



**Republic v Kipkemei (Criminal Case E040 of 2021)
[2024] KEHC 2388 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E040 OF 2021
RN NYAKUNDI, J
MARCH 8, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

NICHOLAS KIPKEMEI ACCUSED

JUDGMENT

1. The accused herein Nicholas Kipkemei has been charged before this court with the offence of murder contrary to section 203 & 204 of the Penal Code. It is stated in the particulars of the offence that on the night of 5.6.2021 in Lemwook location in Kapseret sub-county within Uasin Gishu county he murdered Simon Kibungei alia Kaka. He pleaded not guilty to the offence and what followed was for the prosecution to prove the elements of the offence beyond reasonable doubt which comprise the following:
 - i. Death of a human being.
 - ii. Unlawful causation of that death.
 - iii. The said unlawful causation having been done with malice aforethought.
 - iv. The participation of the accused in causing the said death.
2. The prosecution in discharging that burden of proof in consonant with Section 107 (1), 108 & 109 of the *Evidence Act* adduced evidence from 7 witnesses in support of their case.
3. PW1 Edwin Kimeli testified that on the 5.6.2021 he was at home together with 5 of his cousin and a friend refreshing and entertaining themselves on bussa. The accused came and demanded for a drink they were taking but because he was almost finished the busaa, they gave him the one remaining in their cups. They then began speaking about local politics and they were joined by the Simeon Kibungei, the deceased. The accused and the deceased supported different political leaders and shortly after, there



arose a heated argument between the two cousins. The other cousins intervened and separated the two. Everyone went to their house though the deceased remained unseen till 7th June, 2021. When looking for him, they recalled that the last time he was seen, the deceased was still furious with the accused and had been heard saying that he will go to the accused person's house to continue the fight. They visited the accused's person's home where they noticed drops of blood at several points, a broken wooden stick with blood stains and broken glasses around the house. The body of the deceased was found in a well that was about 30-40m away from the house.

4. PW2-Gilbert Kosgei Kiptoo's testimony was quite similar to that of PW1 and so were the statements of the other relatives who were present at PW1's home that night. Had they been called as witnesses, their testimonies would have been of no further probative value. It was for that reason that the prosecution and the defence by mutual consent agreed to dispense with their testimonies.
5. The next witness, PW3 was Dr. Kibet Keittany who conducted the post-mortem and produced the Post-Mortem form as P Exh 1. According to him, the cause of death was severe head injury due to blunt force trauma consistent an assault.
6. PW4-Chief Inspector Stephen Mumba produced the accused person's cautionary statement together with his confession as P. Exh 2A and 2B. According to him, the accused confessed that after the argument in the busaa den, he went back home. The deceased came to his house and fought him. He fought back hitting the deceased using a stick causing the deceased to run away. When he woke up in the morning, the accused found the deceased lying dead near the family well and out of panic and fear of repercussions, he threw his body inside the well.
7. PW5-Joan Chepchumba testified that she is a sister-in-law of the deceased and the accused. On the night of 5^h June 2021, she was at home when she heard someone who she believed to be the accused shouting, "hapa ni kwangu." She also confirmed that the body of the deceased was found in a well near the accused person's house.
8. PW6- PC John Okach testified that when the matter was assigned to him for investigations, he visited the crime scene where he noticed blood drops rubbed with soil as if to hide them, charred remains of clothes, broken window panes and signs of a fight. He called officers from crime scene support to document the scene of the crime after the deceased's body was found inside a well that was approximately 60ft deep. According to him, all the evidence including the accused's confession, pointed to him as the perpetrator of the crime.
9. PW7 Chief Inspector Onyapidi testified that he took pictures of the crime scene. He produced those pictures as Exh3 and 4.
10. When placed on his defence, the accused elected to give a sworn testimony wherein he explained that on the 5.6.2021 he was at Kapseret centre on or about 4pm when he went to the club to partake busaa (traditional liquor). He stayed at the club up to 8.30 pm in company of nine other persons. The deceased also joined and they commenced some discussions on election matters focusing on the candidates. It happened according to the accused that the deceased was a strong supporter of Oscar Sudi, while he supported a different candidate by the name Norbert in the same election. The arguments between them escalated into a full blown fight all about which candidate is better than the other. He further told the court that he left the busaa club and went to his house for a night rest. In a little while the accused stated that he had a knock at the door of his house and on peeping it was the deceased demanding that he comes out of his house. That he the deceased wanted them to talk over the issues which arose at the busaa club. It did not take long he was hit on the head by the deceased and another fight ensued and it may be in those circumstance the deceased may have suffered injuries. Therefore, raising the defence of self and provocation implicit in his testimony.



