



REPUBLIC OF KENYA



**Republic v Mamanja & 2 others (Criminal Case 40 of 2018)
[2023] KEHC 19040 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 40 OF 2018**

**A. ONG'INJO, J
JUNE 15, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

KALONGO TSIMBA MAMANJA 1ST ACCUSED

NGALA LWAYO NGOLO 2ND ACCUSED

KAZUNGU MWARUWA GARERO 3RD ACCUSED

JUDGMENT

Background

1. The accused persons Kalongo Tsimba Mamanja, Ngala Lwayo Ngolo and Kazungu Mwaruwa Garero face a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya.
2. The particulars are that Kalongo Tsimba Mamanja, Ngala Lwayo Ngolo and Kazungu Mwaruwa Garero on the 13th day of July 2018 at 1100hrs at Shika Adabu in Rabai Location of Rabai Sub-County within Kilifi County jointly murdered Chisubi Dzaya Nyenjere.
3. The prosecution called 5 witnesses to support its case that the accused committed the offence herein. The accused persons were therefore placed on their defence.

Prosecution Case

4. PW1, Bakari Chisubi Dzaya testified that he lived in Shika Adabu Rabai and knew the 1st Accused as Kalongo whom he identified at the dock. He stated that he did not know the 2nd Accused and that the 3rd Accused was his uncle. That the deceased Chisubi Dzaya Nyenjere was his father. He informed



court that on 13th July 2018, he was at work then left to go home at around 10.00 pm and that his father used to live in the same compound with him.

5. PW1 informed court that while at home, he heard a loud bang coming from his father's house and his father screaming. That he took stones and went to his father's house and found the doors locked from the inside. That he stood outside and saw the 1st Accused as he tried to emerge from the house. PW1 stated that he informed the 1st Accused that he knew he had finished his father. That the door was open and he saw a panga on the floor of his father's house, it was blood stained, the 1st Accused was holding an iron rod, and that his father lying on the floor in a pool of blood. PW1 identified the said panga in court which was marked MFI-1.
6. PW1 stated that the 1st Accused had closed the door after PW1 spoke to him and after some time he opened it and ran out. That PW1 ran after him and that the 1st Accused threw the iron rod he was carrying during the chase on some grass and when he caught up with him, he said 'do not kill me, do not kill me, I have been sent'. That when asked who had sent him, he took them to the 3rd Accused's house and told him that he had done the work of killing PW1's father but he had been arrested. That the 3rd Accused entered his house and ran out through the rear door. The 1st Accused was taken to Rabai Police Station where they recorded statements and that the police went home and collected the body of the deceased. That the body of the deceased was taken to Coast General Hospital and PW1 was called to go and identify the body of the deceased which was on 13th July 2018, the same date of the incident. PW1 informed court that he was given a copy of the post mortem report which was marked MFI-2. That his father's neck had been cut and both his upper arms were broken.
7. PW1 testified that the 3rd and the deceased were good friends but there was a time he started doing things on his own without involving them. That one of his sons was arrested for theft in Lamu and he requested the deceased who had the land title deed so that he could sell the land to pay bail for his son. That the deceased refused to give him the title deed and the 3rd Accused became annoyed. That the 3rd Accused left for Lamu and he would stealthily go back at night and leave, and that they would only hear that he was around. That the land for which the title deed was being sought by the 3rd Accused was where they were all living.
8. PW2, Dzombo Baya Garero, testified that he knew the deceased who was his grandfather, that he knew the 1st and 3rd Accused but not the 2nd Accused as he had never seen him. He stated that on 13th July 2018, he was seated outside his house and that he saw the 1st Accused running and he was being followed by PW1 who was shouting 'he has killed' and pointing towards the 1st Accused. That the 1st Accused got to PW2's kitchen and tried to push the door to the kitchen open but the door opens outwards not inwards so he was unable to enter the kitchen. That armed members of the public ran after him but he surrendered when he got cornered. That the 1st Accused admitted to killing the deceased but he had been sent. That he took them to the house of the 3rd Accused who denied the allegation. That the 3rd Accused got a chance and escaped and the 1st Accused was taken to Rabai Police Station.
9. PW3, Garero Chidzungu Garero, stated that he knew the 1st and the 3rd Accused but not the 2nd Accused. That on 13th July 2018, he went to work at his shop and at 11.00 am, he heard shouts that "He has killed! He has killed!" That he left a young man at his shop and ran to their homestead where shouts were coming from and when he got to the compound, he saw some people chasing the 1st Accused. He identified PW1 and PW2 in court as the ones chasing the 1st Accused and that the 1st Accused was arrested outside PW2's house. That the 1st Accused was on the ground and on the verge of being beaten and when PW3 got there, the 1st Accused saw him and asked for help as he had been sent by the 3rd



