



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Shume & another (Criminal Case E024 of 2022)  
[2024] KEHC 6023 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6023 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E024 OF 2022**

**A. ONG'INJO, J  
MAY 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HENRY MWASAMBU SHUME ..... 1<sup>ST</sup> ACCUSED**

**DICKSON MZUNGU SHUME ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused Henry Mwasambu Shume and Dickson Mzungu Shume face a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#).
2. Particulars of the offence are that Henry Mwasambu Shume and Dickson Mzungu Shume on the 22<sup>nd</sup> day of August 2022 at Mbuyuni Village, Chasimba Location within Kilifi County jointly murdered Mwasambu Mwarabu Runya.
3. The prosecution called 8 witnesses to support its case that the accused persons committed the offence herein and they were placed on their defence.

**Prosecution Case**

4. PW1, Onesmus Ziro Mlanda, testified that on 22.8.2022, he was at home when a bodaboda rider went and informed him that Mwarabu had been killed. That when he went to Mwarabu's home, he saw a fire burning on Mwarabu's body. That he was burning outside his house and it was Henry Mwasambu Shume who had put makuti on the body of Mwarabu. That PW1 rushed into the house of Mwarabu to look for water but he did not get. That he got out and held Mwarabu by the leg and pulled him from the fire. That he had been tied on the hands and legs using a rope and was bleeding from the mouth. That PW1 got a knife and cut the rope as well as the shirt and shorts which were also on fire, and was assisted by one of the people who was in the crowd.



5. PW1 testified that the accused persons were at the scene when he arrived and that they added palm leaves and branches to the fire to increase it. That after removing the deceased from the fire, he died after 10 minutes. That a report was made to the Village Elder, the Assistant Chief and the Chief who called the police. That the police went and collected the body and the accused persons were arrested.
6. PW2, Carlston Lewa Zero, said that on 22.8.2022 at 12.30 pm, he received a phone call and was informed that Mwarabu was being lynched. That he went to Mwarabu's home and found he had been set on fire using palm leaves and branches. That Mwarabu had been tied using a green rope. That Henry Mwasambu was at the scene and he asked to be left to finish Mwarabu. That Mwarabu was still struggling to rescue himself and it was Onesmus who pulled Mwarabu from the fire but Mwarabu was already injured.
7. PW3, Mwambao Kube Kalama, said that on 22.8.2022 at about 12.30 pm, he was in his house when he heard noise and he was informed that there were people fighting in Henry's home. That he saw Shume who said "Niachieni mtu wangu nimmalize mwenyewe, mmechelewa nyinyi." That Shume was putting palm leave on the body of Mwarabu and he set the body on fire. That Mwarabu's leg had not caught fire and Mzee Nuru held it and pulled him from the fire but his clothes had caught fire. PW3 said that the deceased's hands and legs had been tied with a rope and that Mzee Nuru got a knife and cut the rope.
8. PW3 informed court that he made a phone call to the Village Elder and the Chief. That the deceased was alive and could still talk and that he said "Mali yangu inaniua, mali yangu inaniua." That as he spoke, he was bleeding from the mouth and shortly thereafter he died. That PW3 remained at the scene until the police went and collected the body. That he accompanied the police to Chasimba Police Station where he recorded his statement. That when PW3 arrived at the scene, he did not find Dickson.
9. PW4, Robert Nyamaro Kai, the Village Elder of Mbuyuni Village said that on 22.8.2022, he received a call from Festus Gande Kwesha, the Nyumba Kumi elder who informed him that there was a fight in the family of Shume and Runya. That he went to the scene and found the deceased was restless with burn wounds and was asking for water. That the deceased was bleeding from the mouth and ears and had been removed from the fire and placed aside. That PW4 made a phone call to the Assistant Chief and Inspector Baya and reported the incident. That after about an hour, the police from the D.O.'s office arrived. That PW4 went to Henry Shime who was seated outside his house in the Verandah and asked what happened. That Henry Shime told him what he had seen was what was there and that Henry was arrested. PW4 said that vehicles from Mtwapa and Chasimba Police Station also went to the scene. That they then went to Chasimba Police Station after the body of the deceased was collected.
10. PW4 further informed court that when he went to Henry's house, Dickson was in the house. That when the police arrived, they asked for the clothes he was wearing during the fight. That he wore school uniform to look like he was going to school and that the clothes he had removed to wear the school uniform were blood stained. That while in the police vehicle, Henry said he had killed his brother because he was disturbing him.
11. PW5, No. 261172 PC. Foster Omondi Otieno attached at Bandara Salama Police Post under Chasimba Police Station Gender Desk said that on 22<sup>nd</sup> August 2022, they received information at the station that an alleged thief was being assaulted by members of the public. That PW5 accompanied the in charge to the scene using a GK vehicle driven by CPL Kalama. That on the way to the scene, CPL Joshua Kiiro again received a call that the person who was being assaulted had succumbed. That they arrived at the scene and found a body.



