



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mwaduka & 2 others (Criminal Case 6 of 2014)
[2023] KEHC 19507 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE 6 OF 2014
JN ONYIEGO, J
JULY 3, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENJAMIN MWADUKA 1ST ACCUSED

MAIKWASI MWARUTA 2ND ACCUSED

FREDRICK ZIGHANI TOLE 3RD ACCUSED

JUDGMENT

1. Accused persons herein James Mutua alias Osama (1st accused now at large) Benjamin Mwaduka Tole (2nd accused) Mwaikwasi Mwaduka (3rd accused) and Fredrick Zighani Tole alias Mwafrika (4th accused) were originally charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars are that, on the February 17, 2014 at Riata farm in Taveta sub county in Taita Taveta county, jointly with others not before court while armed with bows and arrows murdered Gerald Okello Adero.
2. Upon entering a plea of not guilty, hearing commenced with the prosecution calling a total of 13 witnesses. During the pendency of the proceedings, the said James Mutua who was the 1st accused in the original information absconded. He has been at large to date. The information was however amended on November 29, 2021 and the case proceeded with the remaining accused persons whom I shall now refer to accused 1,2 and 3.
3. Briefly, Pw1 Jacob Odongo Adero a brother to the deceased was on February 17, 2014 at the farm of their brother Essau Opiyo (Pw2) which had been allocated to him by the ministry of lands officials. While in the farm with his brother Gerald Okello now deceased and other workers, they were attacked by a group of people who were allegedly against the allocation of the farm to Gerald Essau.



4. That as a result of the attack, Gerald sustained fatal injuries out of an arrow shot. He however never identified the attackers specifically. On cross exam by Mr Were, he stated that he did not see the attackers. Pw2 Essau Opiyo Odongo the owner of the disputed farm in Taita Taveta gave a detailed testimony on how his brothers Pw1 and the deceased plus other workers he had engaged in the farm to cultivate and plant were attacked by people armed with bows and arrows. That he was shot with an arrow on the left elbow while the deceased sustained fatal injuries out of the said attack by use of arrows. He told the court that during the attack, those who were in the front line were the accused persons being people he knew very well before.
5. Pw3 Ali Danson a driver to Pw2 was in company of Pw2 when they were attacked at the farm of Pw2 by eight people wearing masks covering their faces. He stated that he saw the accused persons as they were in the front line out of the 40 people who had confronted them. He described them as neighbours and people he knew very well. However, on cross examination by Mr Were, he stated that he never saw the faces of the four accused persons
6. Pw4 one Kostensi Crispin Chief Riata stated that, on the material day, he was cultivating his farm which was allocated to him by the government when he heard screams from Pw2's farm. On responding, he saw several people armed with bows and arrows. According to him, accused 3 was among those people who attacked the people working in Pw2's farm. He further stated that, those people were covered with hoods bearing openings on the eyes. That he was able to identify one man from his physical features. That he did spy on the identity of the 3rd accused for some time before reporting to the police that he had seen him at the scene on the material day. On cross examination by were, the witness stated that on the material day, he only saw the 3rd accused. That the 1st and 2nd accused who were persons known to him were not at the scene on the material day.
7. Pw5 Paul Otieno and Pw6 Wilson Otieno were at the farm of Pw2 when several people intruded Pw2's farm while armed with bows and arrows. That some workers among them the deceased were injured. They however could not identify the hooded people who attacked them.
8. Pw7 scenes of crime personnel visited the scene and took photographs. Pw8 IP Lilian conducted identification parade in respect of accused 3 who was identified by Pw4. Pw9, Pw10 and 11 all police officers visited the scene and recovered some exhibits besides arresting the accused persons. Pw10 also conducted an id parade in respect of accused two whom Essau picked out as one of the attackers albeit resistance from the accused who claimed that he had grown with Essau in the village hence the id parade was not relevant. Indeed, in his evidence in-chief Essau admitted that he knew Mwaikasi (accused 2) before.
9. Pw12 is the doctor who did a post mortem examination on the deceased's body and ascertained the cause of death as bleeding caused by arrow penetration. Pw13 one Catherine Serah government chemist analyst did analyse various arrow heads presented for analysis whether they had any traces of poison. In her examination none had traces of poison.
10. After going through the prosecution evidence in chief and cross examination arising therefrom, the court was satisfied that prosecution had established a *prima facie* case hence put them on their defence.
11. The first accused person denied the offence on oath. He denied ever visiting farm on the material day. On cross examination, he told the court that the arrows recovered from the house where his herdsman was staying were not his as alleged by the prosecution.
12. On his part, the 2nd accused equally denied the offence on oath. He stated that on the material day, he was in his farm and not Riata farm where the act of murder took place. That at 6pm, he heard



