



**Republic v Mbeta (Criminal Case 16 of 2020)  
[2023] KEHC 828 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 16 OF 2020  
PJO OTIENO, J  
FEBRUARY 10, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NASHON MUNIKA MBETA ..... ACCUSED**

**JUDGMENT**

1. The accused, Nashon Munika Mbeta, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and the particulars of the offence were given to be that on the 2<sup>nd</sup> day of August, 2017 at Etondo village, Esianduba sub location, Emasaba location in Luanda sub county within vihiga county, the accused person murdered Agnes Etole Amkoa. He pleaded not guilty and a full trial followed at which the prosecution paraded and called an aggregate of six witnesses.

**The Evidence**

2. Dr. Dickson Mchana set the ball rolling as PW1. As the consultant pathologist in charge of the larger western Kenya, he conducted autopsy on the body of the deceased on the 15.8.2017 and compiled a report which he produced as an exhibit. He stated that on examination of the body of the deceased, she had burns which were at various levels of healing and infection. That the lower lip, entire front abdomen, the inner and back aspects of both thighs and buttocks were all burnt. Internally, there was bleeding on the surface of the stomach and the spleen was severely infected. He formed the opinion that the cause of death of the deceased was severe infection arising from burns which he assessed at 40%. When cross examined and reexamined by counsel, the doctor told the court that his assessment of the degree of burns was based on a medical formula.
3. PW2, Melisa Kuya, a sister to the deceased, gave evidence that on 26/6/2017 she was at her place of work selling vegetables when the deceased was brought to her by the accused brother. She burnt wounds on



- the deceased and decided to take her to hospital. She first took her to Emuhaya hospital and later to Coptic hospital where she was admitted for three weeks and discharged due to the rising hospital bills.
4. At Emuhaya hospital, the deceased told the medical personnel in her presence that she had been burnt by the husband. On 28/8/2017 she left home for kazi kwa vijana and was later called and informed by the medical personnel who took medicine to the deceased that the deceased had died. She added that the deceased had constantly complained of habitual assault by the accused.
  5. Following the death of the deceased the accused disappeared and only emerged during his mother's funeral where he was arrested. The witness however conceded that she did not witness the incident occur but reiterated that before death the deceased was able to talk and was consistent that it was the accused who had burnt her.
  6. It was the testimony of PW3, Felistus Ambiyu, mother to the deceased that on 24/6/2017 she received information that her daughter had been burnt. She went to see her and confirmed she was burnt on the abdomen and thighs. They rushed her to hospital where she was admitted for three weeks. At the hospital she kept on asking if the accused had been arrested for burning her.
  7. On cross examination she stated that she did not witness the accused burn the deceased.
  8. PW4, Wilberforce E. Etole, a village elder testified on 26/6/2017 he received information from the chief that a woman had been injured in the area. They headed to the home of the accused and found his mother who informed them that the accused had locked his wife in the house with instructions to not open the door. They managed to open the door and the chief together with others ladies entered and found the deceased naked and burnt. They covered her in a leso and took her to hospital.
  9. On cross examination he stated that it was the chief who arranged for a taxi to take the deceased to hospital.
  10. PW5, Rodah Agnes Malenje, the area chief of Ebusakam location testified that on 26/6/2017 at about 5:55 AM she received a call that a lady had been burnt and locked in a house for two days. She called PW4 who accompanied her to the scene. She entered the house which had a bad stench and found the deceased in a bad state with burns on the abdomen, thighs and hands. The deceased informed her that she had been burnt by her husband using paraffin which he had sent her to get. She ordered for a taxi and took the deceased to Coptic hospital.
  11. On cross-examination she stated that she only knows what the deceased told her because she was not there.
  12. PW6, No. 67638 PC Francis Matheka, the investigating officer testified that they had received a complaint of assault against the accused but then he disappeared. It was at the funeral of the mother to the accused that the accused resurfaced and was arrested was causing disturbance. He said he said he received treatment notes from Emuhaya hospital and Coptic Hospital and since the deceased had spoken to the sister, mother and the chief that the accused had burnt her, he preferred a charge of murder against the accused.
  13. On cross examination he stated that he relied on report and statements of other people.
  14. The court ruled that a prima facie case had been established against the accused person and he was thus placed on defence.
  15. The Defence called one witness, Nashon Munika Mbeta, who testified that on 2/8/2017 he was at home when his girlfriend, the deceased, came home drank at about 8PM. He was in the bedroom while she was at the sitting room. There was a lamp at the sitting room. He then heard a fall and when he



went to check he found the deceased had fallen on the lamp and was burning. He helped put out the fire using a blanket. The next day he went to look for a motorcycle to take the deceased to hospital but when he came back he found the chief had taken her to hospital. At the request of the clan elder he prepared tea which he took for the deceased and his mother who were at the hospital. At Emuhaya hospital he was informed by his mother that the family of the deceased had taken her to Mbale hospital and he went there though he did not find her. He went back home and was informed by the assistant chief that the deceased had been taken to Coptic hospital and that her family was saying he burnt her. He stated that the police never looked for him concerning the incident and he further refuted claims that he burnt the deceased.

