



**Republic v Mwakio (Criminal Case 8 of 2018)  
[2023] KEHC 20276 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL CASE 8 OF 2018**

**JN ONYIEGO, J  
JULY 14, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BONIFACE MWAKIO ..... ACCUSED**

**JUDGMENT**

1. The accused person herein was on December 7, 2018 charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. Particulars are that on the night of November 27, 2018, at Mwanga village in Ronge sub location within Taita Taveta County murdered one Mwangisha Mwamburi. Accused having understood the charge returned a plea of not guilty. Subsequently he was put on his defence.
2. In its endeavor to discharge the onerous duty of proving a case beyond reasonable doubt, the state called a total of nine witnesses. At the close of the prosecution case, parties were directed to file their respective submissions on whether the accused had a case to answer or not.
3. Pw1 Patrick Maganga told the court how he visited Mwakio the accused herein at his home on the November 28, 2018. That he found the accused with one Mshimba seated outside. He stated that he heard accused telling Mshimba how he (accused) had assaulted his father after the said father attempted to sodomize him. He however did not bother to see mwakio's father as the three left for the farm to harvest coconut. That the following day he received information that Mwakio's father was found dead in the house.
4. Pw2 Nancy Marura chairlady nyumba kumi stated that on November 28, 2018, accused went to her shop and disclosed how he had assaulted his father after he attempted to sodomize him the previous night. That she called one Beatrice a village elder whom she directed to visit the deceased's home to resolve the differences between Mwakio and the father. She told the court that on the following



- day, Beatrice (Pw3) confirmed to her that Mwangesha (deceased) had died. She visited the scene and confirmed that the old man had indeed died and that he had a stab wound on the neck. She later called the Ass -chief and the local chief who in turn called the police Mwatate police station to collect the body.
5. Pw3 Beatrice Mkiwa Nguru confirmed that on November 28, 2018, she was requested by Pw2 to go and visit the deceased's home to confirm the report given by Mwakio (accused). She told the court that when she visited the accused's home, she found Mwangesha his father lying on his bed while dead. That it was the accused who disclosed how he had assaulted his father after he (deceased) attempted to sodomize him.
  6. Pw 4, Pw5 and Pw6 confirmed visiting the deceased's home and found him dead while Mwakio allegedly admitted that he was the one who had assaulted him.
  7. Pw7 IP Kyalo scenes of crime visited the scene and took photographs reflecting various injuries on the face, left Ambit and the head of the deceased. Pw8 Pc Apolo Njenga investigated the matter and preferred charges.
  8. Pw 9 Doctor Joyner Wali, produced a post mortem report on behalf of Doctor Njumwa confirming the injuries sustained as multiple stab wounds on the face and right mandibular; multiple rib fractures; bruises on both elbows; multiple skull fractures; and perforated right and left lung tissues. She told the court that the cause of death was severe head and chest injuries secondary to blunt force trauma.
  9. After the closure of the prosecution case, parties submitted on whether the prosecution had established a prima facie case or not. Consequently, the court found that the prosecution had established a prima facie case hence put accused on his defence.
  10. On his defence, accused gave sworn testimony denying killing his father. He further denied confessing before any of the prosecution witnesses that he had killed his father on the material night. He stated that on the material day, he went to his father's house where he found him in a lot pain while in bed. He stated that after realizing his father was not okay, he rushed to call his uncle Mwarima Mwangesha to see what the problem was. That when he informed Nancy (pw2) his aunt what had happened, Nancy told him to called a Mkisii doctor for help. It was his testimony that when he missed the Mkisii doctor, he went back and ground some Panadol for the old mzee to take.
  11. He went further to state that when the deceased failed to swallow Panadol, he died. That suddenly, people started screaming for help as they stoned him as the person who killed the father. He disputed the allegation that his father's body had physical injuries. That people called police officers who in turn arrested and subsequently charged him for an offence he never committed. He further stated that at the material time he was staying with his father as his mother had separated with him. According to him, the case is a frame up due to a family grudge.
  12. Upon close of the trial, counsel agreed to file submissions.

### **Prosecution's submission**

13. The state represented by Mr. Franklin Sirma state counsel filed its submissions on February 20, 2023. However, a copy was only availed to the court on July 4, 2023. Learned counsel took the court through the entire evidence. It was counsel's submission that from the nature of the injuries suffered by the deceased, it was obvious that they were unlawfully occasioned by somebody and that somebody was the accused who bragged to everyone in the village how he had killed the father.



