



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mkondo (Criminal Case E014 of 2021)
[2023] KEHC 943 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E014 OF 2021
JR KARANJA, J
FEBRUARY 15, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PIUS OTIENO MKONDO ACCUSED

JUDGMENT

1. Pius Otieno Mkondo is accused of murder, contrary to S.203 read with S.204 of the [Penal Code](#), in that, on the July 31, 2021 at Burinda-Butula-Busia County murdered John Ogeda Oluoch.
2. The case for the prosecution emanated from the facts that the deceased and the accused were related. They were “brothers” but were apparently not in good terms due to what appeared to be a land dispute. On the material date at about 4.00 p.m., Clinton Ochieng (PW 1) was on his way to fetch water at a nearby river when he met his uncle, the deceased who was looking after his cattle grazing nearby. Behind him, Clinton saw the accused following the deceased while carrying a panga (machete) which he used to attack and injure the deceased while uttering the words to the effect that the deceased had disturbed them for a very long time.
3. The incident unfolded in full view of Clinton (PW 1) along a waljina path. Thereafter, the accused left the scene with his panga while Clinton raised alarm. Earlier, the deceased was at his home with his grandson, Okoth Maxwell (PW 2), when he left to go to fetch his cows. Shortly thereafter, Maxwell heard him screaming and upon enquiring, found him falling down having been attacked with a panga by the accused who was then hiding nearby. The deceased suffered an injury on his head to which he succumbed. Villagers arrived at the scene and the police were called.
4. The deceased wife, Dorine Achieng Ogeda (PW 3), was notified of the attack against her husband and rushed to the scene where she found him lying on the ground with injuries on his head, neck and



shoulders caused by a sharp object. She collected his hat from the scene and handed it over to the police who arrived at the scene. Her husband was already dead from his injuries.

5. Cpl. Charles Mwai (PW 7), attached to the Directorate of Criminal Investigations, Westlands Nairobi was at the material time based at Butula Busia County. He proceeded to the scene of the offence accompanied by his colleagues after the offence was reported to them by members of the public. They found the dead body of the deceased lying on the ground in a pool of blood with a deep cut at the back of the head.
6. Cpl. Mwai arranged for the scene of crime to be photographed before removing the body of the deceased to the Sega mortuary. Together with his team, he returned to Bumala police station where they found the accused having surrendered himself. Cpl. Joel Nadoya (PW 5), was at the material time on duty at the said police station when the accused presented himself and reported to him that he had killed his neighbour by slashing him with the panga in his possession.
7. Cpl. Nadoya noted that the panga (P.EX 2) together with the clothes the accused was wearing (P.EX 3) had blood stains which were later analyzed by a Government Analyst, Salvin Cheruto Kutokoi (PW 6) and found to have emanated from the deceased.

The autopsy on the body of the deceased was performed by the consultant Pathologist, Dr. Dickson Mchana (PW 4), on the 6th August, 2021. Thereafter, he compiled the post mortem report (P.EX 1) indicating that the deceased died from multiple injuries secondary to sharp force trauma due to assault.

8. The accused denied the charge but in his defence admitted having killed the deceased without having the necessary intention to do so. He stated that it was at about 5.35 p.m. on the material date when he arrived at his home and found his fence damaged by a vehicle and while cleaning the spot he noticed his brother, the accused, coming from his home and approaching him with a machete (panga). On reaching him, the deceased questioned him on the debris at the fence and after abusing him raised the panga with a view to slashing him.
9. At that juncture, the accused stated, that he lifted a fence pole to defend himself and the panga got stuck in it. He pulled it off the pole and engaged in a struggle with the deceased. In the process, he sustained a cut on his hand. Thereafter, he attempted to slap the deceased with the blunt side of the panga but the deceased was hit and cut with the sharp side of the panga. He (deceased) moved a few metres away before falling down.
10. The accused then picked the panga and proceeded with it to Bumala police station where he surrendered to the police and handed the panga over to them. He contended that the incident was unfortunate and although the deceased and himself had a long standing land dispute he could never intentionally kill anybody for the land and what happened between him and the deceased was accidental.
11. From the evidence in its totality, there is no contest that the accused caused the death of the deceased by assaulting him on the head and other parts of the body. The post mortem report indicated that the attack was vicious, brutal and extensive such that it was inconsistent with a self –defence act or an accidental act. The effect of this was to overrule the accused’s contention that he did not intend to kill the deceased.
12. The nature and seriousness of the injuries suffered by the deceased leading to his demise was conclusive enough for a holding that the accused acted of malice afterthought when he set upon attacking the deceased without any provocation and out of misplaced anger and spite towards him. It cannot be possible that the deceased was the aggressor and that the accused was provoked and/or acted in self defence.



13. The law is clear on how the intention to kill may be deduced. In that regard, S.206 of the [Penal Code](#) provides that:-

“Malice aforethought shall be deemed to be established by evidence proving any one 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 of or grievous harm to some person whether the 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 the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

14. The evidence against the accused clearly established that he was possessed of an intention to cause the death of or to do grievous harm to the deceased for

“having disturbed them for a very long time”.

Such statement was evidently attributable to the existing land dispute within the family of both the accused and the deceased and showed that when the accused set upon the deceased and stabbed him severally with the panga he knew that his action would cause the death of or do grievous harm to the deceased.

15. The accused cannot therefore be heard to raise the defence of provocation or self defence as an excuse for his unlawful act or to dispel the notion that the action was premeditated.

In sum, the case for the prosecution was proved against the accused beyond any reasonable doubt.

Consequently, the accused is hereby found Guilty as charged and is accordingly convicted.

DATED AND DELIVERED THIS 15TH DAY OF FEBRUARY, 2023

JR KARANJAH

JUDGE

