



Republic v Malio (Criminal Case 7 of 2019) [2024] KEHC 5632 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

CRIMINAL CASE 7 OF 2019

JN ONYIEGO, J

MAY 23, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ZAMZAM MALIO ACCUSED

JUDGMENT

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 10.06.2019 in Maramtu village, Maramtu Sub Location, Madogo Division within Tana River County she unlawfully murdered one Saumu Mui.
2. The accused person pleaded not guilty to the charge and the matter proceeded to full trial wherein the prosecution called a total of twelve (12) witnesses in support of its case. Upon the close of the prosecution’s case, she was placed on her defence wherein she gave a sworn testimony and called one witness.
3. Via a ruling delivered on 23.05.2020, the court reached a determination that PW1, Mohamed Ali could not testify against the accused as the marriage between him and the accused was still subsisting hence a spouse to the accused. The same was informed by the fact that various witnesses referred to the accused person as the wife of PW1. As a result, the said witness was stood down.
4. PW2, Yussuf Ali Funani, a boda boda operator in Madogo testified that on 13.06.2019 while with his area chief, his uncle and his uncle’s wife, he heard one Mohamed Ali tell the said chief that the lady who had burnt another lady (the deceased) was reportedly back. That he was sent to go and make a report at Madogo Police station.
5. That while there, a lady known as Omari informed him that the said lady had taken a bag and was leaving. He was therefore told to go to the stage and confirm whether the same was true. Upon reaching



- the stage, he just found a bag. He went further to state that one Mohamed told him that he had previously sent some young men to spy on the lady and that they had since found her hiding.
6. That it was at that point that one person shouted 'here she is' and so people started beating the lady a fact that prompted him to call the police who came to rescue her thus taking her to the police station. On cross examination, he stated that he was a vigilante member and that he did not participate in beating the said lady.
 7. PW3, Hero Hussein, a boda boda operator testified that on the material night at about 7.40 p.m., at Madogo stage, he carried a pillion passenger to a place known as Maramtu. That the journey to Maramtu was about ten kilometres from Madogo stage where he was at the material time. He stated that upon reaching Maramtu, the pillion passenger, the accused herein told him to wait only for her to return after about ten minutes.
 8. It was his evidence that the accused person came out running as a mob of people followed her and so, she tried to ride the motor cycle in vain. That people came from nowhere and started beating him together with the accused and in the process, he sustained injuries thus prompting him to report the same to the police station. While there, he saw the motor cycle that he had left at the scene already parked and in a damaged state.
 9. PW4 Juma Yeta testified that on 10.9.2019 at 8.00 p.m., he was in his house praying when he heard noise emanating from the deceased's place. When he went to find out what was happening, he found Saumu, the deceased burning. That there were many people at the scene and the deceased was crying while saying that 'Zamzam ameniua'. The lady was thus taken to the hospital but on the fourth day, she died.
 10. He told the court that he knew the deceased as the accused person's co-wife. On cross examination, he stated that he did not see how the fire started save for the fact that he heard the deceased cry that Zamzam had killed her. That the deceased further stated that the accused had poured oil on her and then set her ablaze.
 11. PW5 Issa Mohamed Mambaire, a neighbour as well as a brother to the deceased, testified that on the fateful night, he heard screams emanating from the deceased's house about 30 metres away. That when he responded, he saw a huge fire and someone burning while running towards the neighbouring house. It was his case that together with others, they attempted to put out the fire but the deceased was already seriously burnt.
 12. It was his case that while the deceased was burning, she stated that 'nimechomwa na Zam mke wa Mohamed'. That Zam was the co-wife to the deceased. On cross examination, he stated that he did not know the cause of the fire but he heard the deceased say that 'nimechomwa na Zam'.
 13. PW6 Yussuf Ramadhan testified that on 10.06.2019 at 8.00 p.m., he heard loud noise with cries coming from the home of Mohamed, his neighbour Upon getting out, he saw the deceased running while burning as she headed towards her mother in law's house. That she was burning all over her body and Issa was pouring water on her. He stated that upon calling the deceased, she responded by saying that 'Zam amenichoma'. That Zam is Mohamed's wife a co-wife to the deceased.
 14. PW7, Kazim Muli Ghariba testified that the deceased was her sister. That upon the deceased dying, she was called to identify her body to the doctor who conducted post mortem.
 15. PW8, Godfrey Gubina Mwaura, a boda boda rider testified that he knew PW3 as he was his friend and further, he had previously given him his motor cycle to ride. That on 10.06.2019, at about 8.p.m., PW3 did not return and that his phone was not going through but later on, he managed to talk to him