16. On cross examination he stated that the deceased was taken to hospital by her mother and the village elder. He also stated that he never visited the deceased in hospital.
17. This testimony marked the close of the defence case with the prosecution filing its written submissions.

### **Submissions By The Prosecution**

18. It is the submission of the prosecution that in as much as there is no eye witness on what transpired, the deceased prior to her death informed PW2, PW3 and PW5 about who had burnt her. They argue that the dying declaration which was corroborated by PW2, PW3 and PW5 was sufficient to support a conviction against the accused and places reliance on the case of *Charles Njonjo Gituro v Republic* (2019) eKLR and *Nelson Julius Karanja Irungu v Republic* (2010) eKLR.
19. On the intention of the accused to kill the deceased, the prosecution claims that this is imminent from the accused actions namely; he sent the deceased to buy paraffin which he used to burn her, after the deceased was burnt the accused locked her for two days and never visited her while in hospital and after being discharged and that the accused did not attend the deceased's burial.

### **Issues For Determination**

20. The offence of murder is defined in section 203 of the *penal Code* as follows;

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
21. Therefore, for the prosecution to sustain a conviction, all the ingredients contain in section 203 of the *penal code* ought to be proved beyond reasonable doubt.
22. That said, the issues that arise for determination by this court are as follows:-
  - a. Is Agnes Etoe Amkole deceased?
  - b. Did the accused kill the deceased?
  - c. Was the death of the deceased alluded to by unlawful acts or omission?
  - d. Whether the accused was actuated with malice afore thought in causing the death of the deceased

### **Whether Agnes Etoe Amkole is deceased**

23. There is in no doubt that Agnes Etoe Amkole is dead. This was confirmed by the prosecution witnesses, the autopsy report and even the accused person. PW1 indicated that the deceased died due to severe infection arising from burns which he assessed at 40%.



## Did the accused kill the deceased?

24. There was no eye witness that the accused killed the deceased. However, prior to her death, the deceased indicated to PW2, PW3 and PW5 that it was the deceased that burnt her. The admissibility of dying declarations is contained in section 33 of the *Evidence Act*, Cap 80 Laws of Kenya which provides;

“ 33. Statement by deceased person, etc., when

Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) Transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

25. This section was demystified in *Philip Nzaka Watu vs Republic* [2016] eKLR where the court held: -

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

26. The accused was a person well known to the deceased as they were cohabiting. The deceased prior to her death made a dying declaration to PW2, PW3 and PW5 that the accused was her assailant. Prior to her death it was the testimony of PW2 that the deceased was able to express herself. The testimony of PW2 was corroborated by that of PW3 and PW5 to the extent that it was the accused who burnt the deceased.

27. It was the testimony of the accused that the deceased fell on a lamp and sustained burn injuries. He claimed that when he heard the deceased fall he went to the sitting room and put off the fire using a blanket. If the accused was that fast as he purports to have actioned, I do not think the deceased would have suffered 40% burn injuries.

28. I thus find that the prosecution proved beyond reasonable doubt that it was the accused who burnt the deceased, burns which led to her death.



## Whether his death was alluded to by unlawful acts or omission

29. The right to life is protected and guaranteed under Article 26 of *the Constitution* of Kenya, 2010 and any action that tends to take the life of another is unlawful.

Whether the accused was actuated with malice afore thought in causing the death of the deceased

30. What constitutes malice aforethought was addressed by the Court of Appeal in *Nzuki v Republic* [1993] KLR 171 where it was observed 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 rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous 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. It does not matter in such circumstances whether the accused desires those consequences, to ensue or not 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 DPP* [1975] AC 55).”

31. Malice aforethought has also been explained by the Eastern Court of Appeal in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63 where it was observed as follows: -

“In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

32. Further, in the case of *Hyam v DPP* {1974} A.C. the Court had this to say on malice aforethought: -

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

33. Having established that it was the accused who attacked the deceased, this court is now called to determine whether the accused intended to kill the deceased.

34. It was the testimony of PW1, PW2, PW3, PW4 and PW5 that the deceased had burns on the abdomen, thighs and hands. It was also the testimony of PW5 that after the accused burnt the deceased, he locked her in the house for two days. The deceased had suffered 40% burns according to PW1 and for the accused to lock her up for two days with no food and no medical attention and had it not been for the intervention of PW5 it is unknown how long the deceased would have remained locked up with her injuries makes me infer that the only intention of the accused was to kill the deceased.

35. Accordingly, I find the accused person guilty for the offence of murder as charged and convict him accordingly.



**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

**M/s. Okali for the Accused**

**Ms. Chala for the Prosecution/State**

**Court Assistant: Polycap**

