



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Konte (Criminal Case E004 of 2021)  
[2023] KEHC 21788 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E004 OF 2021**

**JN NJAGI, J**

**JULY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MAHAMUSH ALEMAYO KONTE ..... ACCUSED**

**JUDGMENT**

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. The particulars of the offence were that on the night of 23<sup>rd</sup> and 24<sup>th</sup> day of March 2021 at Alokona Sub-location in Mandera West Sub- County within Mandera County he murdered one Mameru Mathews Seegay (herein referred to as the deceased).
2. The case for the prosecution is that the deceased was an Ethiopian national. He was employed as a herdsman by a person called Alio Eddah PW3. It was the evidence of PW3 that on the evening of 23<sup>rd</sup> March 2021 he was at his camel boma together with the deceased and his three young children aged 4,5, and 6 years. That at 7pm a person who was unknown to him went to the camp. He asked the deceased who the person was and the deceased told him that they hailed from the same home area. At 9pm PW3 went to sleep at a nearby manyata and left the deceased, his sons and the visitor keeping guard at the camp. At mid-night PW3 heard the camels granting and he went to the camp to check what was going on. He did not find anybody at the camp. He saw blood stains at the place the people had been sleeping. He returned to the manyata and woke up villagers. They went to the place. They saw drag marks from the place the people had been sleeping heading towards the bushes. They followed them and found the body of the deceased about 80 meters away. It had injuries on the neck. They started to look around. They saw a torch light in the bush. They surrounded the place. PW3 was the first person to reach the place before the others arrived. He flashed a torch and saw a person seated. He was holding an axe and a jembe. The axe was stained with blood. His shoe that he was wearing was also stained with blood. He identified the person as the one he had left with the deceased at the camp on the previous evening. The



- other four searchers arrived. PW3 identified the axe and the jembe as his. He had left them at the camp when he went to sleep at the village. They tied up the person, the accused, with a rope. Villagers went to the place. A person called Abdi called the police. PW3 later found his sons at the village.
3. The Assistant Chief PW1 testified that he received the report of the death and went to the scene at 6 am. He found the police and elders having already arrived. He identified the body as that of a person called Ambush who hailed from Ethiopia. He had been introduced to him by Alio Eddah (PW3) when the said person wanted to employ him as a herder. At the scene he found the accused tied up. He had a blood-stained axe and blood stains on his left leg and shoe. He did not have the other shoe on. The accused was taken to the police station.
  4. Mame Abdulahi Ibrahim PW2 testified that he is a businessman and that on 24/3/21 he woke up at 6 am and received a call that a person had been killed. He went to the scene of the crime at 7 am and found the accused tied up and the body of the deceased herein lying there. There was a blood-stained axe and shoes. There were also dragging marks. The police took photographs of the scene of the crime. He then went to the police station and recorded a statement.
  5. The doctor PW4 testified that he examined the body of the deceased and found it with a deep cut wound on the back of the neck measuring 10cm in length and 6 cm deep and other two smaller deep cut wounds on the anterior of the neck. The doctor formed the opinion that the cause of death was due to the injury on the neck which was caused by a heavy object with a very strong force. The doctor produced the postmortem report as exhibit, P.exh.1.
  6. The government analyst Kipngetch Bernard PW5 testified that he received the following items from PC Kiongera of DCI Takaba: blood sample in a vacutainer belonging to the deceased; hair sample in a plastic container belonging to the deceased; body tissue samples in a plastic container belonging to the deceased; an axe with a wooden handle and a green pair of sandals enclosed in a khaki envelope marked Mahamush Alemayo Konte, the accused. They were asked to examine and determine preference of blood stains and their biological relationship. PW5 did the same and found that the pair of sandals and the axe were stained with human blood. That the hair sample and the body tissue did not generate any DNA profile. That DNA profiles were generated from the blood stains from the axe and the pair of sandals that matched the DNA profile generated from blood sample in the vacutainer belonging to the deceased. PW5 prepared a report to that effect. During the hearing he produced his report as exhibit, P.exh.2.
  7. The investigating officer, PC Moses Kiongera PW6 testified that he was asked by the DCIO to respond to a murder scene at a place called Alokona. He went to the place with other police officers and found the area assistant chief and members of the public. They found the body of the deceased behind the home of one Ali Edin P3. There were drag marks from the home of the deceased to where the body was lying. They found the accused having been arrested by members of the public. Next to him was an axe, a jembe and a pair of sandals. He took photographs of the scene using his mobile phone. They re-arrested the accused and took him to Tabaka police station. A postmortem was conducted on the body by Dr. Mohamed, PW4. The doctor handed over to him samples of hair, body tissue and blood samples of the deceased. The body was released to relatives for burial. PC Kiongera prepared an exhibit memo form and forwarded the samples to the government analyst together with the axe, the jembe and the sandal. The officer downloaded the photographs he had taken into a CD and forwarded it to the scenes of Crime Office Nairobi for processing. He later received the processed photographs from the said office. After completing investigations, he charged the accused with the offence of murder. During the hearing the officer produced the sandals, the axe, the jembe and the memo as exhibits, P.exh.3, 4, 5 and 7 respectively. He also produced the memo that forwarded the CD to the Crime Scenes Investigations as exhibit, P.exh. 8. He also produced the photographs as exhibits, P.exh. 6(a) – (j).



