



**Republic v Muthike (Criminal Case 14 of 2015)
[2024] KEHC 10937 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 14 OF 2015
RM MWONGO, J
JULY 24, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON WACHIRA MUTHIKE ACCUSED

JUDGMENT

1. The accused person is charged with murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars of the offence are that on the 23rd July, 2007 at Ciagiini village in Kirinyaga County, unlawfully murdered Alice Njeri Muchira.
2. The prosecution case was made out through seven witnesses. The defendant gave sworn testimony and was cross examined.
3. PW1 (Anne Wanjiru Kinyua) testified that on 23rd July 2007 at about 9.00pm the deceased, who was her sister, visited her saying she had been chased away by the accused. Before long, her sister's husband Simon Wachira Muthike (the accused), walked in and started arguing and quarrelling with the deceased. He was insisting on a talk with his wife, but the deceased was not interested. The deceased told the accused they could go to her parents who could resolve the dispute.
4. PW1 further testified that they left as if to go to her parents' homestead. Before long, PW1 was informed that the deceased had been injured by the accused; and that she she was needed to assist take her sister to Hospital. As she got to the scene, she found the father and mother were all injured, and the deceased was rushed to Kimbimbi Hospital where she was pronounced dead upon arrival.
5. In cross-examination, PW1 admitted that she did not go to the scene of the alleged crime. Further, she did not see those injured.



6. PW2 (Jane Njoki Muchira) the deceased's mother, testified that on 23rd July 2007 at about 11.00 pm she was resting at her home when she heard screams at the gate. She rushed there and found the accused (Simon Wachira Muthike) having wrestled the deceased. He was armed with a knife and a Machete, and the deceased was bleeding profusely. She was told that the accused had stabbed her daughter on the neck. About this time, PW2's husband asked her to go for his walking stick, and they struggled with the accused to get hold of the knife and panga. The panga cut her on her left index finger. The husband got injured too.
7. According to PW2, the accused escaped into the night; and they escorted the deceased to Kimbimbi Hospital where she passed on. They then reported the matter to the Police and learned that the accused had surrendered himself to the authorities.
8. In cross examination PW2 said the deceased was living in her (PW2s) house; that she saw the accused lying on the deceased who was on the ground and that the accused had a panga and knife. However, she could not tell in which hand the knife was held. She also admitted that she did not see the accused stab the deceased.
9. PW3 (Nicasio Gachoki Muriuki), a neighbour, testified that on the 23rd July 2007 he responded to screams that were emanating from the homestead of the deceased's parents. He went there and witnessed first-hand that the accused had descended on the deceased. The deceased had suffered injuries on the neck with stab wounds. He testified that he assisted the deceased to Wang'uru Police Station. There, they were given another vehicle that escorted the deceased to Kimbimbi Hospital where she died.
10. In cross-examination, PW3 stated that he did not see all that had happened. However, he did see Njeri, the deceased, with injuries.
11. PW4 (Joseph Muchiri Njoka), a Village Elder, testified that he received a call from Alfred Nyamu, a friend of the deceased's brother. He was told that the deceased had died on her way to hospital. He then went with some young men to the accused's house and found the accused in his house sleeping with one child. This was on the 24th July, 2007. He testified that the accused had visible injuries and when he asked him what happened, the accused narrated the ordeal of the previous night where the wife was injured.
12. They arrested the accused and held him until the police came and took him to the Police station.
13. PW5 (Peter Karega Muchira), is the deceased's brother. He testified that he was at home – the scene of the crime – on 23rd July 2007 at about 9.30pm, when he heard screams outside the compound. He said he witnessed the accused assaulting the deceased, panga in hand. He saw the deceased cut in the head. He told the accused to stop what he was doing, and he did. The accused then disappeared towards his home in Thome. PW5 then looked for a vehicle, and in the process, found that Duncan Kariuki had taken the deceased to hospital using another vehicle.
14. In cross examination, PW5 said he saw the deceased cut in the head, and that he saw the accused cutting her. However, he contradicted himself when pressed, and admitted that he did not see the accused cutting the deceased. His credibility suffered from these contradictions. A confusing snippet of his actual evidence in cross-examination is as follows:

“I saw Njeri was cut on the head. She had been cut, I saw when the accused was cutting her.
I did not see the accused cutting the deceased...”