- that somebody had been killed at Riata Farm. He wondered why he was arrested. He disowned the identification parade conducted by Pw10 which comprised of Ethiopians who had soft hair hence distinguishable from him. That all parade members were tall than him and that Essau who picked on him was hidden somewhere as the parade was being organised in the full view of Essau.
13. The 3rd accused also gave sworn testimony thus denying the offence. He stated that on the material day he was at Kaloleni his place work.
 14. Upon close of the defence case, counsel agreed to file submissions.
 15. Through the firm of Munyari Advocates, the 1st accused filed his submissions on July 25, 2022. Learned counsel submitted that the prosecution had failed to prove the salient elements of the offence of murder. It was averred that although the cause of death was as a result of an arrow shot, there was no proof that it was the 1st accused who shot him. That nobody saw him shooting the deceased nor was there any proof that the arrow belonged to him. That the arrows recovered from the 1st accused's house were not connected with the murder in question and that they belonged to his employee.
 16. Learned counsel submitted that the prosecution failed to prove malice a forethought. That the 1st accused had no reason to attack the deceased because he was not claiming any land. Regarding identification, counsel submitted that, Pw3 and Pw4 stated that the attackers were masked hence not possible to identify them. That the evidence by the prosecution was contradictory hence inadequate to prove a case beyond reasonable doubt. To emphasize the importance of proof of a criminal case beyond reasonable doubt, counsel made reference to the case of *Josephat Manoti Omwancha v Republic* [2021] e KLR.
 17. Regarding the aspect of id parade in respect of the 1st accused, counsel asserted that it was worthless as the accused was well known by Pw1 who confirmed the same. To support that position counsel referred to the case of *Republic v Valentine Maloba and 2 others* [2021] e KLR where the court held that an id parade cannot be conducted against a known person. Counsel went further to submit that the 1st accused had raised an a libi defence which was not challenged and that he had no obligation to prove the same.

2nd Respondent's Submissions

18. Through the firm of Machora Motuka advocates, the second respondent filed his submissions on July 4, 2022 wherein he submitted on two issues namely; whether the prosecution proved the elements of the offence; whether the prosecution proved its case beyond reasonable doubt. It was counsel's submission that it is the duty of the prosecution to discharge the burden of proof at all times. In that regard, the court was referred to the case of *Stephen Nguli Mulili v Republic* [2014] e KLR.
19. Learned counsel opined that the prosecution did not prove the three elements in establishing the offence of murder *inter alia*; death of the deceased and cause of death; that accused committed the unlawful act which caused the death of the deceased and; that the accused had the malice aforethought. To buttress this position, reliance was placed in the case of *Anthony Ndegwa Ngari v Republic* [2014] e KLR.
20. Whereas counsel conceded the fact that the deceased died out of an arrow shot, he was quick to add that such unlawful act was not caused by the second accused. Learned counsel contended that the prosecution evidence was full of contradictions and lack of positive identification as none of the witnesses specifically saw the person who shot the deceased hence doubtful evidence which should go to the credit of an accused person. In support of that position, counsel placed reliance in the case of *Philip Muiruri Ndaruga v Republic* [2016] e KLR.



