



**Republic v Shimole (Criminal Case E010 of 2021)  
[2024] KEHC 7096 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E010 OF 2021**

**JN ONYIEGO, J  
JUNE 14, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MOHAMED HAMISI SHIMOLE ..... ACCUSED**

**JUDGMENT**

1. The accused person herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 04.12.2021 at Balambala Location, Balambala Sub – County within Garissa County he murdered Idriss Salim Hama.
2. The accused having pleaded not guilty to the charge, prosecution called five witnesses in its endeavour to prove its case against him.
3. PW1, Juma Salim, brother to the deceased testified that on 04.12.2021, he visited his brother together with his daughter who lived in Balambala. That While there, a young man, the accused herein, approached them and asked his brother(deceased) to give him his hammer. When the deceased told him that he did not have his hammer, accused bent down, took out a knife from his bag and then stabbed the deceased on the left leg. That upon being rushed to the hospital, the deceased succumbed to his injury due to bleeding.
4. PW2, Aisha Shire daughter to the deceased corroborated the testimony of pw1. She testified that on the fateful day, she was at her stall selling miraa when PW1, her father and the deceased, her uncle visited her. While there, the accused joined them asking for his hammer from her father. That the deceased informed the accused person that he had not seen his hammer. That in response, the accused took out a knife from his bag and then stabbed the deceased on his leg. She reiterated that the accused was a person well known to her and she saw him stab the deceased.



5. PW3, Jomo Abagana Abadida chief Balambala location testified that on the material day, he was in his office when he received a call from one Yunis Khalif and the Officer Commanding Station, Balambala. He testified that Yunis informed him that the accused herein had killed the deceased and thereafter ran towards Tana River. On the other hand, the Officer Commanding Station, Balambala directed him to try trace the accused person as he was a local.
6. He told the court that by 8.00 p.m., Jille, a brother to the accused called him informing him that the accused had been found. It was his evidence that the accused person was not forcefully arrested as he presented himself at Asako Police station.
7. PW 4 Dr. Mohamed Noor conducted an autopsy on the body of the deceased. He testified that upon examination of the body, there was a deep cut at the back upper left leg and that blood was still oozing out. He recalled that the wound extended up to the front part of the thigh and from his examination, he formed the opinion that the cause of death was hypovolemic shock as a result of massive haemorrhage. He signed the postmortem report dated 04.12.2021 which he produced as exhibit P. Ex 1.
8. PW5 No. 65611 Benson Sindani testified that he was the investigating officer in this case. He stated that on 04.12.2021, the Officer Commanding Station, Balambala directed him to carry out investigations in respect of the murder report made at the station. He recalled that he started his investigations by visiting the crime scene wherein he established that the accused person had stabbed the deceased on the leg and thereafter disappeared. He later proceeded to pick the accused who was being held at Asako Police Station after presenting himself to the station. Upon conclusion of investigation, he preferred the charges before court.
9. Placed on his defence, the accused gave a sworn testimony. He stated that the deceased was his friend and that they used to work together. He denied committing the offence in question. He stated that on the material day, he visited the deceased to pick his hammer. That he found the deceased with his family and upon requesting for his hammer, the deceased was reluctant claiming that he had misplaced it. It was his testimony that it was the deceased who together with his family attacked him thereby knocking him down. It was further his evidence that he managed to escape and only heard later on that the deceased had been stabbed and succumbed to his injuries.
10. The court gave directions that both parties file their written submissions wherein all the parties complied with the said directions.
11. Mr. Kihara, the learned prosecutor via his submissions dated 19.02.2024 submitted that prosecution had established the salient elements in proving the offence of murder. Reliance was placed in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR where the court held that for the offence of murder to be proven, the elements to be proved are that; death occurred, the accused caused the said death and that he had malice aforethought. The prosecution urged that indeed death occurred as the same was proved vide the testimony of PW1 and PW2 which was later corroborated by the evidence of PW3 who conducted post mortem on the body of the deceased.
12. On whether the said death was caused by the accused person, it was urged that the evidence of PW1 and PW2 clearly pointed towards the accused person as the person responsible for the death of the deceased.
13. On malice aforethought, the prosecution placed reliance on the case of Republic v Tubere 1945 EACA 63 and Nzuki v Republic [1993] KLR 171 where it was held that malice aforethought in murder can be established by ascertaining the nature of weapon used and the manner in which it was done. This court was urged to find the accused person guilty of the offence charged as the circumstances of this case clearly points to malice aforethought by the accused person.