11. Besides the evidence from both sides, learned counsels argued their respective cases by way of written submissions.

The Case For The Prosecution

12. Learned senior prosecution counsel Mr. Mark Mugun, submitted and argued that in the context of the evidence from the 7 witnesses all the elements of the offence have been proved beyond reasonable doubt. Further, learned counsel contended that provocation is not available as a defence by the accused in rebuttal of the prosecution case. To buttress his case learned senior prosecution counsel placed reliance on the following authorities;

In Nzuki Vs Republic (1993) KLR 171, NMW vs Republic (2018) eKLR, Moriss Aluoch Vs Republic (1997) eKLR, Tuper S/O Ochen Vs Republic (1945) 12 EACA 63, Republic Vs Juma Mwarabu Chai alias Juma Kazungu & Another (2022) eKLR.

13. In staying on a course of a case proven beyond reasonable doubt against the accused person, the senior prosecution counsel invited the court to consider the following inking questions in balancing the equation between the prosecution and defence case;
 - a. What was the weapon? A stick was used. We were quick to add that a stick is ordinarily not a weapon but can be improvised to be one.
 - b. How was it used? The accused grabbed it from the deceased.
 - c. Which part of the body was injured? The head and all over the deceased body. The cause of the death was the head injury.
 - d. What was the conduct of the accused before, during and immediately after inflicting the injuries? After discovering that the deceased had died, accused dumped his body into a well to cover up the incident.
14. On the other hand, learned counsel Mr. Omboto for the defence, submitted that on the material day of the offence, friends and cousins all related to the accused had gathered at a local club to drink busaa and it was at that time local politics was introduced leading to a scuffle between the accused and the deceased. The central actors of contestation between the accused and the deceased was Hon. Oscar Sudi and Hon. Kiprono. Apparently, learned counsel's submissions the deceased was a diehard of Oscar Sudi while the accused was campaigning and supporting Robert Kiprono. It was contented by learned counsel on behalf of the accused that hell broke loose when the deceased left the busaa joint to pursue the accused in his house calling him names and hitting the windows with stones. That is the reason argues learned counsel the accused came out of his house after being provoked and in self-defence an immense fight broke out again involving the two parties. In the circumstance of this case submitted learned counsel, that he accused acted in self-defence ousting malice aforethought a key ingredient for the offence of murder contrary to Section 203 of the penal code. In support of his perspective of the case, learned counsel cited and relied on the principles set out in the following cases; R vs Andrew Omwenga (2009) eKLR, Guzambizi Wezonga Vs R (1978) EACA 63, Rex Vs Tubere s/o Ochen (1945 EACA 63, Ahmed Mohammed & 5 others Vs R (2014) eKLR.



15. In light of the foregoing, learned counsel Mr. Omboto opined as follows;
- “that the prosecution has failed to prove the ingredients of murder beyond reasonable doubt and urge the court to acquit the accused person for the offence of murder and in the alternative substitute the offence to the lesser charge of manslaughter.
16. With that rival submissions and the evidence adduced by both parties It is now my singular duty to evaluate and assess the evidence to establish whether the accused is guilty of the offence of murder contrary to Section 203 of the Penal Code or the lesser charge of manslaughter contrary to section 202 of the Penal Code.

The Law Analysis And Determination

17. As a starting point I reiterate the case of R Vs Andrew Omwenga (2009) eKLR in which the court held as to the scope of the ingredients of murder under Section 203 of the penal code that:

“it is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act omission there are therefore three ingredients of murder which is the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

- a. Death of the deceased and the cause of death.
 - b. That the accused committed the unlawful act which caused the death of the accused.
 - c. The accused had the malice aforethought.
18. How is this evidence tested? The standard of proof expected of the prosecution case is as set out in Section 107 (1), 108 & 109 of the *Evidence Act* and the principles elucidated by non other than Lord Denning in the case of Miller Vs Ministry of Pensions 1947 2 ALL ER 373-375 thus;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof of beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it addressed forceful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remedy possibility of his favour which can be dismissed with the sentence of course, it doubt but nothing of that will suffice” see also Woolmington vs DPP 1935 AC 462.

