



**Republic v Mwambegu & another (Criminal Case 19 of 2019)
[2023] KEHC 19419 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE 19 OF 2019
RN NYAKUNDI, J
JULY 4, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MZUNGU DADU MWAMBEGU 1ST ACCUSED

NEEMA TSUI GHAI 2ND ACCUSED

JUDGMENT

1. The two accused persons are indicted for the offence of murder contrary to Section 203 as Read with Section 204 of the [Penal Code](#) chapter 63 of the Laws of Kenya. The particulars of the charge being that on the night of 16th of February, 2019 at Masheheni village in Magarinin sub0 county within Kilifi County, within the Republic of Kenya jointly murdered Swaleh Kalume Mwambegu. Each of the accused pleaded not guilty to the offence. At the trial they were represented by legal counsel Mr. Atyang Advocate.

The Prosecution Case

2. The state summoned evidence of four witnesses to prove the charge beyond reasonable doubt against the accused person in consonant with the principles as emphasized in [Mbugua Kariuki v the Republic](#) (1976-80) 1KLR, in [Kioko v The Republic](#) (1983) KLR & [Woolmington V DPP](#) (1935) AC 46. What to bear in mind is that the prosecution is under duty to prove each element of the offence against the accused person beyond reasonable doubt. That dichotomy on proof of the case beyond reasonable doubt never shifts at any one time with the accused persons unless the facts of the case follow within the exceptions provided for under Section 111 of the [Evidence Act](#). However still the standard and burden of proof being an operation of the law rests with the prosecution.



3. In the instant case, in Reference to PW1 Swaleh Salim testimony he gave an account on the circumstance of the offence which occurred on the night of 16th February, 2019. It was his testimony, that on the material day, the 1st accused armed himself with a club which he used to attack his father on the head. In retaliation the father armed himself with a knife which he used to hit the 2nd Accused inflicting harm to the neck. As a consequence of his father being attacked by the 2nd accused PW1 told the court that he fell down on the ground as the 1st and 2nd accused left the scene of the crime. That the incident attracted members of the public and what followed was a report being made at the police. PW1 alleged that the whole saga involved a quarrel between the 1st and 2nd Accused which triggered the father now deceased to make efforts to intervene. Next in support of the prosecution case was the testimony of PW2 Mapenzi Swaleh who told the court that she the 1st accused as a boyfriend to the 2nd Accused. Further PW2 gave an account on how the deceased travelled to Mashereni and brought with him other siblings to join them. The deceased later left for another place only to be informed that he had been killed which information came from the community. It was PW2 testimony that during the actual attack of the deceased she was not present. Similarly the prosecution summoned PW3 Kakala Kirao who gave evidence to the effect that the accused persons cohabited together at his homestead at intimate friends, notwithstanding that the 2nd accused was also a married woman. PW3 further told this court that on the material day the deceased came to his homestead to follow -up some issues with the 2nd accused. That is when a conflict arose between the 1st accused and the deceased which finally culminated into a full blown fight. The outcome of it was the death of the deceased. According to the prosecution case the matter was reported to the police station at Marereni as stated by PW4 P/C Abdallla. According to PW4 they conducted the necessary investigation including making arrangements for the postmortem to be carried out to ascertain the cause of death of the deceased. He submitted the post mortem report as Exhibit No. 1.
4. At the close of the prosecution case under Section 306 (1) & (2) of the Criminal Procedure Code a finding of a *prima facie* case was made in favour of the prosecution to warrant accused persons to be placed on their defence.

The Defence Case

5. The 1st accused person elected to give a sworn statement in which he stated that on the night of 16th February, 2019 he left his home to tap wine in the neighborhood. That is the place he stayed until the next day of 17th February 2019. He went back to Maweni and that is the time he heard about the death of the deceased. He denied any love affair with the 2nd accused as alleged by the prosecution witnesses. That during his arrest he thought it was all about Muzungu's land. In essence the 1st accused person in his evidence introduced an *alibi* defence of not being at the scene to commit the crime. On the part of the 2nd accused he denied killing the deceased whom she confirmed was her husband. However, the 2nd accused went further to state that prior to 2018 they had a long standing conflict with the deceased which escalated up to the year 2019. It was a defence the deceased had neglected the family and only concentrated in wine tapping. The accused further alleged that due to the irreconcilable differences with the deceased she left the matrimonial home for her step father's home. That is where the deceased followed her and a confrontation ensued between the two resulting in his death. The background of it was a series of events involving their children and a mediation with the elders with a view to reconcile and restore the relationship. The last incident of 16th February 2019, according to the 2nd accused was precipitated by the conduct of the deceased who visited the same home accompanied with his other wife. In the middle of the night the deceased while armed with a knife started inflicting bodily harm but in the struggle managed to disarm him. It is at that juncture members of the public heard her screams and responded with the purpose of rescuing her from the deceased attack. She denied causing the death



of the deceased as the information came through while she had gone to the hospital to seek treatment for the injuries earlier on occasioned by the deceased.

