



**Republic v Ndoro (Criminal Case E030 of 2022)
[2024] KEHC 2793 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2793 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E030 OF 2022**

**A. ONG'INJO, J
MARCH 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

WILSON JAWA NDORO ACCUSED

JUDGMENT

1. The accused Wilson Jawa Ndoro is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code cap. 63 of Laws of Kenya.
2. The particulars are that Wilson Jawa Ndoro on 30th day of November 2022 at Tsuini 'A' village, Jego Sub-location, Vanga Location within Kwale county murdered Julius Jawa Ndoro.

Prosecution's Case

3. The prosecution's case was that PW1 heard his brother the deceased cry early in the morning and saying "Rodger nauawa!! Rodger nauawa!! That when he got out of his house and went to where the deceased was, he found he was bleeding from the head and there was a cut at the back of the head. He said he also found accused at scene armed with a panga and 2 sticks. That when the accused saw him he walked away. PW1 helped the deceased from the scene and he took him to Jego Police Patrol Base and made a report. He also took him to Vanga Health Centre.
4. That on 29.11.2022 when he took painkillers to the deceased, he found his condition had worsened and he could not stand. That he took him to Lungalunga Hospital and it was found that the wound which had been stitched was swollen. They were referred to Msambweni Hospital for a scan. That they went back home and hired a Probox to take them to Msambweni the next day but by 2.00 am, the deceased persons condition worsened and he called the vehicle but while carrying him out of the house to take him to hospital he died.



5. PW1 made a phone call to CPL. Otieno of Jego Police Patrol Base. That the DCI's vehicle from Lungaluga went to the scene and collected the body to Msambweni Hospital Mortuary. PW1 said that when the accused returned home after 20 years and was told to wait for one year before he could be given land to put up a house, he did not understand and he reported the matter to the police. That when they went back home, the accused reported that his father had defiled his children but it was established he was fabricating the father.
6. PW1 said that there were people who witnessed the fight between Wilson, the accused, herein and his father. He said he was in the house with his wife and it was alarm raised by the deceased that made him come out. He said the accused was bare chest and he only had a short. He said the accused used to quarrel with the father.
7. PW2, Umazi Chemene, testified that the deceased was the elder brother to her husband. She said Wilson, the accused, was the son to Julius the deceased. She said that the accused Wilson used to stay with the mother and when he returned he started quarreling with the father over a plot. That Wilson constructed on the plot by fence. That the family sat and Wilson was told not to construct until they agree with the father. That on 23.11.2022 at 6.00am, she heard the deceased raise alarm and saying "Rodger nauliwa, Rodger nauliwa!". That they woke up to go and see what was happening. That they met Kwekwe who told Ken that Wilson and Julius were fighting. That when they went to the scene, Wilson, the accused, saw them and walked away. She said Julius was bleeding from the head. PW2 said that Wilson was armed with a panga and 2 runigus.
8. That PW2's husband took the deceased to Jego Police Station and to Vanga Hospital where the wound was stitched. She said that on 29.11.2022, the deceased person's condition worsened and he was taken to Lungalunga Hospital where he was referred to Msambweni for a scan. That PW1 returned with the deceased home so as to mobilise resources to take the deceased to Msambweni the following day.
9. That they had hired a vehicle to take the deceased to hospital the following day at 3.00am but before he could be taken he died. That the body was removed to Msambweni Hospital where postmortem was done the same day and body released for burial. PW2 identified the panga she saw the accused carrying. She also identified the accused as the one who committed offence.
10. In cross examination, PW2 said they were still sleeping when the accused attacked his father and they heard the father screaming and calling for help. She said they found the deceased lying down and was bleeding. She also said that the accused did not have a shirt. She said she did not see if the panga the accused had was stained with blood as he ran away. She said the runigus the accused had were not in court.
11. PW3, CPL Ochieng Otieno, testified and said that on 23.11.2022 at 4.00pm he received a call from a former police officer Julius Jawa Ngoro who wanted to see him. That when the said Julius Yawa Ngoro went to the patrol base at 5.00pm, he reported that he saw his son Wilson constructing a house at night in a portion of land where he had told him not to construct. That when he went to tell his son not to construct a scuffle ensued and the son cut him. PW3 booked a report and he issued a P3 Form and referred him to Hospital in Vanga where he was treated. That PW3 instructed the reporter to go back and record a statement when he recovers, unfortunately his condition worsened and PW3 advised him to go back to hospital. That he went to Lungalunga where he was referred to Msambweni for a scan. That the reporter went back home as it was late and he did not have money, the next morning before he could be taken to hospital he died.
12. The deceased's brother called and reported to PW3 about the death. PW3 proceeded to the home of the deceased and found the accused sleeping in the house and arrested him. That he escorted the accused to



