



**Republic v Andai (Criminal Case 35 of 2020)
[2024] KEHC 4303 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 35 OF 2020
HI ONG’UDI, J
APRIL 15, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOHNSTONE OLIMBA ANDAI ACCUSED

JUDGMENT

1. Johnstone Olimba Andai the accused stands charged with the offence of murder contrary to Section 203 as read with Section 204 Penal Code. The particulars being that the accused on the 23rd day of August, 2020 at Kaptembwo Location Rhonda Sub-location, Nakuru West Sub-county within the Nakuru County, murdered Peter Getanda Oyaro.
2. The accused person pleaded not guilty and the case proceeded to hearing, with the prosecution calling a total of 8 witnesses.
3. Moses Onambi Korari testified as PW1 stating that on 22nd August 2020 at around 10.00pm while in the bathroom, he heard “Rambo” say “do you really know me”. He came out and found “Rambo” with a panga and the person he was earlier talking to was lying down with blood on the face and a cut on the head. He struggled to take the panga from Rambo’s hand and in the process the person who was lying down managed to escape.
4. He testified further that he did not see the said person wake up but he was informed that he had left and was later taken to the hospital. He added that he found “Rambo” doing the act, he did not know his other name but he had known him for 10 years, as a kind person who lived in Msalaba area. He identified the accused person as “Rambo”. The panga he took from the accused was later produced as EXB 1.
5. In cross examination, he confirmed that he handed over the panga to the police on 1st September 2020 but he never signed any documents on the same. He stated that the sharp part of the panga had blood.



6. Paul Ouma Okiri testified as PW2 stating that on 22nd August 2020, he saw PW1 holding the accused who was beating the deceased. He added that the deceased left though he appeared drunk and so did the accused. The accused demanded that PW1 return his panga but he refused.
7. In cross examination, he confirmed having known the accused for a period of 8 years, as a good person save for the times when he was drunk. He further stated that he did not see anybody being cut but he heard the accused asking for his panga. He said the time of incident was 10.00 p.m.
8. Magdalene Getemba Nyakundi the sister to the deceased testified as PW3 stating that on 23rd August 2020 at around 8.00 am her husband called her and informed her to go where the deceased was since he had been cut. She called her cousin Hillary who informed her that the deceased had been taken to Nakuru Level Five hospital. Upon arriving there she saw the deceased who was in a serious condition. He had a bandage on his head and was asking for water and milk.
9. She testified further that the deceased only mentioned the name “Rambo” when she asked him what had happened to him. It was her testimony that the deceased passed on while in theatre and the post-mortem was later done. She added that the deceased had a cut on both sides of the mouth, the head and hand. The post-mortem report was later produced as EXB 2.
10. In cross examination, she confirmed that she only saw the accused at the police station when she went to report the incident.
11. No. 91431 P.C Edwin Karani attached to Ongata Rongai Police Station but formerly at Ronda police station testified as PW4. He stated that on 22nd August 2020 while at the crime duties standby, three people came to the station and informed them that they had witnessed someone being assaulted. Together with his colleagues P.C Gitau and Corporal Juma they walked to the scene and found the deceased, who was sitting and had injuries on the head. He later told them his name and they sought to take him to the hospital.
12. He stated further that they heard shouts from a range of 100 meters. It was the accused and they approached him, but he retreated so they ran after him. They flashed him out from inside the toilet within the compound where he had been hiding. The accused appeared drunk and they took him to the police station where he was interrogated. He however shifted account of what had happened and could not explain how the accused had been identified. He added that the deceased was taken to PGH. He said they had been told of another person who was also found injured 300 meters from where the other incident had occurred but they did not find him.
13. He further stated on 24th August, 2020 in the morning, PW3 informed them of the deceased’s demise and that he had been assaulted by one “Rambo” (Alias) who is the accused herein. He added that they were informed that, that was the person they had arrested and was already in their cells. He stated that they were unable to know where the first person went or what happened after the 1st victim went to hospital. He stated that they took the accused to court on a holding charge of assault.
14. In cross examination he confirmed that they had met a person who had identified the accused by his voice and that the name “Rambo” was associated with the accused. He confirmed further that they did not find the accused at the scene and that the charge sheet had no alias “Rambo”. He added that when they apprehended the accused there was light coming from a street light and he had no weapon.
15. Dr. Titus Ngulungu (PW5) performed the post mortem at Nakuru Teaching and Referral Hospital on 25th August 2020 at 11.40am upon a request from Kaptembwo Police station after the body had been identified by Vincent Oyando and PW3. He found the cause of death to be head injury with



