



**Republic v Mutelwa (Criminal Case 54 of 2018)
[2023] KEHC 2139 (KLR) (Crim) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 54 OF 2018
JM BWONWONG'A, J
MARCH 15, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

AMOS WANJALA MUTELWA ACCUSED

JUDGMENT

Introduction

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap. 63) Laws of Kenya.
2. The particulars of the offence are that on 30th September 2018 at about 10.00 hrs, at Kangemi estate in Sodom section within Nairobi County murdered Judith Negesa Nafula.
3. On 8th November 2023 upon the application of the prosecution the court acting under section 275 (2) (3) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, allowed an amendment to the information (charge sheet) in relation to the time when the offence was allegedly committed. The time as amended now read 10.00 pm instead of 10.00 hrs.
4. It was clearly a minor amendment. Thereafter the defence did not apply to have recalled some witnesses for further cross examination. The prosecution then closed their case.
5. He pleaded not guilty.
6. The prosecution called five (5) witnesses in support of their case.
7. After the close of the prosecution's case, this court found that the accused had a case to answer under the provisions of section 306 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.



8. In his defence, the accused gave sworn testimony and did not call any witnesses in his defence.

The case for the prosecution

9. Branice Muhonja (Pw 1) testified that on 30th September, 2018 she was living in Kangemi within Nairobi County with the deceased, who had come to visit her. She narrated that at around 10 a.m., the accused, who was the deceased's boyfriend, came to see her, but she refused to see him. At the time, she had known the accused for three weeks. He went away and came back at around 9 .00 pm. He demanded his belongings from the house. He tried to take the kitchenware but the deceased stopped him. A struggle ensued between the two. The accused stabbed the deceased in her stomach with a knife that he was carrying on his waist. He then ran away with the knife and the deceased screamed for help. She was bleeding and neighbours arrived at the scene to help. With the help of Robert and Alfred, they took the deceased who was bleeding to Eagle Clinic for treatment.
10. At the hospital, first aid was administered and they were referred to Kenyatta National Hospital due to the nature of the injuries sustained. She testified that police from Kabete Police Station arrived at the clinic. They directed them to pass by the station before heading to Kenyatta National Hospital, where the deceased had been referred to. Upon arrival at the station, she went back to the scene in the company of Alfred and a police officer, who carried out a search. The deceased was left with the taxi driver.
11. They then went back to the police station. Before they could proceed to Kenyatta National Hospital, the deceased succumbed to her injuries. She recorded her statement and was released. The accused was later arrested after a mob tried to lynch him. She identified him in court.
12. In cross-examination, she testified that when the accused removed the kitchen knife that he used to stab the deceased, she was frightened and ran outside the house. She maintained that she was present when the deceased was stabbed by the accused. Further, that the deceased had told her that she had disagreed with the accused.
13. Lucy Warukira Wachira (Pw 2) a laboratory technologist at the Government Chemist Department testified that she received the following items. A knife, a blood sample marked Judith Nafula and a buccal swab marked Amos Wanjala. Her task was to examine the items and determine the presence and origin of any biological evidential material. It was her findings that the knife was moderately stained with the blood of human origin. The DNA profile generated indicated the blood originated from Judith Nafula, the deceased. She produced the report dated 28th December 2020 as Pex 2.
14. No. 67380 CPL Wilfred Bundi (Pw 3) of Kabete Police Station testified that on 1st October 2018, at around midnight, he was on patrol duties with PC Ngusia and PC Gakuo. They passed a crowd that was gathered outside Eagle Clinic. Upon inquiry, they found Pw 1 who informed them that her friend had been stabbed by her boyfriend. He told the court that they sought advice from the doctor, who advised that the injured be taken to Kenyatta National Hospital (KNH).
15. It was his testimony that at the time, the deceased was not breathing, and thus decided to report to Kabete Police Station before proceeding to Kenyatta National Hospital. Upon arrival at KNH, the deceased was confirmed dead. They took the body to Nairobi City Mortuary. He also recorded statements concerning the case from witnesses and visited the scene of crime.
16. The accused was later arrested.
17. Robert Momanyi Ondieki (Pw 4) testified that he is a casual labourer. On 30th September 2018 while he was working around the area where the deceased and Pw 1 were living, he heard a commotion. Immediately thereafter, there was a loud scream for help. One man ran outside the house at high speed.



