



REPUBLIC OF KENYA



**Republic v Muthee (Criminal Case 1 of 2020)  
[2023] KEHC 914 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL CASE 1 OF 2020  
CM KARIUKI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN MAINA MUTHEE ..... ACCUSED**

**JUDGMENT**

1. The accused is charged with murder contrary to section 203 as read in section 204 of the [Penal Code](#) Cap 63 Laws of Kenya.
2. The particular being that on the 14<sup>th</sup> day of January 2020, at the Marmanet trading Centre in Marmanet Location within Laikipia county, murdered Samwel Nderitu Wachiuri.
3. He pleaded not guilty, and the matter went into full hearing. The prosecution called six (6) witnesses, and the accused was put on his defence and gave an unsworn statement. The parties filed and exchanged submissions.
4. Prosecutions final submissions was filed on November 3, 2022 dated November 2, 2022.

**5. Prosecution Submission**

6. The submitted that the ingredients of murder are well set out in the case of [Republic v Henry Obisa Ouko](#) (2018) eKLR as: -The death of the deceased has occurred.That the accused committed the unlawful act which caused the deceased's death.That the accused had malice aforethought.The death of the deceased has occurred
7. It is not contested that Samuel Nderitu Wachiuri was identified as the deceased. A post-mortem was conducted, exhibit 1, which confirms that Samuel Nderitu Wachiuri died on January 17, 2020 due to stab wounds to the abdomen and thorax.



8. That the accused committed the unlawful act which caused the death of the deceased
9. PW4, the investigating officer PC Fernandez Andover stated that during his investigations, it was discovered that the accused was demanding his balance of Kshs One hundred from the deceased when the fight between the two broke out. The deceased suddenly fell to the ground during the fight, and the accused person ran away.
10. The accused lawfully recorded a cautionary statement in the presence of Chief Inspector Peter Ramogi. The statement was produced as exhibit 2. In his statement, the accused states that he and the deceased differed over a mobile phone handset and some money, and they got into a physical fight. He further stated that

“As we were fighting, he had a knife, I got hold of his hand and kicked him on foot, and he fell down, and I left him on the ground as I went home without my phone.”
11. This places the accused person at the scene of the crime. He was the last person to be seen with the deceased person alive. He fought with the deceased, and at that time, a knife was involved.
12. Malice aforethought is well defined in section 206 of the [Penal Code](#) as: -An intention to cause the death of or do grievous harm to any person, whether that person is the person actually killed or not. Knowledge that the act or omission causing death will probably cause the death of 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, by the wish that it may not be caused. An intent to commit a felony. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony.
13. PW1 stated that he saw the accused and the deceased arguing about a mobile phone and some money on a fateful day. The accused clearly had the motive to kill the deceased over the mobile phone that he had sold to the deceased, and the deceased had failed to complete payment for the same. This demonstrates malice aforethought.
14. In the accused person's statement, he states:

“That the following day as I was at the bus, stage one, known to me as Kamau, came and told me that the police wanted me because I stabbed someone with a knife. That I decided to go home, collect my cloths, and went to places until Saturday when I received a call from Smart, he informed me that Sam was dead; I decided to escape from the market”.
15. The accused had a guilty mind and thus decided to flee. He was arrested by his two uncles, who then handed him over to the Marmanet Patrol base.
16. It's also noteworthy that the accused elected to rely on an unsworn defence.
17. In addition, in the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement.
18. This is the disadvantage of the accused electing to make an unsworn statement. A few cases will illustrate the point.
19. In [Amber May v The Republic](#) [1999] KLR 38, the High Court held that an unsworn statement has no probative value notwithstanding the provisions under section 211(1) of the [Criminal Procedure Code](#).



On appeal against that decision and reported as May v The Republic 9[1981] KLR 129, the Court of Appeal held inter alia:-

That unsworn statement is not, strictly speaking, evidence, and the rules of evidence cannot be applied to an unsworn statement.

It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value, it must be supported by evidence recorded in the case.