- Accused to kill the deceased. That when they went to the 3rd Accused's house, he denied involvement in the death of the deceased. That they took the 1st Accused to Rabai Police Station where they recorded statements.
10. PW4, No. 112927 P.C. Shivoko Isaack attached at Rabai Police Station performing general duties stated that on 17.11.2018, the OCPD Eunia Wakio requested to be accompanied to Mombasa. That they proceeded to Diani Police Station where 4 police officers accompanied them to a village in Kwale County. That in the village, an informer led them to a rental house where officers from Diani Knocked at the door while they surrounded the house. PW4 stated that when the house was opened, he managed to find a suspect who was sleeping and that the suspect is known as Ali Gerero. That the suspect was interrogated by officers from Diani after which he was handed over to them and escorted to Rabai Police Station. He identified the suspect in the dock and that he was the 3rd Accused also known as Kazungu Mwaruwa Garero.
 11. PW5, Dr. Gabriel Mungola from Coast General Teaching and Referral Hospital produced the Post Mortem Report and stated that Dr. Ahlam who filled it was known to him as they worked together. He testified that the post mortem was done on 13.7.2017 on the body of Chisubi Dzaya at Coast General Hospital Mortuary at 4.15 pm. On the general observation, the body had short-sleeved t-shirt soiled with blood and a kikoi which was blood stained. That the deceased was male African with good nutrition and physique. That his height was 163 cm and the body was fresh.
 12. PW5 informed court that externally, there was a deep cut on the right ear, throat and fracture of the humerus of the left arm with other several linear sharp cut wounds on the head. That there was a deep cut on the neck about 6 cm deep, cut on major blood vessel, cut on oesophagus, swelling on the lower jaw with obvious fracture, and that there was dislocation on the right elbow joint. PW5 informed court that internally, the respiratory system was normal, cardiovascular was normal, digestive system was normal, genito-urinary system was normal, no fractures were on the head, the nervous system was normal, and the spinal column had cervical sphere injury. That as a result of examination, the cause of death was severe hemorrhage shock due to cervical injury to major vessels due to decapitation of the neck secondary to assault. He stated that the Post Mortem Report was signed and dated and he produced it as EXP-2.

Defence Case

13. Accused 1 (DW1), Kalongo Tsimba informed court that he understood the charges against him and that on 13.7.2018, he left his home in Rabai to go to work at a construction site. That he passed by a home that had a path in the middle when someone passed him while running but he did not understand why. That suddenly a young man held him and started beating him within the home and later taken to the police station. He stated that he did not see the two young men in court and that the people who held him and started beating him wanted to kill him and he had to admit an offence he did not commit.
14. Accused 2 (DW2), Ngala Lwayo Ngolo testified that he used to stay in Mikindani prior to his arrest and that the allegations against him are false. He stated that the deceased is not known to him and that he used to meet the 1st Accused at construction sites, he had known him for two months and the 3rd Accused was not known to him. He informed court that on 13.7.2018, he went to work as usual and after 2 days, he was arrested and taken to the police station on allegations that were unknown to him. That police officers beat him up when recording the statement and that it was not his. That it was because he was working with the 1st Accused and he does not know what he did in Rabai where he came from.



15. Accused 3 (DW3), Kazungu Mwaruwa Garero stated that the deceased was his elder brother and he was killed on 13th July 2018 and that on the said date, he was in his house in Rabai and that the deceased had his house 50 metres away. That he was in his house when he heard noise outside and when he got out, he found many people making noise saying “Ameuwa! Ameuwa!” That when he went to the scene, he found there was a young man who was surrounded by the crowd and when the 3rd Accused arrived, the young man pointed at the 3rd Accused and the crowd followed him wanting to attack him. That luckily his brothers and brother’s children were present and they took him inside the house and the door was locked. Accused 3 further informed court that it is not true he planned and paid for his brother to be killed. That the people who made allegations of being paid are not known to him

