



**Republic v Thierere (Criminal Case 4 of 2017)
[2023] KEHC 675 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE 4 OF 2017
FN MUCHEMI, J
FEBRUARY 9, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

CHRISPO MAMITHI THIERERE ACCUSED

JUDGMENT

1. The accused person faces a charge of murder contrary to section 203 of the *Penal Code* as read with section 204. The particulars of the charge are that on the 10th day of August 2017, at Gathuthi village, Rititi Sub location, Ngandu location in Mathira West sub county, Nyeri county, he murdered Joseph Thierere Meitei by stabbing him with a panga.
2. At the inception, the case was heard by Matheka J who heard 5 prosecution witnesses. Directions under section 200(3) of the *Criminal Procedure code* were taken and the accused initially opted to recall two prosecution witnesses for cross examination, but abandoned the move opting to proceed from where the former trial judge reached. This court heard the last three prosecution witnesses and the defence case. A total of eight (8) witnesses were called to testify.
3. The evidence of the prosecution was that on August 10, 2017, the deceased and his son the accused had a disagreement over a hen at the deceased's house and that the accused person who was armed with a panga attacked the deceased. He cut him severally on the head and neck thereby causing him fatal injuries. Members of the public rushed to the scene and arrested the accused person until the police came and arrested him. A blood stained panga was recovered at the scene of the crime. The accused was thereafter taken for mental assessment where Dr Joseph Thuo declared him fit to plead.
4. Post mortem of the deceased's body was conducted by Dr Stephen Nderitu and he formed the opinion that the deceased died as a result of multiple cut wounds on the head, neck and left hand, a severe head injury and severed left carotid artery.



5. Upon being put on his defence, the accused person elected to give sworn testimony without calling any witnesses. He stated that on the material day he was in Karatina at around 7.30 am when his wife and two sisters called him and informed him that his father had assaulted his mother. He then returned home at around 10.30 am – 11 am where he met the deceased. He stated that the deceased hit one of his chicken with a fork jembe and killed it instantly. On inquiring why he had done so, the deceased threw the fork jembe at accused. In self-defence, the accused threw the panga at the deceased hitting him on the head which caused the deceased to fall down. The deceased bled to death following the injuries sustained.
6. The prosecution and the defence filed their submissions in this case which the court has perused and considered in this judgment.
7. PW4 testified that he witnessed the accused person quarrelling with the deceased and then saw the accused hitting the deceased with a panga. It was submitted by the prosecution that the evidence of PW4 was consistent with that of the doctor on the injuries sustained which were said to have been inflicted by a sharp object. It was further argued that the accused supported PW4's testimony for he placed himself at the scene of the crime. He admitted having an altercation with the deceased over a chicken and being armed with a panga and further using the panga which he used to inflict injuries on the deceased.
8. The prosecution further submitted that it proved the element of malice aforethought which it demonstrated by the fact that the accused was armed with a panga before attacking the deceased. The defence raised the defence of provocation and self-defence to which the prosecution submitted that the evidence on record strongly discounted the said defences. Particularly, the post mortem showed that the deceased sustained five (5) cut wounds from the attack which does not support the accused person's defence that he threw the panga once at the deceased. Furthermore, PW4 testified that he saw the accused person with a panga at least two times before he went to call for help. It is notable that the accused did not sustain any defensive wounds as he claimed when he testified. If he did so, he would have introduced this self defence early enough during the trial.
9. The defence relied on his submissions for no case to answer filed on July 4, 2022 and filed final submissions whereby it was submitted that the prosecution did not demonstrate that the accused person had malice aforethought. The accused person relied on the cases of *Republic vs Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR; *Republic vs Tubere s/o Ochen* [1945] 12 EACA 63 and *Lokoye vs Uganda* (1968) EA 332 and submitted that malice aforethought is a premeditated thought to commit a crime and in the instant case, the accused person did not premeditate to kill the deceased. He further submitted that he was provoked when the deceased killed his chicken and on confronting the deceased about it, he sensed danger and threw a panga at the deceased which killed him unfortunately.

The Law and Analysis

10. The burden of proof in criminal cases lies on the prosecution to establish that the deceased's death was a result of the unlawful act of the accused person. The prosecution must prove the primary ingredients of the offence of murder namely:-
 - a. That the deceased died as a result of the unlawful act of the accused;
 - b. That the accused person has been positively identified and placed at the scene of the crime;
 - c. That the unlawful act was actuated by malice, rather that malice aforethought existed on part of the accused person.



11. Upon the death of the deceased, PW1 Dr Stephen Nderitu conducted an autopsy on the deceased. The post mortem report shows that the cause of death was multiple cut wounds on the head, neck, left hand, severe head injury and severed left carotid artery. The death of the deceased and the cause of that death by the prosecution through the medical evidence.

