



**Republic v Khakali (Criminal Case 2 of 2017)  
[2024] KEHC 12966 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12966 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 2 OF 2017  
SC CHIRCHIR, J  
OCTOBER 17, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**RAPHAEL AMBOSO KHAKALI ..... ACCUSED**

**JUDGMENT**

1. Raphael Amboso Khakali ( the accused) was charged with Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the charge are that on 4<sup>th</sup> January 2017 at Butsinya village , Shisembe Sub-Location, Murando Location in Kakamega East Sub-County within Kakamega County, murdered Joseph Khakali Amboso (the deceased). The Accused denied the charge and the matter went to full trial.

**The prosecution’s Case**

3. PW1 was the grandchild of the deceased and a niece to the Accused. She told the court that on the evening of 4/1/2017 at about 7.00 Pm the deceased sent her to buy paraffin. On coming back, she found the Accused hitting her grandfather, the deceased. He kept hitting the deceased until the deceased fainted. She further stated that the Accused also attacked the deceased with a panga, he then ransacked the deceased pockets, removed a key, and left. The witness screamed, and ran to seek help. She first went to the house of grandmother Nyakeno. She found that Nyakeno had been cut and a child called Vuhinda had also been attacked. She then ran to the house of Josephat and Josephat told her to stay and hide. She further told the court that the accused had a torch. She identified the accused in the dock. She also identified the panga used to attack the deceased.
4. At cross-examination, she stated that she got to meet the Accused that day, as she never used to reside with her grandfather. She further stated that in the morning of that day, the accused had scolded the deceased and went away. He came back around lunch- hour but refused to eat the mid- day meal. He



- went away again , but came back in the evening. That is when he attacked the deceased. The accused wanted the deceased to build a house for him. He also did not want the witness and one child called Marcus living with the deceased.
5. PW2 was in her house that evening. He was with her husband and some 2 visitors. She was sited near the door and had sat facing the entrance. Suddenly she saw the Accused holding a panga over her head and a phone with a torch. She tried to flee but the accused hit her on both hands. He also cut her on the cheek and on the head. she lost consciousness and regained it at Mukumu Hospital. She knew the Accused; he was a neighbor; that she had known him for 20 years. She identified the Accused in the dock ,and the panga used to cut her.
  6. At cross- examination, she stated that she had known the accused since he was born; that he had always been a trouble- maker. she further stated that the accused never used to stay permanently at home; he would be away for a while then he would be back. She further stated that PW1 used to visit her grandfather during holidays. The deceased used to stay alone as his wife had died. She further stated that Marcus was the Accused's half-brother.
  7. PW3 told the court that on that day at 7.30 p.m, he was in his house when he heard a girl crying outside. She was saying someone was cutting her grandmother Jesica Nyakeno. When he came out , he saw someone chasing one Fred Shikoti with a panga and pointing a torch at him. The attacker was saying 'leo nitakuuwa'' (today I will kill you). The person caught up with Fred and began cutting him. He said he identified the attacker as the accused herein. The witness ran to the house and got a torch, and when he got back he found that the accused had escaped. Fred was lying on the ground. He also heard another neighbour ,Penina Munyore, screaming. He rushed there and found Penina and Charles having been attacked, and were lying on the ground.
  8. He also went to the home of Peter Muhatia whom he had been told had been injured. He found him with injuries on the head. His wife had also been injured. He called the Assistant- chief and he was told the police were already on the way. From there , he went to the home of the deceased and he found that the deceased had already died. He went to look for the vehicle and took Jesica, Peter Muhatia, Penina and Charles to hospital.
  9. He identified the accused in court. He had known him for 30 years, he stated.
  10. PW4 was Charles Mutupa Mambili. He told the court that on the material date , at about 7.00 P.M, he was sitting inside the house , with his wife (PW2) and some visitors. Suddenly the accused walked in ,while holding a panga. There was a lamp on the table. His wife was sitting near the door. The Accused attacked her and she fell. He then cut her with a panga on the head. He got up, and he was also cut with the panga. His grandchild who was in the kitchen began screaming. The Accused fled. His wife had fainted. Neighbours arrived and were both he and his wife were taken to hospital. He identified the Accused in the dock and stated that they were neighbours.
  11. PW5 told the court that on the material day, at about 7.00 P.M, he was on his way home from Shinyalu. On the way he found the accused attacking his neighbor, one Vulinda. He ran home and found both his grandparents had beenattacked. He chased the Accused. There was moonlight he said. The Accused was wearing a maroon jacket. He followed the accused to Mambili's house and found that the Accused had left. He had cut Mambili (PW4) and his wife Penina (pw2). He took his grandparents to hospital. . He identified the Accused in the dock.
  12. PW6 did not witness the Accused attacking the people mentioned, but he came and found his grandparents injured. He told the court that the Accused was his nephew. He had known him for 20 years.