21. In conclusion, counsel submitted that the aspect of malice aforethought could not be proved as nobody knows who murdered the deceased.
22. Although Wambura indicated that she had filed her submissions, a copy was not placed in the court file. On their part, the state did rely on the evidence on record.
23. I have considered the evidence on record, testimony by various witnesses and submissions by the 1st and the 2nd accused persons. 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”

24. 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 *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”.

25. In the instant case, Pw1 Joseph Ondogo Adero was with the deceased when they were attacked by people armed with arrows. That the deceased was shot by an arrow That every effort to save his life failed as he died in hospital. Pw12 produced a post-mortem report indicating that the cause of death was bleeding due to arrow penetration. There is no doubt the act of an arrow shot was unlawful and it was the cause of death of the deceased.
26. The key question is, who committed that act leading to the death of the deceased. An act can be as a result of omission or commission directly or indirectly. The same act can be ascertained through direct or indirect evidence. Direct evidence is by way of an eye witness testifying that he or she witnessed the commission of the offence. On the other hand, circumstantial evidence can be inferred from circumstances under which the offence was committed. See the case of *Ahamad Abolfathi Mohammed*



and another v Republic [2018] eKLR, where the court of appeal had this to say 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.’ “Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v Republic* CR App No 32 of 1990(UR) in which this court held 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.”And in *Sawe v Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus:“In order to justify on circumstantial evidence, 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 his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

27. According to pw1, they were attacked while in his brother’s shamba. He did not specify who attacked them. On cross examination by Mr Were, he stated that he knew accused 1(absconded) and accused 4 (now accused 3) and that he did not see them in that Shamba at the material time. On further cross examination, he said that he did not see the attackers. He added that accused 2 is his neighbour and he did not see him armed. In a nutshell, he could not identify any of the attackers despite having been with the deceased when they were attacked.
28. Pw2 also a brother to the deceased stated that he was in the same shamba when the deceased was shot. He claimed that he knew the accused persons before. He stated that, while in the shamba they were attacked by people armed with arrows among them the three accused persons. On cross examination by Mr Were, he stated that on February 16, 2014, Osama and accused 3 herein had threatened him over a dispute over land allocation.
29. Pw3 said that he was driving the deceased’s car and that when they were attacked, Gerald was shot and ran to rescue him and drove off. According to him the attackers were masked wearing hoods. On cross examination by were, he stated that he never saw the faces of the attackers. He told the court that all the accused were his neighbours. He however contradicted himself that he saw the four accused persons in the frontline. He went further to state that the people who attacked them came from all over and could



not tell who shot the deceased. From his testimony he is an unreliable witness given his contradictory testimony.

30. Pw4 claimed that he was in the farm when masked people attacked them. That he was able to identify accused 3. He however did not see accused 1 and 2 at the scene although they were well known to him. On his part, pw5 said he was in the said shamba when masked men attacked them. On cross examination, he said that he did not recognize them and that he did not know who caused the deceased's death. Equally, Pw6 who had heard screams from Riata firm responded to the screams. He saw masked people armed with arrows and bows. According to him, he could not identify who they were. That none of the accused persons was at the scene.
31. From the testimony of the key eye witnesses, only Pw2 claims to have seen the three accused persons at the scene. He however admitted that he had collided with the 1st and 3rd accused the previous day. How come he was the only one who saw the three accused persons yet they were masked. Regarding Pw4 identifying the 3rd accused in the id parade conducted by Pw10 yet he knew him before, the same is inconsequential as it is not of any probative value.
32. A murder case is such a serious offence which can attract a death penalty hence should not be treated casually. The evidence by the prosecution is not consistent nor well corroborated. It is full of contradictions and inconsistency with some evidence based on hatred over land disputes. It is unfortunate that somebody died but there was no clear evidence to point at the actual culprits. If the witnesses were together, how come they could not see the same thing.
33. Having held as above, the issue of malice aforethought does not arise. Accordingly, I do not find any evidence to prove the offence of murder hence accused persons are acquitted accordingly.

Right of appeal 14 days.

Dated, signed and delivered virtually at Garissa this 3rd day of July 2023

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J.N. ONYIEGO

JUDGE

