



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Molel (Criminal Case 10 of 2019)
[2024] KEHC 2540 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 10 OF 2019**

A. ONG'INJO, J

MARCH 7, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES MOLEL ACCUSED

JUDGMENT

1. The accused James Molel 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 on the 15th day of April 2019 at Rea-Vipingo Sisal Plantation in Takaungu Area in Kilifi County murdered Ismael Dhido Kopaye.
3. The prosecution called 5 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Hadija Gababa, said that on 15.4.2019 at 7.30 am, the deceased and the accused herein who were her herdsmen went to herd cattle together. PW1 said that the accused who was a neighbour's herdsman had been sacked and PW1 asked him to temporarily step in for PW1's herdsman who had gone home. She said that the next day at 5.00 am, the accused went back alone. That PW1 asked where the deceased was as he was the one to milk but the accused said he did not know where he was. That the accused entered the house and lay on the bed. That PW1 went to inquire from a neighbour and told him to call his number but he was not reachable. That while still there, two people from the stage went and told her that Ismael had been killed in a sisal plantation. PW1 said that she went to Kijipwa Police Station and reported. That she went to the scene and found the accused had been arrested by members of the public. That the police collected the deceased's body and carried the accused.



5. PW2, Matan Mohamed Barile, said that he is a herdsman and on 14.4.2019 at 10.00 am he was in the grazing field in Kazinuni. He said that he saw Ismael and Masai grazing cattle together and that they were in Rea Vipingo farm. That when they returned home at 5.00 am, they learnt that Ismael had died. He said that he did not know who killed Ismael.
6. PW3, Harun Salado Barisa, said that on 15.4.2019, he was in Kibaoni and was working as a herdsman when at 6.30 am his neighbour Hadija went and inquired about the whereabouts of her herdsman Ismael. That PW3 told her he had not seen him. PW3 said that Hadija had employed 2 herdsman, Ismael and a Maasai man whom she had nicknamed Abiyar. That at 7.00 pm, Mzee Hussein alighted at Kibaoni stage and got information from bodaboda riders that someone was found dead in the sisal at Rea Vipingo farm. That Hussein went and reported to them and they went to check and found it was Ismael's body. PW3 said there was a stab wound at the back of the head and the body was lying facing down. He said that the body was on the road to Kibaoni and that Mama Hadija went to Kijipwa Police and reported. That the police as well as DCI officers went to the scene and took photographs.
7. PW3 informed court that Ismael used to complain about the accused and that on Friday around 11th or 12th April 2019, Ismael went and complained that the accused had threatened to kill him. That PW3 once heard the accused swearing that he would kill Ismael. That Hadija was in Kilifi and PW3 made a phone call and reported what he had heard. That Mama Hadija went and spoke to him but it did not take 3 days before Ismael died.
8. PW4, Dr. Moiz at Kilifi County Hospital said that on 15.4.2019, he conducted a postmortem on the body of Ismael Dhido Kopaye which was identified by Abubakar and Weta Ismael. Dr. Moiz said that there were multiple lacerations over he back area and the largest was 15 cm in diameter, there was a laceration over the chest approximately 8 cm, there were other lacerations on the hip and thigh region, and there was another laceration on the occipital region of the head. That 2 ribs were fractured and blood was found in the left chest cavity around the lungs approximately 500 ml. The head also had a large laceration. PW4 concluded that death occurred due to massive hemorrhage due to head trauma with associated hemothorax.
9. PW5, No. 52772 Sgt. Dalmas Muthoka the Investigating Officer said the matter was minuted to him on 15.4.2019. That the OCPD also informed him that there was a murder case reported at Kijipwa Police Station. That in the company of P.C. Abdi and driver Juma they proceeded to the scene where they found the OCS from Kijipwa Police Station. That they took photographs. That the body was on the road between sisal plantations and there was injury at the back of the deceased's head. That the body was then taken to Kilifi County Hospital Mortuary. PW5 conducted investigations and preferred the charge of murder against the accused.

Defence Case

10. The accused, James Molel gave sworn statement that he used to work for Mzee Ali but went to work for Mama Hadija because she offered him a better salary. That when he left Mzee Ali's place, he took a 3-day break and upon his return, he went to Mama Hadija's place, took the cattle and went to graze in the sisal plantation with Ismael, and returned the cattle home. That on 8.4.2019 at 7.00 pm, Harun and Suleiman who work for Mzee Ali went and threatened the accused that they would kill him even if they are jailed as prisons are built for men. That Mzee Ali's wife also called Hadija insulted the accused by calling him stupid and he informed his employer Mama Hadija about it. He said that he went and reported to Mzee Ali and when nothing was done he stopped communicating with Mzee Ali and his people and that it was Ismael who used to give him reports of what was being said.