- upon which PW3 informed him that he had been attacked. He found his motor cycle at the police station and upon enquiry he learnt that the said motor cycle was recovered from the area where the crime herein was allegedly committed.
16. PW9, Najma Mohamed, a grade II pupil in her unsworn testimony stated that on the fateful night, she was at home with her mother the deceased herein together with her father, Mohamed Ali. She testified that her mother was cooking when they heard a knock at the door. That her mother went to welcome the person who turned out to be the accused herein her step mother. She stated that her step mother did not talk but instead poured petrol and then set her mother ablaze. That she thereafter ran away. She further stated that her mother ran towards the house of her grandmother as she followed her while carrying her young sibling. It was her case that her mother was rushed to the hospital but unfortunately passed on.
 17. On cross examination, she stated that the person who knocked at the door was the accused person as she managed to see her well. She proceeded to state that with the help of a huge lamp in their house which produces bright light, she managed to see the accused hold a bottle in one hand and a knife on the right hand.
 18. PW10, Aden Abdi, a village elder from Maramtu testified that on 10.06.2019 at 8.30 p.m., he was on his way home from the mosque at Maramtu when he heard noises of people crying. That he went towards the direction of Mohamed Ali's house where he found the deceased badly burnt. He stated that in as much as the deceased was badly burnt, she was still able to talk. They thus organized for the deceased to be taken to the hospital but unfortunately, she passed on.
 19. PW11, Dr. Raphael Obiero Okoth testified that together with Dr. Irungu, he performed a post mortem on the late Saumu Mui Ngirima's body. That the said post mortem was conducted on 14.06.2019 at 4.00 p.m. at Kenyatta National Hospital. He stated that the deceased had mixed superficial and deep burns involving interior part of the head at 45%, interior trunk (body) at 18%, posterior trunk at 18%, interior legs at 9% and anus at 19%. That due to religious reasons, the body was not operated on. It was his evidence that the cause of death was severe burns.
 20. On cross examination, he stated that with the extensive burns, it was pretty easy to determine the cause of death and therefore, an internal exam was not necessary. That the same would not have added value as the deceased suffered burns estimated at 76%.
 21. PW 12, No. 113130 PC Nicholas Mugambe testified that on 13.06.2019, while on patrol, he received a report that there was a girl who was being beaten as it was alleged that she had poured petrol and burnt some lady. That the crowd said that she had burnt her co-wife and so, he rescued her and thereafter booked her at Madogo Police station. He stated that the girl was later taken to the hospital where she was treated and thereafter discharged. It was his case that the DCI thereafter took over the matter.
 22. Upon the prosecution closing its case, parties filed written submissions which were later highlighted in court on whether the accused person had a case to answer or not.
 23. Via a ruling dated 10.05.2022, the court found that the prosecution had presented sufficient evidence to enable the accused person tender his defence.
 24. DW1, Zamzam Malio denied committing the offence herein. She stated that, on 10.06.2019, she woke up in the morning together with her husband who later on went for afternoon prayers. That at 9.00 p.m., she went to the shop from where she overheard people saying that she had burnt someone. She stated that she went back to the house and on her way, she asked the said people what they meant but none told her anything. She stated that she stayed for three days and on the third day, people came and



