



**Republic v Musembe (Criminal Case 32 of 2017)  
[2024] KEHC 12930 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12930 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 32 OF 2017  
SC CHIRCHIR, J  
OCTOBER 17, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**TOFIKO ODUONG MUSEMBE ..... ACCUSED**

**JUDGMENT**

1. Tofiko Musembe Oduong( 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 were that on 21<sup>st</sup> August, 2017 at 13.00 hours at Namungome village Shinoyi Sub-Location within Kakamega County murdered Silvester Nawandekwa Oduong.
3. The Accused denied the charges and the matter went to full trial.

**Prosecution's Case**

4. PW1 told the court that she was in the company some young children looking for firewood when they heard people talking . She heard someone asks ‘why are you hitting me with a stone?’”. The time was about 2p.m. she had earlier seen the deceased stepped out of a tractor in the company of one Vitalis. The made to enter a home that was beside the road when some 8 people emerged . The accused was one of them, and he had a jembe and a sword. The rest of the people had rungun. She saw the deceased cut the deceased on back of the head, while the others in the group were beating him with whips and rungun. The group left the deceased after he lost consciousness. She identified the accused in court. She further stated that the accused went away while muttering that he had killed. The accused’s clothes were blood- stained. The witness and her companions approached the scene. The deceased was lying face down. The witness and another Millicent turned the deceased over and that is when they realized that he had died. The deceased had suffered an injury on his head and blood was oozing out from the wound.



5. On cross-examination she told the court that the deceased was her uncle; the incident took place on the road; there was a house next to road and a thick bush. The incident was not at the house but on the road she clarified. She stated that she witnessed everything She further stated that the accused is the one who started the fight; and that the accused took the weapons to the police.
6. PW2 told the court that at about 1pm while at her residence she saw some children children running towards her. The children called her and she went along. She met the accused carrying a jembe and a rungu. The Accused threatened to kill her but the accused was held back by one Elizabeth. She noted that accused's clothes had blood stains. She went to her husband's house, one Charles Odier, she found him and his other children holding whips.
7. They inquired about the deceased but one of the family members told them to look for him. She and Elizabeth looked for the deceased. They found the deceased near the place "where her house used to be." She saw that deceased body had injuries on the back of the head.
8. She further told the court that the deceased was her son while the the accused was her step-son. The accused's mother was her co-wife. She used to live with the deceased at the church, as her home had been destroyed by her husband . She informed the court that there was a dispute over land. The Accused was carrying a jembe and a whip when they met.
9. At cross- examination, she stated that she lived with her sons in the church. The body was found near her former home. She was the first to arrive at the scene. She was with Eliza while PW1 was on the road. The Accused threatened to kill her. Her husband had sold her land until she was left with none, forcing her to seek accommodation in the church.
10. PW3 was at his house at about 1Pm on the material day, when he heard PW2 and one Eliza shouting that someone was killing Ochieng. He got out and he met with the accused. The accused was carrying a jembe and a rungu . He did not talk to him. He saw that the Accused's clothes were stained with blood. She followed PW2 and they found the deceased's body. He saw his step mother Beatrice and another person on the scene. The deceased had an injury on his head,
11. He went to the police station at 5.00Pm and he saw the jembe and rungu that he had earlier seen the accused with. He told the court that the accused was his half-brother. He stated that there was a subsisting land dispute within the family.
12. At cross-examination he stated that the accused lived next to their father while the deceased lived in church with his mother. That when he met the accused he had held a jembe and a slasher on one hand and a "rungu" on the other hand. He told the court that the deceased had a tractor and he had gone to carry some soil. He found the tractor on the road, with the engine running.
13. PW4 was the pathologist. He conducted the autopsy on 28/8/2017. A week had lapsed since time of death. On examination, he found that the deceased had sustained a skull fracture on the back of the head, extending to the left side of the skull; there was bleeding outside and below the brain covering. He formed the opinion that the cause of death was a severe head injury due to blunt force trauma following assault.
14. On cross-examination, he stated that two people identified the body although the police failed to insert their names in the report. On re-examination he stated that as a matter of established procedure, he could not conduct the procedure before the body was identified.
15. PW5 was the investigating officer. On the material day he was in the office, when somebody came running fast to the police station. The runner requested to be placed in the cell. He kept saying he had



killed. He further stated that the accused told the police that he had quarreled with his brother and he had hit him on the head. He was afraid that the members of the public were after him.

16. They placed the accused in the cells and went to the scene. They found a crowd and the deceased lying face- down. The body was covered with twigs . There were cuts on the head and it was also bleeding. They took the body to the mortuary.
17. They also found that the two houses belonging to the accused had been burnt. His investigation indicate that there was a dispute over land; that during the incident , there was a scuffle in which the deceased hit the accused. In retaliation the accused hit the deceased, causing him fatal injuries.
18. He further testified that when the accused arrived at the police station ,he had a panga, a jembe and a whip (produced as Prosecution exhibits numbers 2,3 and 4 respectively).
19. At cross- examination he denied the suggestion that the twigs that had covered the deceased's body could have caused the injury.