Analysis and Determination

16. In consideration of the evidence of 5 prosecution witnesses and in consideration of the defence witnesses’ sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
17. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -
- ‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
18. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the deceased

19. Death of the deceased is not in dispute. PW1 stated that he heard a loud bang coming from his father’s house and his father screaming. That the door was open and he saw a panga on the floor of his father’s house, it was blood stained, the 1st Accused was holding an iron rod, and that his father was lying on the floor in a pool of blood. That the police went and collected the body of the deceased and took it to Coast General Hospital. PW1 stated that he was called to go and identify the body of the deceased and that he was given a copy of the post mortem report. That his father’s neck had been cut and both his upper arms were broken.
20. PW5, Dr. Gabriel Mungola from Coast General Teaching and Referral Hospital stated that post mortem was conducted on 13.7.2017 on the body of the deceased. He stated that there was a deep cut on the right ear, throat and fracture of the humerus of the left arm with other several linear sharp cut wounds on the head. PW5 stated that the cause of death was severe hemorrhage shock due to cervical injury to major vessels due to decapitation of the neck secondary to assault.



Whether death was caused by an unlawful act or omission

21. The manner in which death of the deceased was caused shows that the said death was through an unlawful act which was not self-inflicted. PW1 testified that the door of his father's house was open and he saw his father lying in a pool of blood. He further testified that his father's neck had been cut and both his upper arms were broken. PW5, Dr. Gabriel Mungola from Coast General Teaching and Referral Hospital testified that there was a deep cut on the neck about 6 cm deep, cut on major blood vessel, cut on oesophagus, swelling on the lower jaw with obvious fracture, and that there was dislocation on the right elbow joint. This court therefore finds that it is not in dispute that death of the deceased was caused by an unlawful act.

Participation of the accused persons in the commission of the alleged offence

22. PW1 informed the court that when he heard a loud bang and his father screaming, he went and found the door to his father's house locked from inside. That the 1st Accused wanted to come out but when he saw PW1, he locked the door and went back in. That after some time, he opened and ran out and PW1 started pursuing him while shouting "Buda he has killed" That members of the public responded to shouts by PW1 and came armed with pangas and stones and the 1st Accused was cornered and he surrendered.
23. The 1st Accused was found by PW1 in the house where the deceased was killed and he was caught within the same compound while trying to run away from the scene. The 1st Accused admitted he was at the scene but that he was passing through a home when someone passed him while running and suddenly young men held him and started beating him up. He said he admitted the offence because the people who held him wanted to kill him. The evidence of PW1 and PW2 is however overwhelming that the 1st Accused was caught while running from the scene of murder. He even attempted to seek refuge in PW2's kitchen but he was unable to open the door to the kitchen. The allegation that someone passed the 1st Accused while running before he was apprehended was not put to the prosecution witnesses in cross examination and it is clear that it is an afterthought. This court finds that the unlawful act that led to the death of the deceased was committed by the 1st Accused.
24. Regarding the 2nd Accused, PW2 said that only one person left his father's house and he chased the person and arrested him. He said that person was the 1st Accused and not the 2nd Accused. Similarly, PW2 said that he was seated outside his house at the material time and he did not see the 2nd Accused at all. PW3 said he had never seen the 2nd Accused at any time and he did not see him on 13th July 2018. The 2nd Accused gave sworn evidence and said that he was arrested 2 days after the 1st Accused had told him that there was some work somewhere and they went and worked. He stated that the allegations for which he was arrested were unknown to him and he did not know what the 1st Accused did in Rabai. The police officers who arrested the 2nd Accused did not come to court to testify and it is not clear how he was connected to the murder of the deceased except the fact that he said he knows the first accused.
25. The 3rd Accused was arrested by PW4, P.C. Shivoko Isaac on 17th November 2018 in a village in Kwale County under the jurisdiction of Diani Police Station. PW4 was under the instruction of the OCPD Yunia Wako of Rabai Police Station when they were led by an informer to a rental house in Kwale where the 3rd Accused person was found sleeping. He said that the 3rd Accused introduced himself to them as Ali Garero and he later learnt that he was also known as Kazungu Mwaruwa Garero. PW4 said that the OCPD did not brief them on the kind of operation that they were going to undertake and his role was to arrest the suspect.