- Lungalunga Police Station and informed the OCS and DCI who took over the investigations. PW3 said that when the accused returned home, the deceased reported to the patrol base that he was suspicious of his return. That he referred the deceased to go and have elders resolve the land dispute but the deceased died before the matter could be resolved. PW3 said the accused insisted on putting up his house near his father's house but the father refused. PW3 said he did not recover the murder weapon.
13. In cross examination, PW3 said the accused did not run as he was not aware the father had died by the time he was being arrested.
 14. PW4, Dr. Samuel Mungai, examined the body of the deceased and formed the opinion that the cause of death was severe head injury with possible intracranial hemorrhage secondary to assault.
 15. PW5, 12 years old minor Eunice Zaiza Ngola, testified that on 23.11.2022 in the morning, she woke up to go to the toilet when she heard screams. She said it was her uncle known as Jawa who was calling her father. That he spoke in kiduruma and said he was being killed. That she saw Wilson armed with a rungu and panga beating his father. PW5 said she ran to go and call her father. That when she met the parents at the door they got out and saw the accused standing at the house he was constructing, armed with a big rungu, a small rungu and a panga.
 16. That the accused then went to his younger brother Mwero's house. PW5 said that the accused did not have a house. That he was still constructing. That the uncle who had been assaulted went to his house. That when PW5's mother gave her tea to take to the deceased, she found the uncle lying at the veranda on the floor and he was bleeding. That he told her he was not able to take tea. That PW5's father took him to hospital at 2.00pm. That when they returned from hospital the uncle was unable to stand. That the following day the uncle was taken to Lungalunga hospital and they were referred to Msambweni. PW5 said her uncle had an injury at the back of the head. She also said that her father called for a vehicle to take the uncle to hospital but he died.
 17. PW5 said Wilson the accused had been told not to construct his house where he constructed it but he persisted. She said it was 6.30am when she saw the accused beat the father. She said that Kwekwe Mangale also saw the accused assault the deceased. She said the panga which the accused used to assault the father had blood stains when it was recovered.
 18. PW6, P.C. George Ochieng of DCI Lungalunga investigated the murder and preferred charges against the accused. He produced the P3 form which had been issued when the deceased reported that he had been assaulted – ExP3. He also produced treatment notes – ExP4. PW6 testified that when they visited the scene, they searched the accused person's house and recovered the murder weapon panga – ExP1. PW6 said that the accused person's parents had separated and the mother was living in Mariakani. He said the dispute between accused and deceased was over land. He said that the deceased had been jailed for one year for assaulting the wife, mother to the accused, and that they had divorced. The investigating officer said that the P3 Form had not been filed as the deceased was still undergoing treatment. He said that he recovered a panga hidden under accused person's mattress.
 19. PW6 said he did not take the panga for analysis as it had been cleaned. PW6 said the deceased refused to give the accused herein land on where to construct a house, whereas he had given land to another son. That the deceased suspected that the accused would bring back their mother.

Defence Case

20. When placed on defence, the accused gave sworn statement and said that he was previously staying in Miritini and that he went back home and became a farmer. He said that on 30.11.2022, he was sleeping in the house when at 03.00hrs he heard a knock at the door and those who knocked said they were the



police. That when he opened, he was told he had killed his father. He said he had not differed with his father. He said his father differed with PW1 his brother Ngoja Ndoro when he found Ngoja's child picking coconut without permission.

