



**Republic v Kagio (Criminal Case E006 of 2021)  
[2023] KEHC 647 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E006 OF 2021  
LM NJUGUNA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**WALKER NJIRU KAGIO ..... ACCUSED**

**JUDGMENT**

1. Walker Njiru Kagio, 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 are that on January 30, 2021 at Kiangungi village Gachoka Sub-location, Mbeti South Location within Mbeere South Sub-County within Embu County murdered Joshua Nthenge. The prosecution called a total of 9 (nine) witnesses in support of its case.
2. PW1 Jane Njomo, an Assistant Chief from Gachoka Sub-Location testified that she was called by one Peter Njaro who informed her about the scuffle in the village where the deceased was killed. That upon reaching the scene, she found an irate crowd while the deceased lay under a tree with a deep cut on the neck. She stated that the accused had locked himself in his house and upon calling him, he came out and she enquired from him why he killed the deceased. After a short while the DCIO arrived and arrested the accused person; further that, upon searching the accused person's house, a panga was recovered.
3. PW2, Peter Ndaru, a village elder of Kagongi B, testified that on January 30, 2021 he received a call from a Mr. Kariuki who informed him of what had happened. It was his evidence that he hurriedly went to the scene and found the deceased's body with blood on the neck. That the accused herein had locked himself in his house but thereafter, he was arrested. He stated that he called PW1 to inform her of the happenings.
4. PW3 Cpl. Henry Kiboma, a DCI officer at Embu and a Scenes of Crime officer stated that on February 7, 2022 he received photographs accompanied by a memo from Corporal Adan Hassan of DCI Mbeere



- South requesting for certification. It was his evidence that he certified the same and marked them Nos. 1-8. He also stated that he is not the one who took the photographs and that both the deceased and the accused persons were not known to him.
5. PW4 Sgt. Paul Seda, the Investigating Officer stated that, on the material day, between 1300-1400 hrs he was instructed to take up this matter. He stated that the incident happened near Gachoka police station within Kangugi village. He further testified that at the scene, he found the village elder and the assistant chief, Gachoka Sub-location, who had detained the suspect; he thus proceeded to arrest the suspect and then started processing the crime scene. It was his evidence that he is the one who recovered the plastic shoe belonging to the deceased and a catapult which he was informed belonged to the deceased. He further stated that he went to the house of the accused and the accused person gave him the panga that was allegedly used to cut the deceased. On cross examination he stated that the incident happened at the home of the accused and there was an allegation that the deceased had gone to pick miraa from the accused person's farm.
  6. PW5 Dr. Godfrey Njuki Njiru, stated that he conducted autopsy on the body of the deceased and that there was a deep cut wound on the left side of the neck which had cut the vertebrae bones into the spinal code. He noted that the deceased died of severe cut wound with no other injuries.
  7. PW6 Austin Ouma Mumbo, testified that on the fateful day, he was going to the shop when he saw a man bleeding on the neck and he decided to help him and take him to hospital using his motorbike. It was his case that he was unable to do so as he couldn't lift him; and therefore, he was forced to leave him at the scene. He stated that he didn't know what happened to the deceased or the person who was responsible for the attack.
  8. PW7 Erick Bundi who produced the mental assessment report, stated that he was familiar with the handwriting and signature of Dr. Andrea Muikaba who conducted mental assessment on the accused herein and found him fit to stand trial.
  9. PW8, Florence Kinyua, testified that on the fateful day, at about 10am, she was at home doing some laundry but left for the shop to buy some soap. On coming back, she was informed that the accused and the deceased had fought. The deceased was lying in the compound under a tree and that she saw a panga where the deceased lay. It was her evidence that, she did not see the accused and the deceased fight. On cross examination, she stated that she heard the accused telling the deceased to stop picking his miraa but the deceased did not heed. That it was the deceased who had the panga since he was using the same to cut the grass for the goats. On re-examination, she stated that she witnessed the verbal altercation between the accused and the deceased.
  10. PW9, Alice Gikuu, stated that on January 30, 2021 she had gone to look for menial work at the accused person's place and that the accused left for the shop but on coming back, he found the deceased on his land, and ordered him to leave. That the deceased refused and continued to pick the accused person's miraa and the accused herein went to where the deceased was, and a fight ensued. It was her evidence that the accused person left the deceased at the farm picking miraa but after that, the deceased left the farm and went back to where he had been employed but after some time went back and dared the accused person to fight him. It was her further evidence that he told the accused that he will beat him saying that even the police could not take him anywhere and a fight ensued again and she ran away. On cross-examination, she stated that she witnessed the duo exchange words but did not see any weapon. She reiterated that the deceased was picking miraa from the accused's farm and that it was the deceased who started the fight.
  11. The defence filed submissions on no case to answer to wit that the prosecution failed to demonstrate that the accused herein had malice aforethought and further, no evidence was adduced that he had any



