



**Republic v Rajab (Criminal Case 3 of 2020)  
[2024] KEHC 2352 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL CASE 3 OF 2020  
GMA DULU, J  
MARCH 5, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ALI MWINYI RAJAB ..... ACCUSED**

**JUDGMENT**

1. The accused person herein stands charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of offence are that on 20<sup>th</sup> May 2020 at around 20:00hours at Mochi village within Mnamu Location in Mwatate Sub County in Taita Taveta County murdered Festus Machila.
2. He has denied the charge. In proving their case, the prosecution has called six witnesses. On his part, the accused person tendered sworn defence testimony and did not call any additional witnesses.
3. PW1 was Matilda Mwahe Mwakio from Bura Location, Mwandolo village, whose evidence was that on 27<sup>th</sup> May 2020 Ali Mwinyi Rajab a son of her sister visited her house. In the evening, the witnesses’ brother Festus also came to the house.
4. According to this witness, when Festus tried to greet Ali Mwinyi, the latter refused the greeting prompting Festus to use the witnesses mobile phone to call Catherine, Ali Mwinyi mother.
5. Thereafter Festus left saying that Ali Mwinyi should pay for the water container and soda he had taken from his mother Catherine. Then Ali Mwinyi started crying and after eating supper, he asked for the phone of the witness and called his mother Catherine Mwakio and asked for Neto’s phone number.
6. Ali Mwinyi then left the house as if going to say prayer and then ran out to go and kill his Uncle and told Magdalene in Kiswahili – let me be in the custody of the police instead of living with people who do not understand me. This was about 9:45p.m.



7. According to this witness, at about 11p.m Ali Mwinyi came back running with a manila bag which he dropped outside the door and asked her and her daughter to open the house.
8. Due to the pressure of the manila bag, the door which was not locked, opened and the witness on being called by her daughter Magdalene went and found the manila bag near the door, with blood stains and a panga (machete) lying nearby.
9. It was her further evidence also, that Ali then ran to the back of the house to get water to take a bath, and when she asked him what had happened he responded in Kiswahili – “I have eliminated the bad omen.” The witness then called her husband David Mwachene who came and touched the manila bag, then pulled it out of the house.
10. It was her evidence that her husband used a stick to find out what was in the bag and using a security light peeped and came back crying saying that the head of the witnesses’ brother Festus Mwachila was in the manila bag. Shortly after their daughter Magdalene re-viewed what was in the manila bag and confirmed that it was the head of Festus.
11. It was also her evidence that Ali bathed and continued threatening that nobody should go near him. After taking a bath Ali went behind the cow shed and then they made a phone call to the Assistant Chief and Chief who arrived when Ali had already run away, after changing clothes.
12. It was her further evidence that a crowd gathered and Ali was pursued and tied, and police arrived later and took the panga and the head of the deceased away.
13. She identified the panga (machete) in court, and stated further that Ali talked a lot during the incident and admitted that he had killed his Uncle Festus. It was her further evidence that she accompanied the police to the house of Festus where they saw the headless body on the bed. She also identified the accused in the dock.
14. In cross-examination, she stated that she did not witness Ali cut Festus, but maintained that Ali came home carrying Festus head in a manila bag. According to her, Festus lived alone.
15. PW2 was Daudi Mwacharia Ngede the husband of PW1 Matilda who testified that on 27<sup>th</sup> May 2020 he arrived home and found his wife with the children Magdalene, Getrude and an infant, together with Ali the accused person. They had supper and he went to bed.
16. At about 11:00p.m, his wife informed him that Ali had brought manila bag with something that had blood. He thus proceeded to the sitting room where he saw the manila bag at the door way and he removed it out of the house and used a stick to open it, and assisted by the light around saw a human head and identified it as the head of his brother-in-law whereupon his wife and daughter Magdalene started crying.
17. He then phoned the Assistant Chief and Chief and people started gathering. It was his evidence that he also saw a machete on the floor, and that at the time he first came out Ali had already gone to take a bath. He said that Ali was a son of his sister-in-law, and identified him in court as the accused person.
18. In cross-examination, he stated that he initially went to sleep and was woken up because Ali had brought a manila bag with blood stains. He confirmed that he did not see Ali cutting the head. He stated that the machete had blood stains. He did not go to the deceased’s house that night.
19. PW3 Magdalene Matunda Mwachene testified that she was a niece of Festus the deceased and first cousin of Ali the accused person. It was her evidence that on 27<sup>th</sup> May 2020 she was at her parents home and Ali Mwinyi was also present.