12. PW5 testified that the deceased's body was surrounded by a crowd of people, the body had burn injuries, that the deceased had been dragged to his own house and his thatched roof materials – makuti used to light the body. That they also found a green polyester rope that had been used to tie the deceased's legs and hands before he was burnt. That when they followed a trail of blood at the scene, it led them to a house structure under construction. That they got information that the deceased and a boy by the name Dickson had a disagreement over a coconut tree that Dickson had cut down to build his house which displeased the deceased. That when Dickson returned from school and found the deceased had chopped the coconut tree, a fight ensued. That Dickson's father joined the fight where the deceased sustained a cut on the head.
13. PW5 informed court that on inquiring about the whereabouts of the perpetrators, the crowd pointed at the Accused who was at the verandah of his house. That Dickson was inside the house and that they arrested the two. That they called Chasimba Police Station who went and took the suspects and that the DCIO officers from Mtwapa were called and they went and took over investigations.
14. PW6, Dr. Ruth Nyangi of Kilifi County Referral Hospital examined the body of the deceased and found that it had lacerations/tears on the right ear, the nasal bridge, forehead and left parietal region. There were also multiple abrasions on the right temporal region, the right frontal region and the right side of the chest. She also observed 1<sup>st</sup> and 2<sup>nd</sup> degree burns on 36% of the surface area of the body. Internally there was fracture on the right and left lower limbs. She was of the opinion that cause of death was complication of 36% total body surface area burns and skeletal injuries due to blunt force trauma. She produced the Postmortem Report as Exp2.
15. PW7, Sabastian Mwarumba Mwavita, Chief of Mwarakaya Location received a phone call from the Village Elder who reported that there was an old man who had been attacked by his brother, the 1<sup>st</sup> Accused Person herein, and his son. When he arrived at the scene he found the deceased had died. The body had multiple bruises and had also been burnt. PW7 said that the deceased had been beaten and dragged from the disputed coconut tree to his house and burnt having been tied on his legs and hands. He said the accused persons removed makuti from the deceased person's roof and used it to burn him. He said that the accused persons were at the scene and when the crowd continued growing they became restless and the Chief restrained members of the public from restraining them. PW7 said the disputed coconut tree belonged to the deceased and he had cut it to use it for construction. PW7 also said that the 1<sup>st</sup> Accused Person and the deceased were cousins and were staying in the same compound.
16. PW8, Cpl. Susan Chebet from DCI Kilifi County investigated the murder. She visited the scene in the company of the Deputy DCI CIP Shoka, the Driver Cpl. Nathan and PC Wafula. She said that they found the body of the deceased lying beside his house, the fire having been put off. She established that the deceased and the 1<sup>st</sup> Accused had a dispute over a coconut tree which the 2<sup>nd</sup> Accused wanted to use to construct a house and that when a scuffle arose between the 2<sup>nd</sup> Accused, the 1<sup>st</sup> Accused joined and beat the deceased using an axe and a panga. That after beating the deceased, they dragged him up to his house and burnt him using coconut leaves that they removed from the roof of his house. When they arrived at the scene, they were informed that the accused persons herein had committed the murder and they were arrested. The murder weapons being a rungu, axe, panga and rope were recovered and produced as exhibits. Photographs were also taken at the scene and were produced in court. The Investigating Officer said that the 2<sup>nd</sup> Accused did not sustain any injuries after the scuffle.