14. On the aspect of malice aforethought, counsel referred to section 206 of the *Penal Code* which defines malice aforethought. Counsel further referred to the case of *R v Stephen Sila Wambua Matheka* (2017) eKLR where the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before and after the attack.
15. According to Mr. Sirima, the conduct of the accused after the vicious attack of his father by bragging to villagers how he had killed his father is enough proof of malice aforethought. Touching on circumstantial evidence, counsel submitted that circumstances under which the offence was committed leads a blameworthy finger towards the accused as the deceased was only staying with him in the same house. Learned counsel dismissed the defence of the accused.

### **Accused's submissions**

16. Through Elizabeth Isika Advocate, the accused filed his submissions on March 7, 2023 and later resent a copy on July 4, 2023. Learned counsel recited the evidence tendered before the court. It was counsel's submission that there was no proof that the deceased had died out of an unlawful act caused by the accused person. That there was no proof of malice aforethought established against the accused person as defined under section 206 of the *Penal Code*. Counsel contended that there was no proof that the accused had a motive to kill. That there was no eye witness to confirm that the accused was responsible for the death of the deceased.
17. Regarding the alleged confessions by the accused, it was counsel's submission that the same were not taken in accordance with section 25A and 29 of the *Evidence Act* pursuant to the relevant confession rules of 2009. Learned counsel submitted that the case of the prosecution is purely anchored on circumstantial evidence which fell short of the test as laid down in the case of *Republic v SNM*(2022) eKLR. It was counsel's contention that there was a possibility that the deceased may have fallen down from the bed hence the blunt trauma leading to his death.

### **Analysis and determination**

18. Accused person herein is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Section 203 provides as follows;

“Murder

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

(Section 204). Punishment of murder

Any person convicted of murder shall be sentenced to death”

19. Malice aforethought is also defined under section 206 of the *Penal Code* as follows;

“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.

20. I have considered the evidence on record, testimony by various witnesses and submissions by the state and accused person. Issues that emerge for determination are; whether the death of the deceased was caused by an unlawful act; secondly, who committed the unlawful act which caused the death of the deceased and thirdly; whether there was malice aforethought. See *Chiragu & another v Republic* (criminal appeal 104 of 2018(2021) KECA342(KLR))(Crim) where the court held that;

“the prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act”

21. It is trite law that the onerous duty to prove a criminal charge against an accused person squarely lies with the prosecution. The burden of proof does not shift; See *Seketoleko v Republic* (1967) EA.531, *Kiilu and another v Republic* (2005) e KLR and *Peter Wafula Juma and 2 others v Republic* (2014) e KLR where the court held that;

“As I have already stated, the expression “burden of proof” entails two distinct concepts; “legal burden of proof” and “evidential burden”. The two are different, and understanding the distinct application of each is essential. It is also important to understand the position of the law on burden of proof in criminal cases and civil cases; there is a marked difference especially on the legal burden of proof. We shall deduce that difference in the application of the legal burden from the sources I am going to quote below.

Legal burden of proof; does it shift?

According to *Halsbury’s Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues”.

22. There is no dispute that the deceased died on the material day. According to the postmortem report prepared by Dr. Njumwa but produced by Pw 9 doctor Joiner Wali, the deceased died as a result of severe head and chest injury secondary to blunt trauma. From the physical examination of the body, the deceased had suffered multiple stab wounds on the chest and right mandibular; multiple rib fractures;



