



**Republic v Boneh (Criminal Case 44 of 2020)  
[2024] KEHC 4635 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4635 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 44 OF 2020  
RN NYAKUNDI, J  
APRIL 16, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BERNARD BONEH ..... ACCUSED**

**JUDGMENT**

1. The accused person faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The brief particulars are that on the 25<sup>th</sup> day of June 2020 at Chebarus Village – Moi’s Bridge location, the accused person is alleged to have murdered Irene Nelima Matuli. He pleaded guilty to the charge and in terms of Article 50(2)(a) of *the Constitution* and sections 107(1), 108 and 109 of the *Evidence Act*, it became the duty of the Prosecution to disapprove his innocence beyond reasonable doubt. He was represented at the trial by legal Counsel Mr. Ombego.

**THE CASE FOR THE PROSECUTION CAN BE SUMMED AS FOLLOWS;**

2. PW1 – BRUTTON OWEN MATULI – testified that he is the deceased’s son. On the 1<sup>st</sup> day of June, 2020 at around 7. 00p.m he was at home together with his grandmother, mother and nephew. He told the Court that a relative called Kennedy came while seeking for their help because he had fought with the accused by the road near their house. The deceased jumped into the fray and another fight started. He testified that in the process of struggling with each other, he saw the Bernard stepping on his mother’s leg which caused her to scream loudly, “Boneh umenivunja mguu”. Bernard did not do anything about it but went home. They mobilised means to take her to hospital where she was treated then discharged and advised to be coming for check-up. She continued nursing the injuries for three weeks and on 25<sup>th</sup> June, 2020 she began having difficulty in breathing and was rushed to Cherangany Nursing Home where she died. Brutton also testified that the deceased had reported a case of assault causing actual bodily harm and so had the accused. He confessed that their family depends on the proceeds of chang’aa- which the deceased used to brew and that Ken was a regular customer who had



on the day of the fight, just been served with the illicit brew. He further confessed that he was aware that but for his mother's injuries, Ken, him his brother and mother would have been charged in Court for assaulting the accused. Lastly, this witness confirmed that prior to her demise, his family and that of the accused had a successful reconciliatory meeting as evidenced by the agreement dated 24/06/2020. He confirmed that the other eye-witness (his grandmother – had since passed on and therefore could not come to testify).

3. PW2: INSPECTOR WILBONA MARONGE testified that she was the Officer investigating the matter. According to her preliminary investigations, both the accused and the deceased reported cases of assault against each other and were issued with P3 Forms that were returned duly filled. They were all arrested and bonded to appear before Court on 26/06/2020. She testified that due to the harmless and personal nature of the offence, the parties were advised to try and settle the matter amicably before the bonded date. She was aware that the parties had a successful reconciliatory meeting on 24<sup>th</sup> June, 2020 which she produced in Court. Also, according to the investigations, the deceased had not exhibited any signs that she required urgent medical attention that would have necessitated swift action until the fateful day, 3 weeks later. The accused was then charge with the offence of murder. This witness similarly confirmed that the other eye-witness (PW1's grandmother and mother to the deceased) had passed on and therefore could not come to court to testify.
4. PW3: DR.OKUMU testified that on the 29<sup>th</sup> day of June, 2020 he conducted a post-mortem on the body of the deceased. The only significant finding was a scar on the right foot at the medial malleolus. In his opinion, the cause of death was due to fat embolism syndrome caused by respiratory failure. He explained that the fat particles must have travelled from the injury at the malleolus then clogged the lungs causing the death. He further explained that this was a unique case considering people heal from those kind of injuries without a problem. Moreover, he said, it is not easy to detect the presence and build-up of fat particles around an injury.