No adverse interference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by section 211(1) of the Criminal Procedure Code (cap 75, Laws of Kenya.)

20. Based on the above authority, it is submitted that since the accused made an unsworn defence, such has no probative value in the absence of collaborating witnesses. For he stated that there was a witness who was present when he was asking for his phone from the deceased, and further that there were people who separated them, and it was during that process that a knife was seen tucked in the deceased waist. However, the accused did not avail any of these witnesses.
21. In the upshot, the court found that the accused person's defence is full of mere denials and that the prosecution's case was fully proved; thus, the court urged to convict accused accordingly.

## 22. Defence Submissions

23. The defence counsel submits that the prosecution has placed hearing reliance on a statement under inquiry recorded by PW5. The accused person never recorded a cautionary statement, as claimed by the prosecution. On record is a statement under investigations that does not make any admission as to the accused person having been involved in the stabbing of the deceased herein.
24. If anything, the statement under inquiry only indicates that the deceased and the accused person were involved in an altercation at some point.
25. The evidence of PW2 is material as to the circumstances and the times relating to the incident herein. PW2 testified that at around 11 pm on the material day, he found the deceased and the accused person arguing outside Success Bar. He intervened and told them to resolve the matter as it was not a big issue. He further testified that the accused was drunk and was holding onto the walls. That upon his intervention, the accused and the deceased each went separate ways. He further testified that after a while, he was informed by a friend, Maina Mwangi, that the deceased had fallen and that Maina had seen the deceased fall. Neither PW2 nor the friend, Maina Mwangi, who informed him that he had seen the deceased fall, indicated that when he had seen him fall, he was in the company of the deceased.
26. There is no evidence that has been brought by the prosecution to show that the accused was seen by any person stabbing or murdering the deceased.
27. Viewed against the background of this evidence that the accused, according to PW2, was drunk at the time they were arguing with the deceased, and coupled with the evidence that they were separated and went different ways, the accused cannot be said by any direct evidence or otherwise to have stabbed the deceased to death.
28. He could not, in any event, due to the state that he was in, be in a position to have malice aforethought and formed the necessary mens rea to constitute the offence of murder. The statement under inquiry only places the accused at some point with the deceased, and that was around 11.10 pm yet PW2 clearly



indicates that the deceased and the two accused were separated and went separate at that time. The deceased was found much later stabbed, and there is no evidence that the accused had stabbed him.

## 29. ISSUES, ANALYSIS, AND DETERMINATION.

30. After going through the evidence on record and submissions the court finds the salient issues from the matter herein are whether the ingredients of murder have been proved beyond any reasonable doubt. Did the unsworn defence exonerate the accused?
31. Section 203 defines the offence of murder. It requires proof of the following elements beyond a reasonable doubt to establish the crime of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused and that the unlawful killing was with malice aforethought.
32. Murder; elements of murder; generally, most offenses are established by proving both *actus reus* and *men's rea*. *actus reus* is a Latin term meaning a guilty act, while *men's rea* means a guilty mind. Specifically, *men's rea* refers to the mental state, including intent, knowledge, recklessness, and criminal negligence. Proving *actus reus* is easy as it is the physical act of killing someone. It involves one of the acts or omissions discussed above.
33. As previously noted, from a reading of section 203 of the *Penal Code*, the *men's rea* element of murder is malice aforethought. Malice aforethought, in this sense, does carry the literal meaning but means the existence of intention. Therefore, the presence of malice aforethought is of utmost importance, for it is the presence or absence of it which determines whether an unlawful killing is murder or manslaughter.
34. In the English case of *R v Maloney*, the House of Lords stated that the malice aforethought of murder consists of an intention to kill any person or cause grievous bodily harm to any person. The conception of malice aforethought in the above-cited case also mirrors our courts' definition. As noted by the Court of Appeal in *Nzuki v Republic*, before an act can be murder, it must be aimed at someone, and it must be committed with the following intentions: –Intention to cause death; Intention to cause grievous bodily harm;
35. Where the accused knows there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
36. Furthermore, the intentions have been codified under section 206 of the *Penal Code*. This section provides for circumstances when malice aforethought is deemed to be established. These circumstances are; An intention to cause the death of or to do grievous harm to any person, whether that person is the one actually killed or not; The knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; An intent to commit a felony; An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
37. Additionally, to make the exercise of determining whether a murder has been committed easy, the courts have developed a three-element test.
38. This is exemplified by the case of *Anthony Ndegwa Ngari v Republic*, where the elements were listed as follows: – The death of the deceased occurred; That the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought.
39. The burden of proving the existence of the above elements is on the prosecution. The prosecution must discharge this burden sufficiently and beyond reasonable doubt for the court to find a person