20. They prayed at 9p.m before going to bed and shortly thereafter, Ali Mwinyi said that he wanted to leave and go home after phoning his mother. Though the mother discouraged him as it was late at night, he insisted and left and the witness and a sister went to watch TV, and after a while they heard someone say in Kiswahili – “Open the door for me.”
21. Suddenly, there was a bang at the door and as it had not been locked it opened widely and Ali Mwinyi told her that he had thrown a head of a person therein.
22. Because they noticed blood dripping from a manila bag and there was also a panga thrown by Ali, she shouted to her mother to come and see. Thereafter, the father PW2 came to the door and used a stick to see what was in the manila bag, and he saw a human head which he identified as that of Festus Mwachila.
23. According to this witness, by that time Ali the accused person had gone to take a bath then proceeded to the rear of the house. The witness then made a phone call to the Assistant Chief and Chief who came to the scene with the police and arrested the accused person. She identified the accused person in the dock.
24. In cross-examination, she stated that she did not see the accused person carrying the manila bag, but insisted that when the door was pushed open Ali (the accused) was the person standing at the door. She did not look at the machete closely. She stated that Ali wore a trouser which was blood stained, which she did not see in court. She stated that the deceased lived with Ali (the accused person).
25. In re-examination, she maintained that though she did not witness the murder, she saw the manila bag. She stated that when Ali came with the manila bag, he did not enter into the house.
26. PW4 was Dr. Christopher Mliwa of Moi County Referral Hospital Voi whose evidence was that on 29<sup>th</sup> May 2020 he performed post mortem examination of Festus Machila Mwakio at 9:30a.m at the hospital mortuary. Findings were that head was decapitated from the body and all structures of the neck exposed. No other injuries noted. Cause of death was cardio pulmonary arrest secondary to haemobic beheading using a sharp object. He produced the signed post mortem report form as an exhibit.
27. In cross-examination, he stated that he estimated that death had occurred 48 hours earlier.
28. PW5 was PC Mukau Wanyama of DCI headquarters Nairobi, the investigating officer herein. It was his evidence that on 28<sup>th</sup> May 2020 at 00:30hours while at Mwatate he received a phone call from CIP Edward Farah informing him of a murder incident at Bwamisho. He then visited the scene with police driver and Scene of Crime Officer from Voi Police Station.
29. On arrival, they met a crowd and police officers who showed them a white sack with blood stains, and a blood stained panga (machete). The sack contained a head of a male adult. Photographs of the head were taken and they then took possession of the manila sack with the head and panga as well as the suspect and put them in the police vehicle. According to this witness, the suspect informed them that he left the body in the home of the deceased at Mochi village.
30. They then proceeded in the police vehicle to Mochi village and entered the house where the deceased and accused lived and found the body on the bed covered with a duvet. The body lay in a pool of blood and the Scenes of Crime Officers took photographs of the body.
31. Neighbours and villagers helped remove the body and put it into the police vehicle and it was taken to Moi Referral Hospital mortuary – Voi. He then proceeded to prepare a file and Ali Rajab Mwinyi was interrogated by DCI, and admitted the killing.



