



**Republic v Ngoje (Criminal Case 8 of 2020)  
[2023] KEHC 21998 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL CASE 8 OF 2020  
RPV WENDOH, J  
JULY 13, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**FREDRICK OTIENO NGOJE ALIAS FEDA ..... ACCUSED**

**JUDGMENT**

1. By the information dated 6/8/2020, the accused, Fredrick Otieno Ngoje alias Fedra (accused) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The accused denied committing the offence and the case proceeded to hearing with the prosecution calling a total of ten witnesses.
3. Ngore Berine Otieno (PW1) recalled that on 21/7/2020, when away from home attending a meeting, received a call from his wife informing him that Mercy Awuor Otieno (deceased) known as Knight, had been killed. He went back home on 23/7/2021 when he was informed that Fedra (accused) had committed the offence after the deceased and her sister went to harvest soil from a sugarcane plantation that belonged to him.
4. PW2 Lucas Otieno Ogecho, a motor cycle rider knew both accused and the deceased, Mercy Awuor, his daughter. On 26/7/2020, he identified the deceased's body to the doctor before postmortem was done. He saw the deceased's right hand had been cut off; wounds on upper shoulder and lower back.
5. Jacob Ochieng Obuya (PW3) is an uncle to accused i.e. that accused is his brother's son. He recalled 21/7/2020 about noon when one Lilian went to his home to get basins; that she entered Fedra's house and took two big basins and two small troughs which belonged to Fedra. He followed Fred where harvesting soil was being done and met Fedra (accused) while armed with a panga. When PW3 denied seeing the deceased, on that day the prosecutor applied to declare PW3 a hostile witness which was allowed and he was cross examined on his statement.



6. PW4 Lilian Anyango Otieno, a sister to the deceased stated that on 21/7/2020, she went to harvest soil for repairing the house. She was in company of Viola, Sharon and Devina; that the land where they went to get soil belonged to Berine (PW1).
7. When in the process of collecting the soil, the accused went there while armed with a panga, asked them who allowed them to harvest soil; that she replied that Mama Awuor had and he questioned her how she had answered him rudely; that he beat her with a sugarcane and she ran towards her home and she heard him cutting her basins. On reaching home, she found the deceased (Mercy) washing clothes and informed her what happened and they decided to wait for their mother to report the incident. She then saw Accused and Jacob arrive and accused asked for her and claimed that PW4 had abused him. PW4 denied abusing him and Mercy demanded to know why accused cut PW1's basins; that accused asked her why he was answering him like a lady and he cut up the basins which Mercy was using and started to cut up Mercy, on the neck, the hand fell off and the waist and Mercy fell; that accused then jumped over the fence and ran off with the panga. PW4 denied that Jacob ever used his panga to assault the deceased. PW4 testified that when the deceased was assaulted, she was standing next to her and that the accused also attempted to cut her but she evaded. She denied ever having had any dispute with the accused before this incident.
8. PW5 Polycarp Lutta, a Government analyst told the court some specimens were forwarded to the Government Chemist Kisumu for DNA profiling i.e. Blood sample belonging to the deceased, a panga with a black leather handle with some red stains. After analysis, he concluded that the DNA profile generated from blood stains on the panga matches the DNA profile of Mercy, the deceased. He prepared a report to that effect.
9. PW6 Sharon Atieno, a sister to the deceased identified the accused as a neighbour. She recalled that on 21/7/2020, they went to look for clay for decorating the house in company of Lilian, Devina and Viola; that Lilian got permission from the person who looks after the land where they went to get the soil; that when taking the soil Feda (the accused) went where they were with a panga and sugarcane and was with Fredrick; that Lilian and Accused disagreed and Accused cut up Lilian's basin (trough). When Lilian questioned why he had damaged her basin, yet she had Fredrick's permission to get soil. Accused, started to beat Lilian with the sugarcane and she ran home crying. They followed behind but before reaching there, they heard screams from the home and found Mercy had been cut and lay outside their house; that Mercy had injuries to the neck, waist and the hand had been chopped off. She did not see who cut Mercy.
10. PW7 CPL Samuel Ndonge of Rongo Police Station recalled 21/7/2020 about 9:30p.m when Fredrick Ngoje presented himself to the police station while carrying a panga and said that he had information that he was wanted by Rongo CID Office. PW7 took the panga from him and arrested him and informed Deputy OCS Rongo Police Station and officers from Rongo collected him on same night. He said the panga had a stain of blood and had a black leather handle; that he handed over the panga with dry blood stains.
11. PW8 CPL Leonard Pamba recalled 21/7/2020 about 1:00 p.m he was sent by the OCS Rongo to visit a murder scene where they found the deceased's body; the left hand had been cut off at the elbow joint and was five (5) metres from the body. A cut on the back, neck and wrist; that Atieno who was at the scene explained what happened; that accused had chased her from where she was getting soil, found deceased washing clothes, and that he attacked the deceased and she attacked deceased and she died on the spot. Accused ran off. Deceased's body was photographed by him; that on the same night the accused surrendered at Oyond Police Base with a panga and was arrested. Blood was drawn from