From Kenny’s Outlines Of Criminal Law (16TH EDN AT P. 416 the learned author stated that:

“A larger minimum of proof is necessary to support an accusation of crime that will suffice when the charge is only of a civil nature... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more that show that there is reasonable doubt as to the guilt of the accused see R. V. Stoddart (1909) 2 Cr. App Rep. 217 at p 242.

19. It is against this background that the above elements are to be scrutinized to establish that the burden of proof which rests with the prosecution and never shifts to the accused has been discharged in its entirety,



- a. The death of the deceased.

It is not disputed that the deceased Simon Kibungei alias Kaka is dead. The evidence in support of this ingredient flows from the circumstantial evidence of PW1& PW2 who gave a narration of the chain of events on the 5.6.2021 when both the accused and the deceased had met in a local busaa joint and thereafter a conflict ensued over the candidature of Hon. Oscar Sudi and Robert Kiprono. The two apparently were geared towards contesting for the position of member of parliament of Kapseret Constituency in Uasin Gishu. In addition, the post-mortem report by PW 3 confirmed that the deceased who was duly identified by Tito Keter is dead.

- b. That the death was unlawful caused the actus reus of the offence of murder contrary to Section 203 of the Penal Code are that the unlawful acts of commission or omission that causes the death of another human being. Some of the unlawful acts on causation of it is also not lost that in Kenya the right to life under Art. 26 of *the Constitution* is protected unless it is shown to be excusable in any of the circumstances laid down by the same Constitution or statute. As held in the case of *Guzambisi s/o Wesonga 1948 15 EACA 65*, death is excusable or justified in self-defence, defence of property, life third party in imminent danger of in advancement of administration of criminal justice, or that which is accidental in nature. When it comes to self defence under section 17 and 241 of the Penal Code the doctrinal element remains to be determined according to the principles as domesticated in our jurisprudence as expounded in the following cases: in *R Vs Joseph Chege Njora 2007 eKLR*, *Antony Njue Njeru vs R CR. Appeal No. 77 of 2006* the court held:

“A killing of a person can only be justified and excusable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or part arising from a sudden and serious attack by his victim. It must also be shown the reasonable force was use to avert or forestall the attack.

Further in the case of *Ahmed Mohammed Oman & 8 others Vs R 2014 eKLR* the court held as follows:

“In the circumstances is the appellant contended that they acted in self-defence plausible.”

Making reference to the provision of Section 17 of the Penal Code and relying on the dictum in *Palmer Vs R 1971 AC 814* and *R Vs McInners 55 CR Appeal 551* the restatement of the law was that:

“It is both good law and good sense that a man who is attacked may defend himself, it is both law and common sense that he may do so but may only do what is reasonably necessary. But everything will depend upon the particular facts and circumstances.”

20. The elements of unlawful Acts in homicide cases have this common features;

1. A deliberated act which is unlawful (e.g. an assault)
2. The act is a dangerous act in that it is, from an objective standpoint, one which as sober, reasonable and responsible person of the perpetrator’s age and gender, would inevitably realise in an act which is likely to cause the deceased some physical harm, albeit no serious harm, and
3. The unlawful, dangerous act cause death (even though death or harm or any kind is not intended). See *Archbold 19-112* and *DPP Vs Newbury (1977) AC 500*