- blood vessels including soft tissues and blood loss as a result of sharp trauma to the head and limbs. He produced the postmortem report as exhibit (Pexb2).
16. Samwel Wanyoike Nganga testified as PW6 stating that on 23rd August 2020 at around 9 am on his way to work, he saw a crowd of people and someone he knew was wounded. The person had been cut on the face, the head, the shoulder and blood was oozing. They took him to the hospital but he was later informed that he had passed on.
 17. Polycarp Kutta Kwenyu (PW7) the principal government analyst prepared a DNA report in respect of the items presented to him by PC Wakoli which included; Fingernails of Peter G. Oyaró (deceased) Marked “A”, Hooded black jacket marked “B” and panga with a black handle marked “C”. He confirmed that the DNA profile from the said items matched that of the deceased. He produced the said report as Pexh 2b.
 18. In cross examination he confirmed that he did not conduct a Touch DNA but only concentrated on the areas with blood on the items presented.
 19. No. 82559 P. C Amos Wangoli, attached to DCIO’s office Nakuru testified as PW8. He stated that on 24th August 2020 he was called by I.P Musila, who sent him to Ronda police station where a murder report of Peter G. Oyaró had been made. The accused whose other name was Rambo had been arrested. He called him out and he responded. He later went to the scene at Musalaba together with P.C Karanja and I.P Doreen where they recovered a black jacket.
 20. They recorded witness statements from those who witnessed and one of them was PW1 who gave them the panga which had a black handle, and the accused was arrested. He produced the panga, jacket and exhibit memo which were produced as Exhibit P1, P3 and P4 respectively.
 21. In cross-examination he confirmed that they did not get any sample from the accused and that he was the only one with the name ‘Rambo’ in that village. He added that PW1 knew the accused well by voice and sight. He confirmed further that PW1 came out with the panga after a week and that from the villagers there was no grudge between PW1 and accused.
 22. In re-examination he stated that he was not sure if the accused committed the offence and that the two witnesses saw the accused with the panga. He added that PW1 was in shock upon taking the panga from the accused, hence the delay in releasing it to the police.
 23. When placed on his defence the accused elected to give unsworn evidence without calling any witness. He stated that on the night of 23rd August 2020 while in his house he heard noises, and went out to the scene where he saw PW1 among those present. When the gate was opened people started dispersing and PW1 went to his place carrying a panga. He testified further that he heard the name “Rambo” being mentioned but did not witness anything. That he did not know the deceased and he never saw him.
 24. He stated further that when he went to the scene he did not have any weapon. He said PW1 was his brother in law and had lied in court about him. He denied his name being “Rambo”. He went on to state that on 22nd August 2020 there was a person who had reported that he attempted to steal from him, and he was arrested. He was however never given the reason for his arrest. He testified that he was in the cell with PW1 for being in possession of the murder weapon but PW1 was later released. He confirmed being at the scene but not being involved in the crime. He added that there was no “Alias” name of “Rambo” in the charge.
 25. Both parties filed written submissions through their counsel at the close of both the prosecution and defence cases.



26. The prosecution's submissions dated 28th December 2023 were filed by counsel James Kihara, who submitted that the prosecution tendered cogent evidence which was beyond reasonable doubt and which the accused person failed to displace vide his defence. He added that the accused failed to avail any witness to support his case and hence did not dislodge the prosecution's case. He urged the court to convict the accused for the offence of murder.
27. The accused person's submissions dated 15th January 2024 were filed by the firm of Geoffrey Otieno & Co. Advocates. Counsel Chepng'etich submitted that the identification of the accused by PW1 was wanting. She added that the accused in his defence claimed that there was bad blood between him and PW1 which was the probable reason for him having implicated him as the perpetrator. She placed reliance on the cases of Abdalla Bin Wendo v Republic [1953]20 E.A.C.A and Roria v Republic [1967] EA at 573.
28. Counsel submitted that the prosecution failed to call one Wairiuko whom PW5 testified that they were called to assist while at the scene. She added that the report by PW7 did not link the accused to the offence at all, and PW8 could not identify the motive of murder on the part of the accused person. Additionally, that PW1, PW2, PW4 and PW8 testified that the accused was drunk on that fateful day, thus the element of malice aforethought was not established. She urged the court to acquit the accused under section 215 of the Criminal Procedure Code.