- deceased and taken to Government analyst together with the panga. Panga was produced as the panga as PEXH. 2
12. PW9 is Dr. Morebu Peter Momanyi conducted post mortem on the body of the deceased on 26/7/2020 at Rosewood Nursing Home Mortuary. On observing the body, he found a deep cut wound on the left back of chest that extended to the neck 22cm and the left forearm was amputated. He formed the opinion that the cause of death was due to chest injury secondary to sharp force trauma to the chest. He produced the postmortem as PEXN. 4.
  13. PW10 CPL Livingstone Katim processed the photographs taken by PW8 and prepared a certificate to that effect.
  14. When called upon to defend himself, the accused opted to give a sworn statement in which he denied committing murder. He recalled that on 21/7/2020, he was on the farm planting sugarcane with Fred, a nephew; that Lilian and her three sisters went to get soil and Feda told them not to and that a quarrel ensued when Lilian started abusing Fred; that Fred beat Lilian with a stick and Lilian ran home; that Fred went home and he was left in the farm with his brother Ken. After a short while he heard screams but did not bother with them and continued with the work till evening. He went there and found Mercy had been killed then he went to buy food at Cham gi wadu. He was arrested because of the curfew and police wanted a bribe of 500/= which he did not have and they took him to Rongo Police Station. He was then taken to court and was charged with murder. In cross examination, he stated that he heard that Fred from Karachuonyo had killed Mercy. Though Fred is his aunt's son he could not tell his other name(s) nor did he know the aunt's names.
  15. Both the prosecution and the defence filed written submission. It was submitted for the Accused that the accused was mistaken for Fredrick who actually committed the murder; that there had never been any misunderstanding between the accused and the deceased's family and from the facts, no malice can be attributed to the accused as respects deceased's death. Counsel argued that the numerous gaps and inconsistencies in the prosecution case go to the root of the charge; that PW7 testified that the accused Presented himself to police station and handed over the panga but that PW7 being a Corporal could not take a confession from the Accused. Counsel also urged that PW3, PW6 and PW7 described the panga differently hence it was interfered with or pointed to suspect the prosecution case.
  16. On their part, the prosecution submitted that the prosecution evidence connected accused to the offence; that the accused's defence of mistaken identity is not tenable because he did not even know PW3, or the names of his aunt the mother of Fred; that he was positively identified as the perpetrator and presented himself to the police.
  17. I have duly considered all the evidence on record, the submissions of counsel. The Accused faces a charge of murder. This being a criminal case, the prosecution has the duty to prove its case beyond any reasonable doubt to sustain a conviction. In the case of *Woolmington vs. DPP* (1935) AC 462 the court stated what the legal burden of proof in criminal matters is. At page 481 the Court stated:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove



the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

18. *Halsbury's Laws of England* 4<sup>th</sup> Edition Volume 17 paragraph 13 and 14 also set out the legal burden as follows:-

“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.”

19. In *Miller vs. Ministry of Pension* (1947) 2 ALL ER 372 Lord Denning addressed what reasonable doubt when he said :-

“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.”

20. To prove a charge of murder under Section 203 of the Penal Code the prosecution has to establish beyond reasonable doubt that the following ingredients exist:-

1. The death of the deceased;
2. That accused committed the act or omission that led to the death;
3. That accused possessed malice a forethought.

21. The testimony of PW2, PW4, PW6 all confirm that Mercy Atieno died following an assault. Accused also admitted to have gone to the scene after deceased’s death. The Doctor who preformed the post - mortem (PW9) found that the deceased sustained a cut on the left back extending to the neck (23cm) fracture of 2<sup>nd</sup> to 8<sup>th</sup> ribs and the left forearm was amputated. The Doctor opined that the cause of death was due to the sharp trauma to the chest. This evidence corroborated the evidence of PW2, PW4 and PW6. No doubt the deceased met her death after an attack and assault.