- started beating her claiming that she had burnt the deceased. It was her case that the police arrived in time and took her to the hospital.
25. DW2, Ali Salam stated that on 10.06.2019, he was at Madogo when he heard people saying that the accused person had burnt somebody. On cross examination, he stated that they are family friends and that on the fateful night, he had sent the accused person to a nearby shop and upon returning, she informed them of what people were saying.
 26. Upon closure of the defence case, the court directed parties to file and exchange their submissions. Via submissions dated 03.08.2023, Mr. Kihara, the learned prosecution counsel submitted that prosecution had proved its case beyond reasonable doubt thereby proving the salient ingredients of the offence of murder. Counsel placed reliance on the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR to express the position that for the offence of murder to be proven, it must be established that death occurred, the accused caused the said death and that he had malice aforethought.
 27. Learned counsel urged that indeed death occurred as the same was proved vide the testimony of PW4, PW5, PW6, PW7 and PW11 who conducted post mortem on the body of the deceased hence the first requirement was thus met.
 28. On the issue whether the accused person committed the offence herein, counsel relied on the evidence of PW9 who testified that on that fateful night the accused person without uttering a word entered their house, poured some liquid to the deceased and thereafter set her ablaze. On malice aforethought, counsel relied on the cases of *Republic vs Tubere* (1945) 12 EACA and *Nzuki vs Republic* [1993] KLR 171 where the Court of Appeal stated that before an act can be considered as murder, it must be aimed at someone and in addition, it must be an act committed with the following intentions: intention to cause death, intention to cause grievous harm and where accused person knows there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful cause.
 29. That the act of burning the deceased using petrol was a clear manifestation of malice aforethought and therefore, this Honourable Court should rightly find that the accused person herein is guilty of the offence as charged.
 30. Accused person in her submissions dated 06.02.2024 urged that the prosecution did not prove its case to the required standard as the accused person herein was not placed at the scene of crime. Learned counsel relied on the holding in the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, where the court of appeal set out the elements of murder as follows: that the death of the deceased occurred; that the accused person committed the unlawful act and; that the accused person had malice aforethought.
 31. Regarding the question whether the accused herein caused the death of the deceased through an unlawful act, counsel contended that nobody saw the accused person set the deceased ablaze. That the prosecution star witness, PW9, Najma Mohamed in her unsworn statement, did not specifically ascertain that the person who knocked at their door on the material night was the accused herein. That the incident having happened at night, the issue of identification was not clearly determined.
 32. In relation to the dying declarations, it was urged that the same were not corroborated and therefore, this court cannot rely on them. To that end, reliance was placed on the case of *David Agwata Achira vs Republic* [2003] eKLR where the court reiterated that it is unsafe to rely on dying declarations made in the absence of the accused person and not subjected to cross examination, unless there is satisfactory corroboration. In the end, this court was urged to acquit the accused person and set her at liberty.



Determination.

33. I have considered the evidence presented before this court by the prosecution and the defence. Further, I have taken into account parties' rival submissions. It is trite that in any criminal charge preferred against an accused person, prosecution has the duty to prove the elements of the offence in question. See section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. There is no doubt that the standard of proof is always that of 'beyond any reasonable doubt'. See *Miller vs Minister of Pensions* [1947] 2 ALL ER 372 - 373.
34. The accused person herein was charged with the offence of murder contrary to section 203 of the Penal Code. Murder is defined as, 'when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
35. To sustain a conviction on a charge of murder under Section 203 of the Penal Code, prosecution is required to prove beyond any reasonable doubt the following elements of the offence: -
- i. The fact and cause of death.
 - ii. That the death was caused by an unlawful act of commission or omission on the part of the accused person.
 - iii. That it was committed with malice aforethought on the part of the accused person.
36. On the first element, death was confirmed by PW7 who identified the body of the deceased to the doctor who performed the post mortem. In the same breadth, PW4, PW5, PW6, PW8, PW9 and PW10 confirmed the fact that the deceased died. PW11, Doctor Raphael Obiero Okoth corroborated their testimonies by stating that the deceased died as a result of mixed burns – total body surface area at 76.5% with inhalation injury. It is therefore clear that the deceased died and the cause of her death was proven beyond any reasonable doubt.
37. On the question whether the death was caused through an unlawful act or omission, Article 26 of *the Constitution* of Kenya 2010, would be the reference point in so far as the sanctity of life is concern. That provision does underscore the position that the right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63).
38. PW 11 testified that the death of the deceased was as a result of mixed burns – total body surface area at 76.5% with inhalation injury. As a consequence of the finding by PW11, the death of the deceased was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
39. On the question whether the accused caused the death of the deceased, the prosecution basically relied on the evidence of pw9 a minor then aged 11 years who gave unsworn testimony as the eye witness and the deceased's alleged dying declaration. Accused raised the issue of lack of positive identification considering that the offence was committed at night. According to Pw9, on the fateful night and time, she was with her mother now deceased and her father(pw1) whose evidence was disqualified being a spouse to the accused.
40. According to pw9, when she heard a knock on the door from outside, she saw the accused person enter while holding a bottle on one hand and a knife on the other. She saw the accused her step mother pour petrol on her mother and set her a blaze. That after that accused ran away as the deceased ran out screaming for help. According to her, she recognized the accused very well using light from a bright lamp that was on at the particular time.