Whether the accused caused the death of the deceased by either an unlawful act

12. PW4 testified that he saw the accused person cut the deceased with a panga on the head twice. He testified that he met the accused person and the deceased quarrelling at the deceased's homestead over a chicken and the fact that the deceased had been seen to be violent to the accused person's mother earlier in the morning of the same day. The witness further stated that he persuaded the deceased to put the matter to a hold and await the elders to resolve it. PW4 then saw the accused person cut the deceased with a panga twice on the head. PW4's testimony is consistent with the post mortem report which indicated that the cause of death was due to injuries inflicted by a sharp object.
13. The accused person testified that he went home at around 10.30am – 11am and was involved in an altercation with the deceased over a chicken. Evidently, the accused person placed himself at the scene of the crime and he admitted to having quarreled with the deceased. The accused person also admitted having a panga and using the said panga to inflict fatal injuries on the deceased.
14. The accused was identified as a person well known to PW4 to the civilian witnesses who were his neighbours. The identification was therefore by recognition as the incident occurred during the morning hours in broad daylight. In the case of *Anjononi & others Vs Republic* [1976-80] KLR 1566 it was held:-

Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

It is therefore my considered opinion that the prosecution has proven that the accused person was the one who unlawfully inflicted the fatal injuries on the deceased.

15. The defence challenged the evidence of the prosecution and stated that he threw the panga at the deceased because he was provoked and he acted in self defence.
16. The law relating to provocation has been provided in section 207 and 208 of the *Penal Code*. Section 207 provides:-

When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter.

Section 208 of the *Penal Code* defines the term provocation as follows:-

The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal parental filial or fraternal relation or in relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.



17. Superior courts have dealt with the defence of provocation in several cases. In the case of *Republic vs Hussein s/o Mohammed* [1942] EACA at pg 66, the Eastern Court of Appeal held:-

When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.

18. Further, in the case of *Peter Kingori Mwangi & 2 Others vs Republic* [2014] eKLR the court stated that for provocation to exist the following two conditions must be established:-

- a. The subjective condition that the accused was actually provoked so as to lose his self-control ; and
- b. The objective condition that a reasonable man would have been so provoked.

19. The accused person has also raised the defence of self defence to this offence. The defence of self defence is provided for in section 17 of the *Penal Code* which provides:-

Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of persons or property shall be determined according to the principles of English Common Law.

20. The said common law principles were spelt out in the case of *Palmer vs Republic* [1971] AC 814 in which it was held:-

It is both good law and god sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury.

21. In the case of *Mokwa vs Republic* [1976 – 80] KLR 1337 the Court of Appeal held that:-

Self defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force.

22. Further, the Court of Appeal in the case of *Victor Nthiga Kiruthu & Another vs R* [2017] eKLR further discussed self defence as follows:-



The principles that have emerged from these and other authorities are as follows:-

- a. Self defence as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
 - b. The law generally abhors the use of force or violence, but there are instances when a person is justified in using reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
 - c. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
 - d. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
 - e. What amounts to reasonable is a matter of fact to be determined from evidence and the circumstances of each case.
23. The facts of the case demonstrate that the accused was the aggressor for he is the one who descended on the deceased and cut him with a panga several times. There is evidence to the effect that the accused was not provoked so as to act in the heat of passion. Neither was he attacked by the deceased to justify any action of self-defence on part of the accused.
24. Having considered the defences relied on by the accused, I am of the considered view that the defences of provocation and self-defence were not established by the accused in his defence.

Whether the accused had malice aforethought

25. Section 206 of the *Penal code* stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-
- a. An intention to cause the death of another.
 - b. An intention to cause grievous harm to another.
 - c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
 - d. An intent to commit a felony.
 - e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

It is trite for a charge of murder to hold against the accused, the prosecution must prove that at the time he inflicted the injuries on the deceased, the accused had formed the necessary intention to either cause death or grievous harm on the deceased. The prosecution submitted that the accused person demonstrated malice aforethought by the fact that he was armed with a panga before attacking the deceased. The prosecution further submitted that the accused person's intention was to kill the deceased who was not armed during the incident.



26. The prosecution evidence was that the deceased died as a result of multiple cut wounds on the head and neck. He had severe head injury and severed left carotid artery. The post mortem report indicates that the deceased sustained at least five cut wounds from the attack. Additionally, the deceased sustained fractures to his skull with brain exposure and a severed cervical spine. The extensive nature of the injuries suggest that the accused person used the panga more than once to injure the deceased. Furthermore, PW4 testified that he saw the accused person cut the deceased two times before he went to call for help. As such, the accused person's actions and specifically the nature of injuries he inflicted on the deceased are indicative of malice aforethought and thus the defences of provocation and self defence are not applicable.
27. The Court of Appeal in the case of *Lucy Mukeni Mutava Vs Republic* [2019]eKLR in a case with similar facts held:-
- “ All in all, we, like the trial court are satisfied that the appellant's actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under section 206 of the *Penal code*.
28. The accused in this case inflicted very severe injuries on the deceased as demonstrated by the doctor's evidence on the post mortem which caused his death just a short while after the attack.
29. It is my considered view that the prosecution have proved malice aforethought on the part of the accused.
30. Having considered all the evidence and the issues ingredients of the offence, I find that the prosecution have proved the offence of murder against the accused beyond any reasonable doubt. I find him guilty of the offence contrary to section 203 as read with section 204 of the *Penal Code*.
31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 9th day of February, 2023

