



**Republic v Mbuvi (Criminal Case 1 of 2018)  
[2023] KEHC 756 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 1 OF 2018  
LM NJUGUNA, J  
FEBRUARY 8, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANTONY LOLE MBUVI ..... ACCUSED**

**JUDGMENT**

1. Antony Lole Mbuvi, the accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence being that on January 2, 2018 at Nthigine Village, Riakanau Location, in Mbeere Sub-County within Embu County murdered Simon Muiya. The prosecution called a total of 6 (six) witnesses in support of its case; while the accused person gave sworn testimony and called no witness.
2. PW1, Philip Musyimi, testified that on January 2, 2018 at about 5am, he was sleeping when his wife called him and told him that the children were calling him. That upon going to where the children were, they informed him that there was a person who was lying outside their gate and upon checking, he found the accused person near there. It was his evidence that upon enquiring from the accused what was happening, the accused told him that he didn't know and then walked away. He testified that the person who was lying there was not breathing but he had no physical injuries on the body. It was his testimony that the accused person did not have any weapon with him.
3. PW2, Nancy Wanjiru testified that on January 2, 2018 at about 0500am she was woken up by some noise from outside. She woke her husband Kennedy Chira and they went out to find out the source of the noise. They saw two people, one of them was lying down and was talking although was not audible and there was also Jonathan alias Mukorino and the accused. She stated that she heard Mukorino saying 'usipige mtu mlevi'. They left the scene and went back to the house. Later, the accused went to their house and told them the man had died but in his hands, he was holding something that looked like a stick. On cross-examination she clarified that it was about 4am and she could not see clearly; she stated



- that she did not see the weapons that were in court (green pipe, whip and a panga) and she did not see anyone beat the deceased.
4. PW3, Johana Nduati Ndungu, stated that on the material day at around 5am, he was going to Embu Level 5 Hospital when he arrived near PW1's house and found someone lying down. That while there, the accused came and started whipping the man on his back and when he tried to restrain him, the accused threatened to beat him up. It was his testimony that the accused also used a panga to attack the deceased and that he had all the three weapons presented before court. He also confirmed that the people who were present at the scene were PW1, PW2, the deceased and him; and that the place was well lit and further that, he had a torch. On cross examination, he reiterated that PW1, PW2 and himself were present when the accused was assaulting the deceased; he further reiterated that the scene was not well lit but he had on him a small torch which unfortunately fell and broke as he was heading to the hospital.
  5. PW4, Antony Francis Mwangi testified that on January 2, 2018 at about 0339am, he saw the deceased who was crying "soldier nisaide". The witness stated that he could see clearly because the place was well lit and he had a torch. That upon enquiring from the deceased on the kind of help that he needed, the deceased told him that the accused herein had beat him as he was going to PW1's house. He stated that after a short while, the accused showed up carrying a panga and a pipe and that he warned him not to beat the deceased and advised that if there was a problem, then the same ought to be reported to the police. It was his further evidence that he directed the deceased to PW1's house but later heard distress calls but he did not follow but he learnt of the death of the deceased the following day. On cross examination, he stated that he did not record in his statement that the accused herein was the one who beat up the deceased. He also stated that he did not see the person who attacked the deceased and further, that he has never had a good relationship with the accused person.
  6. PW5, Dr Rosemary Wangari testified that on January 3, 2018 she conducted postmortem on the body of the deceased. That on the external appearance of the body, there was dry blood and soil over the face and mouth. There were 3 abrasions on the right side of the chest. On the head and nervous system, there was sub dural hematoma on the right parietal area which evidenced a raised intracranial pressure. In her considered opinion, the cause of death was head and chest injuries secondary to blunt force.
  7. PW6, CPL Joshua Kiprono, the investigating officer testified that on January 2, 2018 while in the station, they received a report from Makutano police station that a man was found dead at Ndingine market. At the scene, they found the body of the deceased lying 200 meters from the market and the same was wrapped in a white sheet and that the body had bruises on the chest and head. It was his evidence that the investigations led to the arrest of the accused through a good Samaritan, Nduati Ndung'u who allegedly saw the accused beat the deceased using a whip; that he recorded statements from the witnesses, escorted the accused for mental assessment and further, attended the post mortem carried out by PW5. Additionally, he stated that after analyzing the evidence, he charged the accused herein. It was his statement that on arrest and upon searching the house of the accused herein, a panga, a whip and a plastic pipe were recovered. On being asked why Joseph Mutinda, Simon Muasya and Muchiri Macharia were set free and why he did not include the details in his statement, he stated that the trio were released on the advice of the Office of the Director of Public Prosecution. The witness also produced the mental assessment report by Dr Thuo showing that the accused person was fit to stand trial.
  8. At the close of the Prosecution's case, this Court considered the evidence tendered by the prosecution and placed the accused person on his defence.