15. He further said he saw his father and mother trying to grab the panga from the accused, and saw the deceased fall to the ground. Other than the panga, he saw no other weapon at the scene.
16. PW6 Patrick Gachoki Muchira, a farmer and Village Elder of ten years, stated that on 24th July 2007 at about midnight, he was called and told to go to Simon Wachira's house, as something had happened there. He went there with four elders. He met Simon Wachira, the accused, and asked him what had happened. Simon said that he had been involved in a fight with his wife and that he had been injured. PW6 said he did not see injuries on the accused.
17. PW7 (No 53451 Julius Mutune) testified that a report of Murder was made at Wang'uru Police Station on the 23rd July 2007 at about 2340 hrs. That he rushed at the scene where he was able to secure the Machete (panga) that was the murder weapon and after he escorted the deceased to hospital, he made the arrest of the accused (Simon Wachira Muthike) before he handed over the matter to the investigative agencies. He did not do further investigations.
18. The accused Simon Wachira Muthike testified that the deceased was his wife. They married in 2002 and had two children. He stated that on 23rd July, 2007, he was escorting his wife to her parent's house when they met her brother, Kariuki. He was with another brother, Peter Karega (PW5). An argument ensued and the two brothers began to beat the accused.
19. According to him, his father and mother in-law also came and began to beat him too. He managed to escape to his house. Later, the area in-charge and Kariuki called the police who arrested him and took him to the police station. He did not know what happened to his wife.
20. In cross-examination, he said that he did not have a knife and he fought his brothers in law with bare hands.

Prosecution submissions

21. The prosecution correctly submitted that murder must be proved by demonstrating three elements as listed in *Anthony Ndegwa Ngari v Republic* (2014) eKLR:
 1. Proof of the Death of the deceased
 2. Proof that the accused caused the death of the deceased
 3. That the accused had malice aforethought
22. According to the prosecution, the death of the deceased was proved by the testimonies of eyewitnesses PW2 (Jane Njoki Muchira) the mother to the deceased, PW3 (Nicasio Gachoki Muriuki) and PW5 (Peter Karega Muchira) the younger brother of the deceased.
23. PW7 (Julius Mutune) also confirmed that the incident was reported to the Wang'uru Police Station where he was manning the front desk. He testified that it was at the Kimbimbi Hospital where he had escorted the deceased that she was pronounced dead.
24. As for proof that the accused caused the death of the deceased, the prosecution submitted that immediately after the act the accused surrendered at the Wang'uru Police Station on the 23rd July 2007. He informed the Police of what he had done which the Police confirmed before he was re-arrested. According to the prosecution, this was sufficient evidence that the accused caused the death.
25. As to whether the accused had malice aforethought: the prosecution submitted that the choice of weapon used in assaulting the deceased, the force used to inflict the injury and the timing that the accused occasioned the injury points the fury, anger and knowledge that the accused wanted to



maximize the opportunity to eliminate the deceased at all costs. From the evidence on record, the deceased suffered deep cut wound on the head occasioned by a sharp object.

26. Malice aforethought was defined in the case of *Nzuki v R* (1993) KLR 171, where it was held as follows:

“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:-

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. 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.”

27. The accused gave a sworn statement of defence and narrated the events of 23rd July, 2007. The defence by the accused was credible and uncontroverted. It was unchallenged by the prosecution.

Defence submissions

28. The defence submitted that the prosecution has not met the standards set out in Section 107(1), Section 108 and Section 109 of the *Evidence Act* on proof of the existence of particular facts as to the commission of a crime in order to obtain judgment in its favour. That burden never shifts to any of the accused persons, and it therefore remains that their conviction is based on the strength of prosecution evidence.

