



**Republic v Muigai (Criminal Case 3 of 2017)
[2023] KEHC 1620 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 3 OF 2017
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL MUIRURI MUIGAI ACCUSED

JUDGMENT

1. The information before court dated January 23, 2017 provided the charge against the accused, Samuel Muiruri Muigai, for the offence of murder of Thomas Njoroge deceased. Section 203 of the [Penal Code](#) reads that murder is committed by:-

“ Any person who of malice aforethought cause death of another person by an unlawful actor omission is guilty of murder.”
2. The element necessary to prove the offence of murder were discussed in the case [Anthony Ndegwa Ngari Vs. Republic](#) (2014) eKLR as follows:-

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-

(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and;

(c) that the Accused had the malice aforethought.”
3. The prosecution called a total of 9 witnesses to prove the case against the accused. the accused offered an unsworn defence.



4. This is a case that involved very close members of the same family. That fact makes it the more the sadder.
5. Prosecution adduced evidence from accused's mother two sisters and two children of the deceased all who were eye witnesses of what transpired between accused and the deceased.
6. Irene Wangui Muigai is the mother of the accused, Grace Wanjiru Muigai and Ruth Njeri Muigai. Ruth was wife to the deceased and they had children who testified in the case. It follows that the deceased was a son in-law to Irene.
7. The evidence adduced by Irene, Grace, Ruth and Ruth's two children was that the accused used to often insult his mother, Irene using very vulgar words towards his mother with sexual overtones.
8. On the day in question, Ruth and her deceased husband had visited the homestead of Irene. The accused used to reside on the same compound with his mother and other siblings. Ruth resided in Ruiru with her husband, the deceased and their children.
9. Later in the day in question, January 6, 2017, the accused went home and found his mother in the company of her grandchildren. His mother, Irene said that she saw accused enter and grab a panga which was with one of his siblings called Denis. The accused began to direct a barrage of vulgar abusive words towards his mother. He was very noisy. Accused went outside the house as he continued to abuse his mother and began to cut the live hedge.
10. Because of the abusive noise, the accused was making his sisters Grace and Ruth heard him as they were at the neighbour's home fetching water. They immediately went to their mother's homestead. On arriving at their homestead, they inquired why the accused was abusing their mother. The accused responded by threatening to kill Grace and her little dog (referring to her child). Accused struck Grace with the blunt part of the panga while holding onto Grace's hair. He then aimed the sharp part of the panga at Grace in attempting to deflect that blow with her hand Grace had her small finger cut.
11. All this while, the deceased was seated at a distance. He had a phone on his hand and was smoking a cigarette. On seeing the attack on Grace, deceased said to accused "brother why the problem."
12. All the witnesses were unanimous in their evidence that the accused did not reply the deceased but he, the accused, bent down and took up an axe and hit the deceased with it on the head. He hit him using the blunt side. On hitting the deceased, deceased fell down and everyone ran into the house out of fear of the accused's rage. The accused was seen dragging the deceased's body. There was blood on the ground where deceased lay.
13. Police and the Chief were called and when they arrived, the accused had disappeared.
14. Although the deceased was taken to hospital, he was pronounced dead on arrival. The postmortem report noted that the cause of deceased's death was massive subdural hematoma due to blunt force consistent with the blow to the head with a blunt object.
15. The accused was arrested the following day on being seen at Kamangu in Kikuyu area.
16. The accused offered an unsworn statement in his defence. He stated that on the day in question, he was in the shamba. When he returned to his house, he began to prune his fence of flowers that were protruding into his compound. Without saying which of his sisters, he said his sister who was then



washing clothes threw water to him. He responded by slapping her. Then, the two sisters Ruth and Grace began to attack him and the deceased went to him with an axe and was saying:-

“who do you think you are?”

17. The accused said that Ruth went to him with a panga and deceased lifted an axe to hit him. The axe slipped out of deceased's hand. The accused further stated:-

“I went to throw way the axe, I noted I had hit him.”

18. Although he did not elaborate he said he ran away from the scene due to fear and went to his sister, Anastacia's house. That sister called the police whereupon he was arrested.

Analysis

19. The first element prosecution should prove is the death of the deceased. Death of the deceased was proved by deceased's wife, Ruth. On the deceased being pronounced dead at the hospital, Ruth went and reported that death at the police station.
20. Death of deceased was also proved by the doctor who performed postmortem. Death was due to massive bleeding in deceased's head due to blunt force trauma.
21. The other element the prosecution had to prove was that the accused committed the unlawful act which caused the death of deceased.
22. As stated before, the prosecution presented consistent evidence of three adults and two children who were present at the scene. The genesis of the attack of the deceased was the abuse of the accused towards his mother. The prosecution's evidence was that accused's sister, Grace on being offended by the vulgar abuse of their mother, questioned the accused about that abuse. The clear evidence is that the accused pounced on Grace and did indeed cut her small finger with a panga in his possession. The deceased questioned the accused why he was fighting and the accused in turn, picked up an axe and hit the deceased with it on the head.
23. The accused in his defence gave unsworn statement. The Court of Appeal in the case *Amber May v. Republic* [1979] eKLR held that unsworn statement is not evidence and that it does not have probative value. The holding of the Court of Appeal in that case is:-

“With reference to section 1(h) of the Criminal Evidence Act, 1898, which preserved the right of an accused person in England to make a statement without being sworn, Shaw LJ said:

“The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness, and he does not give evidence ... what is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that



a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.’

From all this, we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence.”

24. From that analysis, it becomes obvious that there was no evidence to prove the fact alleged by accused that he was attacked by deceased. That statement of the accused that he was attacked does not detract the very clear and cogent evidence of three adults and two children who witnessed the accused hit the deceased with an axe. Little weight will be given to the accused’s unsworn statement by accused that he was self-defending himself and it does not displace the very clear evidence that it was the accused who was the aggressor. Not only was he aggressive physically but he was entirely out of line and behaved in a depraved behavior by abusing his mother with words that had sexual overtone and also fondled his mother in inappropriate manner. There was no evidence presented by accused supporting his allegation that he was provoked.
25. The third element of murder is that prosecution must prove the accused had malice aforethought. Section 206 of the *Penal Code* sets out what is malice aforethought is 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.”
26. The accused first cut the finger of Grace. When deceased questioned the accused about that, the accused responded by bending down retrieving an axe, which all the prosecution’s witnesses had no prior sighting, and he used it to hit deceased causing him fatal injury. The accused in my view well knew that hitting the deceased with a metal (the axe) on the head would cause grievous harm or death. The accused had malice aforethought.
27. I therefore find accused guilty as charged.

Disposition

28. Samuel Muiruri Muigai is guilty of the murder of Thomas Njoroge deceased and is therefore convicted of that murder.
29. The accused is invited to make his mitigation before sentence.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.



MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julia

Accused Samuel Murirui Mugai :- Present

For accused : - absent

For DPP :- Mr. Gacharia

Judgment delivered virtually.

