



**Republic v Wangenge alias Maji (Criminal Case E004 of 2022)
[2023] KEHC 17984 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 17984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E004 OF 2022
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MILTON NAMATSI WANGENGE ALIAS MAJI ACCUSED

JUDGMENT

1. 6 witnesses testified in this matter. PW1 and PW2 claimed to have had witnessed the assault on the deceased. PW1, Brian Juma, a son the deceased, went out with the deceased, and confronted 2 intruders. The deceased had a torch, and PW1 identified the intruder, who attacked and hit the deceased on the head, with a panga, as the accused herein. PW2, Farida Ongayo Mukhome, was the mother of PW1, and the widow of the deceased. She did not identify any of the intruders. PW3, Carolyne Auma Juma, was a daughter of the deceased. She was not within the compound when it happened. PW4, Salim Mustafa, was not within the compound when it happened. PW5, Zebio Juma Kweyu, was not at the scene. PW6, No 23931 Inspector of Police John Mugo, was the investigating officer.
2. I put the accused on his defence. He denied killing the deceased, saying that at the material time he was at home with his family.
3. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
4. On whether the deceased died, I have the evidence of PW1, PW2, PW3 and PW4. They saw the body of the deceased at the scene shortly after the killing. PW5 identified the body for post mortem purposes. The accused also testified as to the death. The pathologist did not testify, but the post-mortem report was produced by consent. The cause of death was said to be a penetrating head injury secondary to sharp force trauma following assault. The cause of death was linked to the accused, by PW1, who



testified to seeing the accused cut the deceased on the head with a panga. The accused denied hitting the deceased, saying that he was not at the scene. However, PW1 was positive that the person that he saw hitting the deceased on the head with a panga was the accused. He knew him prior, for they were first cousins, and the deceased had shone his torch light directly on the 2 assailants. He came to close proximity with them, as he was out there assisting the deceased fight them off. The accused was positively identified and recognised. The fatal injury was that inflicted on the head, and the assault leading to it was witnessed by PW1. I find that there is evidence, beyond reasonable doubt, that the injury that caused the death, was inflicted by the accused.

5. Having concluded that the accused was properly identified and recognised as the assailant behind the fatal injury, the remaining issue for determination is whether the act by the accused was with malice aforethought.

6. Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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.”

7. Under section 206, malice aforethought is to be inferred where there is an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from lawful custody of a person and in the process a death is caused.

8. By hitting the deceased on the head with the sharp edge of the panga, it can be inferred that the accused had an intention to kill the deceased or to cause him grievous harm, both of which are elements of malice aforethought.

9. In view of everything stated above, I do hereby, find the accused herein, Milton Namatsi Wangenge alias Maji, guilty of the offence of the murder of Isaac Juma Onyango, contrary to section 203 of the [Penal Code](#), as read with section 204 thereof, and I convict him accordingly, under section 322 of the [Criminal Procedure Code](#), cap, 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
2ND DAY OF JUNE 2023**



WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Olucheli, Advocate for the accused person.

high court criminal case no. e004 of 2022 – judgment 3