29. The defence is in agreement with the prosecution on the four main ingredients of murder

30. The issue for determination is whether the prosecution has proved the ingredients for murder.

Analysis and Determination

31. The accused person is charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is not in dispute that the elements necessary to prove the offence of murder are:

- a. The death of the deceased occurred.
- b. That the accused committed the unlawful act which caused the death of the deceased.
- c. That the accused had malice aforethought.

(See *Anthony Ndegwa Ngari v Republic* (2014) eKLR.)

Whether the death of the deceased occurred

32. This was proved by the testimonies of eye witnesses being PW2 Jane Njoki Muchira the deceased’s mother; PW3 (Nicasio Gachoki Muriuki), and PW5 (Peter Karega Muchira) the deceased’s younger brother.

33. PW7 (Julius Mutune) also confirmed that the incident was reported to the Wanguru Police Station where he was manning the front desk. He further testified that it was at the Kimbimbi Hospital where he had escorted the deceased that she was pronounced dead.



34. The accused submitted that no evidence of proof of death was produced. Indeed, PW7 stated that he did not complete the investigations, but handed the matter to the investigating officer, Inspector Mwangi. There is no evidence that he was able to confirm that the deceased's body was that of the victim in this matter.
35. Further, the post-mortem report was not produced in court as evidence that the deceased had died.
36. In *Chengo Nickson Kalama v Republic* [2015] eKLR the court while upholding its decision in *Ndugu v Republic* [1985] KLR 487 and commenting on the Tanzanian case of *Republic v Cheya & another* [1973] EA 500 stated:

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt. Accordingly, the Judge erred in convicting the appellant.”

That the accused committed the unlawful act which caused the death of the deceased

37. The next issue is whether the accused's actions caused the deceased's death.
38. PW2 testified that she saw the accused stabbing the deceased on the neck. In that process, he cut her left index finger with a panga. PW3 stated that he did not see what happened. He only saw the deceased with injuries.
39. PW7 testified that he rushed to the scene where he was able to secure the machete (panga) that was the alleged murder weapon and after he escorted the deceased to hospital. However, he did not witness the event that led to the death of the victim, nor was the alleged panga subjected to forensic examination to establish whether it was involved in the incident or was connected to the victim. Further, neither the alleged panga nor the knife was produced in court as exhibits.
40. The accused submitted that no evidence was adduced to show that he inflicted the deceased's injuries. He testified that he did not have a knife and that he fought his brothers-in-law with bare hands, trying to defend himself from their attack.
41. Consequently, it is impossible to hold that the prosecution did prove that the accused caused the death of the deceased

Whether the accused had malice aforethought

42. Finally, is the question of whether the accused acted with malice aforethought.
43. Malice aforethought was defined in the case of *Nzuki v R* (1993) KLR 171, as follows:

“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:-

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;



iii. 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.”

44. PW1 testified that the accused had beaten and chased the deceased from her home hence she had found refuge in her house. She refused to return to the accused’s house as he had threatened to kill her
45. PW2- testified that the deceased had returned to her home after being allegedly beaten by her husband. However, she did not have any visible injuries on her body.
46. The accused testified that the deceased’s family members attacked him and that they beat him up until he managed to escape. Further, that he did not have a knife and did not hurt anyone.
47. From the preceding discussion, there is no evidence of the accused making any plans to kill the victim and then proceeding to execute the same.

Conclusions and disposition

48. Ultimately, the prosecution did not produce evidence of a murder weapon that they alleged the accused used to murder the deceased. They did not prove the cause of death as no post-mortem report was produced to show what killed the deceased.
49. The law is clear that one of the elements necessary for the proof of murder is that the accused committed the unlawful act that caused the death of the deceased. This element and the and the element of malice aforethought were both not proved in this case
50. Accordingly, the prosecution’s case fails and the accused is hereby acquitted of the charge of murder. He shall be set at liberty forthwith unless otherwise lawfully held.
51. Orders accordingly.

DATED AT KERUGOYA THIS 24TH JULY 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Accused: present in person

Ms. Muturi holding brief for Makworo for the Accused

Mr. Mamba for the State

Court Assistant: Mr Murage