Determination

6. I have considered the evidence by the prosecution and the re-joinder by the accused persons. The facts and the evidence of this case revolve around the ingredients of the offence as laid out in Section 203 of the *Penal Code*. The prosecution is under duty to prove the following elements of the offence beyond reasonable doubt. (a) the fact of death of Swaleh Kalume Mwambegu (b) that the death so reported and investigated by the police was unlawfully caused (c) that the death of the deceased was caused by malice aforethought (d) that there was the accused persons before court who were responsible for the death of the deceased. It is against this background that the specific ingredients shall be tested in the basis of the evidence.

a.Element No. 1 Is whether the Prosecution has demonstrated that the deceased is dead

7. It is trite that death can be proved by direct or circumstantial evidence. In this respect medical evidence in the form of a post mortem report by a qualified pathologist or medical officer comes in handy to assist the court as to proof of death beyond reasonable doubt. (See *Nyabanga v Republic* (1990-1994) EA 462, *Ndiba v Republic* (1981) KLR 103, On this fact the prosecution evidence basically rests on the testimony by PW1, PW2, PW3 and the post mortem report exhibit 1. From the examination, conducted by the medical officer upon the deceased body as identified by PW1 and close relatives it was established he suffered severe injuries to the head. The doctor opined that the cause of death was a reason for those injuries inflicted upon the deceased. The defence is also in concurrence that the deceased is dead. In the circumstances, I am satisfied that the prosecution has discharged the burden of proof of beyond reasonable doubt on this ingredient.

b.Whether the death of the deceased was unlawfully caused

8. This ingredient focuses on the Actus Reus of the offence. This has two elements for the prosecution to prove that the act or omission and the result or consequences of the Act or omission by the accused person was a consequence of the death complained of by the victims in conjunction with the state. The *constitution* in Article 26 (1) provides as follows: (1) every person has the right to life (3) a person shall not be deprived of life intentionally except to the extent authorized by the *constitution* or other written law. Generally, it flows that all homicide cases are presumed unlawful unless cogent evidence is presented that it falls within the known exceptions like in defence of property or person or accident or authorized by law. (See *Gusambiz s/o Wesonga v R* (1948) 15 EACA 65) In *Joash Wandanda Okwiri v Republic Kisumu* CACRA No. 83 of 1984 the court observed as follows: “ it was said that an act is dangerous in the sense that a sober and reasonable person would inevitably recognize that it carried some risk of harm and in fact that it caused death . The deceased had been beaten severely by the appellant, a youth winger who was in pursuit of the deceased’s boyfriend. When the appellant questioned the deceased on the whereabouts of her boyfriend, she did not cooperate hence the assault. She sustained multiple cuts and bruising and lacerations on the head. Her ribs were broken and there was bleeding in the chest cavity. The court concluded that the attack on the deceased was brutal yet unjustified, and that the unlawful act causing death was a dangerous one, clearly bringing the case within the borderline between murder and manslaughter.
9. From the testimonies of PW1, PW2 and PW3 there is overwhelming evidence which point to the fact that the deceased death was unlawfully caused during the scuffle between the 1st accused and apparently in the presence of the 2nd accused. The motive is traceable to an alleged affair between the two accused persons. In balancing the scales of the evidence tendered by the prosecution as challenged by the



defence shows a pattern of family differences between the 2nd accused and the deceased. The spousal relationship had irretrievably broken down leaving her with no choice but to desert the matrimonial home. The 2nd accused evidence points to that fact of a husband and wife relationship which was no longer cordial. The evidence of PW1 & PW2 shows the chronology of events involving the deceased and the 1st accused which later resulted in an assault whose outcome was the death of the deceased from the fatal injuries inflicted. The post mortem report produced as an exhibit opines that the cause of death was as a consequence of injuries inflicted upon the deceased which was more pronounced to the head. The inference to be drawn from the evidence is that the deceased death was unlawfully caused.

c. Central to murder cases, is the question whether the death of the deceased by the accused persons was actuated with malice aforethought.