#### **THE CASE FOR THE DEFENCE CAN BE SUMMED AS FOLLOWS;**

5. When placed on his defence, the accused gave sworn testimony and called 2 witnesses. In brief, his testimony was that on 1<sup>st</sup> June 2020 at around 7.00 p.m he was on his way back home from escorting a friend. He met with Kennedy together with BATISI MUCHIKA. He extended his hands towards him to greet him but Kennedy started abusing him calling him, "Mbwa. Takataka. Nikusalimie kama nani?" It was at that point that Kennedy started fighting him and after Batishi separated the two, Kennedy ran towards the deceased's home – where he had been drinking chang'aa. He picked himself up and went home – which is directly opposite the deceased's house – whereupon the deceased came out to attack him. He testified that the deceased's mother tried to caution her from jumping into a fight that did not involve her but she refused to heed counsel. She grabbed him tightly by the neck and shortly afterwards, PW1 came out with sticks which they used to beat him all over. He said that as he struggled to free himself from the grip of the deceased and escape the onslaught, he heard the deceased screaming "Boneh umenivunja mguu". By the time he freed himself, he was bleeding from the head and had sustained injuries on the back and legs. He went to the hospital for treatment and later reported the matter at the Police Station. Shortly thereafter, the deceased also reported against him. The deceased's sons were arrested then released on bond to attend court on 26<sup>th</sup> June, 2020 and so was he. He confirmed that they were advised to try settle the matter out of court since they both did not sustain serious injuries from the assaults. He testified that he was reconciled with the deceased in a meeting chaired by their village elder. He produced the agreement together with his P3 Form and ripped clothes as exhibits in the matter.



6. DW2: BATISI MUCHIKA's testimony was almost similar to that of the accused. He testified that on 1<sup>st</sup> June 2020 at around 7.00 p.m, he was drinking chang'aa together with Kennedy at the home of the deceased who he knew distils the illicit brew. Kennedy asked him to accompany him to the nearby shops to check on his son because the boy had taken too long to return from an errand. On their way, they met the accused who wanted to greet them but Kennedy started abusing him calling him a dog and rubbish. Shortly thereafter, Kennedy started attacking the accused and he intervened. He saw Kennedy running back to the deceased's home and heard him talking about the fight. The deceased stormed out of the house and asked the accused what more he wanted from them after they paid him the cost of a tank. He heard the deceased's mother unsuccessfully beseeching and cautioning her three times against joining a fight that concerned her not. The deceased then attacked the accused by grabbing him on the neck as her sons beat him up using wooden poles. He witnessed the three almost ripping off the accused's clothes before he managed to free himself from their grip. He heard the deceased screaming that her leg was injured. He testified that it was him who took the accused to hospital because he noticed that he was bleeding from the head and was complaining that the back and thighs were also painful from the beating.
7. DW3: NICHOLAS MBATIANY testified that he is the village elder Chebarus Village. On 20<sup>th</sup> June 2020 the deceased went to his home to request him to chair a reconciliatory meeting with her neighbour – the accused. He was also told that the two had fought and the matter was pending at the Police Station. Her sons had been arrested together with the accused for a case of assault. He agreed to do that and on the 24<sup>th</sup> June 2020, they had a successful reconciliatory meeting and everybody signed an agreement to that effect. They noted that both the deceased and the accused had sustained injuries but appeared to be doing well. After the signing, they shared a meal and the meeting ended. The following day, he was shocked to learn that the deceased whom he had just successfully reconciled with the accused had passed on.
8. Thereafter, both Counsels filed their respective submissions in respect of their identified typology for or against the indictment facing the accused person. Given this background, it is now my singular duty to establish whether the Prosecution under Article 157(6)&(7) of *the Constitution* as read with section 107(1), 108 & 109 of the *Evidence Act*, a case of murder has been sufficiently proved beyond reasonable doubt.

## ANALYSIS AND DETERMINATION

9. I think it makes sense to start with, to lay down the principles on what constitutes the burden of proof of beyond reasonable doubt. This is to distil the element of a strong case for the Prosecution or a weak case which has been controverted by the Defence. With regard to the offence of murder, contrary to section 203 of the Penal Code, that duty of the standard and burden of proof constitutes the following elements;
  - i. Death of the deceased.
  - ii. Unlawful causation of the death.
  - iii. Malice aforethought in causing the death.
  - iv. Participation of the accused in causing the death.
10. It is emphasized again and again that the burden of proof rests with the Prosecution and it never shifts to the accused person unless and until the nature of the evidence is that which falls within section 111 of the *Evidence Act*. Undoubtedly, this provision does not shift the burden of proof to the accused person. (see the principles in *Mwaula and another v The Republic* (1980)KLR 127 (1976-80)1KLR 1656,



Mbugua Kariuki v The Republic (1976-80)1KLR 1085, Longinus Komba v Republic (1973)LRT 127, Ernest Asami Bwire Abanga alias Onyango v R CACRA No.32 of 1990. In the same vein, the Court in Andrea Obonya v R (1962)E.A 542 stated as follows;

“As to the standard of proof required in criminal cases DENNING, L.J (as he then was), had this to say in Barter v Barter (1950)2 All E.R 458 AT 459:

‘It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.’