41. Why would pw9 name the accused as the person she saw enter their house and set ablaze her mother? It is not in dispute that the accused person is a step mother to pw9. Therefore, the question of mistaken identity does not arise. On whether there was favourable conditions for positive identification, Pw9 was categorical that there was sufficient light from a big lamp inside the house thus enabling positive identification. I have no doubt pw9 was able to recognize the accused as the person who set her mother a blaze. She had no grudge with the accused to frame up a case against her.
42. Besides pw9, nobody else witnessed the accused set a blaze the deceased. Therefore, it calls for corroboration of her testimony. However, it is trite law that a court can safely convict based on the evidence of a single witness in this case a minor after cautioning itself of the consequences of relying on such evidence. In the instant case, the accused was arrested by a mob of people after information went round that it was the accused who had killed the deceased.
43. The Court of Appeal of Uganda in Okwang Peter vs Uganda Criminal Appeal No. 144 of 1999 had this to say regarding the evidence of a single witness -
- “Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”.
44. PW4, PW5, PW6 and PW9 all testified that upon hearing screams emanating from the deceased’s home, they independently rushed to the scene where they found the deceased burning. That the deceased was badly burnt but all the same, she managed to tell them that ‘Zamzam’, the accused person herein was responsible for her death.
45. In law, the evidence of PW4, PW5, PW6 and PW9 is what may amount to a dying declaration and is provided for under Section 33 of the *Evidence Act*, Cap. 80 Laws of Kenya which states that;
- “Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –
- Relating to the cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question”.
46. In the case of Philip Nzaka Watu vs Republic [2016] eKLR, the court stated the following on admission and reliance on a dying declaration.
- Under Section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence.



“Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death ... while it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe”.

[Also see Lord Acker in the case of R vs Andrew [1987] AC 281

47. In the cases of R vs Muyovya bin Musuma [1939] 6 EACA 128 and R vs Premananda [1925] 52 Calcutta 987, the Court of Appeal in emphasizing the need of caution cited the principle from the 7th Edition on Evidence by Field as follows;

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The deceased may have stated his inferences from facts concerning which he may have omitted important particulars from not having his attention called to them”.

The court went on to state;

that particular caution must be exercised when an attack takes place in darkness when the identification of the assailant is usually more difficult than in day light. The fact that the deceased told different persons that the appellant was the assailant is evidence to the consistency of his belief that such was the case, it is no guarantee of accuracy although there is no more rule of law that to support a conviction, there must be corroboration of such statements. It is generally recognized that it is very unsafe to base a conviction solely on them.

48. I am fully aware of the dangers of solely relying on the evidence of a dying declaration alone to convict. However, the dying declaration in this case was heard by more than one person mentioning the accused as the person who had set the deceased a blaze. The span of time between which the incident occurred and the dying declaration made was immediate hence no room for alteration or manipulation. The witnesses who heard the deceased utter the words that it was Zam her co-wife who had set her ablaze does well corroborate the testimony of pw9.
49. A careful examination of the entire prosecution evidence reveals that, there was nobody else at the scene of crime at the material time and that pw9 positively identified the accused as the perpetrator. Besides, the dying declaration made by the deceased cannot be faulted as it was consistent with the testimony of pw9. Therefore, the prosecution evidence is well corroborated thus placing the accused at the scene of crime. [See Abanga alias Onyango vs Republic CR A No. 32 of 1919(UR)]. I do not agree with the defence case that there was no positive identification. Accused’ defence is just but a general denial which does not challenge prosecution’s case especially on what transpired on the material night.
50. As to whether the accused person had malice aforethought, it is trite that the same ought to be proved. See Section 206 of the Penal Code. In the same breadth, the Court of Appeal in Bonaya Tutu Ipu & Another vs Republic [2015] eKLR while quoting with approval the decision by the Court of Appeal of Uganda in Chesakit vs Uganda, CR. APP. NO. 95 OF 2004, held that; in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.



51. In the instant case, PW11 stated that the deceased suffered mixed superficial and deep burns involving interior part of the head at 45%, interior trunk (body) at 18%, posterior trunk at 18%, interior legs at 9% and anus at 19%. It was his evidence that the cause of death was severe burns. On cross examination, he stated that the deceased suffered burns estimated at 76%. PW 11's vivid description of the severity of the burns suffered by the deceased created a picture that was not only bizarre but also severe. As a consequence of the foregoing, it is my considered view that the injuries as enumerated showed a clear manifestation of an intention to cause death or serious bodily harm.
52. After considering all the evidence adduced herein by the prosecution vis a vis the defence case, I am satisfied that the case against the accused person has been proved beyond any reasonable doubt. Accordingly, I am inclined to find the accused person guilty of murder contrary to Section 203 as read with section 204 of the Penal Code.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY 2024

J. N. ONYIEGO

JUDGE

