



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Adiedo (Criminal Case E025 of 2020)  
[2023] KEHC 961 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE E025 OF 2020  
RPV WENDOH, J  
FEBRUARY 9, 2023**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**MICHAEL RADIER ADIEDO ..... ACCUSED**

**JUDGMENT**

1. By the information dated November 23, 2020, Michael Radier Adiedo was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the charge are that on November 11, 2020 at Kwe village, Rabondo Sub location, West Sakwa location, Awendo Sub County, murdered Benard Odhiambo Dede.
3. The accused denied the offence and the prosecution called a total of seven (7) witnesses in support of their case.

**The prosecution case:**

4. PW1 Peter Onyango Odede, a son to the deceased who was aged about eighteen (18) years, recalled that on the material day, at about 5:00am, they were weeding sugarcane with his brother Calvince Otieno (PW2) and his father (deceased); that the father went away from them to look for firewood from some branches that had been cut along the edge of the farm the previous day. He suddenly heard the father scream and on looking back, he saw the father lying down and the accused who was a next door neighbour (accused) was standing near the father together with his brother, Otieno and was armed with a panga; that PW1 and the brother PW2 tried to lift their father up in order to take him to hospital but he was already dead. PW1 noticed that the deceased had injuries to the left shoulder and head. PW1 further stated that his grandmother arrived at the scene and had also been assaulted by accused's brother. In cross examination PW1 admitted that there had been a long standing land dispute between accused, the deceased and his grandfather and that the deceased had once been imprisonment at Rongo



- court for seven months. He denied knowing if the land dispute was the cause of the attack on the deceased.
5. PW2, aged fifteen (15) years also testified that he was weeding sugarcane with PW1 when his father went to look at some firewood; that at the time, his grandmother was weeding a bit far off from them; that he saw two people with pangas and a sharp pointed metal on both ends. He saw Michael Radhier alias Ochanya who is not the accused, cut the father on the head and shoulder. According to PW2, the person in court is Owade. PW2 said that together with PW1 started to scream. They went picked up the deceased; that the grandmother arrived at the scene and was injured by Owade. He insisted that Michael Radhier, the person who assaulted the father was not the accused in court.
  6. PW2 Ruth Akinyi Dede, the wife of the deceased recalled that on November 15, 2020 she went to work in the farm at 8:00a.m and her husband (deceased) and the two sons PW1 and PW2 went to work in a different farm. She later heard screams, ran towards the source of the screams and met her mother in law, Magdalene (PW4) crying holding the left hand but she did not tell PW3 what had happened to her. PW3 passed her and went where there were noises and found the sons holding the deceased. She observed him and noticed blood on his clothes. She saw Michael (Accused) at his gate which is on the road and he had stones in his hand and a panga. A police vehicle came and took the deceased's body to the mortuary. Her sons informed her that Michael had cut the father. She admitted that her husband had cut a tree on November 10, 20220 but was not aware that he had gone to get firewood. PW3 was aware of the land dispute between accused and deceased and that the deceased was arrested and charged but not imprisoned. She denied that the Chief had ever gone to resolve a land dispute between Accused and deceased but that elders did.
  7. PW4 Magdalena Atieno Dede, the deceased's mother recalled that on 11/1/2020, at about 8:00a.m She was digging in her farm while the deceased was in his sugarcane with his children. She heard the deceased shouting asking why they had killed him. She went where the deceased was and found Michael Radhier and Charles Juma who were armed with pangas; that Michael told Charles to finish her because she was testifying in court and it is then Charles cut her on the left hand which hand was still in a bandage. She said that when she was cut, she fell next to her son and came back to when being taken to hospital. PW4 said that the accused took himself to police station but Charles went missing and was not at home but has a case at Rongo Law Courts for assaulting her. PW4 denied that there was any land dispute between the accused's family and her family.
  8. PW5, Mike Obuya Ong'ori, Assistant Chief Rabondo Sub location since 2004 recalled that about 7:00 am to 8:00 am Ruth Dede (PW3) went to his home and reported that she had heard screams from the farm, rushed there and found accused had cut her husband, (deceased), on the head and shoulder and he was bleeding profusely. He told her to go ahead and he followed but found Bernard already dead and the body was at the road junction where they had reached after attempting to take him to hospital. The OCS Awendo came to the scene. PW5 observed an injury to deceased's head and shoulder. PW5 was aware that there was an existing land dispute between deceased and accused's father over encroachment and adoption of the boundary; that the dispute went upto Rongo court where it was settled in favour of Accused's father. He was aware that there now existed a boundary dispute between accused and deceased and that it is the deceased who was committing trespass. He received a report of the trespass on October 21, 2020 from Accused that deceased was cutting trees on the boundary and burning charcoal. He gave the accused an appointment that he would visit the scene and elders went to the scene on October 20, 2020; that both deceased and accused's families attended arbitration; that accused produced his father's title deed while deceased did not produce any and there was no settlement.
  9. PW6 Dr Erick Wekesa Wanyonyi, of Awendo Rapcom medical Centre performed the post mortem on the body of the deceased on November 22, 2020. He found that the deceased sustained a deep cut