10. The operative provisions as to manifestation of this element, is precisely outlined in Section 206 of the *Penal Code*. In summary malice aforethought as an intention to cause the death of any person, whether such person is the person actually killed, or knowledge that the act or omission causing death will probably cause death, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. See the principles in the cases of *Langat v Republic* (2002) KLR 191, *Republic v Felix Nthiwa Munyao Nairobi* HCCR 43 of 1999, *Jesse Wagi Mbugua -v- Republic Nairobi* CACRA No 35 of 1991, *Rex v Tubere s/o Ochen* (1945) 12 EACA 63.
11. Malice aforethought is strictly speaking a subjective condition of the mind which necessarily manifest itself by words and conduct of the person subject matter in the criminal process. It is therefore inferred from the acts of omission committed by the alleged accused person. The doctrine may either be said to be express or implied malice aforethought. It is good to emphasize some of the difficulties likely to be encountered by the trier of facts to clearly define with precision the features of implied malice aforethought. However, that is not the case with express malice which is a design formed in the mind of the perpetrator of taking away another man's life or to cause grievous harm In *S v Mini 1963 (3) SA* 188 (A) at 196 E Williamson J.A expressed himself as follows:

“In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time, He must of course also be on his guard against the insidious subconscious influence of ex post factor knowledge.”
12. Reference to this element is to be found in the evidence of PW1 who saw the 1st accused while armed with a club, attacked the deceased on the head and immediately he fell down on the ground on impact of the assault. PW1 went on to state that the 1st accused left the scene without offering any first aid or assistance to the deceased person. He attributed the genesis of the conflict as between the 1st accused and the deceased grounded on the demands by the deceased to have the 2nd accused to return back to their matrimonial home. This was corroborated by the evidence of PW2 as to the circumstances of the offence and the resultant death of the deceased. The prosecution in addition tendered the post mortem report as exhibit 1 which opined the cause of death and reasons in support as a consequence of the severe head injury. The closer one can deduce an answer to the commission of this offence is the testimony by the 2nd accused. Whereas the 1st accused relied on *alibi* defence. Obviously, the probative value of the 2nd accused testimony did not rock the prosecution case as to the characterization of malice aforethought to cause the death of the deceased. Not only is malice aforethought present in the instant case but there was an actual design by the 1st accused to kill or fatally injure the deceased. So far attention is directed at the conduct of the 1st accused before, during, and after the commission of the offence as directly seen by PW1. I find no justification, excuse or mitigation on the part of the 1st accused to



inflict serious harm targeted at vulnerable organ or part of the deceased body. Perhaps the 1st accused unlawful acts was to permanently restrain or prohibit the deceased in following his wife herein the 2nd accused. In the interpretation of Section 206 of the *penal code* if the dangerous force thus used results in the death of the victim, the crime is murder, just as much as if the danger was inherent in the very nature of the felony itself. I find the element of malice aforethought proved beyond reasonable doubt.

13. Whether in view of the defence by the accused persons, this court can satisfactorily conclude that there was positive identification of the perpetrators to this offence. In *Wamunga v Republic* (1989) KLR 424 the Court of Appeal stated thus “ it is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification re favourable and free from possibility of error before it can safely make it the basis of a conviction also in *Ogeto v Republic* (2004) 19, it was stated that: it is trite law that a fact can be proved by the evidence of a single witness although there is need to text with the greatest care the identification evidence of such a witness especially when it is shown that conditions favoring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest to be mistaken”
14. As far as the 1st accused person in concerned, on identification he raised an *alibi* defence. There is a relatively well developed body of jurisprudence which deals with the principles for consideration to give effect to the defence of the accused not being at the scene. In the case of *Kiarie v R* (1984) KLR the court of Appeal laid down the following principle: “ An *alibi* raises a specific defence and an accused person who puts an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s finding on the alibi because the findings was not supported by any reason. (See also *R v Sukha Singh S/o Wazer Singh & Others* (1939) 6 EACA 145 it was held as follows: 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 internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they satisfied as to its genuineness, proceedings will be stopped”
15. On review of the evidence of PW1 & PW2 the plea of *alibi* by the 1st accused was demolished and there is no clear and satisfying evidence that he was elsewhere other than the scene of the murder. Although the 1st accused gave a long chronology of the places and as to time which was aimed at exonerating as a perpetrator of the offence, there is indeed some doubt to such a testimony. I also highlight that the 1st accused person *alibi* defence was never corroborated by any independent witnesses. In this case the plea of *alibi* named some physical locations but failed to provide accuracy of his movements to warrant the court to satisfactory believe that he was not at the scene. Given the veracity of the direct and circumstantial evidence by PW1, PW2, & PW3 who placed the 1st accused at the scene of the crime the best of his evidence can only be summed up as a fabrication. It is trite that the one who claims to rely on the plea of alibi has to prove it beyond reasonable doubt for the court to take it into consideration. In the same case here the 1st accused has failed miserably to prove with accuracy his alibi defence. The 1st accused therefore who was alleged to have committed the offence of murder by the state was actually at the scene of the crime. In the case of *Ricky Ganda v The State* (2012) ZAESHIC 59, the Free State High Court Bloemfontein held: “ The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of



the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.”

