



**Director of Public Prosecutions v Michubu (Criminal Case
72 of 2017) [2024] KEHC 6975 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 72 OF 2017
TW CHERERE, J
JUNE 6, 2024**

BETWEEN
DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTION
AND
JULIUS MICHUBU ACCUSED

JUDGMENT

1. Julius Michubu (Accused) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code in that he murdered one Murungi M’Kirari on 09th September, 2013 at Ndumuru village in Baiborio sub-location in Igembe North Sub County within Meru County.

Prosecution case

2. Mary Mutoria w/o Murungi M’Kirari (Murungi) stated that on 09th September, 2013 she was at their farm in company of her husband Murungi and Monica when Accused who is Muriungi’s brother joined them and claimed that the footpath between their parcels of land ought to have been on Muriungi’s side. That Muriungi informed him that the footpath was already on his side and without any provocation Accused grabbed a fork jembe from Monica and knocked Muriungi on the head several times after which he went away leaving Muriungi who had a crushed head lying dead.
3. Monica Inokubia confirmed he was in the shamba with Muriungi and his wife when Accused joined them and without provocation seized a fork jembe from her and knocked Muriungi on the head with it leaving him dead.
4. A fork jembe PEXH. 1 that was identified as the murder weapon was tendered as an exhibit. Similarly, tendered was a postmortem report dated 18th October, 2013 PEXH. 2 in which Dr. Guantai found that Muriungi suffered a skull fracture (maxillary and temporal bone fractures) and died of severe head



injury secondary to assault. The investigating officer testified that Accused went on the run from 2013 and was arrested and charged in 2017 when he resurfaced.

Defence case

5. In his sworn defence, Accused stated that he was not at the scene of crime on the material date having travelled to graze cattle for his employer one Ishmael. His first witness and brother Moses Mutuma was not at home when the offence was committed. His second witness Jonah Mukuria stated that he knew Accused as a herdsman.

Analysis and Determination

6. I have considered the evidence for the prosecution and for the defence. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence.
7. In the case of Joseph Githua Njuguna v Republic [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows: -

“...Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See Milton Kabulit & 4 others v Republic [2015] eKLR.”
8. I have considered all the evidence availed in this case as set out above together with written submissions made on behalf of Accused person and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the said death and that that they were actuated by malice.
9. The degree of proof in criminal cases was properly established in the classicus English case of Woolmington vs. DPP 1935 A C 462. Similarly, in Bakare vs. State 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
10. That Muriungi died was proved by way of a postmortem form PEXH. 1 which reveals that he suffered a skull fracture (maxillary and temporal bone fractures) and died of severe head injury secondary to assault.
11. In order to establish the accused's culpability, the prosecution relied on the evidence by deceased's wife Mary Muturia and one Monica Inokubia. Both witnesses stated that they were with Muriungi in the shamba on the material date. It was their evidence that Accused had without provocation seized a fork jembe from Monica with which he crushed Muriungi's head after which he escaped.



12. Accused has denied that he was at the scene that of the murder. He raised the defence of alibi that he was away from home grazing cattle and did not return until 2017. His two witnesses did not know where Accused was on the material date.
13. The Supreme Court of Nigeria in the case of *Ozaki & Anor Vs The State* (1990) LCN/2449(SC) held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.
14. Our own Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held THAT: -

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”
15. In *Elizabeth Waithiegeni Gatimu vs. Republic* [2015] eKLR, Mativo, J (as he then was) stated that:

“To my mind, the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”
16. I have weighed the uncorroborated alibi by Accused vis a vis the corroborated evidence by deceased’s wife Mary Muturia and one Monica Inokubia both of whom placed Accused at the scene of crime and identified him as the one that attacked and killed Muriungi. Accused’s defence of alibi does not in my considered view introduce into the mind of the court any doubt as to the truthfulness of the two witnesses.
17. From the totality of the evidence before the court, I find the evidence by deceased’s wife Mary Muturia and one Monica Inokubia was well detailed on the manner in which the murder was executed. They both identified Accused as the assailant. Accused conceded that he had no grudge with the two witnesses and I therefore find that they would not have had any reason to give false evidence against him.



Malice Aforethought

18. In *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR, the Court of Appeal cited with approval *Rex V. Tubere S/O Ochen* (1945) 12 EACA 63 where the former Court of Appeal for Eastern Africa stated thus on the issue of malice aforethought:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

19. In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996* [1997] eKLR), the Court of Appeal cited the case of *Rex Vs Tubere S/O Ochen* (supra) with approval where it was stated that:

“If repeated blows inflicted the injury, then malice aforethought could well be presumed.....”.

20. In this case, deceased’s wife Mary Muturia and one Monica Inokubia stated that Accused knocked Muriungi’s head with a fork jembe several times. Medical evidence on record demonstrates the injuries inflicted on Muriungi were severe and concentrated on the head and this court has come to the conclusion that Accused was actuated by malice for Accused ought to have known that such grave injuries could possibly cause grievous harm or the death of Muriungi.

21. Right to life is protected by Article 26 of *the Constitution* and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). The death of Marangu was in the circumstances of this case intentional and unlawful.

22. In the end, Accused is found guilty of murder Contrary to Section 203 as read with Section 204 of the Penal Code and he is convicted under Section 322 (2) of the Criminal Procedure Code.

DELIVERED IN MERU THIS 06th DAY OF June 2024.

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For Accused - Ms. Gumato Advocate

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