14. On the other hand, the accused through Mr. Bosire advocate filed his submissions dated 14<sup>th</sup> April 2024 thus submitting that motive was not established and that investigations were not properly carried out. Learned counsel contended that it was the deceased who first attacked the accused who in self defence ended up stabbing him unintentionally.
15. Mr. Bosire further submitted that the prosecution did not even prove a prima facie case against the accused. In that regard, he relied on the case of Ramanlal Trambaklal Bhatt vs Republic (1957) E.A. 332 and Republic vs Bernard Obunga (2018) E KLR.
16. I have considered the evidence adduced by both the prosecution and the defence. I have further considered parties' rival submissions. The main issue for determination is whether the prosecution has proved beyond reasonable doubt all the elements of murder against the accused person herein. These elements are: the fact of the death of the deceased; the cause of that death; that the death was occasioned by an unlawful act or omission; that it was the accused person herein and no other person who caused the unlawful death of the deceased and finally; that the accused had malice aforethought when he unlawfully killed the deceased.
17. There is no doubt that there was death of a person in the name of Idriss Salim Hama. The testimonies of PW1 and PW2, the deceased's brother and niece respectively, stated that they saw the deceased's body. This was sufficient to demonstrate that death occurred. Further, PW3, Dr. Noor, who carried out the post mortem on the deceased's body testified that as a result of his examination, he formed the opinion that the cause of death was hypovolemic shock as a result of massive haemorrhage. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased died.
18. As to whether the deceased's death was caused by an unlawful act or omission, Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report prepared by PW3 and produced as PEx 1 showed that the cause of death was hypovolemic shock as a result of massive haemorrhage. There is no lawful basis for the aforementioned cause of death and as such, I find that the deceased's death was unlawfully caused.
19. On the question of whether it was the accused who caused the deceased's unlawful death, PW1 and PW2 testified that the accused person approached them and asked the deceased whether he had seen his hammer. Upon the deceased informing him that he didn't have the said hammer, the accused bent down, took out a knife from his bag and then proceeded to stab the deceased on the left leg. PW2 further testified that the accused person was someone well known to him and therefore, there was no room for any confusion or foul play.
20. The accused person in his defence admitted that indeed he was at the scene of crime at the material time. He went further to state that it was PW1, PW2 and the deceased who assaulted him when he enquired from the deceased of his hammer. He testified that when he got an opportunity, he fled the scene and only to learn of the deceased's death later on. Of importance to note is the fact that on cross examination, the accused stated that he ran away for the reason that he heard that he was being accused of stabbing the deceased.
21. From the accused person's testimony, the question that begs an answer is why he chose to hide if at all he had nothing to do with the death herein. According to the submissions of the defence counsel, he acceded to the fact that it was the accused who stabbed the deceased but in self defence following the attack on him by the deceased. Based on that form of admission coupled by the testimony of pw1 and pw2 the eye witnesses, I have no doubt that it was the accused who stabbed the deceased leading to his death.



22. Looking at the evidence of the prosecution alongside that of the accused person, the prosecution's case was not only elaborate but also well corroborated. As a consequence of the foregoing, I am persuaded beyond reasonable doubt that the evidence adduced by the prosecution pointed at the accused person as the one who caused the unlawful death of the deceased.
23. On whether the accused had malice aforethought, the Court of Appeal in the case of *Peter Kiambi Muriuki vs Republic* [2013] eKLR reiterated its previous holding regarding malice aforethought in the case of *Nzuki vs Republic* (1993) KLR 171, where it stated that:
- “Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:
- The intention to cause death;
- The intention to cause grievous bodily harm;
- Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (see *Hyman – v- Director of Public Prosecutions*, {1975} AC 55.”
24. In this case, the injury suffered by the deceased clearly showed the cruelty with which the accused person killed the deceased. In fact, his action was senseless and uncalled for. It remains unknown why the accused person stabbed the deceased. In the case of *Rex vs Tubere S/O Ochen* 1945 12EACA 63 the court laid down the guidelines for trial Judges in consideration of malice aforethought where the court held that:
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.
25. In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe* CACKA No. 32 of 1990, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008 eKLR and *James Masomo Mbacha v republic* 2015 eKLR the respective courts sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries occasioned to the victim.
26. In this case taking all the circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. For whatever reason, the accused testified that the deceased was his friend and that both were masons. The accused person pre-planned to kill the deceased and the allegation for searching for his hammer was just a mere excuse. For what purpose was he armed when going to pick his hammer. He must have formed the intention to attack the deceased. His conduct is telling. It was not by coincidence but rather a planned act hence proof of malice aforethought by inference. I do not buy the idea of self defence as there was no provocation



27. I thus find and hold that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.
28. Taking into account the totality of the evidence and circumstances surrounding the manner in which the deceased met his death, I am inclined to find and hold that the accused person herein is guilty of the offence of murder for which I convict him accordingly.

Dated, signed and delivered in open court this 14<sup>th</sup> day of June 2024

**J.N. ONYIEGO**

**JUDGE**

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