### **Defence Case**

17. The 1<sup>st</sup> Accused, Henry Mwasambu Shume, gave sworn statement and said that the deceased attacked his son and when he went to intervene, the deceased armed himself with an axe and a panga and used



the axe to hit him on the left hand. That the deceased also assaulted him with a panga and he fell. He said that the 2<sup>nd</sup> Accused was also injured and he went to his house crying. That he raised alarm and his neighbours and members of the public disarmed the deceased of the panga and axe. That it is the members of the public who attacked the deceased and dragged him away while beating him. The 1<sup>st</sup> Accused denied having been seen burning the body of the deceased. In cross examination, the 1<sup>st</sup> Accused said that he fought with the deceased when the deceased hit him with the panga and axe. He said he had to defend himself. He also said that when they started fighting there was no one else and it is when he raised alarm that members of the public came.

18. The 2<sup>nd</sup> Accused, Dickson Mzungu Shume, also gave sworn statement that on 22<sup>nd</sup> August 2022, he returned home from school for lunch and found the deceased splitting a coconut tree that he had felled using an axe and a panga. That when he asked why the deceased was splitting the tree that he had already given to him, the deceased threw a panga but he missed it. That the deceased jumped on him and wrestled him down. That when his father came out to separate them, the deceased let him go and followed his father. That he went home and locked himself inside the house as he feared the deceased could harm him. He said that he did not know what happened after he entered the house and locked himself in.
19. The Accused Persons' Advocate filed submissions dated 5<sup>th</sup> March 2024.

### **Analysis and Determination**

20. In consideration of the evidence of 8 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
21. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
22. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
  - ii. That the death was caused by an unlawful act or omission;
  - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
  - iv. That there was malice aforethought.

### **Death of the deceased**

23. There is no dispute as to the death of the deceased Mwasambu Mwarabu Runya.

### **Death was caused by an unlawful act or omission**

24. From the evidence of the prosecution witnesses particularly PW6, Dr. Nyangi, the injuries that led to the death of the deceased were not self-inflicted and they were not accidental. The deceased person was



beaten, his legs and hands tied before his body was set on fire outside his house. It is no doubt therefore that the cause of death was through an unlawful act.

### **Participation of the accused in the commission of the alleged offence**

25. The Investigating Officer, PW8, established from the evidence of PW1, PW2, PW3, PW4, and PW7 that the Accused Persons were the ones who committed the unlawful act that led to the death of the deceased. PW1 said he saw the 1<sup>st</sup> Accused put coconut leaves on the body of the deceased which was on fire. PW2 and PW3 said they arrived at the scene and heard the 1<sup>st</sup> Accused say he should be let alone to finish the deceased whose body had been set on fire. PW1, PW2 and PW3 said they saw the deceased hands and legs tied while his body was being lynched. PW1 also said he heard the deceased saying “mali yangu inaniua” shortly before he died. PW4, the Village Elder said the 2<sup>nd</sup> Accused Person was involved in the fight and that he had removed the blood stained clothes that he had worn during the fight and the police told him to go and get the said blood stained clothes which were taken as exhibits.
26. Evidence has therefore been adduced sufficient to find that the Accused Persons participated in the murder of the deceased herein.

### **Malice aforethought**

27. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances: -

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

28. On the element of Malice Aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of [Isaac Kimathi Kanuachobi v R](#) [2013] eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”



29. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held: -

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

30. The Accused Persons beat the deceased, tied his legs and hands and dragged him from the disputed coconut tree to his doorstep where they removed the makuti from the roof of his house and used it to set him on fire. The actions of the Accused Persons are proof of express malice aforethought. Their intention was clear that they wanted to eliminate the deceased person. The precision with which the offence was planned and committed is proof of the extent of malice on the part of the perpetrators.

31. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused persons are found guilty of the offence of murder and convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 23<sup>RD</sup> DAY OF MAY 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Etropia- Court Assistant

Ms. Maina for the State

Ms. Nyawira Advocate H/B for Ms. Barayan Advocate for the 1<sup>st</sup> Accused

Ms. Nyawira Advocate for the 2<sup>nd</sup> Accused

Accused person present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Ms. Maina: No records have been availed. I undertake to follow up.

Order: Mention on 6.6.2024 for records, mitigation, Victim Impact Statement and Sentence.

