chimera, said that he had the postmortem report of Mweru Piru Nyawa and that on 27.9.2021, he conducted the postmortem on the request of the DCI Lungalunga. He said that the body was identified by Mulongo Kimera, the wife of the deceased, and Tsuma Mwero, the son of the deceased. PW7 said that on the external appearance, the head had 2 deep cut wounds – 4 cm above jawline slightly below earlobe on the right involving teeth up to the right incisor going backwards all the way to the posterior side. That multiple bones were involved in the cut including upper and part of lower jaw and a small part of the parietal. That the 2nd cut was noted/1 cm in front of the right ear from the brow all the way to the lower jaw.



12. PW7 said that posteriorly, he noted 2 other deep cuts around 0.5 x 1 cm just above the left ear. That the 2nd larger cut was going through the left ear extending backwards to the occipital region neck – large gaping wound frontal going as deep as cervical vertebrae chipping into the bone slightly involving major arteries. He said that the upper limbs were noted to have blood clots on the surface but no cuts were noted. That the torso and lower limbs were essentially normal.
13. PW7 testified that internal examination was not done as per request of relatives which was signed by Juma Mwero Piru, the son of the deceased of ID No. 353xxxxx. That as a result of the examination, PW7 formed the opinion that the cause of death was acute haemorrhage mainly from the major vessel severed on the right side of the neck and from the other wounds. PW7 signed the postmortem report and produced it as ExP2.
14. PW8, No. 92xxx PC George Ochieng’ attached at DCI Lungalunga performing investigation duties said that on 23.9.2021, at around 8.00 pm, he was within the station when he was informed by his boss IP Debra that there was a murder incident at Mkuduru Village. That a report had been made at Mamba Police Post and the in charge reported to his boss. PW8 said that in the company of PC Kones (driver) and PC Rotich, they proceeded to the scene using the station’s motor vehicle. That they found a crowd of people including the Area Chairman. That the body of the deceased lay on the ground 20m from his house behind the suspect’s house.
15. PW8 said the body had deep cut wounds on the head and face. That the deceased was wrapped in a *mkeka* and the body kept next to burning charcoal. That they searched the compound but they were not able to recover any weapon. That the suspect’s house was locked with a padlock and he was not at home. PW8 testified that they collected the body of the deceased to Kwale Hospital Mortuary. That on 25.9.2021, the Chairman and 2 family members went to the station and took a *panga* which had been recovered from the suspect’s house. That they suspected the *panga* was a murder weapon. PW8 said that he took the *panga* into his custody as an exhibit. PW8 said that on 27.9.2021, he accompanied family members for postmortem and the body was released to the family. That he later summoned witnesses and recorded their statements. PW8 produced the *panga* as ExP1.

Defence Case

16. The accused, Mangale Mwero Piru gave sworn evidence that he was the son of the deceased. That on 23.9.2021, he was herding cattle at Mzee Nyaya’s home. He said that he had been working between July 15, 2021 to October 2021 when he left employment and went to work for Mzee Douglas Mwamumbo up to 30.12.2021 when he decided to go home. That on the way home, he passed by a pub where he met the son of his step grandmother who questioned him on whether he was around when his father died. The accused said that he was surprised as he was not aware that his father had died. That before he left, 4 police officers went and arrested him and took him to Mamba Police Station, and later to Lungalunga Police Station.
17. The accused further informed court that his aunt Aisha and grandmother are the ones who had a grudge with his father. That Mama Chizi’s children used to die mysteriously and she suspected it was his father who bewitched them. That Mama Chizi told the deceased that he was the one who was killing her children and that they went for oath taking and it was found that the deceased had been affected. That the deceased accepted to compensate the accused’s grandmother for her losses although the accused’s aunt and Mama Chizi still had a grudge against the deceased. The accused said that he was framed because he was not at home and that he knows nothing about the murder.



Analysis and Determination

18. In consideration of the evidence of 8 prosecution witnesses and in consideration of the defence evidence, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
19. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
 - " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."
20. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
 - i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

21. There is no dispute as to the death of the Deceased Mwero Piru Nyawa.

Death was Caused by an Unlawful Act or Omission

22. The body of the deceased was found wrapped with a mat behind the accused person's house with a v-shaped cut from the mouth towards the right ear and another cut from the cheek towards the ear and there was another cut on the neck according to PW1.
23. PW7, Dr. Abdalla Mzungu Chimera examined the body of the deceased at Kwale Sub-County Hospital and observed that there were 2 deep cut wounds above the jawlines slightly below the earlobe involving the teeth up to the right incisor going backwards all the way to the posterior side. He said there were multiple bones involved in the cut including the upper part of the lower jaw and a small part of the parietal. There was a second cut noted in front to the right ear from the brow all the way to the lower jaw. That there were two other deep cut wounds above the left ear. There was a second larger cut going through the left ear extending backwards to the occipital region. On the neck there was a large gaping frontal wound going as deep as the cervical vertebrae chipping into the bone and slightly involving major arteries. These were possibly made by several cuts. The Cause of death was established to be acute hemorrhage mainly from the major vessels severed on the right side of the neck and from other wounds.
24. The grievous and fatal injuries could only have been Caused by an unlawful act on the part of the perpetrator. They were not self-inflicted nor accidental.