21. In applying the above principles, the fact of this case the following significant characteristics emerge. The deceased suffered the fracture of the Mandible and Maxilla, bilateral defence injuries and severe head injury and acute subdural haematoma. The prosecution evidence from PW 1 & PW2 leads me to conclude, that the accused person and the deceased had started a fight while they were drinking busaa at a local joint. It was this scuffle which continued soon thereafter when the accused left for his house and shortly followed by the deceased who demanded that he comes out of his house so that they can settle the issues arising out of the contest of their preferred candidates as members of parliament for Kapseret constituency. The actual examples of assault are as alluded by the accused person. What is more intriguing is the piece of evidence from the accused that he did not inflict any serious injuries against the deceased other than the ones inflicted by the deceased on the head. However, no medical evidence was produced by the accused that he suffered any threatening immediate violence from the deceased person. In contrast the post-mortem report carried out by PW3 shows serious injuries suffered by the deceased more prominently to the vulnerable part of his body which doctor identified to be the head. To that extent therefore, the act of omission and assault seem to be limited to the role the accused played in hitting the deceased who made attempts to defend himself but was overwhelmed by virtue of being at the accused's territorial jurisdiction.
22. In *Abanga alias Onyango Vs R Cr. Appeal No. 32 of 1990* the Court of Appeal stated as follows on threshold of circumstantial evidence.
- “ it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests.
- i. The circumstances from which an inference of guilt is sought to be drawn, must cogently and firmly established.
 - ii. Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused.
 - iii. The circumstances cumulatively, should form a chain so complete that there is no escape from the conclusion that within or human probability a crime was committed by the accused and none else.
23. I am satisfied that the chain of events of this case demonstrates that the deceased died at a result of unlawful acts of assault perpetrated by the accused person. It was also foreseeable that by throwing the deceased into the borehole, he would sustain serious harm likely to cause death. The unlawfulness of the death of the deceased is therefore not in dispute.

Whether malice aforethought was proved by the prosecution

24. Malice aforethought is in reference to the accused's intention or criminal liability under Section 206 of the Penal Code. Using the Penal Code model law the prosecution bears the burden to prove beyond reasonable doubt the following manifestations;
- i. An intention to cause the death or grievous harm to another person.
 - ii. Knowledge that the Act is omission will cause death.
 - iii. An intention to commit a felony.
 - iv. An intention to facilitate the escape from custody of a person who has committed a felony.



The structure and context on manifestation of malice aforethought in which the particular murder is committed has been defined in several cases. In the case of *R vs Juma Mwarabu Chai alias Juma Kazungu & Another* (2022) eKLR where the court stated:

“The tests of malice aforethought is to be properly understood in so far as the evidence by the prosecution presents and manifests the following circumstances.

- a. The nature of the weapon used;
- b. How it was used, the manner used to inflict the injuries;
- c. The part of the body injured;
- d. Conduct of the assailants before, during and immediately after the injuries were inflicted.

(see *R vs Tubere* 510 clear (1945) 12 EAZA 63, *Ojwang Vs* (1999) 2 EA SCU, *Njoroge vs Republic* (1983) KLR 197, *Peter Okoth & Another Vs R* (1964) EA 103, *Earnest Asaami Bwire Abung alias Onyango vs R* CCACRA no. 32 of 1990 *Mbugua Vs R* (2000) 1 EA,”

25. From the prosecution evidence of PW1 & PW2 throughout this litigation there is a common denominator of the concept of self-defence in terms Section 17, 241, 207 and 208 of the Penal Code. What differentiates this case primarily is the use of excessive force applied by the accused. Here is the deceased still struggling with high adrenaline levels triggered by the fight at the busaa joint involving the accused person testing their prowess and ego as who is a better supporter of the two parliamentary candidates for Kapseret Constituency. In fact, it is on record from the evidence, tendered by the prosecution that the accused person exited earlier from the busaa joint and went straight to his residence leaving behind the deceased and other customers. What escalated this criminal incident to the level of a life being lost is the aftermath conduct of the deceased. So then the struggle for this court is whether indeed on the part of the accused person notwithstanding use of excessive force he had manifested malice aforethought as defined in Section 206 of the Penal Code. Let us delve for a moment to what are the key elements of provocation in the peculiar case of homicide. This is what the court has profoundedly stated in these cases in the case of *R vs Davis Muriuki* (2021) eKLR the court laid down the essential of provocation in the following manner:

“The essentials of provocation as provided in Section 207 and 208 of the Penal Code entails the following requirements:

- a. There had to have been provocative conduct by the deceased.
- b. This had to have caused the accused to respond in anger.
- c. And that there had to have been a reasonable relationship between the provocation and the response.

Two fundamental conditions must be fulfilled in order for the accused to take refuge in that defence that may reduce it to manslaughter which would otherwise be murder. First, the provocation must be gross and must be such as might cause a reasonable man to lose his self-control and use violence with fatal results. Secondly the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime whilst still so deprived.