reason to murder the deceased. That clearly, it was not demonstrated that the accused had a strained relationship with the deceased and reliance was placed on the cases of *Joseph Kimani Njau v Republic* 2014 eKLR and *Libambula v Republic* (2003) KLR 683. It was submitted that there was no evidence that the accused had any intention to kill the deceased or cause him grievous harm; and from the evidence, it was clear that the accused was the one who was under attack and therefore, was entitled to defend himself. That if at all the accused person caused the death of the deceased, he did so in self-defence; and as discerned from the prosecution's evidence, he was attacked by the deceased. It was his contention that the main issue for determination is whether the act which led to the death of the deceased was unlawful and whether the accused had malice aforethought. Further reliance was placed on the cases of *Mokwa v Republic* [1976 – 80] 1 KLR 1337 and *Mungai v Republic* [1984] KLR 85; and Section 207 of the *Penal Code*. That the prosecution did not make out a *prima facie* case against the accused person.

12. At the close of the Prosecution's case, this Court considered the evidence tendered by the prosecution and found that the accused person had a case to answer and put him on his defence.
13. When he was put on his defence, the accused person stated that on the fateful day, at around 11.00 am he was at home resting when he saw the deceased picking his miraa at his farm; that he went there and tried to stop him. That the deceased removed a catapult and hit him twice and that he followed him home with a panga; that he managed to get the panga from him and threw it away so that the deceased could not cut him. Thereafter, the deceased left for Florence's place. It was his statement that he later learnt that the deceased had been injured. That he was arrested and charged with the death of the deceased. He stated that it is the deceased who provoked him and that he didn't intend to cut him but the same happened by accident when he was getting the panga away from the deceased. On cross examination, he stated that initially, the deceased had a catapult but later went home to pick a panga.
14. After the close of the defence case, parties filed submissions following directions by this Honourable court.
15. The prosecution submitted that it proved all the necessary ingredients of the offence of murder. The prosecution placed reliance on the case of *Republic v Stephen Sila Wambua* [2017] eKLR in buttressing the point that indeed the death of the deceased was unlawful. Further, the prosecution conceded that there is no witness who directly saw the accused cause the fatal injuries to the deceased but circumstantially, the accused person not only placed himself at the scene but the prosecution witnesses did. That it is at that scene that the deceased sustained the injuries. It was contended that the defence of self-defence is not available to the accused given that the deceased was not armed with a panga but a tiny catapult. That the accused did not sustain any injury to warrant the vicious attack on the deceased and that any such defence if present was absolutely disproportionate. That malice aforethought can be deduced from the nature of injuries occasioned to the deceased and notably in this case, the severed neck injury showed that the essential intent to kill was there. This court was therefore urged to find so.
16. The accused on his part submitted that the prosecution failed to prove the case against him beyond any reasonable doubt and therefore, he be acquitted. That the prosecution failed to prove malice aforethought on the part of the accused person nor was any evidence tendered to prove mens rea. It was submitted that the accused person did not use excessive force or any force at all, given that the deceased was cut with the same panga that he was attempting to cut the accused with. It was his case that as unfortunate as it may be that the deceased lost his life, he could not be free from any blame for the same.
17. 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, 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 doubts” [See *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].

18. 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.
19. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
20. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. PW1, PW2, PW4, PW6, PW9 testified that indeed they saw the deceased lying under a tree. In the same breadth, PW5 who performed autopsy on the body of the deceased stated that the death was as a result of severe cut wound with no other injuries.
21. 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*)].
22. It is quite evident from the several pieces of evidence above and as confirmed by PW5 that the cause of death was severe cut wound. The evidence from the post mortem report clearly showed that the deceased met his death as a result of severe cut wound and 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.
23. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution’s evidence as presented before the court and although no prosecution witness states directly that the accused herein inflicted injuries on the deceased; the accused person has not denied having a fight encounter with the deceased but on the flip side, stated that he did not intend to cut the deceased herein but it happened by an accident as he was trying to get the panga from the deceased. It was his statement that the deceased provoked him. The totality of the evidence herein is that the accused is the person who assaulted the deceased with said panga.
24. As to whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder. The accused in his evidence stated that it is the deceased who provoked him, and that he didn’t intend to kill him or cause him grievous harm; and from the evidence, it was clear that he was the one who was under attack and therefore, was entitled to defend himself. That, if at all the accused person caused the death of the deceased, he did so in self-defence after having been provoked. In the same breadth, PW8 and PW9 equally stated that the accused ordered the deceased to stop picking his miraa but the deceased did not heed.
25. The defence of self-defence when established and proved does not only have the effect of justifying an act causing death of a deceased person but it has the effect of disproving malice aforethought. A finding that the accused herein acted in self-defence will not only disprove the issue as to the act causing death being unlawful but will also disprove the issue of the accused having acted with malice aforethought. As such, the question which needs to be answered is whether the contention that the accused acted in self-defence is plausible.