### **Whether Accused caused the death**

22. In this case, the key witnesses is PW4 Lilian and PW6 Sharon. PW3 Jacob who was named by PW4 as being present was declared a hostile witness and was cross examined on his statement. However, there is no doubt that a dispute arose between PW4 Lilian and the Accused at the place where PW4, PW6 and others had gone to get clay soil.
23. According to PW4 and PW6, they had been allowed to get the soil. The land belonged to PW1 and the accused was not his employee. PW4 and PW6’s testimonies are controverted that the appellants questioned PW4 why they were taking soil and that PW4 answered back, which offended Accused and



he assaulted PW4 with a Sugarcane. It is also PW4 and PW6's testimony that accused then went ahead to damage PW4's basins by cutting them up. Both are also consistent that when accused assaulted PW4 she ran home. Accused remained behind. According to PW6, Accused then left and went towards his work place. It must be true Accused followed PW4 to her home. This incident occurred during the day. Accused was known to both PW4 and PW6 as they are neighbours. I have no doubt that the incident occurred as there is overwhelming evidence to that effect.

24. The second incident is at PW4's home. According to PW4 she told her sister (deceased) what had happened to her and they decided to wait for their mother but before she came, Accused and one Jacob (PW3) who was declared a witness arrived and when Mercy questioned the Accused on why he had attacked PW4, Accused descended on Mercy cutting off her hand and cutting her on the neck and went. According to PW4 Accused also tried to cut her but she managed to escape. It is accused's defence that he only heard that Fred his cousin, assaulted Mercy. The accused raised the said defence for the first time in his defence. Further to that, he could not tell what is the full names of Fred, in addition, accused denied knowing the name of his aunt, the mother of the said Fred. It could not have been possible for the said aunt and Fred to be called as witnesses to support or deny his allegation. Accused's defence, of blaming the other Fred for the murder comes late in the day and is not believable.
25. According to PW8, the accused presented himself to the police station with a panga which was later identified as the murder weapon because it had blood stains that matched the deceased's DNA. PW8's testimony is not a confession by Accused but is direct evidence on how Accused person came to be arrested. It cannot be true that another Fred murdered Mercy and by coincidence, police on patrol elsewhere arrested accused and frame him with murder even though he was arrested for breach of curfew hours. The accused's defence is hollow, unconvincing and unbelievable. The court finds the testimonies of PW4 and PW6 credible and hence believable.
26. In addition, considering the cross examination of PW3, who had turned hostile, he did admit in cross examination that he recorded in his statement that he saw accused cut the deceased and he ran away. I am satisfied that the prosecution proved beyond any doubt that Accused is the one who assaulted the deceased which injuries led to her death.

#### **Whether Accused had malice aforethought.**

27. Malice aforethought is defined in Section 206 of the [Penal Code](#). It provides:-

206 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 of or grievous harm to same person, whether the person is the person actually killed or not although such knowledge is accompanied by indifference. Whether death or grievously bodily harm is caused.
- c) an intent to commit a felony;
- d) an intention by the act or omission facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”



28. In *Rex vs. Tubere s/o Ochen* (1945) 12 EACA 63, the East African Court of Appeal observed:-
- In determining existence or non existence of malice, court has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”
29. Further in the case of *Hyan vs. DPP* (1979) AC the court held:-
- Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”
30. In this case, the injuries inflicted on the deceased were so serious. The deceased’s hand was chopped off. Though the second cut was on the back, it resulted in the fracture of the ribs in the chest. It means that the perpetrator used a lot of force in inflicting the injuries. The deceased die d immediately after the assault and this is clear evidence that the accused intended to end the deceased’s life. Though it all started with a dispute over soil between accused and PW4, the accused turned his anger on the deceased and ended her life. Malice aforethought was proved

**Whether the description of the panga went to the root of the charge:**

31. PW3 who was declared a hostile witness described the panga as having a wooden handle but PW6 said it was a black rubber handle. PW8 the Government Analyst described the panga he received as having a black leather handle. PW7 who recovered the panga from the Accused was not asked to describe the panga but he identified the panga produced in court as that which was handed to him. I find that PW6’s description of the panga matches with that of the Government Analyst. As to whether the handle was leather or rubber, the Government analyst saw the panga at closer range than PW6 did. Rubber can be mistaken for leather. I find no contradictions in the prosecution evidence on the panga . Besides, it is trite law that where there are many witnesses it is not abnormal to finding witnesses observing things differently. In this case of *Philip Nzaka Watu vs. Republic* (2016) eKLR, the Court of Appeal addressed the issue of inconsistencies in evidence as follows:

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people can perceive the same phenomena exactly the same way.

32. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.
33. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”
34. In this case, two witnesses against one saw the same thing. I find that the panga was not a frame up but was recovered from Accused upon presenting himself to the police station.
35. In the end, I am satisfied that the prosecution proved the charge of murder under Section 203 of *Penal Code* against the accused, beyond reasonable doubt. Accused is convicted accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**R. WENDOH**



## **JUDGE**

In presence of; -

Mr. Kaino Prosecution Counsel

Mr. Oywer Advocate for Accused

Appellant Present

Ms. Emma/ Phelix –Court Assistant

