



**Republic v Nderitu (Criminal Case 02 of 2020)
[2023] KEHC 22001 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL CASE 02 OF 2020
RN NYAKUNDI, J
SEPTEMBER 4, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ISAAC GAKENA NDERITU ACCUSED

JUDGMENT

1. The accused person stands charges with murder to section 203 as read with section 204 of the [Penal Code](#). The state alleged that on April 9, 2030 at Nyongoro Area, in Lamu, the accused murdered Jackson Mwangangi. He pleaded not guilty triggering a trial of the issues of the offence to be proved beyond reasonable doubt the element for murder. The offence of murder is provided for under section 203 of the [Penal Code](#), it states:

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder.”

2. According to section 213 of the [Penal Code](#), a person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death. The four basic elements of murder which flow from section 203 of [Penal Code](#) to be proved beyond reasonable doubt are:-

- a. The death of the deceased
- b. The death being caused by an unlawful act or omission of the accused person and
- c. That the death of the deceased was caused with malice aforethought.



- d. That the accused person in court participated in causing the death of the deceased.
3. The facts and analysis for the prosecution was based on the textual testimonies of four witnesses. The evidence simply touches on the following proven facts: According to PW1 Paul Ndito on the April 9, 2020 he was at his homestead, when he received information that there was a fight in the neighborhood and on rushing there urgently PW1 found the deceased on the ground whom they assisted to take to the hospital. Further PW1 evidence was to the effect that on their way to the hospital, the deceased complained of injuries to the stomach. He was to be admitted at Mpeketoni sub county Hospital, but unfortunately he passed on while undergoing treatment. Next was the testimony of PW2 Bethuel Pamba whose narrative focused on the events of April 9, 2020 that on or about 7.45pm while at home a friend by the name Vincent Mutinda came in visiting and later he agreed to escort him to his home because he was a stranger to the local environment. It was at that moment PW2 met mama Jane whom they started talking on many other issues and she also asked that she be escorted by PW2. In the course of time Mama Jane started explaining to PW2 on existence of some issues involving Gakena the accused and one Mwangangi. That is when PW2 decided to find out the nature of the conflict between Gakena and Mwangangi. On arrival, at the locus in quo he found Mwangangi was a sleep but bleeding from the mouth and he also complained of the stomachache. It occurred to PW2 that the two had fought prior to the time when he arrived at that scene. According to PW2 a decision was taken to telephone the police for assistance which included escorting the Mwangangi to the hospital for further treatment. He unfortunately passed on while undergoing treatment.
4. Following, the death of the deceased, a postmortem was carried out by Dr Kamami (PW3) who certified the nature of injuries and the cause of death of the deceased. In his own evidence Dr Kamani confirmed that the deceased had sustained serious injuries to the abdomen and all other systems were within normal range. In summary, PW3 opined that the deceased cause of death was due to blunt injury to the abdomen with rapture of stomach abdominal viscera) with resulting peritonitis. The autopsy report was admitted in evidence as exhibit 1 in support of the prosecution case. It turned out from the investigation conducted by PW4 PC Solomon Akwoyo that the witness statement recorded and subsequent postmortem report demonstrated a pattern of a fight between the accused and the deceased. It was the evidence of PW4 that there were no extenuating circumstances to sustain a lesser charge on manslaughter and he accused had to be arrested and charged with murder contrary to section 203 of the [Penal Code](#).
5. At the close of the prosecution case the accused was placed on his defence under section 306 (2) as read with section 307 of the [Criminal Procedure Code](#). The accused directed to give a sworn statement in which he denied the offence of murder acknowledging that they have been friends with the deceased for some time prior to the date of the incident. The accused further told this court that on the material day the deceased passed through his home for the purpose to answer a call of nature leaving his bag in his custody. In addition, the accused testified that at the same time he saw two young people and a lady. It was the two young men who reported to the police that he had fought with the deceased. He denied any existence of such a fight alluded to by the young people. He only noticed that the deceased never managed to reach the toilet as earlier intimidated for he was lying next to the facility. He therefore denied the offence in totality.

Analysis & Determination

6. In the case of [Republic v Andrew Omwenga](#) [2009] eKLR the court held that from the definition of murder contrary to section 203 of the [Penal Code](#) for an accused person to be convicted of the offence “ it must be proved that he caused the death of the deceased with malice aforethought by an unlawful



act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.”

7. The standard and burden of proof is vested with the prosecution and it never shifts to the accused person at any one time. This burden of proof is known as the legal burden of proof as postulated in section 107(1), 108 & 109 of the Evidence Act which provide as follows:

107: (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of tht fact shall lie on any particular person.