16. In respect to the 2nd accused this court considering the evidence as a whole more specifically PW1 & PW2 I am satisfied that the conditions under which identification is claimed to have been made were favourable. In particular, the prior knowledge of the 2nd accused by PW1 & PW2 who apparently happened to be their biological mother. There are no material discrepancies deducible from the twin testimony of her children. Therefore, even the defence testimony by the 2nd accused does not water down the testimony of PW1 and PW2 in respect of proper and positive identification. However, in this case the 2nd accused testimony seem to corroborate PW1 & PW2 evidence. In this regard I have also perused and analyzed the defence by the 2nd accused. In the premises, the 2nd accused gave a narrative underlying her marital union with the deceased. She stated before court that during their marriage the deceased deliberately neglected the family by failing to provide for their basic survival and maintenance rights. As this were aggravating factors she made a decision to move out of the matrimonial home with some of her children to go and seek shelter within the homestead of the 1st accused. Although the 2nd accused denied cohabiting with the 1st accused a love triangle with the deceased sparked the fight. This case involved a scenario in which the deceased went after his family which was within the premises under the control and occupation of the 1st accused person. The anger, aggression, and violence exhibited between the 1st accused and the deceased resulted in the death in question subject matter of this criminal proceeding. This was a case where the deceased went for his rival who reiterated in turn with full force and in the end he became the 1st casualty. The impulsive attack by the deceased upon the 1st accused slightly inflicted harm which was not fatal, simply why is before this court on account of that offence. Of course the ultimate question is whether the 2nd accused was also a protagonist in the triangle of homicide. In this 2nd limb of analysis, there are dramatic differences between the testimonies of PW1, PW2, & PW3 whether in all this competing interest she can be assumed to be a victim of an offender who killer her partner.
17. In the case at bar the characteristics of the incident demonstrated by the testimonies of PW1 & PW2 is one which displays loss of face on anger and aggression between the two men namely the 1st accused and the deceased. Thus in PW1 evidence it was the 1st accused at the time who attacked the deceased and in retaliation the deceased apparently armed with a knife moved with equal measure to physically assault the 1st accused. The evidence by PW1 does support that the deceased also happened to be his father dropped to the ground and succumbed to death. On my part I find no greater propensity for the 1st accused to have engaged in aggression in particular physical violence pursuant to Section 206 (a) & (b) of the *Penal Code* likely to occasion the death of the deceased. The prosecution case is set within the boundaries of Section 20 and 21 of the *penal code*. In this context the brief facts refers where there was not only a primary criminal act that all the participants intended to commit but also a secondary or collateral criminal act that ensued as a result of the actions of the two accused persons as participants to the murder. What did not come out clearly from the prosecution case is whether the mens rea element required of the 2nd accused in furtherance of the crime was proved beyond reasonable doubt. The questions which remained unanswered are whether the deceased assault and the 2nd accused reiterate was in furtherance of the 1st accused common intention to kill him, and whether the 1st and 2nd accused shared a common intention to inflict serious harm likely to cause death. Applying the rule in Section 20 & 21 of the *penal code* there is no evidence that the end accused had the knowledge required that



the 1st accused was likely to inflict physical injury in contravention of section 203 of the *Penal Code* for her to be held liable as actual doer which gave rise to the offence of murder. For whatever is worthy such degree of specificity is correctly required by the prosecution beyond reasonable doubt and goes towards addressing concerns relating to concurrence between moral blameworthiness and criminal responsibility in the words of the statute on common intention. The legislative purpose behind Section 20 & 21 of the *penal code* in my view ought to be interpreted purposively bearing in mind the phrase in furtherance of common intention. It is no secret that because of the nature of interpretive exercise courts in Kenya have come to different conclusions as to the mens rea requirement of Section 20 & 21 of the *Penal Code*.

18. In this respect on evaluation of both the prosecution and defence case and bearing in mind that the burden of proof is always on the state to prove beyond reasonable doubt all the elements of the offence of the crime charged and this burden never shifts, I make the following findings. First and foremost, the evidence by the prosecution points to the 1st Accused person's guilty beyond reasonable doubt for the offence of murder contrary to Section 203 of the *Penal Code* as punishable under 204 of the same *Code*. As I have said, I therefore enter conviction in favour of the prosecution as against the 1st Accused for the indictment. Whereas for the 2nd Accused, it is so difficult and risky to define the concept of reasonable doubt as having been established from the prosecution evidence to warrant a finding of guilty piecing together the various aspects stated on oath by the witnesses in support of the charge. Given the shortcomings surrounding the actual involvement of the 2nd Accused the law permits me to find her not guilty and order her acquittal for the offence of murder.

SIGNED, DATED AND DELIVERED AT MALINDI ON THIS 4TH DAY OF JULY 2023

R. NYAKUNDI

JUDGE