...The application of this doctrine thrives within the following rubric as exemplified in the case of *R v Hussein s/o Mohamed* {1942} EACA thus:



“When once legal provocation as defined in our Court has been established and death is caused in the heat of the passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. This defence by the accused leads to the question of guidelines propounded under Section 17 on self-defence before an accused is entitled to a defence of self the following circumstances must seen to exist:

- (1). That he was repelling an unlawful attack that posed danger of serious assault or grievous harm to him.
- (2). That the force he employed was commensurate to the danger he was repelling.
- (3). That the means he employed were the only reasonable available means in the circumstances (See Ahmed Mohammed Omar & 5 others v R {2014} eKLR Palmer v R {1971} AC 814, R Vs Mcinnes (55 CR App R Elphas Fwambor v R {2009} eKLR)”

26. Homicide as known in law which will otherwise be murder but manslaughter if the act by which death is caused is done in the heat of passion, caused by provocation as defined in Section 207 as read with 208 of the Penal Code. The following acts may subject to provisions contained in Section 207 & 208 of the code may amount to provocation. (a) an assault of an attack of such a nature as to inflict such a bodily harm or great insult is provocation to the person assaulted. (b) if 2 persons quarrel and fight upon equal terms and upon the spot whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, whoever strikes the first blow amounts to provocation. (c) an unlawful entry to a person’s homestead and attempts made to assault or attack the owner of that homestead may be considered provocation. (d) the employment of unlawful force against the person of another is provocation to the person against the person whom it is employed. (e) the words expressing an intention to inflict actual bodily harm accompanied by some acts which shows that such injuries intended may be taken to account in estimating the degree of provocation given against that other party. At the time of this incident, the accused person become culpable when he reiterated with excessive force against the deceased. The wrongful act of assault by the accused person was that suddenly upon hitting the deceased he did not stop there but dragged his body and dumped it inside the borehole. Can this conduct be that of a reasonable man in the circumstances of this case? The answer to me is no. If in any event the accused had overpowered the deceased and induced him to a level of surrender or defeat there was no need to reasonably throw him into the borehole within his compound. There is no sufficient material even on a view of the evidence most favourable to the accused why he formed the unlawful intention of throwing the deceased inside his borehole. The degree and method of continuous of violence which produced the death of the deceased was that of an unreasonable person. The provocation so implied in this case was not enough to lead a reasonable person in the accused shoes to not only inflict physical harm but under unexplained circumstances, goes further to expose his victim to foreseeable risk of injury likely to cause death. My further observation from the facts of this case which are relevant to some large extent the measure of injuries diagnosed by the pathologist may have been accelerated by the series of acts of dragging the deceased as suddenly throwing him inside the borehole. It is on this obvious analysis that this matter eventually fails to rest on malice aforethought as defined under



Section 206 to qualify with completeness the offence of murder contrary to Section 203 of the Penal Code. What's more convincing is that the prosecution has established culpable homicide that would otherwise be murder but now in view of the discussion elsewhere in this judgement the offence is reduced to manslaughter under Section 202 as punishable under Section 205 of the Penal Code.

Sentence

27. I have considered the mitigation and aggravating factors as an aspect of sentencing in this case and in particular I pay attention to sentencing regime of this offence. There is approach illuminated by the Supreme Court in the case of Francis K. Muruatetu Vs R 2017 eKLR. In the same sense the seven purposes for which a court may impose a sentence on an offender that are detailed in the sentencing policy guidelines of the Judiciary 2023.
- a. To ensure that the offender is adequately punished for the offence.
 - b. To prevent crime by deterring the offender and other persons from committing similar offences.
 - c. To protect the community from the offender.
 - d. To promote the rehabilitation of the offender.
 - e. To make the offender accountable for his/her actions.
 - f. To denounce the conduct of the offender.
 - g. To recognize the harm done to the victim of the crime and the community.
28. When considering all this I sentence the convict to 8 years imprisonment bearing in mind the discount for credit under Section 333 (2) of the CPC for the period spent in remand custody. 14 days right to appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8th DAY OF MARCH 2024

.....

R. NYAKUNDI

JUDGE