26. The Court, after discussing several cases among them Robert Kinuthia *Mungai v Republic* (1982-88) 1 KAR 611, *Beckford v R* [1987] 3 ALL ER 425, *DPP v Morgan* [1975] 2 ALL ER 347, *R v Williams* [1987] 3 ALL ER in regards to the same came to the following conclusion in regard to the aforesaid principles: -

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in *DPP v Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.....

.....It is acknowledged that the case of *DPP v Morgan* (Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also *Smith And Hogan’s Criminal Law*, 13<sup>th</sup> Edition, Page 331.....

.....Just as the Privy Council did in *Beckford v R* (Supra), we must also dispel the fear that “the abandonment of the objective standard demanded by the existence of reasonable grounds for belief will result in the success of too many spurious claims of self-defence.” Each case will have to be determined on its own merit and peculiar circumstances.....”

27. In the case herein, the evidence adduced by the prosecution denotes that it is the deceased who started the aggression by picking the accused person’s miraa and despite the accused person dissuading him from doing so, he did not heed to the same and this brought about the fight between the duo; thus, be that as it may, was the reaction by the accused herein commensurate with the alleged impending danger posed by the deceased? The evidence by the prosecution witnesses states that indeed the deceased had the panga but he was using the same to cut the grass for the goats and from the accused person’s evidence where he stated that he did not intend to cut the deceased but it happened by accident. In the same breadth, PW5 in his evidence stated that the deceased had no other injuries save for the left side of the neck which had a cut wound so deep that had cut the vertebrae bones into spinal cord; in my view therefore, the nature of injury was way excessive than the alleged impending danger and the same negated the defence of self-defence, if any, in light of the surrounding circumstances. [See *Racho Kuno Hameso v R* [2014] eKLR].

28. My humble view above is further fortified by the case of *Victor Nthiga Kiruthu & another v R* [2017] eKLR wherein the Court of Appeal while discussing self-defence stated:

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

- (i) 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.
- (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a 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.



- (iii) 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.
  - (iv) 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.
  - (v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. [Emphasis added]
29. The defence of self-defence notwithstanding, the accused equally raised the defence of provocation. Section 207 of the [Penal Code](#) describes as “killing on provocation” as follows;
- 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 only.
30. Section 208(1) of the [Penal Code](#) defines “provocation” as follows-
- The term “provocation” means and includes, 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 who is under his immediate care, or to whom he stands in a 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.
31. The implication of Section 208 of the [Penal Code](#) is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation [See *Wero v Republic* [1983] EA 549]. Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt [See *Kenga v Republic* [1999] 1 EA 141].
32. The Court of Appeal in [Peter Kingori Mwangi & 2 others v Republic](#) [2014] eKLR stated:-
- “For provocation to exist, the following two conditions must be established: -
- (1) The subjective condition that the accused was actually provoked so as to lose his self-control and
  - (2) The objection condition that a reasonable man would have been so provoked.”
33. In this case there is evidence that it is the deceased who started the aggression by picking the accused person’s miraa and despite the accused person dissuading him from doing so, he did not heed to the same and this brought about the fight between them; thus, I hold the view that the deceased was the aggressor. I say so for the reason that PW 8 who testified that she heard the accused telling the deceased to stop picking his *miraa* but the deceased did not heed. That it was the deceased who had the panga since he was using the same to cut the grass for the goats. On re-examination, she stated that she witnessed the verbal altercation between the accused and the deceased. PW9’s testimony was very



similar to that of PW8 in that she reiterated that deceased picked miraa from the accused's farm despite being told not to, and further that, it was the deceased who started the fight.

34. However, taking into account the part of the body which the accused hit the deceased, notwithstanding the fact that he only hit him once, it is clear to me that the force used was excessive. Having failed to establish malice aforethought which is an integral element of the offence of murder, I find and hold that the prosecution failed to establish beyond reasonable doubt the offence of murder but find and hold that a lesser offence of manslaughter was proved beyond reasonable doubt, as the action of the accused was an unlawful act, dangerous and caused the death of the deceased. [See *Republic v Samson Eipa* [2021] eKLR].

35. In reference to the above, I seek refuge in Section 179 of the *Criminal Procedure Code* which provides that a court may convict of a lesser offence. It provides: -

- 1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- 2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

[Also see the Court of Appeal decision in the case of *Rashid Mwinyi Ngwisya & Another v Republic* (1997) eKLR].

36. I therefore substitute the charge of murder with that of manslaughter contrary to Section 202 of the *Penal Code* against the accused person. I hereby find him guilty thereof and convict him accordingly.

37. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the State