Analysis and Determination

29. I have carefully considered the evidence on record and the submissions by both parties. The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Murder is defined under section 203 as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
30. For a charge of murder to be proved the following ingredients must be satisfied:
 - i. The fact and cause of death.
 - ii. The actus reus: the act of causing the injury leading to the death of the deceased. The act or omission must have been orchestrated by the accused.
 - iii. Malice aforethought which forms the “mens rea ” must be shown to have been present.
31. On the first element of fact and cause of death, the testimony of PW6 and the post mortem report produced as Exhibit P2 attest to the fact that the deceased died on 23rd August 2020. The said report has given the cause of death as head injury with blood loss, blunt and sharp force trauma to the head and limbs. I find that the fact and cause of death has been proved.
32. The second issue is the act causing the injury that led to the deceased's death. PW1 testified that while he was in the bathroom, he heard the accused who is also called “Rambo” say “do you really know me”. When he came out he found the accused with a panga and the person he was talking to was lying down with blood on the face and a cut on the head. PW2 on his part testified that he saw PW1 holding the accused who was beating the deceased. In cross examination he confirmed to not seeing anybody being cut and that he heard the accused asking for his panga be returned to him.
33. In his evidence in chief PW3 testified that the deceased only mentioned “Rambo” when she asked him what had happened to him. During cross examination she stated that she saw the accused for the first time at the police station when she went to report the incident. It was PW4's testimony that when



- they went to the scene they found the deceased who was sitting and had injuries on the head. He added that there was another person who was also injured other than the deceased on the material day but they did not see him. PW6 testified that on his way to work, he saw a crowd of people and someone he knew was wounded.
34. The accused in his unsworn defence stated that while in his house he heard noises, he went out to the scene and saw PW1 among those present. When the gate was opened people started dispersing and PW1 went to his place carrying a panga. He stated further that he heard the name “Rambo” being mentioned but that is not his name. He added that he did not know the deceased, he never saw him and when he went to the scene he never had any weapon.
35. From the evidence of PW1, PW2, PW3, PW4, PW6 and PW8 it is clear that none of them saw what happened to the deceased as they all saw him after he had been injured. PW7 testified that the DNA profile from the items brought for examination by PW4 matched that of the deceased only. It was PW8’s testimony that they did not get samples from the accused and that it was PW1 who gave them the panga. PW4 also testified that when they arrested the accused he had no weapon.
36. PW1 who allegedly took the panga (Exhibit P1) from the accused kept it. It was recovered from him by the police on 1st September, 2020. He just said he handed over the panga to the police and no details were given nor presented to the court. The said handing over was done a week after the occurrence of the incident with no explanation, and no record at the police station.
37. The burden of proof in a criminal case is always cast upon the prosecution. This is well illustrated under Section 107 (1) of the *Evidence Act* Cap 80 of the Laws of Kenya which provides:
- “(1) Whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
38. In addition, Lord Denning dealt with the onus of proof in criminal cases in the case of *Miller v Minister of Pensions* (1947) 2ALL ER 372 where he stated:
- “It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would fail to protect community if it admitted fanciful possibilities to deplete the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible but not in the least probable; the case is proved beyond reasonable doubt but nothing short of that will suffice.”
39. It is also trite law that an accused person is presumed innocent until the contrary is proved as clearly provided for under Article 50 (2) (a) of *the Constitution* of Kenya, 2010. Therefore, the prosecution bears the burden to prove that the offence was committed and the culprit is the accused person in the dock. The evidence by the prosecution must meet the threshold of beyond reasonable doubt and nothing less like suspicious possibilities.
40. An evaluation of the evidence before this court reveals that the prosecution witnesses especially PW1 who was at the scene did not reveal to the police and to the court what exactly happened to the deceased since he found the deceased already injured and “Rambo” was holding a panga. PW2 in his evidence in chief said he had seen the accused beating the deceased. In cross examination he denied seeing any one being cut. What then did he witness? Both PW2 and PW3 testified that it was “Rambo” who had



attacked the deceased but no evidence was adduced identifying the accused as “Rambo”. If indeed that was the name the accused was known by it should have been clearly stated in the charge sheet as his ‘alias’ name. What was so difficult in doing that?

41. Additionally, PW4 testified that there was another person who had been arrested other than the accused but they did not find him at the police station. Who was this person and why was he arrested? Unfortunately, the said person was never availed as a witness and neither was the person who had also been injured availed as a witness.
42. Further PW4 told the court that three (3) members of the public told them that they had witnessed the deceased being assaulted. There is no evidence that the statements of these three (3) persons were ever recorded and none of them came to testify. Had they indeed witnessed the incident that night they could even have been called to identify the arrested person at an identification parade which was not the case here.
43. The accused explained what according to him occurred on this fateful night. Weighing all the evidence adduced, this court finds that the prosecution did not avail sufficient evidence pointing out the accused as the only person who could have committed the heinous crime. The accused or somebody else may have committed it. It was the duty of the prosecution to bring out this clearly, but it failed to do so.
44. In view of the above it is my finding that the prosecution case was not proved beyond reasonable doubt. I therefore find the accused not guilty and accordingly acquit him under Section 215 of the Criminal Procedure Code. He shall be set free unless otherwise lawfully held under a separate warrant.
45. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF APRIL, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