That passage was approved in HORNAL n NEUBERGER PRODUCTS LTD. (1956) All E.R 970, and in Henry H. Ilanga v. M. Manyoka (1961)E.A 705 (C.A). In HORNAL v. NEUBERGER PRODUCTS LTD., HODSON L.J., cited with approval the following passage from KENNY’S OUTLINES OF CRIMINAL LAW (16<sup>th</sup> Edn.), at p.416

‘A larger minimum of proof is necessary to support an accusation of crime than 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 more than to 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.

From ancient of times, it is undisputed that any proof of guilty against an accused person by way of evidence is based on direct or circumstantial surroundings at the locus in quo of the crime. With this backdrop in mind, what do I make of the case for the prosecution as against the accused? The second interrogatory question also to be answered by this court is whether the defence put up a strong case to deconstruct the burden of proof of beyond reasonable doubt to secure himself an acquittal.

11. First and foremost, in so far as section 203 of the Penal Code is concerned, being the subject matter of this trial is the fact of death. It is now settled law that proof of death of a human being whose right has been violated under Article 26 of *the Constitution* is based on circumstantial or direct evidence and the aspect of a post-mortem report. Hence the position in Kimweli v R (1968)(EA) 452 in which the court affirmed that death may be proved by presentation of a post-mortem report on such a body positively identified by the next of kin or such other person with knowledge and full proof information about the deceased. In the case before me. The post-mortem dated 29<sup>th</sup> June 2020 By Dr. Okumu confirms that Irine Nelima Matuli is dead. This was a post-mortem examination conducted at Cherangany Nursing Home, duly identified by her brothers Antony Matuli and Chrispus Matuli. There is no contrary evidence to counter the autopsy report. This element is therefore proven beyond reasonable doubt.
12. Secondly is the ingredient of unlawfulness causation of death. The law is clear that the act or omission of an accused person which results in the offence committed may it be homicide or any other related offence, for it to count, the characteristics of unlawfulness must be established beyond reasonable doubt. In murder cases, or manslaughter for that matter, causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the Penal Code is concerned.
13. For purposes of this case, given the nature of the evidence by the Prosecution, I reiterate the provisions of section 213 of the Penal Code which defines causing death to include acts which are not the



immediate or sole causes of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;

- a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;
- b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;
- c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;
- d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
- e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

14. In the case of *R v Gusambisi s/o Wesonga* (1948)15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the Penal Code on provocation. The chain of events on the commission of this offence is well articulated by PW1 who told the court that at the initial stage Kennedy had fought with the accused person on the material day. The deceased apparently jumped into the fray, triggering another fight. According to PW1, it was at that spur of the moment that the accused stepped onto the deceased's right leg, which caused her to scream loudly, "Boneh umenivunja mguu!" Thereafter, they mobilized resources to take her to the hospital where she was treated and discharged with a follow up on clinic reviews to monitor the progress of healing. PW 1 further testified that on 25<sup>th</sup> June, 2020 the deceased began having difficulty in breathing and was rushed to Cherangany Nursing Home where she died while undergoing treatment.

So, the million-dollar question to be answered by this court based on the Prosecution evidence is whether there is a correlation between the injuries suffered by the deceased upon being stepped on by the accused and the aftermath on the cause of death as opined by the pathologist PW3. For good or bad, what was the proximate cause of the death of the deceased? The logic in answer to this question is an evaluation of the cannons I refer to actual cause and effect relationship between the assault and the deceased's injury. It is not in dispute that the deceased suffered a fracture at the malleolus and segmental fibular of the right leg that was sustained following an assault after which she developed respiratory complications 3 weeks later.