- He had a knife in his right arm scaring everyone and vanished into the slums. He told the court that he could not recognise the individual who was running. The deceased came from the house holding her stomach and fell at the door.
18. With the help of 'boda boda' operators, they rushed her to Eagle Clinic in Kangemi, where she was attended to and referred to Kenyatta National Hospital. While at Eagle Hospital, police officers arrived and he went home. He later learned that the deceased had passed on.
 19. No. 92480 PC Eric Kimathi Kiome (Pw 5) testified that on 1st October 2018, he received a call from SSP Wanjanu who informed him that there was a murder at the Kangemi area. He proceeded to the scene with his colleagues PC Mutisya and PC Omari. At the scene they found Pw 1, who informed them that they lived with the deceased. She narrated the ordeal whereby the accused had stabbed the deceased. There were blood stains on the floor. Pw 1 was taken to the police station for interrogation and later released.
 20. On 4th October, 2018, he received a call that the accused had been arrested after a mob attempted to lynch him. At that time the accused was not aware that the deceased had passed on. After searching his house, they recovered a kitchen knife with blood stains, which was produced as P Exhibit 5. The house was well lit, and there were security lights outside. A post-mortem was conducted on the body of the deceased. The post-mortem report was produced as PEx 4. He also took samples from the deceased, which were sent to the government chemist for testing. On 18th October, 2018, the accused was taken for mental assessment, and after he was found fit, he was charged. The report from the government chemist confirmed that the blood from the kitchen knife was matched with that of the deceased.

The written submissions of the prosecution

21. The prosecution did not file any submissions, since the prosecution was not conducted personally by the Director of Public Prosecutions in terms of section 310 as read with section 161 of the [Criminal Procedure Code](#).

The case for the defence

22. In his defence, the accused gave sworn testimony. He did not call any witnesses. He testified that he was at the scene of crime at the time of the incident. That his aim was to collect his belongings from the deceased. However, the deceased attacked him with a knife. She stabbed him with a knife on the chest. It was his testimony that he sustained injuries on his 3rd, 4th and 5th fingers of the right hand, while trying to take the knife from the deceased in self-defence. He produced a medical report dated 18th October 2018 as D Exhibit 1. He maintained that the deceased stabbed herself in the ensuing confrontation. That he ran away from the scene for his own safety. He denied claims that the blood-stained knife produced as an exhibit was recovered from his house by the police.

The written submissions of the accused.

23. Ms. Ajiambo learned counsel for the accused submitted that the accused raised the defence of self-defence under the provisions of section 17 of the [Penal Code](#). She argued that the prosecution failed to tender evidence to dislodge the accused's account and thus the defence of self-defence is available to him.
24. Learned counsel further submitted that the accused did not have the intention to cause the death of the deceased. This was evident as he tried to call her after their altercation to find out how she was fairing. However, his calls could not go through. During this period, he was in touch with Pw 1, who kept misleading him that the deceased was recovering. She further submitted that the prosecution did not



tender evidence that he fled or went into hiding after the incident. She maintained that the prosecution failed to prove beyond reasonable doubt the element of malice aforethought to the required degree.

25. She therefore urged the court to acquit the accused.

Issues for determination

26. To sustain a conviction on a charge of murder under section 203 of the Penal Code, the prosecution is under legal and evidentially burden to prove beyond reasonable doubt the following elements of the offence:-

- a) The fact and the cause of death.
- b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.
- c) That it was committed with malice aforethought - *mens rea*, on the part of the accused as defined in section 206 of the Penal Code.

Analysis and determination

27. The fact and cause of death of the deceased is not in dispute. Pw 1, Pw 3 and Pw 4 confirmed that the deceased died while on her way to Kenyatta National Hospital, where she had been referred for treatment. The caused of death as indicated in the post-mortem report confirmed that the deceased as a result of exsanguination of a penetrating sharp object trauma to the chest and abdomen.

28. On whether the said death was caused by the accused person, the prosecution placed him at the scene of crime and was arrested a few days later by Pw 5. In his evidence in chief the accused confirmed having been at the scene and having tussled with the deceased and as a result she was stabbed. He claimed that all this was in self-defence.

29. The evidence of Pw 1 was that she was present when the commotion arose between the accused and the deceased. She maintained that the accused attacked the deceased with a knife that he was carrying in his waist stabbing her on the stomach. Pw 4 testified that he heard a loud scream and witnessed the deceased coming from the house holding her stomach. The deceased came from the house holding her stomach and she fell at the door. It was also his testimony that he saw a man running from the house.