guilty of murder. So, it is the case; therefore, where malice aforethought is not proved, the accused is usually found guilty of manslaughter.

40. That the accused committed the unlawful act which caused the death of the deceased.
41. PW4, the investigating officer PC Fernandez Andove that during his investigations, it was discovered that the accused was demanding his balance of Kshs one hundred from the deceased when the fight between the two broke out. The deceased suddenly fell to the ground during the fight, and the accused person ran away.
42. The accused lawfully recorded a cautionary statement in the presence of chief inspector Peter Ramogi. The statement was produced as exhibit 2. In his statement, the accused states that he and the deceased differed over a mobile phone handset and some money, and they got into a physical fight. He further stated that;

“As we were fighting, he had a knife, I got hold of his hand and kicked him on the foot and he fell down and I left him on the ground as I went home without my phone.”
43. This clearly places the accused person at the scene of the crime. He was the last person to be seen with the deceased person alive. He fought with the deceased, and at that time, a knife was involved.
44. Malice aforethought is well defined in section 206 of the *Penal Code* as: -An intention to cause the death of or to do grievous harm to any person, whether that person is actually killed or not.
45. Knowledge that the act or omission causing death will probably cause the death of 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, by the wish that it may not be caused.
46. An intent to commit a felony. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony.
47. PW1 stated that he saw the accused and the deceased arguing about a mobile phone and some money on a fateful day. The accused clearly had the motive to kill the deceased over the mobile phone that he had sold to the deceased, and the deceased had failed to complete payment for the same. This demonstrates malice aforethought.
48. In the accused person's statement, he states:

“That the following day as I was at the bus stage one known to me as Kamau came and told me that the police wanted me because I stabbed someone with a knife. So that I decided to go home, collect my clothes, and go to places until Saturday when I received a call from Smart; he informed me that Sam was dead; I decided to escape from the market”.
49. The accused had a guilty mind and thus decided to flee. He was arrested by his two uncles, who then handed him over to the Marmanet patrol base.
50. It's also noteworthy that the accused elected to rely on an unsworn defence. In addition, in the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement.



51. This is the disadvantage of the accused electing to make an unsworn statement. A few cases will illustrate the point.
52. In *Amber May v The Republic* [1999] KLR 38, the High Court held that an unsworn statement has no probative value notwithstanding the provisions under section 211(1) of the Criminal Procedure Code. However, on appeal against that decision and reported as *May vs The Republic* 9[1981] KLR 129, the Court of Appeal held *interalia*:—that unsworn statement is not strictly speaking evidence, and the rules of evidence cannot be applied to an unsworn statement.
53. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value, it must be supported by evidence recorded in the case.
54. No adverse interference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by section 211(1) of the *Criminal Procedure Code* (cap 75, Laws of Kenya.)
55. Based on the above authority, it is observed that since the accused made an unsworn defence, such has no probative value in the absence of collaborating witnesses. For he stated that there was a witness who was present when he was asking for his phone from the deceased, and further that there were people who separated them, and it was during that process that a knife was seen tacked in the deceased waist. However, the accused did not avail any of these witnesses.
  - i. In the upshot, the court finds that the accused person’s defence is full of mere denials and that the prosecution’s case was proved beyond a reasonable doubt, and thus court convicts him of murder accordingly.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

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**CHARLES KARIUKI**

**JUDGE**