32. According to this witness, the suspect asked that his aunt Matilda and Uncle Daudi Mwachare be present in case he made a confession, and the two persons were sought and the suspect made a confession in their presence. He produced the panga as an exhibit.
33. In cross-examination he stated that he interrogated Matilda who said that the accused person left the manila bag with the head at the door. This witness did not interrogate neighbours at the house of the deceased. He also stated that the accused person left the house of Matilda at 8:30p.m armed with a panga and returned at 10:00p.m or 11:00p.m. He stated that he did not have the blood stained shirt of the deceased, and the panga was not taken for chemical tests. That was the prosecution evidence.
34. When put on his defence, the accused person tendered long sworn defence testimony and did not call any additional evidence. It was his defence that he was a welder and lived at Mochi village. That on 27<sup>th</sup> May 2020 he was at the house of her aunt Matilda at Mwamondo village Bura Mission area.
35. That they took supper at 8p.m watched TV and his aunt prayed at 9:45p.m, whereupon he said that he wanted to proceed to Mochi village, but his aunt restrained him because it was late at night. He then proceeded to the bathroom to bath and while there he heard screams and came out but did not go near his aunt's house because the crowd started blaming him for an incident which he did not understand, and the police then came and arrested him.
36. He denied that he lived with the deceased and said that he lived at Mwakange village where his mother came from. He asked the court to have sympathy for him as he was arrested for something he did not know. He was cross-examined at length and re-examined. In cross-examination he denied seeing Festus that day but agreed that he was with her aunt Matilda.
37. At the close of the prosecution and the defence evidence, Mr. Mutidna for the defence filed written submissions and Mr. Sirima for the prosecution also filed written submissions, both of which I have perused and considered.
38. This is a murder case, and the prosecution is duty bound to prove all the elements of the offence. The burden of proof has been placed on the prosecution under Section 107 of the *Evidence Act* (Cap.80). This being a criminal case, the standard of proof is beyond any reasonable doubt – see *Sawe v Republic* [2003]eKLR.
39. I turn to the first element of the offence which is proof of death. Did the deceased die? There is on record the evidence of PW1, PW2 and PW3 that they saw the head of the deceased, a person they knew well as a relative, in a manila bag that night of 27<sup>th</sup> May 2020. When the police arrived, they proceeded to the house of the deceased and saw the headless body of the deceased. The body was taken to Moi Referral Hospital mortuary Voi and post mortem examination conducted established that the deceased died of excessive bleeding due to severing of the head. I find that the prosecution proved beyond reasonable doubt that the deceased died.
40. Was the death unlawful. Nobody has tendered any lawful cause or justification for the violent death. I find that the prosecution proved beyond any reasonable doubt that the death was unlawful.
41. Did the accused person cause the death of the deceased? Nobody witnessed the accused person cut the deceased person. The machete which was produced in court was not chemically tested for traces of blood. No clothes of the accused person were testified to in evidence as having blood stains.
42. This is a case based on circumstantial evidence. For the prosecution to prove that the accused person committed the act the inculpatory facts must be incompatible with innocence of the accused person and incapable of explanation upon any reasonable hypothesis than that of his guilt. Suspicion alone



however strong cannot be a basis for inferring guilt which must be proved beyond reasonable doubt – see *Joan Sawe v Republic* [2003] eKLR.

43. In the present case, the accused person is a relative of the deceased, a nephew. He denies seeing the deceased that day. He denied living with the deceased.
44. However, the evidence of other close relatives PW1, PW2, and PW3 is to the effect that the accused person lived with the deceased. That on the day in question they met at the house of PW1 and after an exchange of harsh words due to a debt, the deceased left for home. That the accused person later insisted on proceeding there late at night after 9p.m and though he was restrained he went there. That after a while, he came back with a manila bag containing the bleeding head of the deceased, and stated that he had ‘eliminated the bad omen.’”
45. It is also their evidence that he immediately proceeded to take a bath and went into hiding. In my view, in those circumstances and with that evidence, the prosecution proved beyond any reasonable doubt that the accused person killed the deceased, as there was no gain to be achieved by any of the witnesses in falsely implicating the accused herein. It is quite apparent that in rushing to the bathroom, the accused person was removing any traces of blood from himself and the clothes. Even if the panga or machete produced in court was not the weapon, the evidence on record points irresistibly to the guilt of the accused person as the one who killed the deceased. I thus find that the prosecution proved beyond reasonable doubt that the accused person killed the deceased.
46. Was the death caused with malice aforethought? Malice aforethought is defined in Section 206 of the *Penal Code* as an intention to cause death or do grievous bodily harm. With the evidence of the vicious cut severing the head of the deceased from the body, that sufficiently proves malice aforethought. In addition, the conduct of the accused person in insisting to go to the deceased’s home at night and coming back to tell relative that he had “eliminated the bad omen”, meant that he had formed prior intention to kill, and executed that intention and was now reporting that success. I thus find that the prosecution proved beyond reasonable doubt that the death of the deceased was caused with malice aforethought.
47. Having found that all the elements of murder have been proved by the prosecution against the accused person, I convict him of murder contrary to Section 203 as read with Section 204 of the *Penal Code* as charged accordingly.

**DATED, SIGNED AND DELIVERED THIS 5TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:

Alfred – Court Assistant

Ms. Moke for the State

Mr. Mutinda for accused

Accused