- multiple skull fractures; perforated right and left lung tissues and bruises on both elbows. The existence of these injuries was confirmed by pw2 and pw3 who visited the deceased's house after accused allegedly alerted them how he had fought with his father. Pw3 said the deceased had injuries on the neck and head.
23. Pw7 scenes of crime took photos at the scene of crime thus confirming the injuries recorded in the postmortem form. Pw8 the investigating officer confirmed that he observed the same injuries. From the extent of the injuries suffered, they are not consistent with injuries occasioned by a fall as claimed by the accused in his defence. Stab wounds and fractures were definitely not self-inflicted in the body. A careful look at the photos clearly shows injuries from the rear part of the left ambidextrous hand which is practically not possible for self-infliction or even a fall. There was foul play and the injuries were occasioned by somebody.
  24. Since there was no allegation of any attempt by the deceased to commit suicide, the nature of the injuries suffered can only lead to the conclusion that they were occasioned by somebody through an unlawful act which was grievous bodily harm. Definitely, the injuries suffered were unlawful and unlawfully caused.
  25. The next question is, who caused the injuries which led to the death of the deceased. It is not in dispute that both the deceased and accused person, father and son respectively, were living in the same house owned by the deceased. Both of them had separated with their wives. Accused admitted that on the material night he saw his father in a lot of pain and that his effort to call neighbors among them Nancy (pw2) chair lady nyumba kumi could not help. Pw2 said that accused had reported to her how he had fought with his father who had tried to sodomize him. Pw1 also stated that on November 28, 2018, he visited accused at his home. That he found him in company of one mshimba. That he overheard the accused telling mshimba how he had fought with his father the previous night.
  26. The fact that pw1 overheard accused engage in a conversation with one mshimba on how he had fought with the father is not itself a confession. Equally, pw2 one Nancy chair lady nyumba Kumi merely received a report from the accused on how he had fought with his father hence the report was not a confession in the strict sense of the word under section 25A and 29 of the *Evidence Act* so as to require the application of 2009 rules of taking confession. Who could have gained access into the house of the deceased and accused person, cause injuries on the deceased without the accused's knowledge or attention.
  27. The claim by the accused that the deceased had no visible injuries is a lie. From the post mortem report, photographs taken by the scenes of crime and evidence by pw2, pw7, and pw8, the deceased had suffered visible injuries. Who occasioned them? There was no eye witness nor independent witness who witnessed the accused attack the deceased. The only evidence relied on is circumstantial evidence and accused's conduct by reporting a fight between himself and the deceased and the conversation overheard by pw1 where he heard accused disclosing to mshimba how he had fought with the father the previous night. The court is therefore duty bound to satisfy itself that the circumstantial evidence relied on is sufficient enough to prove the offence beyond reasonable doubt. In other words, the salient ingredients for circumstantial evidence to apply are complied with.
  28. In the case of *Peter Mugambi v Republic* (2017) eKLR the court while quoting from the *locus classicus* case of *Kipkering Arap Koske v Republic* (1949) 16 EACA 135 restated the cardinal principles for consideration as follows;
    1. The inculpatory facts must be incompatible with the innocence of the accused.



2. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused
  3. There must be no other existing circumstances weakening or destroying the inference
  4. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution
29. Being the only person who was staying with the deceased in the same house and considering that the house was not broken into and bearing in mind the accused' disclosure to his friend mshimba and pw2 that he had fought with his father and further still taking into consideration the nature of the injuries which contradicts the defence that the deceased had fallen down does call for reasonable inference that the only person who had the opportunity that night to attack the father was none other than the accused himself. The unbroken chain of events is so strong such that it irresistibly points a blameworthy finger towards the accused.
30. Was there malice aforethought? From the nature of the injuries which appear to have been occasioned by use of a weapon, and considering the multiplicity of injuries inflicted, the intention to kill is manifest hence a reasonable inference can be drawn that the attack was pre-arranged hence the establishment of malice aforethought. It can be nothing else other than the intention to kill, or to harm which act clearly falls under the definition of section 206 of the Penal Code above quoted. See *Sammy v Republic* (criminal appeal 120 of 2019) (2022) KECA4(KLR)(4February2022)(judgment)neutral citation(2022)KECA4(KLR) where the court of appeal held that”.
- “On proof of elements of murder, as found by the trial court, the fact and cause of the deceased’s death is not disputed. There is also no doubt that from the nature of injuries found on the deceased’s body, whoever killed her had the requisite malice aforethought as there was a clear intention either to kill her, or to cause grievous bodily harm. Elements of malice aforethought as defined in section 206 of the *Penal Code* were satisfied”.
31. Similar position was held in the case of *Republic v Stephen Sila Wambua Matheka* (*supra*) where malice aforethought was inferred from accused’s conduct before, during and after the attack of the deceased, weapon used, part of the body targeted and manner in which the weapon was used. In the instant case, the parts of the body targeted were the chest, head and neck all of which are delicate in the human anatomy. The weapons used to cause a stab and a fracture were definitely a dangerous weapon intended to cause grievous bodily harm or kill. It is therefore apparent that malice aforethought is clear on the face of it that the accused simply wanted to eliminate his father.
32. Accused person had no explanation nor did he controvert the existence of the injuries inflicted on the body of the deceased. After considering the defence of the accused, the same is a mere denial which leaves many questions unanswered or without explanation. On his xx-examination, he admitted the injuries on the head of his late father but fell short of explanation as to how they were inflicted. He also admitted in xx-examination that on the fateful night he spent the night with the father yet he had no explanation on how fractures and stab wounds found their way to the father’s body without his participation.
33. I do not find any merit on the defence tendered by the accused. He displayed a character of a dishonesty person from his general demeanour. He was completely not moved with the fate that befell his father. He appeared a person at peace.



34. Having held as above, I am satisfied that prosecution have proved their case beyond reasonable doubt against the accused person and therefore convict him for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

**Dated, signed and delivered virtually at Garissa this 14<sup>th</sup> day of July 2023**

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**J.N. ONYIEGO**

**JUDGE**

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