15. In my considered view, the prosecution through the testimony of PW1 introduced cogent evidence that the accused's negligent act or omission increased the risk of harm to the person on the deceased's position and that the harm that was in fact sustained was a substantial factor in producing the fatal impact of terminating the deceased's right to life. The cause of death as established by the pathologist is not one of speculation or conjecture or probabilities. In absence of the fracture of the malleolus, it is my strong view that the respiratory failure could not have occurred. The prosecution has shown that the causal chain from the accused's culpability to the injury suffered by the deceased was not too indirect to absolve him of any blameworthiness. The unlawful act of the accused falls within the ambit of section 213 of the Penal Code to the effect that he would be held responsible for another person's death although his act is not the immediate or sole cause of the death.



16. What happened here? The accused inflicted bodily injury to the deceased and as a consequence of that injury, she was taken to Cherangany Nursing Home and while undergoing treatment she succumbed to death three (3) weeks later. The pathologist PW3 told the court that the injuries so suffered hastened the death of the deceased. It matters not whether the deceased submitted herself to proper medical or surgical treatment or had proper precautions as to her mode of living. The model of this case can be answered by an explanation in this format, that if person X acts in a way either by words or action, or a combination of both towards person Y such as to cause him or her to feel humiliate, belittled, or arouse anger that would cause him or her to lose self-control and assault person X, who carries the higher scale of blameworthiness? In both the Prosecution and rebuttal from the Defence case, the deceased bears greater responsibility for the fatal injuries inflicted the accused. This was obviously an act or conduct by the deceased which could have provoked the adrenaline in the DNA & RNA of the accused to act in a certain way and he did so to forestall further attacks or to dis-empower the deceased from further retaliation.

Remarkably enough, in my judgement, and equitably notable is the imminent inclination that the element of unlawfulness has been disrupted by the spectacular defence case and the discernible features by the star witness for the Prosecution PW1, Brutton Owen Matuli. For that matter, the burden of proof on this element has not been discharged beyond reasonable doubt.

17. The third element that the prosecution must prove beyond reasonable doubt is that of malice aforethought under section 206 of the Penal Code, which defines it as follows;
- a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may be caused.
  - c. An intent to commit a felony.
  - d. An intention to facilitate the escape from custody of a person who has committed a felony.

18. In this matter, what is in issue is the differential minimum as to whether the accused's unlawful act or omission can be manifested within the provisions of section 206 of the Penal Code. The landmark case of *Rex v Tubere s/o Ochen* 15 EACA 63, the Court expounded further on what to look for in construing malice aforethought in a given factual matrix; "In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it was used and part of the body injured".

In *Hyam v DPP*(1974)A.C. the Court held inter-alia that:

"Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm"

19. Strictly speaking, the accused was involved in a fight with one Kennedy at the roadside near their homestead. This first fight between the Kennedy and the accused seems to have been de-escalated by the parties themselves. No sooner had the dust settled than the deceased jumped into the fray, which



triggered another fight with the accused. That is when the accused stepped on her right leg, resulting into a fracture as established by the Pathologist PW3 in his post-mortem examination report.

20. This second trajectory of the scuffle between the accused and the deceased as from the evidence adduced before this Court by PW1, it is unlikely that section 17, 207 & 208 of the Penal Code can be divorced from the entire episode. The inference I make as manifested from the evidence is that if two persons quarrel and fight, upon equal terms, and upon the spot whether with deadly weapons or otherwise, each makes an attempt to defend himself/herself or otherwise each gives provocation to the other, and whoever is right or wrong and strong in the quarrel strikes the first blow. There is no mention of these paradigms in the foregoing evidence in the Prosecution case. But whatever, it is nature flowing from the evidence, the deceased initiated this second fight which is sufficient to have deprived the accused of the power of self-control. This is also of significance due to the fact that the deceased was of the female gender. Sometimes, it is difficult for a man of African origin to be overcome or overpowered by the female gender considered weak by the traditional metrics. It will be noticed that none of the warring parties was armed with a dangerous weapon save that the stepping of the accused upon the deceased's right leg was of such a force that it fractured the malleolus and segmental fibular. The holistic approach to this matter is that the act or omission by the accused was actuated with provocation. It seems to me that by the deceased's suffering a serious fracture to her right leg, excessive force must have been applied under the rubric of self-defence in section 7 of the Penal Code. There does also appear from the defence witness DW1, DW2 & DW3 that in retaliation, the deceased's family also came into her aid to mitigate the escalation of the fight into a more serious battle ground between the parties.

