



**Director of Public Prosecutions v Mwinga (Criminal Case
E022 of 2020) [2024] KEHC 5524 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E022 OF 2020
TW CHERERE, J
APRIL 18, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

HENRY MWINGA ACCUSED

JUDGMENT

1. On the night of November 23, 2020, Julius Kilolo heard screams and when he rushed to the scene and found one Musa Ngiri lying down on a public road near Accused's home with Accused who was armed with a stick standing nearby with his wife. He inquired what had happened to Musa but Accused told him to go away and he left the scene. He later received information that Musa had died.
2. The following morning at about 08.30 am, Joseph Muriira was informed by Musa's son that his brother Musa had arrived home with injuries the previous night. He rushed to the home of Musa and Musa informed him that he had been assaulted by Mwinga. He escorted Musa to the police station where the matter was reported and later to the hospital where he died the same day while receiving treatment.
3. A postmortem dated 0December 1, 2020 reveals that Musa suffered massive epidural hematoma over the right parietal region, flattened sulci and gyri, pressure effect with midline shift to the left from which Dr. Wachira formed an opinion that Musa died of epidural hemorrhage due to blunt trauma to the head.
4. The Investigating Officer stated that Accused reported that he had been assaulted by Musa but investigations revealed it was Accused that assaulted Musa who later died and Accused was thus arrested and charged with murder.
5. Accused denied committing the offence and stated that he was at hoem with his wife when in the middle of the night Musa went there and attacked him by hitting him on the head. He stated he fought



Musa with a piece of stick and later reported the assault to police and subsequently handed himself over to the police when Musa died.

6. Accused's wife stated that Musa who was armed with a knife chased Accused into their home and Accused fought back with a piece of stick in self defence.

Analysis and Determination

7. Section 203 and 204 of the *Penal Code* under which the accused persons are charged provide for the offence of murder and the punishment for it.
8. In the case of *Joseph Gitbua Njuguna v Republic* [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows: -

“...Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”

9. In *Stephen Nguli Mulili v Republic* [2014] eKLR the court emphasised the prosecution's duty in a criminal case and state that;

“...it is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, (2013) eKLR”

10. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the said death and that that they were actuated by malice.

a. Death

11. That Musa suffered massive epidural hematoma over the right parietal region, flattened sulci and gyri, pressure effect with midline shift to the left and died of epidural hemorrhage due to blunt trauma to the head was confirmed by the Postmortem form PEXH. 1 tendered by Dr. Wachira.

b. Proof that accused person committed the unlawful act which caused the death of the deceased

12. Julius Kilolo stated he was attracted to the scene of crime on a public road near Accused's home by screams. He found Musa lying down injured with Accused standing beside him with a piece of wood. Accused does not deny that he inflicted the fatal blow on Musa but stated that he was provoked by Musa who first hit him on the head with a rungu. Accused's wife stated that Musa who was armed with a rungu and panga had pursued Accused intending to cause him harm and Accused had fought in self defence.



c. Malice aforethought

13. The law is very clear that every homicide is unlawful unless authorized by law or excusable under the law See *Sharm Pal Singh* [1962] EA 13. In *Guzambizi Wesonga v Republic* [1948] 15 EACA 63, the court held:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
14. I have considered whether Accused was provoked and whether his defence falls under the provisions of Section 207 and Section 208 (1) of the [Penal Code](#) that he was temporarily deprived of the power of self-control and therefore had no malice aforethought.
15. In *Republic v Hussein s/o Mohamed* [1942] EACA 66 , the Eastern Court of Appeal held: -
- “When once legal provocation as defined in our court has been established and death is caused in the heat of 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. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”
16. Having listened to the evidence by Accused and his wife, there is evidence that Musa provoked Accused by threatening to harm him. I therefore find Musa’s death was caused in the heat of passion whilst the Accused was deprived of self-control by that provocation. The prosecution has therefore proved the offence of manslaughter contrary to section 202 of the [Penal Code](#) and not murder and Accused is convicted accordingly.

DELIVERED AT MERU THIS 18TH DAY OF APRIL 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For the Accused persons - Ms. Mugwe hb for Mr. Mutuma Advocate

For DPP - Ms. Rita Rotich (PC-1)