30. The accused in his defence testified that he was present at the time and ran away to save his life. The evidence of Pw 1 and Pw 4 confirms the deceased died as a result of stabbing occasioned by the accused. It therefore follows that the prosecution proved beyond reasonable doubt that the death of the deceased was caused by the accused.

31. The only issue in contention in this case is whether the same was caused with malice aforethought as defined in section 206 of the Penal Code (Cap 63) Laws of Kenya.

32. Section 206 of the Penal Code defines malice aforethought is defined as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one 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 some person, whether that person is the person



actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

33. As malice aforethought is the mental element in the offence of murder, it may be negated by a defence of one self that has been put forward by the accused. The court has to consider that defence in the light of the duty of the prosecution to prove its case beyond reasonable doubt.

34. The accused person’s defence was that his attack on the deceased was not premeditated as he was attacked by the deceased, who wielded a knife and that as the deceased attempted to cut him, the accused managed to grab the knife and in the ensuing commotion she was stabbed. In essence, the accused was raising the defence of one self.

35. He produced a P3 report which indicated that he had injuries, which were allegedly sustained during the attack. On the thorax the accused had healed stab wounds on the right clavicular region and 1/3 of the medial clavicular region. On the upper limbs, he had healing wounds on the 3rd, 4th and 5th right hand fingers. The injuries were approximately 17 days and were likely caused by a sharp object. That it was as a result of this attack that the deceased was stabbed in self-defence and died while being taken to hospital.

36. Section 17 of the [Penal Code](#) as follows:-

“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 person or property shall be determined according to the principles of English Common Law.”

37. In the case of *Sharm Pal Singh v R* [1962] EA 13 the court held that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

38. The Court of Appeal considered the law regarding self-defence in [Abmed Mohammed Omar & 5 others v Republic](#) [2014] eKLR and stated as follows:

“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. But in *DPP v Morgan (supra)* it was held that:...if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”



39. Therefore, the question to be answered in self-defence put forth by the accused person herein is whether the force used by the accused person was reasonable and necessary in the circumstances. The answer is found in the case of *Mokua v Republic* [1976-1980] 1KLR 1337. Where the court observed that;

“Self-defence is an absolute defence even on a charge of murder unless, in the circumstances of the case the accused applies excessive force.”

40. The first test applicable in this case is whether the accused exceeded the bounds of self-defence.

41. According to the prosecution evidence, the accused attacked the deceased. The accused himself testified that he was injured on his hand while trying to recover the knife from the deceased. From the accused’s sworn testimony, he seems to paint a picture that the deceased was only stabbed once.

42. However, even if it was the case that it was the deceased who attacked the accused and that the accused managed to overpower the deceased during the confrontation and even snatched the knife away from her, the question is, did the accused have to continue cutting, stabbing the deceased severally as per the injuries sustained by the deceased?

43. The post-mortem report confirmed that the deceased sustained multiple stab wounds. She had deep stab wounds on the right upper arm anteriorly, lower chest anterolaterally and left lower chest laterally. She had shallow stab wounds on the thigh and forearm. In addition, she had cuts on the palmer surface of the left small finger. She died as a result of exsanguination of a penetrating sharp object trauma to the chest and abdomen. Can that kind of force be said to be proportionate force used in self-defence?

44. In the case of *Mungai v Republic* [1984] KLR 85 it was held that:

“It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – *R v Ngolaiile s/o Lenjaro* (1951) 18 EACA 164; *R v Shausbi* (1951) 18 EACA 198.”

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – *Palmer v Regiam* [1971] 1 ALL ER 1077.

45. The disproportionate attack against the deceased person was in my humble view, excessive and indicative of the intention to occasion serious grievous harm or even death. I find and hold that the acts of the accused person were unlawful. The said unlawful acts caused the death of the deceased.

46. On the evidence and the applicable law, I find that the accused used excessive force in defending himself against the deceased. I further find the offence proved beyond reasonable doubt against the accused is manslaughter contrary to section 202 (1) as read with section 205 of the *Penal Code*.

47. I find the accused person guilty of manslaughter and I therefore convict him accordingly.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MARCH 2023.

J M BWONWONG’A

JUDGE



In the presence of: -

Mr. Kinyua: Court Assistant

Ms Peris Maina for the Republic

Ms Ajiambo for the accused

The accused in person