26. According to PW1, PW2 and PW3 upon arrest of the 1st Accused, he said “do not kill me, do not kill me. I have been sent.” That the 1st Accused led them to the house of the 3rd Accused and told him that he had done the work of killing the deceased but had been arrested. The 3rd Accused told him that he did not know him and he entered into his house and ran out through the back door. That the 3rd Accused person managed to escape after being beaten by members of the public. PW1 attributed the murder of the deceased by the 3rd Accused to a dispute over title to family land which the 3rd Accused wanted to sell to bail his son from court in Lamu.
27. PW2 said that the 1st Accused did not know the name of the person who sent him to kill the deceased. PW3 said that when he arrived at the scene, he found the 1st Accused on the ground and he was on the verge of being beaten. That the 1st Accused told PW3 to help him as he had been sent by the 3rd Accused Mwaruwa to kill the deceased. That the 1st Accused led them to the 3rd Accused’s house and told him that things had gone bad and that he had been arrested but the 3rd Accused denounced knowing him.
28. The 1st Accused in his defence said that the people who held him and started beating him and wanted to kill him and he had to admit an offence he did not commit. The 3rd Accused testified that his house was 50 meters away from the deceased’s house. That on the material day he was in his house when he heard noise outside and when he got out, there were many people shouting “ameuwa! Ameuwa!” That he went to the scene and a young man who was in the crowd pointed at him and the crowd followed and wanted to attack him. That his brothers and his brothers’ children took him inside the house and locked the door. He said that it is not true he planned and paid for the killing of his brother as he had no reason to kill him. That the 1st Accused was not known to him.
29. From the evidence of PW1, PW2 and PW3, the 3rd Accused was arrested because he was mentioned by the 1st Accused who claimed that he had hired him to kill the deceased. That allegation by the 1st Accused was not converted by the Investigating Officer into admissible evidence in the form of a confession. The fact that the 3rd Accused person escaped on the material day of the attack until he was arrested on 17th November 2018 only makes the suspicion of his involvement in the murder stronger but mere suspicion however strong cannot be a basis for a conviction. PW4 who could have enlightened the court on how the 3rd Accused was linked to the murder said that they were led by an informer to a rental house where he was residing but the identity of the said informer was not disclosed and he did not testify. The OCPD for Rabai Police Station who organized for the raid where the 3rd Accused was residing did not also testify. Corporal Joseph Maritim who was the initial Investigating Officer did also not testify because he was involved in a serious road traffic accident. If the 3rd Accused person was involved in the planning of the murder of the deceased, that evidence has not been proved sufficiently to find that he is guilty.

Malice aforethought

30. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

31. On the element of malice aforethought in respect to Section 206 of the *Penal Code*, the court held as follows in the case of *Isaac Kimathi Kanuachobi v R* (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

32. The 1st Accused was possessed of malice aforethought because he inflicted grievous injuries that were intended to maim and/or cause the death of the deceased as it happened. When PW1 responded to the screams from the father’s house, he found the 1st Accused had locked the door from inside and was holding an iron rod while the deceased was lying on the floor in a pool of blood and that there was also a blood stained panga on the floor. The locking of the door and the kind of weapons the accused person armed himself with show that he did not want anybody to rescue the deceased after he had inflicted the fatal injuries. The conduct of the 1st Accused in locking the door, the nature of the injuries and the dangerous weapons with which the 1st Accused armed himself with is evidence of malice aforethought.

33. In conclusion, this court finds that the prosecution has proved its case beyond reasonable doubt regarding the 1st Accused person. The 1st Accused Person is guilty of the offence of murder and convicted accordingly. The 2nd and 3rd Accused persons are not found guilty of the offence of murder and are acquitted accordingly and set at liberty unless lawfully held in custody.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 15TH DAY OF JUNE 2023**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Ochieng’ Advocate holding brief for Mr. Chamwada Advocate for the 1st Accused

Mr. Ochieng’ Advocate for the 2nd Accused

Mr. Ajigo Advocate for the 3rd Accused

1st Accused present in person

2nd Accused present in person

3rd Accused present in person



HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri

I pray for copy of judgment.

I pray for time to confirm if there are any records for 1st Accused.

Order:

Mention on 29.6.2023 for Victim Impact Statement, Records Mitigation and Sentence. Copy of judgment to be supplied to prosecution.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

15.6.2023