8. That being the case, it's the duty of the trial court to evaluate the discharge of the burden of proof by the prosecution within the context of the legal burden of proof and evidential burden of proof. The extract from Fidelis Nwadialo, Modern Nigerian Law Evidence, University of Lagos Press Lagos 1999 states the following principles:- “ The term “burden of proof is used in two different senses. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on party to persuade the court either by preponderance of evidence, or beyond reasonable doubt that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour...The other meaning of the expression “burden of proof” is the obligation to adduce evidence on a particular fact or issue. This evidence in some cases, must be sufficient to prove the fact or issue, while in others, all that is required is for it to be enough to justify a finding on tht fact or issue in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.
9. This is what the court in Mbugwa Kariuki v The Republic [1976-80] 1 KLR 1085 emphasized: “ that the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate tht the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.
10. It is trite that any crime in our legal system must comprise mens rea and actus reus. The trial court is under duty to ensure that before any conviction is entered both actus reus and mens rea have been proved to the required standard of beyond reasonable doubt. (See Joseph Kimani v R 2014 eKLR)
11. From the evaluation of the evidence by the prosecution weighed against the defence it is crystal clear that one Jackson Mwangangi Kalie is dead. This court draws inference from the testimony of PW1, PW2, PW3 and PW4 respectively. However, of significance is the postmortem examination dully performed by PW3 on the body of the deceased. The defence does not contest that fact of death of the deceased. The evidence gives meaning to the concept of the burden of proof of beyond reasonable doubt.



12. The next ingredient is that which revolves around the unlawful acts or omission of the accused as stipulated in section 203 of the Penal Code. Under article 26 (3) of the Constitution the right to life is guaranteed and protected and no person is to be deprived of it unless within the confines of the constitution and the law.
13. Causation of murder may be proved by way of direct or circumstantial evidence. The following case law address causation issues under the rubric of circumstantial evidence (See *Rex v Kipkering Arap Koske and another* [1949] 16 EACA 135, *Samson Daniel v Rex* [1934], *Nduguri v Republic* [2001], *Erenest Asami Bwire Abanga alias Onyango v Republic* Nairobi CA CRA No 32 of 1990.
14. I have considered this case in light of the prosecution evidence of PW1- PW4 and what comes out clearly is the fact of the accused person being the last person to be with the deceased. In the comparative case of *Satpal Singh v State of Haryana* <https://www.vakilno1.com> explains the application of the last seen theory concept as follows: “ The last seen theory may be a weak kind of evidence by itself to found a conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in every close proximity of time the accused owes an explanation... with regard to the circumstances under which the death may have taken place.
15. In this case there is cogent evidence that the deceased was found with the accused having sustained the serious injuries as confirmed by the postmortem report tendered by PW3 Dr Kamami. In this respect the time gap between the time of the deceased being found with serious injuries and being escorted to the hospital for treatment was almost instantaneous. Apparently the deceased passed on before undergoing any major diagnosis or treatment. The prosecution has proved that there was no chance of when that person committing the crime which occasioned the death of the deceased. The defence foundation was based on the hypothesis that the deceased may have suffered grievous harm elsewhere only to be framed for an offence he never committed. The close proximity between the last seen evidence of the accused with the deceased, to me is clearly established. In section 111 of the Evidence Act when a fact is within the knowledge, of a person herein the accused person the burden is upon to establish his innocence. In the instant case the accused person failed to provide a viable explanation as a consequence, he fails to establish his innocence. One wonders why the deceased in a situation described by the accused elected to answer the call of nature at his premises as if it was the only place with such facilities. There is therefore a link on the evidence in relation to the fight between the accused and the deceased and the primary fatal injuries established by the pathologist PW3. This chain of circumstances were never controverted by the accused person. There are incriminating circumstances to say the very least to bluntly find the accused responsible for the crime of murder.
16. It goes without saying that the evidence against the accused as put forth by the prosecution is purely circumstantial. Decided cases on this branch of law have established the threshold culpable of proving facts in issue in order to secure judgement to consist of the following elements:-
 - a. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established
 - b. Those circumstances should be of a definite tendency unerringly portion towards guilt of the accused
 - c. The circumstances taken cumulatively should form, a chain so complete that there is no escape from the conclusion tht within all human probability the crime was committed by the accused and none –else (*Musili Tulo v R* [2014])