wound on the left temporal cranial bone cutting through the left ear into the brain and exposing brain matter a deep cut wound on the left shoulder which injured the clavicle; humerus and major vessels in sub cranial artery and lastly a minor cut wound on the right forearm. He formed opinion that the injuries to the head caused severe brain injury leading to the death and the one to the shoulder caused bleeding leading to hypovolemic shock; that the probable weapon used was sharp.

10. PW7 PC Mathew Tum, the investigating officer, recalled that on November 11, 2020, the OCS tasked him to proceed to a murder scene and they found the body at Kwe Secondary School where the deceased had been carried to from the scene but died before reaching hospital. After investigation, he established that the accused and his brother attacked and assaulted the deceased; that the deceased's mother was also injured when she responded to the distress scream. He established the existence of a land dispute between Accused's family and the deceased. He said that the deceased was pruning trees on the boundary which were claimed by accused's family.
11. When called upon to defend himself, accused opted for unsworn statement. He knew the deceased as a neighbour; that on November 11, 2020, he woke up and heard somebody cutting a tree and he went to see who it was. He found the deceased and his two sons cutting his trees and on enquiring why, a fight broke out; that Onyango threw a panga at him which he avoided. He picked it and by then Accused was approaching him with a panga; that he had picked the son's panga. He threw the panga at him and it cut him on the head; that he left hurriedly and reported to the police; that in 2010, they had a case in Rongo court after deceased encroached on his land.
12. DW3 Susan Akinyi a neighbour to Accused, said that on November 11, 2020 morning, she heard a tree being cut; that accused went where the tree was being cut by deceased and his three children, that she saw one child throw a panga at Accused which he avoided. She did not see anything else. She denied that Accused was carrying any weapon when he left his house.
13. At the close of the defence case, Mr Nyangi, accused's counsel relied on the submissions made at the stage of case to answer; that nobody witnessed the deceased being assaulted and that the case turns on circumstantial evidence but the evidence did not satisfactorily point to the guilt of the accused; counsel also submitted that there were glaring contradictions in the evidence of PW1, PW2, PW3 and PW4 and they were not honest witnesses when they lied that there was no land dispute between the families. He argued that PW2 denied that accused killed the deceased while others said it was the accused; that though PW1 and PW2 were near the scene their testimonies were very contradictory. Counsel relied on the case of *Benson Njoroge Ngugi v republic* (2019) eKLR where the court held that minor contradictions by a witness that do not go to the merits of a case ought not to invalidate a conviction. He also relied on the decision of *Joseph Maina Mwangi v Republic* Criminal Appeal 73 of 1993; *Philip Nzaka Watu v Republic* (2016) Criminal Appeal No 29 of 2015 and Criminal Appeal Nigeria *David Ojeabuo v Federal Republic of Nigeria* (2014)LPCLR 22555 (CA)
14. Counsel submitted that the contradictions in PW1 and PW2's testimonies are so fundamental that they go to the root of the charge. Though Mr Omooria the Prosecution Counsel filed closing submissions, the accused having made unsworn statement the prosecution had no right of reply. The court will ignore the said submissions.
15. This being a criminal case, the prosecution has to prove its case beyond reasonable doubt. Beyond reasonable has been defined in several decisions. In *Stephen Nguli Mulili v Republic* (2014) eKLR, the court stated as follows: -