### **The Defence Case**

20. The accused was placed on his defence, and he opted to give a sworn statement.
21. He told the court that the deceased was his step- brother; that he witnessed the incident; that the deceased died about 30 meters from his house. He told the court that he was at home when he heard screams like those of a child crying. He heard sounds of “woi baba, woi baba’ .He went to check the cause of the cries and he found the deceased beating a child. The child belonged to Chrispinas Obando kwene. He asked the deceased why he was beating the child and the deceased responded “ can’t you see that the cows are grazing here?” A quarrel ensued about the beating of the child and as the accused bent to pick the child’s slippers, the deceased hit him on the head. He lost consciousness. He screamed and the first person to arrive was Chrispinus Obando.It was further his testimony that Obando then hit the deceased on the head.
22. He ran to the police station, and from there he was told to go to the hospital. He had treatment chits dated 22/8/2017 from Navakholo sub- county hospital ( produced as D Exb.1). The police followed him to the hospital and arrested him.
23. He further told the court that he was beaten by the police at the police station. He was beaten with a rungu he said. He produced an X- ray film dated 15/4/2020 (D Exh 2). He testified that Chrispinus Obando was arrested and later released. He testified that he had no differences with the deceased. Their father had given each of them land and therefore there was no dispute over land.
24. On cross-examination, he stated that he was beaten on 4/8/2017. He insisted that his exhibit No 1 were the (treatment chits) were for the same day of the incident. He said he believes the date inserted was erroneous. He refuted the allegation that he was beaten by a mob. He also insisted that the person who hit the deceased was Chrispinus Obado. He saw the said Christopher hit the deceased with a spanner. He admitted that he went to the police station when he noticed that the deceased had fallen down. He did not have anyone who could corroborate his testimony. He denied killing the deceased. He admitted that the X-ray ( D Exb 2) was taken in the year 2020.

### **Accuseds Submissions**

25. The Accused has submitted that despite evidence showing that there were several witnesses to the incident the prosecution were selective in picking witnesses.



26. It is further submitted that the weapons produced in court were not blood stained raising doubts as to whether the weapons were the ones used to attack the deceased.
27. The Defence further takes issue with the fact that the post-mortem report does not indicate the persons who identified the body for purposes of autopsy.
28. It is further submitted that the actual culprit was one Korokocho who DW1 testified to have seen him hit the deceased yet the said Korokocho has not been charged; that one Godwin Ndonga was also seen hitting the deceased, yet he was not charged. He therefore contends that he is simply being made a sacrificial lamb. He also points out that evidence available indicate that he was also a victim of assault from the deceased, and he was simply defending himself from the attacks of the deceased. The Accused further submits that the scene of crime was not well preserved; Finally while relying on the decision in the case of *Republic v Ruto & another* (2022) eKLR it is submitted that once a defence of self-defense is upheld, a conviction of murder cannot stand.

### **Determination**

29. 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.”
30. The elements of the offence as derived from the above definition has been stated as follows:
  - 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 what caused it.**

31. According to the pathologist, the cause of death was a head injury due to blunt force trauma, following assault.
32. The Defence has raised doubt as to whether the body of the deceased was properly identified. The pathologist testified that there were two people who identified the body; that as a matter of procedure, they could not work on the body before identification. He further stated that when the police came, he showed them the relatives who identified the body. I have considered the evidence of the pathologist vis-a-vis the doubts raised by the defence and I find that I have no reason to doubt the pathologist's evidence. This was an independent expert witness without any inclination to either side in this case.
33. Am therefore satisfied that the death of the deceased and its cause was duly proved.

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

34. PW1 was in the company of some small children when she saw the Accused hitting the deceased. She also named Godwin Kimera, Odago Beatrice to have been part of the attackers. She said she saw the Accused cut the Deceased on the head. The others were using rungu, whips and other weapons. She identified the accused in the dock and stated that the accused was her uncle. The deceased too was her uncle. Thus the witness and the accused are relatives; They also lived within the same vicinity; the incident happened between 1 P.m and 2 P.m. Therefore the identification of the Accused as one of the attackers is a non- issue in this case.



35. Further ,immediately after the incident, PW2 meets him on the road. The accused was carrying a jembe and rungu and his clothed were blood stained. PW3, his half-brother also met the accused carrying a jembe and a rungu. Further PW3 and PW5 testified that the accused presented himself to the police. This was corroborated by the accuseds own evidence that indeed he went to the police station.
36. His submission that he was being used as sacrificial lamb is immaterial. What is material is that he was seen attacking the deceased. It is also instructive that of all the alleged attackers, the accused is the one who presented himself to the police. Further PW1 told the court that he saw the accused cut the deceased on the back of the head, and according to the pathologist it is the head injury that caused death. Further apart from being identified by PW1, the circumstances as narrated by PW1, 2 and 3 point to the Accused as the one who attacked the deceased.
37. I have considered his defence. He denied that he is the one who attacked the deceased, while pointing a finger at one Chrispinus Obando. From the evidence of PW1 and 2, there were many people on the scene which included the accused’s own mother and father. The Accused ought to have summoned one of them to corroborate his testimony in any event. He also alleged that the deceased attacked him and he produced treatment chits to support the fact that he was injured. Whereas I accept his explanation on the possible clerical error on the date on the chits, this implied defence does not help him much because he insisted that he is not the one who cut the deceased.
38. I have further considered his submissions , his advocate has submitted that the accused was simply defending himself. However this submission is at variance with his testimony. His testimony was that it was not him but one Christopher who hit the deceased. His plea of self-defense brought up in his submission can not displace his own evidence. In any event, submissions are not evidence. I am satisfied that the prosecution has proved, beyond reasonable doubt, that the accused is the one who inflicted the fatal wound on the deceased.

### **Malice aforethought.**

39. Section 206 of the [Penal Code](#) gives the instances when malice aforethought can be inferred. It states that:-

“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.”



41. In the case of *Daniel Muthee v Republic* Criminal Appeal No 218 of 2005 (UR) the court of Appeal , while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”

42. The Accused must have known that a cut to the head of a person was likely to be fatal. In accordance with section 206(b) of the *Penal Code* and the court of Appeal decision in *Daniel Muthee’s case (supra)*, am satisfied that the threshold , establishing malice was met.

43. In the end, I find 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, and 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