9. It was his evidence that on the fateful day while at work, he heard some screams and in company of five other watchmen, they went to check on what was happening. They found a person lying on the ground eating grass and soil. Also present was the watchman and the owner of the compound (PW1) where the man was, and the son to PW1. That he had a torch and arrow on him and when he shone the light from the torch to the deceased herein, he noticed that he appeared dead. From there, they left and went to different directions. It was his evidence that he only had arrows that he normally carried when on duty and that the panga, whip and electric pipes that the police produced as evidence before the court were collected from his house in his absence. He stated that five of them were arrested but he was the only one who was charged and the only reason was that he could not afford the alleged Kshs 10,000/= that the police demanded from him.
10. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya). The degree/standard of proof is always that of “beyond any reasonable doubt” [See *Miller v Minister of Pensions* [1947] 2 All ER 372 – 373].
11. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as:
  - i. the death of the deceased occurred;
  - ii. that the accused committed the unlawful act which caused the death of the deceased; and
  - iii. that the accused had malice aforethought.
12. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
13. On whether the death of the deceased occurred, it is not in doubt that the deceased herein died. PW1, PW2 and PW6 testified that indeed they saw the body of the deceased. In the same breadth, PW5 who performed autopsy on the body of the deceased stated that the death was as a result of head and chest injuries secondary to blunt force.
14. As to whether the death was caused by unlawful acts, under Article 26 of the *Constitution of Kenya 2010*, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See *Sharm Pal Singh* [1962] EA 13 and *Daniel Nzioka Mbuti & Another v Republic* (supra)].
15. It is quite evident from the several pieces of evidence above and as confirmed by PW5 who carried out post mortem on the body of the deceased and formed the opinion that the cause of death was as a result of head and chest injuries secondary to blunt force. As such the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
16. In this case, the prosecution placed a lot of reliance on PW3 who stated that while on his way to the hospital, he arrived near PW1’s house where he found someone lying down. That while there, the accused came and started whipping the man on his back and when he tried to restrain him, the accused threatened to beat him up. It was the witness’ testimony that the accused also used a panga to attack the deceased and that he had all the three weapons produced before court.



17. The question is whether this evidence by PW3, a single identifying witness, and at night, is sufficient to find the accused guilty of the offence of murder. That being the issue here, I must examine the law on reliance on such evidence. In *Wamunga v Republic* (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

18. In *Ogeto v Republic* (2004) KLR 19 the Court of Appeal held that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult. The Superior Court stated:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

19. The decision by the Court of Appeal in Kisumu Criminal Appeal No 20 of 1989, *Cleophas Otiemo Wamunga v Republic* (supra), the court stated that whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identification, the Court must warn itself of the special need for caution before convicting the accused based on the evidence of the identification.

20. Having considered the evidence of PW3 and other prosecution witnesses namely PW1 and PW2, the people who were present when the accused assaulted the deceased and given that there was enough light at the time and place of the scene, this court warms itself on such evidence as stipulated in the case law cited above. Further, PW3 reiterated that PW1, PW2 and himself were at the scene and they all saw the accused person attack the deceased. It was his statement that the place was well lit and from the evidence herein, he was categorical that he knew the accused so well.

21. The question therefore is whether the evidence of PW3 was corroborated by other independent evidence. PW5 stated that on the head and nervous system of the deceased, there was a sub dural hematoma on the right parietal area which evidenced a raised intracranial pressure and therefore, the death of the deceased was caused by head and chest injuries secondary to blunt force. Further, PW1 and PW2 placed the accused at the scene of crime while PW4 stated that the deceased told him it was the accused person who beat him and that the deceased had sought for help from him. Therefore, considering together the pieces of the prosecution evidence herein, I find that they corroborate one another and as such, I find that the accused herein was responsible for the said death.

22. As to whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder. [See Section 206 of the *Penal Code*].

23. The Court of Appeal in *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR stated as follows on the prove of malice aforethought:-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR APP No 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice



aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick....."

24. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were enumerated by PW5.

25. The accused on the other hand testified that he did not kill the deceased but, as the court has already noted, the evidence shows otherwise. In my view, it remains unknown why the accused herein beat the deceased. But that notwithstanding, motive is immaterial in proving one's criminal responsibility. That is clear from Section 9(3) of the *Penal Code* which provides that:

"Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility."

26. In case of *Joseph Wambirwa Mwanthi v- Republic*, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that "Generally speaking, motive is not essential to prove a crime."

27. However, the same court stated in *Lubambula v R* [2003] KLR 683 that:

"Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."

28. In the end, I find and hold that the prosecution proved all the elements of the offence of murder against the accused person beyond reasonable doubt and I therefore convict him accordingly.

29. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the State