21. That the child fell from the coconut tree and sustained injuries. He said that their uncle Ngoja was using land that their father left for them. He testified that his father and uncle went to drink and the deceased returned the next day at 6.00am when he was totally drunk and went to where he was brushing his teeth. That the deceased told him he was a stumbling block. He said his father had the habit of touching his daughters inappropriately and he reported the matter to his uncle. That his uncle promised to call elders incase the offence was repeated. He said he did not know what injured his father as he had no visible injuries but he had soil on his knees. He said he reported to police that his father was exposing his genitals to his children and he was warned. The accused said he was the sole bread winner to his family and they were suffering.
22. DW2, Lenny Bengano, the brother to the accused and son to the deceased testified that the accused who is his younger brother had not committed any offence. He said he had not witnessed any differences between accused and the father. He said prior to his death the deceased had removed beacons on a boundary with a neighbour and he paid damages. He said the accused used to take alcohol. DW2 said that he saw 2 pangas and one rungu being taken from accused people's house. He said that during burial the brother of the deceased did not allow the accused persons siblings to attend. He said the 2 pangas recovered from Ndoro's house did not have blood stains. He said the accused was not present when panga were allegedly recovered. DW2 said the deceased inflicted serious injuries on his wife to the extent she walked on her knees for long. That as a result of assaulting the wife the deceased and the wife divorced.

Analysis and Determination

23. In consideration of the evidence of 6 prosecution witnesses and in consideration of the defence witnesses' sworn statements, 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.
24. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was 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.'
25. 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

26. There is no dispute as to the death of the deceased Julius Jawa Ndoro.



Death was caused by an unlawful act or omission

27. The deceased died as a result of severe head injury with possibility of intracranial hemorrhage secondary to assault according to the Post Mortem Report - ExP2. Dr. Mungai on examination of the body found that the deep cut wound on the right occipital parietal region was septic as there was pus-like discharge with a clot of blood. The injury must have been sustained when the deceased went to where his son, the accused person, was constructing against his will and according to PW3, a scuffle ensued between them. It is not in doubt that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

28. It is not in dispute that the injuries sustained by the deceased were suffered when a scuffle ensued between the accused and the deceased due to a dispute over the spot where the accused was to construct his house. PW1 confirmed that the accused had reported his father, the deceased to the police over land dispute and PW3, Cpl Ochieng' Otieno, testified that when the land dispute was reported, he referred them to have the matter resolved by elders but the deceased died before the matter could be resolved. He said that the accused person insisted on putting up his house near his father's but the father refused. The accused person is therefore found to have committed the unlawful act that caused the death of the deceased.

Malice aforethought

29. 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”.
30. 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.”



31. 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.”

32. This offence is alleged to have been committed early in the morning on 23.11.2022 and PW5 said that thereafter the deceased went back to his house. PW3 said that the deceased called him at 4.00 pm seeking to see him and went to the patrol base at 5.00 pm where he reported that he saw his son Wilson constructing his house at night on a portion of land where he had told him not to construct. That when he went to tell his son not to construct, a scuffle ensued and his son cut him on the head. The scuffle that resulted in the injuries inflicted on the deceased was not pre-meditated. If the deceased had not gone to where the accused was, the scuffle might not have occurred and the injuries could not have been sustained. It is possible that the deceased may have been the one who confronted the accused person leading to the scuffle and consequent injuries. In the circumstances, evidence of malice aforethought has not been established on the part of the accused person.

33. This court therefore finds that the offence of murder has not been proved beyond reasonable doubt. However, the accused person is found guilty of the offence of manslaughter and is convicted pursuant to Section 322(1) of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 14TH DAY OF MARCH 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Ms. Memia Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: He does not have previous records

Ms. Memia Advocate: We can take directions for mitigation.

Orders: Mention on 13.6.2024 for Mitigation, Victim Impact Statement and Sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

14.3.2024

