



**Republic v Monyancha (Criminal Case 33 of 2021)  
[2023] KEHC 21353 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE 33 OF 2021  
REA OUGO, J  
JULY 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JARED ONDIMU MONYANCHA ..... ACCUSED**

**JUDGMENT**

1. On the November 11, 2021 Jared Ondimu Monyancha ( the accused) was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are, ‘on the night of 31<sup>st</sup> October and November 1, 2021 at Nyachenge village Bonyabwanga Sub-location , Bosinange location, in Gucha South Sub- County within Kisii County, jointly with others not before the court murdered Maxwell Onkendi Nyabuto.
2. The accused person denied the charge and the prosecution called nine (9) witnesses in support of their case. The accused gave an unsworn statement in his defense.
3. Edinah Gesare Miruka (Pw1) testified that she knows the accused and the deceased. The deceased is her cousin and the accused is her neighbor. On the October 31, 2021 at 3pm whilst in her house she saw the accused and the deceased pass by. She called them but they did not hear. The next day at 7.00am she heard that the deceased had died. She saw the deceased’s body in a maize plantation. He had an injury on his head and ear. In cross-examination she testified that the path the deceased and accused were using leads to the accused’s home. She did not witness the accused kill the deceased, nor did they have any differences.
4. Maria Nyagucha Moraa ( Pw2) testified that the deceased is from her home area and the accused is her 3<sup>rd</sup> born son. On the 31<sup>st</sup> of October 2021 at 9.00pm whilst in her house she heard noise coming from the accused’s house. She did not go there as she was not in good terms with the accused. She did not hear a name being mentioned. The next day she heard that the deceased had been found on the road,



she went to the place and found the deceased's body in the maize plantation. She admitted that she did not see the accused kill the deceased.

5. Mary Kwamboka ( Pw3) testified that, the accused and deceased are persons she knows well. She has known the accused for 3 years , his home is 30 meters from her place. He is her brother-in-law. On the October 31, 2021 whilst watching TV the accused went to her place and asked her who had taken unga from his house. She responded that she did not know. A short while thereafter she had someone crying at the accused's place saying ' my brother why are you beating me.' It was a male voice. She heard the voice of the accused and another person. It was the voice of the deceased. She heard the accused tell the deceased 'you have played with the wrong person'. She did not recognize the voice of the person who was telling the accused, 'why are you beating your brother.' The 2 voices were different. The accused told the deceased that 'you are the one who took my panga and maize flour'. This was about 9.30pm to 11.00pm. The voices stopped. She kept hearing the accused tell the deceased wake up, then sleep. It sounded like something was in a sack and it was being hit with a stick. She did not go out as they feared the accused. The accused had slashed her husband with a panga. The next day she was told by a child that Onkendi was dead and his body was in a maize plantation. She later saw the deceased's body with injuries on the head, eyes and the face lying on the ground. During cross-examination she told court that she had not seen the deceased on the material day and that she did not know his voice.
6. Irene Marongo (Pw4) testified that she knows the accused and deceased too. The accused's house is 20 meters away. On the October 31, 2021 at night, she heard people talk in a house. She heard noises. They were screams from Jared's house. A person was being beaten. She heard cries. It was the deceased's voice. He kept calling Jared's name and crying. This went on for 2 hours. The next day the body was found in the maize plantation. He had head injuries on the head left eye and back too.
7. Stephen Oneko ( Pw5) testified that he is the chief of Bosinange location. The accused and deceased are person he knows well. They are from his village. On the November 1, 2021 he was called and informed of a body that was along a path. He proceeded to the scene and found the body of the deceased. it had injuries the face. He informed the police and the body was collected. The accused arrested using community policing. 2 days after arresting the accused he accompanied the police to the accused's house. They book the door and sound a shirt with stains and a stick that had blood stains.
8. Doctor Naomi Ariaga ( Pw6) a pathologist performed a post mortem on the deceased on the November 5, 2021. On external appearance she noted the deceased had abrasion on the left elbow, an abrasion on the back and a laceration on the right knee. On internal appearance on the head there was an abrasion on the face, blood on the left frontal parietal area, .She formed the opinion that the cause of death was a head injury due to a blunt force. The abrasions were caused by a blunt object and that the injuries revealed that the deceased was trying to defend himself.
9. Antony Kirago ( Pw7) testified on the November 1, 2021 he received a report form Pw6 of a murder incident. He proceeded to the scene in the company of other officers. He found a body with injuries on the forehead, above the left eye and left temporal area. He also saw visible injuries bruises on his arms and back of the head. The head was resting on a pair of white shoes and was half undressed. There was no disturbance on the ground around the body. This made him conclude that the deceased had been killed elsewhere and the body taken at the place it was found. He attended the postmortem and on the November 9, 2021 he accompanied the investigating officer to the house of the accused. In the presence of his family, they gained access into the house. It was a 3 bedroomed house. It was swept clean and sprinkled with a lot of water. They found a trouser hanging in the sitting room it had been washed. There was a blood-stained shirt in the bedroom it had been washed and had dried. The body had been found 100 meters from the accused's house. The deceased lived about 300 to 500 meters away.