11. The accused testified that on 12.4.2019, Ismael went to graze at night and lost 27 cattle because of the large number. That normally, cattle return home at 5.00 am but on 12.4.2019, Ismael had not returned by that time. That the accused called him on phone but he was not reachable. That he decided to follow him and that he climbed a hill in the sisal plantation and saw the cattle ran off and that he followed and found them. That when he found Ismael, he told him that he was looking for lost cattle before he could go home. That the accused took the cattle home and Ismael continued looking for other lost cattle but before he got home, guards called him and said some cattle had been detained and he went and confirmed they were Mama Hadija's. That the accused and Mama Hadija went to the company to get the cattle but they used matatus back home while the cattle were driven by Abdi. That Ismael had still not returned home yet he was the one to milk. That Mama Hadija went to look for another person by the name Matano who milked the cows.
12. The accused informed court that at 8.00 pm, when they wanted to go and graze cattle, Mama Hadija said "toeni ng'ombe muende mpoteze kama jana" and that she started complaining to Ismael who said he would not go graze. That Ismael said he went alone the previous day and he was tired as he had spent the whole day looking for cattle. That the accused decided to go alone and that he grazed the cattle up to 5.00 am and returned home. That when he got to the tarmac, Mama Hadija and Matano went to help him cross the road and that Mama Hadija asked where Ismael was and he told her he would not have required her help in crossing the road if he was with Ismael. That he told her Ismael had refused to accompany him to go graze. That they took the cattle to the boma and confirmed none was lost.
13. The accused said that because he was tired, he entered the house and slept. He said that he was woken up with beatings and that it was Mzee Ali, Mohamud, Harun, Suleiman, and Salad who were beating him. He said that his hands and legs had been tied while he was asleep and when he asked why he was being beaten nobody explained. That the door had been locked from the inside and that he was beaten until he lost consciousness. That when he regained his consciousness, he found himself in hospital and that he was being guarded and that he was told he had killed Ismael.

Analysis and Determination

14. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence sworn statement, 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.
15. 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.'
16. 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

17. There is no dispute as to the death of the deceased Ismael Dhido Kopaye.

Death was caused by an unlawful act or omission**

18. When the deceased was found dead along the road in the sisal plantation, PW3 said he had a stab wound at the back of his head and Dr. Moiz of Kilifi County Hospital observed multiple fresh lacerations over the back area of the head, hip and thigh regions. The deceased also had two of his ribs fractured and there was blood in the chest cavity. He concluded that the cause of death was due to massive hemorrhage due to head trauma with associated hemothorax. The injuries must have been inflicted by a 3rd party and they were not accidental. 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

19. PW1 testified that the accused had been sacked by his employer who was his neighbor and he gave him a temporary contract as her herdsman was away. That on 14th April 2019, the accused person and the deceased went to graze together at 8.00 pm in the evening but the next morning when the accused person returned, he was alone. When he asked where the deceased was, he said he had not seen him.
20. PW2, Matan Mohamed Bare testified that he saw the accused and Ismael grazing cattle in Kazinuni and he greeted them and continued to graze.
21. PW3, Harun Salado Barisa also said that the accused and the deceased left together to the grazing field to herd PW1's cattle and on return he was alone and he said he did not know where Ismael was. PW3 said the deceased used to complain that the accused had threatened to kill him and that he also heard the accused swearing by the name of God that he would kill the deceased. PW3 called PW1, the employer of the accused and reported what he had heard. When PW1 inquired what the issue was between the accused and the deceased, the accused downplayed the issue and 3 days after, the deceased was murdered. PW3 said that the reason why the accused and the deceased were being sent to herd together was to prevent cattle from straying off.
22. Although there was no eye witness to the murder which occurred on the nights of 14th and 15th April 2019, there is very strong evidence that the accused person was the last to be seen with the deceased. His evidence that he went to graze alone is challenged by the evidence of 3 prosecution witnesses. He testified as having gone to graze alone on 13th and all prosecution witnesses say he went to graze together with the deceased on 14th April 2019 at 10.00 pm but on return the following morning on 15th April 2019 at 5.00 am, he was alone. When he was asked where the deceased was, he denied having seen him. When information was received that the deceased's body had been seen in the sisal plantation, the accused person remained in the house while everybody else rushed to the scene. The indifference shown by the accused person when told about the death of his fellow herdsman can only be construed to mean that he had a hand in the death of the deceased.
23. The accused person's defence was never raised with the prosecution witnesses. PW1 said that she actually hired him when he was sacked by her neighbor and it was not true that she pleaded with him to become a herdsman because he was more careful. The accused alleged that his former employer's workers had threatened to kill him and that his former employer and his wife called him stupid. It is not explained how the alleged threats and insults connected him to the murder of the deceased. The



evidence of the prosecution witnesses and the circumstances of this case point to the accused person as the perpetrator of the unlawful act that caused death of the deceased.

Malice aforethought

24. 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”.

25. 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.”

26. 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.”

27. The accused had threatened that he would kill the deceased. The accused person left with the deceased to go to the grazing field on the material night and when he returned alone and he was asked about the whereabouts of the deceased, he casually said he did not know. The fact that he killed him under the cover of darkness when they were just the two of them in the grazing field, the manner of inflicting injuries, the weapon used and the parts of the body injured shows that the accused was actuated with malice aforethought.

28. In conclusion, this court find 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 7TH DAY OF MARCH 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Mr. Mwawasi H/B for Mr. Otieno Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: We do not have previous records.

Mr. Mwawasi Advocate: We request for pre-Sentence Report and Victim Impact Statement.

Order: Mention on 30.5.2024 for Pre-Sentence Report, Victim Impact Statement, Mitigation and Sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

3.2024