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolimington (1933) UKHK 1, where the court eloquently



stated that the “golden thread” in the ‘web to English common Law’ is that the duty of the prosecution to prove its case. The Kenyan courts have upheld this position in numerous cases.”

16. In the above case, the court of Appeal cited the case of *Miller v Ministry of Pensions* (1947)2 ALL ER where Lord Denning, on the degree of proof beyond reasonable doubt, stated as follows:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

See also *Bakare v State* (1987) INWLR 579.

17. Applying the principles espoused in the above cases, the court has to consider whether the charge is proved to the required standard.

18. The accused faces a charge of murder contrary to Section 203 of the *Penal Code*.

Section 203 provides as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

19. The three ingredients that the prosecution must prove beyond any reasonable doubt are:-

1. Proof of the fact and cause of death of the deceased;
2. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person; and
3. Proof that the said unlawful act or omission was committed with malice aforethought.

### **Proof of Death**

20. PW1 and PW2 said the deceased died before they could take him to hospital after he sustained injuries. All the prosecution witnesses who testified, saw the deceased’s body with injuries to the head and shoulder. Post mortem was performed by PW6 Dr. Wekesa after the body was identified by PW3. PW6 found that the deceased had sustained two injuries a deep cut wound on the left temporal cranial bone cutting through the left ear into the brain exposing the brain matter. Another cut wound was seen on the left shoulder which injured the clavicle, humerus and the major vessels ie sub clarion artery. The Doctor also saw a minor wound on the left forearm. The Doctor found that the injury to the head caused severe brain injury that led to the death deceased’s death and that injury to the shoulder caused bleeding that caused hypovolemic shock. He opined that the possible weapon was sharp. I find that there is overwhelming evidence that the deceased met his death after an assault.

### **Whether the Accused caused deceased’s death:-**

21. Having heard the prosecution and defence evidence, there is no doubt that the accused was present at the scene where the deceased was injured. The issue of identification raised by the accused’s counsel in the submissions does not arise. In his defence, Accused admitted that he went to the scene where



- trees were being cut. The accused's narration of the events is very different from that of the prosecution witnesses and I need to examine the evidence in detail. PW1 and PW2 were weeding in the sugar cane farm as their father pruned trees on the boundary, away from PW1 and PW2.
22. Although at first PW1 denied knowing why the father was attacked, he later admitted in cross examination that there had been long standing land dispute between his father and the accused's family. PW3, the deceased's wife, PW5 the Assistant Chief of the area and PW7 even the investigating officer confirmed that there existed a long standing land dispute between accused's family and the deceased over land boundary.
23. Having heard the testimonies of PW1, PW2 and PW4, I am inclined to believe that PW1 told the court the truth as to what occurred, that none of them saw the accused assault the deceased. PW2 told the court a very different narration from what PW1 told the court but were called to attention by the deceased's screams. He claimed to have seen accused brother not before this court, assault the deceased while PW2 only found the accused with the panga at the scene where deceased was assaulted. PW4 was also assaulted when she responded to the deceased's distress screams. Though PW4 tended to exaggerate what happened to her after she was assaulted by the accused's brother, it seems that she also found when deceased had already been injured PW4 only went to the scene on hearing the screams. The deceased sustained three injuries and therefore what PW4 told the court that she saw Accused and his brother repeatedly assault the deceased was not true. PW1, PW2 and PW4 arrived at the scene on hearing the deceased's screams. In fact PW1 admitted that the sugarcane were quite grown that one could not see the deceased from where they were. Having found as above, it therefore follows that the case turns on circumstantial evidence.
24. Circumstantial evidence is said to be the best evidence to prove a fact. In [Neema Mwandaro Nduzyar v Republic](#) (2008) eKLR, the court said:-
- “It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in Republic v Taylor Weaver Cr APPRR 20, but circumstantial evidence should be very closely examined before basing a conviction on it.”
25. In the case of [Abamad Abolfathi Mohammed & Another v republic](#) (2018) eKLR, the Court of Appeal had this to say of such evidence.
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
26. The Court of Appeal went ahead to lay down the test to be applied in considering whether the available circumstantial evidence can support a conviction. The court said:-
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In [Abanga alias Onyango v R Cr App No 32 of 1990](#), this court set out the conditions as follows:



“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

27. In this case, though nobody actually saw the accused assault the deceased, the injuries that the deceased sustained tell a different story from what the accused said happened. According to accused, he was under attack by deceased and his three sons and fearing for himself, picked the panga that had been aimed at him and threw it at the deceased and he was injured on the head. If that had happened the deceased would have been injured only on the head. But there was another deep cut wound on the left shoulder cutting through the left shoulder to the major blood vessels. How would this injuries have happened?. There was a third cut on the hand, which the doctor described as a defensive one . It means that the deceased wanted to block an attack. Besides, the injury to the head was so deep that I do not believe that it was a result of a panga being thrown at the deceased. To quote the Doctor (PW6), it was ‘a deep cut wound on left temporal cranial bone cutting through the left ear into the brain exposing the brain matter’. To be so deep, this must have been force inflicted at a close range. I find that the accused did not throw a panga at the deceased but attacked him and inflicted two very serious cut wounds that resulted in his death. The deceased did not even reach hospital but died soon thereafter. The circumstantial evidence points at none else but accused as the person who inflicted the fatal injuries. There is no evidence that he received any injuries despite the fact that he wanted the court to believe that accused was the one who was attacked by four people.

#### **Whether accused had malice aforethought:-**

28. Section 2006 of the *Penal Code* defines malice aforethought as

“206. “malice aforethought shall be deemed to be established by evidence proving anyone 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 same person, whether the person is the person actually killed or not although such knowledge is accompanied by indifference. Whether death or grievously bodily harm is caused.
- c) an intent to commit a felony;
- d) an intention by the act or omission facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”

28. In the case of *Republic v Tubere s/o Ochen* 1945) 12 EACA 63, the Eastern Court of Appeal observed as follows:

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



In *Hyam v DDDP* (1974) AC the court held:-

“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.”

29. In *Ernest Bwire Abanga alias Onyango v Republic* Criminal Appeal 22 of 1990, the court held:-

“Malice aforethought can be inferred from the manner of the killing the victim, if the grievous harm consists of the death of the victim is caused by intentional infliction of extreme, or brutal prolonged acts of assault for one to conclude that the killing was well calculated and planned that alone is sufficient to infer an intention to kill the deceased.”

30. In this case, the weapon used was a panga, and the injuries were inflicted on the head and shoulder, delicate parts of the body. The injuries inflicted were obviously meant to cause grievous harm or cause death. Even if the accused had learnt that the deceased was trespassing on his land, he had no right to take the law into his own hands. The matter was already with the authorities. He should have reported to the Chief or police. This court is satisfied that the accused had malice aforethought and viciously attacked the deceased for allegedly cutting his trees. I find the accused guilty of the offence of murder and convict him of the offence of murder as charged.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

**Mr. Maatwa**, for the State.

**Mr. Nyangi** Counsel for Accused

Appellant present in person.

**Evelyne Nyauke** – Court Assistant