8. When placed to his defence, the accused gave a sworn statement in which he stated that he is an Ethiopian national. That he is a tuk tuk driver. He was working in Kenya. That on the night of 24/3/2021 he was at Bula area when he was arrested by members of the public at 1 am. He was tied on the hands and was not informed of the reason for the arrest. Policemen went to the place on the same morning at 11 am and he was handed over to them. He was taken to Takaba police station where he was told that he had killed somebody. Blood samples were taken from him. He denied that he killed the deceased in this case. He denied that he was found in possession of the axe and the jembe that were produced in court. He denied that the sandals produced in court belonged to him.
9. The accused did not call any witness in the case.

### **Analysis and Determination**

10. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

11. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
12. Section 203 of the *Penal Code* defines murder in the following terms:

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

13. The prosecution in order to sustain a conviction for the offence of murder must prove the ingredients of the offence which were stated in the case of *Republic v Isaac Mathenge Maina* [2018] eKLR to be as follows:

The ingredients of the offence of murder were discussed in the case of *Republic v Mohammed Dadi Kokane & 7 others* [2014] eKLR as follows:

“ The offence of murder is defined as follows by section 203 of the penal code:

“ any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

1. The fact of the death of the deceased.
2. The cause of such death.



3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly
  4. Proof that said unlawful act or omission was committed with malice aforethought.”
14. There is no doubt as regards the death and cause of death of the deceased. The death was confirmed by the evidence of the doctor, PW4, who carried out a postmortem on the body and reached a conclusion that the cause of death was due to deep cut wounds on the back of the neck and on the anterior of the neck. This evidence was not contradicted by any other evidence. The elements of the death and cause of death of the deceased were therefore proved.
15. The next issue for determination is whether it is the accused person who caused the death of the deceased.
16. The evidence against the accused is based on circumstantial evidence. In *Abamad Abolfathi Mobammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:
- “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
17. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
  - (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
  - (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within



all human probability the crime was committed by the accused and none else.”

18. And in the case of *R v Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held as follows on circumstantial evidence:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of is guilt. The burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

19. Alio Eddah PW3 told the court that he had on the previous evening left the accused at his camel camp with the deceased and his children. That during the search he found the accused in the bush not far from where the body of the deceased was lying and was holding a blood-stained axe and a jembe. His clothes and shoes were blood stained.
20. I have keenly examined the evidence of PW3 and I entertain no doubt that he was telling the truth on the matters at hand. PW3 did not know the accused before the evening of 23/3/21. There is no reason for him to lie against him. Other people including the Assistant Chief PW1, a villager PW2 and the investigating Officer PW6 went to the scene in the morning and found the exhibits where the accused was being detained by members of the public. I thereby accept the evidence that the accused was found with a blood-stained axe and shoes.
21. The blood-stained axe that was found with the accused and a sandal shoe that he was wearing were forwarded to the government analyst PW5 for examination. PW5 examined the DNA profile generated from the axe and the sandal and found that it matched the DNA profile generated from the deceased’s blood. This means that the axe and the shoe were stained with the deceased’s blood. There is no reason for this court to doubt this evidence. I therefore find that the axe the accused was found with and the sandal that he was wearing were stained with the deceased’s blood. The axe was therefore the murder weapon that was used to hack the deceased to death. The accused’s sandal shoe must have been stained with the deceased’s blood when he was hacking him to death. This coupled with the evidence that PW3 had left the accused with the deceased at his camel boma on the evening of 23/3/2021 is conclusive proof that the accused is the one who killed the deceased. The evidence before the court unerringly pointed at the accused as the murderer.
22. The Accused in his evidence admitted that he was arrested by members of the public at 1 am. He did not explain the exact place where he was arrested. It is however clear from the evidence that he was arrested in the bush where the body of the deceased was found. He did not explain what he was doing near where the body of the deceased was found.
23. The accused said that he was not told the reason for his arrest. I do not believe that the Accused did not know the reason for his arrest. Evidence was adduced by independent witnesses who went to the scene – the Assistant Chief PW1 and a villager PW2 – that the body of the deceased was lying where the accused was tied up. He cannot therefore have failed to know the reason for his arrest – that he was being arrested over the death of the deceased herein. The circumstantial evidence surrounding the case cannot be explained in any other hypothesis other than that the accused is the one who killed the deceased. I am thereby satisfied that the accused unlawfully caused the death of the deceased.



24. The third and most important ingredient is whether accused killed the deceased with malice aforethought. The offence of murder is defined as the unlawful premeditated killing of one human being by another. The *Black's Law Dictionary* Tenth Edition Page 1776 states murder to be the killing of a human with malice aforethought.

25. Section 206 defines malice aforethought as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

- i. An intention to cause the death of or to do grievous harm to any person----
- ii. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is actually killed or not----
- iii. An intent to commit a felony ...

26. The Court of Appeal in the case of *Joseph Kimani Njau v Republic* (2014) eKLR, held as follows on malice aforethought:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death.
- ii) The intention to cause grievous bodily harm.
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

27. In this case the accused cut the deceased with an axe on the neck thereby inflicting him very deep injuries that caused his death. In the case of *Republic v Moses Murithi Ikamati* [2013] eKLR where the accused stabbed the deceased on the neck, the court held that the choice of the area of the body that the deceased was stabbed evidenced the fact that the accused's intention was to fatally wound the deceased. The fact that the accused in this case cut the deceased on the neck with very heavy force thereby inflicting him very deep injuries can only mean that his intention was to kill the deceased. Malice aforethought was therefore proved.

28. The upshot is that the prosecution has proved the charge of murder against the accused beyond reasonable doubt. I find him guilty as charged and convict him accordingly.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 25<sup>TH</sup> JULY 2023.**

**J. N. NJAGI**

**JUDGE**



In the presence of:

Mr. Ngigi for state

Mr. Halake for Accused

Accused - present

Court Assistant – Jarso

14 days R/A