10. PC (W) Judy Omare (Pw8) testified that on the November 1, 2021 she visited the scene where a body had been found along a footpath. She was with Pw7. She observed the injuries on the body and the surroundings. The scene was processed by the scene visiting officer. They took the body to Tabaka mission hospital. The accused was arrested on the November 2, 2021. Later they visited the accused's house. They recovered a trouser that had been washed and was hanging, a white dotted shirt with blood and a wooden stick with blood stains. They submitted the said clothes and deceased's blood to the government chemist. The neighbors told her that they had heard screams from the accused's house. She drew a sketch plan of place. Pw2,3 and 4 are the accused's neighbors.
11. Inspector Leyrice Ligaka Mukutsi ( Pw9) a scene of crimes investigating officer produced photos he received from Pw8.
12. The accused gave an unsworn statement. He testified as follows; he denies the offence. He left work and went home on the November 1, 2021. It was 6pm. He met the chief at the junction who told him that they had been looking for him. He was arrested and taken to Nyamrambe police station and then to court . He was held for 10 days as the police investigated the case. He was told he had murdered and he denied. They took his fingers by force. He was beaten and he was told that he would know ahead. Up to now he does not know. On the October 31, 2021 he was at Bonchari area. He was told by the police that Maxwell Okendi Nyabuto had died.

### **Analysis and Determination**

13. The offence of murder is defined as follows under section 203 of the Penal Code as, ' Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.' The ingredients of murder were set out in the case of [\*Antony Ndegwa Ngari vs Republic \[2014 eKLR\]\*](#) as follows;
  - i. That the death of the deceased occurred.
  - ii. That the accused committed the unlawful act which caused the death of the deceased and,
  - iii. That the accused had malice aforethought.
14. The death of the deceased is not in doubt, Pw1, Pw2, Pw3, Pw4, Pw5 , Pw7 & Pw8 all saw the body of the deceased. Pw6 did a post on the body of the deceased and told court that she formed the opinion that the cause of death was cause of death was a head injury due to a blunt force. The abrasions were caused by a blunt object and that the injuries revealed that the deceased was trying to defend himself.
15. The next issue is whether it is the accused who unlawful caused the death of the deceased. There is no direct evidence that any of the witnesses saw the accused kill the death. The prosecution case rests solely on circumstantial evidence. In [\*Abamad Abolfathi Mohammed & another v Republic \[2018\] eKLR\*](#) the Court of Appeal stated as follows
 

' 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 accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v Republic*, 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 guilt of the accused;

- (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.”

(See also *Sawe v Republic* (supra) and *GMI v Republic*, Cr Ap No 308 of 2011.

In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See *Teper v R* [1952] All ER 480 and *Musoke v R* [1958] EA 715). In *Dhalay Singh v Republic*, Cr App No 10 of 1997, this Court reiterated this principle as follows:

For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.’

16. Pw1 told the court that on the she saw the accused and the deceased earlier in the day on the October 31, 2021 at 3pm. Pw2 and Pw3 are neighbors of the accused. They recalled that they heard cries of a man crying in the accused’s home at about 9.00pm . Pw2 did not go out to check what was happening. Pw3 told court whilst in her house the accused went and asked her if she had taken unga from her his house. Shortly thereafter she heard someone crying at the accused’s house. It was a male voice. She heard the accused’s voice and that of another male. The accused was telling the deceased you played with the wrong person .’ She knew the accused’s voice very well and the deceased too. Pw3 told the court that she did not know the voice of the person who was asking the accused, ‘ why are you beating your brother.’ She heard the voices from about 9.30pm to 11pm then the voices stopped. The person was being beaten. She could not go out as she feared the accused. Pw4 a neighbor of the accused told court that on the night of October 31, 2021 she was in her home. She heard some people talk in the accused’s house. She heard screams from Jared’s house. The person who was screaming was the deceased. he was being beaten. He kept calling Jared, the accused’s name. the noise went on for about 2 hours. Pw2,3,and 4 all testified that the next morning on the November 1, 2021 the deceased’s body was found about 100 meters from the accused’s house. The sketch produced by Pw8 shows that all these witnesses were close neighbors of the accused. I find that he accused was in his house on the material night and he was heard beating the deceased. The evidence of Pw3 and Pw4 corroborate each other that the deceased was in the accused’ house on the night of the October 31, 2021 and that the next morning on the November 1, 2021 the deceased was found dead. The post mortem report revealed that the deceased died due to a head injury due to a blunt force trauma. Pw6 told court there were injuries on the deceased on the back, elbow and the elbow is a defense area. The evidence of Pw3 and Pw4 unerring point to the accused as the one who caused the injuries on the deceased on the material night. Further there is evidence that he had been seen earlier in the day with the deceased. The accused was the person who had contact with the deceased on the night before he was found dead the next day. The place the body was found was not the place he had sustained the injuries as the ground was undisturbed. I am persuaded that the prosecution has established that there were no other co-existing circumstances which could weaken or destroy the inference of guilt. Pw1,2,3 and 4 all knew the accused very well. He is related to Pw1, 2 and 3. Pw4 has been his neighbor for some time. Their evidence put together links the accused to the death of the deceased. The deceased too was a person they knew very well and had lived in their village. I find that the accused and another not before the court caused the unlawful death of the deceased.