21. The Court of Appeal in *Ahmed Mohammed Omar & 5 others v Republic (2014)Eklr* in recognizing these principles(principles of English Common Law) held as thus;

“What are the common principles relating to self-defence? The classic pronouncement on this issue which has been severally cited by this Court is that of the privy council in *Palmer v R (1971)A.C 814*. The decision was approved and followed by the Court of Appeal in *R v McINNES 55 Cr.App.R.551*. Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.... Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off and old score or may be pure aggression. There may be no longer any link with a necessity of defence..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case, the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter. Any other possible issues will remain. If any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

22. . In this case, the accused essentially had nothing to do with this latest fight between him and the deceased. The primary fight as evidenced from the Prosecution and the Defence case was between him and one Kennedy. Indeed Kennedy took flight from the scene and went to the home of the deceased



to seek for help and gave a narrative on what had transpired with the accused person. The act seems to have annoyed the deceased who then moved in to trigger a fresh fight with the accused. The evidence by the Prosecution and Defence informs this Court that it was all about some tank and payments which had not been reconciled as between the accused and the deceased. Although we are not told whether either the accused or the deceased was armed with a dangerous weapon, one piece of evidence is clear that the accused stepped on the deceased's right leg, occasioning a fracture as established by the post-mortem report examination dated 29<sup>th</sup> June, 2020.

23. . On scrutiny, of both the Prosecution and Defence case, I hold the view that the defence of self under section 17 of the Penal Code and provocation in terms of section 207 & 208 of the Penal Code is supported by the evidence on record. This was an accused person who was not only attacked by the deceased but by her fraternal family members. The accused has shown that he acted on the heat of passion, provocation and self-defence on being attacked by the deceased. In this combatant incident, the accused was alone while the deceased rallied behind her a gang of three sons to rise up and deal with the accused. It is implicit that there could have been a cooling off period between the accused and the deceased, but by dint of the deceased's sons joining the fight, as a consequence, the situation got worse. Admittedly, as to why the deceased reiterated to attack the accused person on a completely isolated dispute from that of between Kennedy and the accused, seems unrelated. On the evidence, it was a distinct matter which was not current to occasion a full blown acts of assault to the physical frame of the accused's body. Indeed, he suffered injuries which the Prosecution witnesses have not controverted. What made the deceased to lose self-control and act in a particular manner to assault the accused remains very sketchy although there is mention of a tank and payment issues. What would a reasonable man do in the ordinary circumstances the accused found himself struggling with at the scene of this crime. Essentially, it would be in consonant with the guiding principles in *Ahmed Mohammed Omar & 5 others v Republic (2014)eKlr*. In sum, the intention to cause death or grievous harm was not foreseeable, dislodging the element of malice aforethought.
24. . Accordingly, the various defences of self or provocation or justification and excusable homicide is available to the accused person who killed the deceased on non-confrontational circumstances on his part. It can be appreciated that the accused person was not armed with any dangerous devices or weapons against the deceased. Unsurprisingly, the fracture on the face of it could not have manifested as the cause of death though elsewhere in this judgement, I have objectively analysed the application of Section 213 of the Penal Code. The approach I take in this matter, in applying these formulations, is that the deceased died yes, but the cause of it is within the precise bounds of legitimate self-defence. For avoidance of doubt, this killing was the outcome of a quarrel and a fight. It is excusable but not justifiable but the circumstances compromise certain positions whose direct consequence is to acquit the accused of any culpability for the offence of murder under section 203 or manslaughter under section 202 of the Penal Code. The accused's conduct in this case has been assessed against the Court's experience of human behaviour and social interaction at the time, his conduct can be described as involuntary.
25. . It is within the context of the aforementioned legal principles that the case for the prosecution ought to be dismissed on the law of homicide as the evidence weighs heavily in favour of the accused. As a consequence, he stands acquitted unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF APRIL 2024**

**In the Presence of**

**Mr. Ombego Advocate for the Accused**

**Mr. Mugun for the ODPP**



**The Accused**

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**R. NYAKUNDI**

**JUDGE**

criminal case no 44 of 2021	0
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