Participation of the Accused in the Commission of the Alleged Offence

25. PW1 said that the deceased person's wife Mulongo told them that she left the accused and the deceased at home as she went to fetch water and on return when she did not see the deceased, she started looking around and found the deceased's body wrapped in a mat behind the accused person's house and the accused was nowhere to be found.
26. PW2, Aisha Piru, the sister to the deceased, said that on the 25.9.2021 when they met to inquire who could have killed the deceased, the accused person who was the 2nd born to the deceased was not at home and his door had been locked with a padlock. She said that the accused had been at home when the accused was alive but he disappeared when he died. That they decided to break into the accused person's house and recovered a blood stained *panga* which they suspected could have been used to kill the deceased.
27. PW3 also testified that when he returned home on 23.9.2021 at 6.00 pm and found his father had been killed, he did not see the accused person and the accused person did not attend the burial and no one knew where he was. That when the family members decided to break into the accused person's house, they recovered a blood stained *panga* which they handed over to the chief. PW3 said that the accused went underground the same day that the deceased was murdered. He said that the accused person had been at home one day prior to the incident and he subsequently disappeared.
28. PW4 also said that on 23.9.2021 when he went to work, he left the accused person and his father at home. He also witnessed a blood stained *panga* recovered from the accused person's house.
29. PW5, Douglas Mwamumbo Ndani, a pastor with PEFA Church in Mwangulu said that he employed the accused to herd his cattle on 23.10.2021 but on 28.12.2021, the accused person disappeared. 2 days later, he learnt that the accused person had been arrested and DCI officers went to interrogate him and he recorded his statement.
30. PW6, PC Benard Mburu said that a member of the public informed them that a murder suspect had been seen in Mwananyamaza Area in a palm wine den and together with his colleagues they went and arrested him and escorted him Mamba Police Station from where DCI officers from Lungalunga collected him. PW6 said that they were informed that the suspect had killed his father.
31. PW8, PC George Ochieng' also testified that on interrogation of members of the public and the accused person whose house had been locked and was not at home was the one who had committed the offence. He also confirmed that on 25.9.2021, a blood stained *panga* that was recovered from the accused person's house was handed over to him as an exhibit. He said that when the brother to the suspect called and informed him that the father had died, he did not bother to go home and attend the burial, he instead switched off the phone and was unreachable. PW8 said further that the blood stained *panga* that was recovered from the accused person's house made him believe that the accused person was involved in the murder as he went underground immediately after and was only arrested on 29.12.2021 when he went back.
32. Although the accused person said he had been away from home from 15.7.2021, evidence of PW1 was to the effect that the accused person was at home with the deceased when the deceased's wife went to fetch water and she found the deceased had been killed and the accused was nowhere to be found.
33. PW3, the brother of the accused also said he went to work and left the accused person at home with the deceased and their stepmother and on return at 6.00 pm, he found the deceased murdered and the accused was nowhere to be found. PW3's stepmother told him that she had left the accused and the deceased at home when she went to fetch water and on return she found the deceased dead behind



the accused person's house and the accused person was nowhere to be seen. PW3 made a phone call to the accused to inform him what had happened at home but he did not bother to go home and subsequently he switched off his phone.

34. PW4, the brother of the deceased also testified that when he went to work in the morning on 23.9.2021, he left the deceased and the accused person at home and while at work, he received a call and was informed that his brother had been killed.
35. PW1, PW2, PW3 and PW4 all talked about a blood stained *panga* that was recovered from the accused person's house and which was suspected to have been used to kill the deceased.
36. Although PW5 confirmed that the accused had worked for him as a herder, the accused person's employment to PW5 came long after the murder had been committed on 23.9.2021. The accused person's defence of alibi has been challenged by the evidence of the prosecution that he was at home at the time the deceased was killed. Although he was not seen committing the murder, the circumstances of this case point to him as the culprit. The accused person is therefore found to have committed the unlawful act that caused the death of the deceased.

Malice aforethought

37. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

38. On the element of malice aforethought in respect to Section 206 of the [Penal Code](#), the court held as follows in the case of [Isaac Kimathi Kanuachobi -vs- R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”



39. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

40. The accused person waited until he was alone with the deceased person when he inflicted fatal injuries on vital parts of the deceased’s body. He left the deceased person bleeding to his death after wrapping him in a mat behind the house. The manner in which the offence was committed is proof of the extent of malice on the part of the accused person.

41. This court therefore finds that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322 (1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 8TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Mr. Nzamba Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Ms. Nyarieda: We don’t have previous criminal records. Accused may be treated as 1st offender.

Ms. Nzamba Advocate: I pray for a date for mitigation. We also request for report.

Order: Mention on 26.2.2024 for mitigation, victim impact statement and sentence. Copy of judgment to be supplied to parties.

HON. LADY JUSTICE A. ONG’INJO

JUDGE