17. The next issue is whether accused malice aforethought. Section 206 of the Penal Code defines malice aforethought 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.'

18. In the case of *R v Chengo Kazungu Kadenge & 2 others [2020] eKLR* the court cited the case of *People v Robertson [2004]* where the Court held as follows;

' That malice is implied when the killing results from an intentional act, the natural consequence of which are dangerous to life , which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life'

19. In *Republic vs Tubere S/O Ochen [1945] 12 EACA 63* the court held that an inference of malice aforethought can be established by considering;

- a. The nature of the weapon used;
- b. The part of the body targeted;
- c. The manner in which the weapon was used and;
- d. The conduct of the accused before , during and after the attack.

20. Malice can be inferred from the weapon used and the place of injury .Pw3 and Pw4 testified that the accused beat the deceased for 2 hours. Pw3 recalled that it was something was in a sack and was being hit by a stick. Pw8 recovered a blood-stained stick, a rungu, exhibit 3 from the accused's house. The injuries the deceased sustained were on the head, the cause of death was a head injury due to a blunt trauma. The weapon used was a blunt object, a rungu, the part of the body that was targeted was the head, the deceased was beaten for about two hours. The accused was heard by Pw3 tell the person he was beating that ' today you will know that you played with the wrong person.' It is clear that the accused had intention to cause grievous bodily harm on the deceased. The serious beating caused the death of the deceased. The prosecution proved malice aforethought.

21. In this case, the accused person has raised the defense of alibi.It is trite law that the burden of proving falsity, if at all, of an accused person's defense of alibi lies on the prosecution (see the decision of the Court of Appeal in *Victor Mwendwa Mulinge vs Republic [2014] eKLR*). The accused should promptly to allow the prosecution to investigate and test the alibi.If he does not bring forward his defense of alibi until months afterwards there is naturally a doubt as to whether he has not been



preparing it in the interval, this was the holding of the court in *R v Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145*, the former Court of Appeal for Eastern Africa, in which it was stated:

' If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.'

22. However, even where the defense of alibi is introduced months later, the prosecution still has an avenue to adduce evidence in reply to rebut the accused person's defense of alibi by virtue of section 212 of the *Criminal Procedure Code*. It provides as follows:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

23. Further the Court of Appeal in *Erick Otieno Meda v Republic [2019] eKLR* stated:

' In considering an alibi, we observe that:

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mblungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)*)"

24. In this case the prosecution did not lead additional evidence to challenge the defence of alibi raised and in that regard I will proceed to compare the alibi provided by the accused with the evidence presented by the prosecution. The accused testified that on the October 31, 2021 he was in Bonchari area and that on the November 1, 2021 he left work and went home at 6pm. He was arrested. The witnesses who testified Pw1, Pw2, Pw3 and Pw4 all stated that the accused was within his home on the October 31, 2021 Nyachenge village. Pw1, saw him at 3.00pm, Pw3 interacted with him at night before she heard noises from his house, both Pw3 and Pw4 heard him whilst he beat the deceased in his house. They feared going out to find out what was happened. All these witnesses were consistent and I believe them. The accused's defense was an aforethought. His defense cannot withstand the strong evidence adduced by the prosecution.

25. I find that the prosecution has proved their case beyond reasonable doubt. I find the accused Jared Ondimu Monyancha guilty of the murder of Maxwell Onkendi Nyabuto and convict him as charged accordingly.

**Dated , Signed and Delivered via Microsoft Teams this 21<sup>st</sup> day of July 2023.**



**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Jared Ondimu Monyancha/ Accused- Present**

**Mr. Oremo- For the Accused Person**

**Mr. Ayodo- State Counsel**

**Orwasa / Wilkister C/A**