17. Given the evidence available, particularly the testimonies of PW1 and PW2 I am satisfied that a reasonable tribunal or court properly directed inevitably find that beneath the circumstantial evidence, the accused murdered the deceased in the present case. PW2 evidence in furtherance of 107(10 of the [Evidence Act](#) appropriately and squarely places the accused at the scene. It is a matter of ordained evidence from PW2, that on visiting the scene, the deceased was asleep with multiple injuries to the abdomen as the accused sat on a chair next to the deceased.
18. Having gone through the evidence of PW2, it is apparent that the accused was the last person to be seen with the deceased at the scene. The common thread was that the evidence of PW1 and PW2 bears similar facts of circumstantial nature of probative value that the death of the deceased was unlawfully caused. It is clear precisely so from the postmortem report in this context that the deceased suffered serious harm to the abdomen. That was the major contributory factor occasioning the death.
19. In article 26 (1) of the [Constitution](#) every person has a right to life:
 - (3) A person shall not be deprived of the intentionally, except to the extent authorized by this [Constitution](#) or other written law.
20. According to section 206 of the [Penal Code](#) malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances:
 - a. An intention to cause the death or to do grievous harm to any person whether such person is the person actually killed or not knowledge that the act or omission causing death will probably cause the death or grievous harm to same person whether such person is the person actually killed or not, although such knowledge is accompanied by indifferent whether death or grievous harm bodily harm is caused or not, or by a wish that it may not be caused.
 - b. An intent to commit a felony
 - c. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed an attempt to commit felony.
21. Turning to this element of malice aforethought as defined under section 206 of the [Penal Code](#), the circumstances to this offence include, the injuries inflicted, the part of the body injured and the conduct of the accused during and immediately after the injuries were inflicted (See *R v Tubere* (1945) 12 EACA 63.) In *Ogeto v R* (2004) 2KLR 14 the Court of Appeal held that where an accused person chased the deceased caught with him and stabbed him with a knife on the chest, the dint of section 206 (A) of the Penal Code on malice aforethought is deemed to be established by evidence showing an intention to cause death of grievous harm. Further in [Ernest Asami Bwire Abanga alias Onyango v R](#) Cr Appeal No 32 of 1990, the court observed that if the fact of the brutal killing which was well calculated and planned by the accused it is plausible to conclude that he had an intention to kill the deceased.
22. A declared evidence of PW3 the post mortem report depict that the deceased suffered serious injuries to the abdomen. It was the prosecution case, that the parts of the body targeted and the injuries sustained were as a result of malice aforethought.



23. In my view above absence of the of the murder weapon does not lessen the test on malice aforethought under section 206 (a) & (b) of the Penal Code. I am of considered view that malice aforethought as known in law includes an intention to kill a person or an intention to do an act likely to occasion death of another person.
24. Self defence under section 17 of the Penal Code which is treated in our law as a species of private defence is recognized by the Kenyan legal system. Given the value attached on the right to life in article 26 of the Constitution there are strict limits to the taking of life as proclaimed in sub-section 3 of article 26. Self defence takes place at a time of the threat to the complainants life at the moment of attack and which may give rise to the necessity in certain circumstances for one to retaliate with some force but not more severe than that of the assailant. Murder in self defence is justified only if the person concerned had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or grievous harm and the only available means is to respond with some measure of force against the assailant.
25. In applying the facts, the defence of self I find no credible evidence to determine that the accused person conducts made the requirements of the parameters set out in section 17 of the Penal Code. Faced with no contradictory evidence from the defence, and nothing to suggest that he was in any imminent danger to his life to prosecution version carries the day of beyond reasonable doubt on the charge of murder against the deceased.
26. For all these reasons I find the accused guilty of the charge of murder contrary to section 203 as read with section 204 of the Penal Code and do enter a conviction of the offence as per the law established.

Sentence

27. Likewise, on sentence the Supreme Court in Muruatetu v Republic and 4 others declared the mandatory death penalty for the offence of murder unconstitutional and recognized the need for the accused person to render mitigation, victim impact statement, aggravating factors in conformity with the right to a fair hearing under article 50 of the Constitution. In addition, the personal circumstances of the accused including his age or any other substantial or compelling reasons before the final verdict on sentence. In the instant case I have considered the mitigation of the accused, the probation officers report detailing the circumstances of the offence, the victim impact statement and aggravating factors as submitted by the state. It is clear from the record that the accused person has been in custody for three years and four months before the final order on conviction. Pursuant to section 333 (2) of the Criminal Procedure Code, the accused person is entitled to a credit of the aforesaid period spent in remand custody. Weighing one factor after another I have sentence the accused person twenty-eight (28) years imprisonment with effect from April 21, 2020. As a consequence, the committal warrant of April 5, 2023 be amended to factor in the commencement date in terms of section 333(2). Right of appeal 14 days.

It is so ordered.

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

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R. NYAKUNDI

JUDGE