13. PW7 was the pathologist. He conducted the autopsy on 11/1/2017. Seth Chikati and Sylvanus Alusiola identified the body of the deceased; 8 days had lapsed since the death. On examination, he identified 9 stab wounds on the face and skull; there was a compound fracture at the bridge of the nose, on the right cheek and right side of the brain. The fractures penetrated into the brain. There was laceration of the brain with bleeding at all levels. He formed the opinion that the cause of death was penetrating head injury, secondary to sharp force trauma, following assault. He produced the post-mortem report (P Exb. 2).
14. PW8 was Fred Mukoko. He was at home when the accused entered, shone a torch at him and cut him. He identified the accused as the person who cut him.
15. The last witness was the investigations officer. He took over the investigation after the initial one left the station. He told the court that investigation showed that the Accused had attacked the deceased and 6 other people ;that the Accused presented himself to the police and handed over a panga. The motive of the murder was not established.

### **Defence Case**

16. The Accused was placed on his defence at the close of the prosecutions case, and opted to give a sworn statement.
17. He told the court that on the material day at about 9.30 P.M he was headed home and he met with the police. The police had arrested many people and he was ordered to sit down with the assembled group. He was questioned about being out in the night, and was ordered to surrender his bag. A vehicle came and were all taken to Shinyalu Police Station. He was surprised to learn that he was being accused of murder. The following day, he got to know that his father had been killed.
18. On Cross-Examination he told the court that he had come from Nairobi on the evening of his arrest. He had no evidence of having travelled, as his Bus Ticket was taken away by the police alongside his other items. She knew Brenda (PW1) Penina (PW2) Josephat (PW3) and Charles (PW4). He further told the court that PW1 was his niece while the rest were his neighbours. He stated that they have all conspired to frame him. He did not have any the occurrence book extract showing that he had been booked for loitering at night.
19. On Re-examination he stated that he had no disagreement with any of the prosecution’s witnesses.
20. None of the parties filed submissions.

### **Determination.**

21. Section 203 of the *Penal Code* defines murder as follows: “any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder.”
22. From the above definition , it has been held that to sustain a conviction the prosecution must prove the following:
  - a. The death of the deceased and the cause of that death
  - b. Proof that the death occurred as a result of the unlawful act or omission on the part of the accused;
  - c. That the act or omission was accompanied by malice aforethought as defined under section 206 of the *Penal Code*. ( see *Anthony Ndegwa Ngari v Republic* [2014] eKLR



### **Death of the Deceased and its Cause.**

23. The pathologist (PW7) carried out the autopsy on the body of the deceased. He formed the opinion that the cause of death was penetrating head injury due to a sharp force trauma following assault. The body was identified by Seth Chikati and Silvanus Alusiola. The doctor produced the autopsy report .
24. The pathologist evidence established the death of the deceased and what caused it.

### **Whether the Accused caused the death of the Deceased.**

25. In this regard, PW1 testimony is relevant. She walked into the house and saw the Accused attacking the deceased. Although she had met him only that day, she knew him as her uncle. The Accused had a torch which he was using as he attacked the deceased. The Accused then left. The witness had also been with him in the morning when the Accused complained to his father about the father building for him a house, he again saw him when he came back at about 1 pm, and refused to eat lunch. Thus it is evident that the encounter at 7.00 Pm was not the first one .
26. The testimony of PW1 remained firm at Cross-Examination. I am therefore satisfied that the accused was positively identified by PW1 as the person who attacked the deceased.
27. There is also circumstantial evidence, that point to the Accused as the perpetrator of the crime.
28. Circumstantial evidence was described by the court of Appeal in *Abamad Abolfathi Mohammed and another v Republic* [2018] eKLR, as follows:

“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.”

29. In the present case, a number of the deceased’s neighbours were attacked the same evening. PW2, PW4, PW8 and one Mr. Vulinda were all attacked. They all identified the Accused as the person who attacked them. The Accused did acknowledge, during cross- examination that all of the above named persons were his neighbours.. PW2 and PW4 were in their home; there was a lamp on the table and the Accused walked in with a torch. Further pw4 told the court that they had known the accused for several years as they were neighbours.
30. PW8 told the court that the Accused had a torch. PW5 identified the Accused too as he was attacking Mr. Vulinda. He chased after the Accused and noted that he was wearing a maroon jacket.
31. Am satisfied that the accused was positively identified as the attacker in all these attacks.
32. I am conscious of the fact that the Accused herein is charged with killing the deceased and not for assaults on the other persons mentioned. However what relates these subsequent assaults to the death of the deceased and hence the attacker is the weapon used. The panga, identified by PW1 to be the



- one used to attack the deceased, was the same one identified by PW2,PW4 and PW8 to be the same weapon that was used to attack them.
33. Further the attacks took place around the same time, that is from about 7.00 P.m up to about 7.30 P.m. Further still ,the victims were immediate neighbours.
  34. Thus the identification of the same panga as the weapon of the attack by PW1 and all the subsequent victims show that the person who attacked the deceased was the same one who attacked the other victims. In other words the weapon used is the link that connects all the attacks, and the person wilding that weapon was the accused herein.
  35. I therefore find that the circumstances following the attack of the deceased leads to the conclusion that the accused, and not any one else ,was responsible for the death of the deceased.

**Malice aforethought.**

36. What constitutes malice aforethought is set out under section 206 of the [Penal Code](#). The Section provides as follows: “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.”
37. According to the pathologist, the deceased sustained 9 stab wounds on the head. The report indicate that the wounds ranged between 9cm x 1.5 cm to 2.5 cm. most of them penetrated deep into the brain. There was also a cut on the thumb.
38. The Accused did not expect the deceased to survive such a vicious attack. He must have known that those attacks had or was going to kill him. I am satisfied that malice aforethought was proved.
39. I have considered the Accused’s defence. I found it rather evasive. The defence of what amounted to an alibi came out at the tail end of the proceedings, giving no chance to the prosecution to investigate. Further going by his testimony to the effect that he was arrested alongside 6 others for loitering at night, he ought to have called one of the people he was arrested with, to corroborate his testimony. Further he had no occurrence book extract to prove that he had been booked at the police station for loitering.
40. The Accused’s defence is not plausible at all ,and I hereby dismiss it.
41. Motive is not an ingredient for the offence of murder but it is apparent from the testimony of PW1 that the Accused had wanted the deceased to build him a house. It also emerged that the accused was unhappy that his niece and half-brother were being housed or were about to be housed by the deceased.
42. In the end, I am satisfied that the prosecution has proved the offence of murder , contrary to section 203 as read with section 204 of the [Penal Code](#) , against the Accused beyond reasonable doubt.
43. In accordance with Section 215 of the [Criminal Procedure Code](#), I hereby convict him as charged.



**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of:-

Godwin Luyundi- Court Assistant

The Accused.

Ms. Osoro for the State

Ms. Agumba for the Accused

