



**Republic v Jibo (Criminal Case E006 of 2023)  
[2024] KEHC 12223 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12223 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E006 OF 2023  
JN ONYIEGO, J  
OCTOBER 9, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**OSMAN ALI JIBO ..... ACCUSED**

**JUDGMENT**

1. The accused herein faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 31.03.2023 at Bula Vanga area within Madogo Location, Bangale sub county within Tana River County he murdered Hassan Shide.
2. Having denied the charge, the matter proceeded to full hearing with the prosecution calling a total of seven (7) witnesses in order to prove its case.
3. PW1, Fatuma Barija Shide testified that on 31.02.2023, she was in her house when she realized that her goats had made their way back home through the accused person's home. That the herdsman, one Mohamed who is also her son was left behind. She stated that Osman (hereafter the accused) drove the said goats away and when Mohamed asked him why he had driven the goats away, accused got annoyed and punched him on the head. She went further to state that it was the accused who cut Mohamed with a panga on the head thus prompting Mohamed to run away.
4. She told the court that it was Mohamed who rushed home and informed them of what had ensued. That in response, she in company of one Hassan Shide(deceased), went to check on the goats and also ask the accused on what had transpired. To their surprise, the accused person confronted them while armed with a panga consequences whereof he cut Hassan (the deceased) on the head three times. In the process of protecting Hassan, the accused cut her on the head besides hitting her with a metallic object on both hands. That the accused only left them after Habey pleaded with him.



5. It was her testimony that the deceased was rushed to Kenyatta National Hospital for medical care but unfortunately, he succumbed to his injuries. On cross examination, she reiterated that the accused person was responsible for the injuries sustained by Hassan the deceased.
6. PW2, Sangabo Shide Walio recalled that on the material day, her brother, Mohammed Shide had gone for their goats at the grazing field. That she was in the company of Mohamed Hassan Shide, Ismail Aden and his children together with PW1 when Mohamed arrived home crying while bleeding. That Mohamed named Osman (accused) as the person who attacked him. That they left Mohamed at home as they went to enquire from Osman what the problem was. She reiterated and corroborated pw1's testimony. On cross examination, she stated that she saw Osman attack the deceased person.
7. PW3, Abdi Shide Walio testified that on the fateful evening, he was with his mother pw1, when his brother Mohamed arrived home while crying and bleeding from the head. Upon being asked what had transpired, he named the accused as the person who had assaulted him. Together with PW1, PW2 and the deceased, they went to enquire why the accused had beaten Mohammed. That the accused in company of other people, cut Hassan's head twice and when he tried to intervene, he also cut him on the head, (court shown healed scar on the head). It was his evidence that upon a crowd gathering, the accused person ran away. Later, Hassan was rushed to Kenyatta Hospital but unfortunately, he passed on after nine days. He identified the accused person as the one responsible for the fatal injuries sustained by the deceased.
8. PW4, Ismail Aden Walio stated that on 31.03.2023, they had just finished Ramadhan fasting when Mohamed arrived while crying and bleeding from the head. That Mohamed named Osman as the person who had attacked him. That he together with Fatuma Abdi, Sangabo and Hassan Shide, left for accused's home to enquire from him what the problem was. On approaching his house, the accused attacked them. That he attacked the deceased and one Abdi by cutting them using a panga. He confirmed that one Hassan the deceased herein succumbed to the said injuries while undergoing treatment.
9. PW5, Mohamed Shide Walio recalled that on the fateful day, he was herding animals when their goats strayed to the accused person's homestead. That the accused person chased away the goats and further asked him why he had led them stray through his homestead. It was his testimony that it was the accused person who cut him on the head, thus prompting him to run back to his home whereby, he informed his mother, PW1, Hassan, Abdi, Sangabo and Ismail what had happened. At that point, his family left to see Osman as he remained behind. Later, he saw Fatuma, Abdi and Hassan injured. They were later taken to a hospital at Garissa while Hassan was taken to a hospital in Nairobi where he succumbed to his injuries.
10. PW6, No. 11775 PC Wanjohi stated that he was the investigating officer and that on 02.04.2023, he was minuted a case of assault which he started to investigate. He stated that in the course of his investigations, he found out that the deceased was attacked during a fight that took place at Bura Vango where several people sustained serious injuries. That among those who sustained injuries was the deceased who was rushed to Kenyatta hospital but succumbed to the said injuries. He organized for the postmortem examination and later arrested and charged the culprit with murder
11. PW7, Dr. Benard Midia conducted postmortem examination upon the body of the deceased which was identified by the I.O and a relative. That there was a healing incised cut wound on the scalp and above the left eye brow where there was a laceration. He stated that there was a sign of having undergone surgery on the head, cut wound on the right elbow and a tear on the right ear. Additionally, there was a skull fracture which had been opened for surgery. In his opinion, the deceased died of meningitis secondary to compound depressed skull fracture.



12. In his defence, DW1, Osman Ali Jilo, testified that on the material day, he was at his home when he saw over 200 goats passing through his home stead. That the said goats were with Abdi. That he restrained them not to go through his gate in vain as Abdi confronted him. It was his evidence that Abdi threw his fimbo against him but he managed to grab the same. He stated that given that it was Ramadhan, he had gathered together with other villagers for the evening meal when madam Fatuma alerted them that she had seen 20 armed men heading towards her home.
13. After a short while, one Bashir asked Abdi to show them the person who had assaulted him. That upon Abdi pointing at him, people started beating him and as a consequence, a fight ensued. In the process, he was injured on the head, left thigh, right wrist and shoulder. That the deceased was also injured and thereafter taken to Kenyatta Hospital. He reiterated that upon being discharged, he was attacked by several people and in the process, his house was burnt down. On 05.04.2023, the DCI called his father who directed him to report to the station where he was arrested and thereafter charged with the offence herein.
14. Upon the defence closing its case, the court directed that parties file their written submissions which directions both parties did not comply with.
15. I have considered the evidence adduced by both the prosecution witnesses and the defence proffered by the accused person. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.
16. Section 203 of the Penal Code provides that, ‘any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’
17. It therefore follows that for the Prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an accused person. In Anthony Ndegwa Ngari vs Republic [2014] eKLR, the elements of the offence of murder were listed as follows:
  - i. that the death of the deceased occurred;
  - ii. that the death was due to an unlawful act or omission;
  - iii. that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and
  - iv. that the accused had malice aforethought.
18. On whether there was proof of death and the cause of the said death, the evidence of all the witness who testified in this case is clear and well corroborated. The same was corroborated by PW7 the doctor who conducted the post mortem.
19. As to the cause of the deceased’s death, PW7, Dr. Benard Midia produced a post-mortem report as PEX 1 detailing the injuries found on the body of the deceased. In his opinion, the cause of death was meningitis secondary to compound depressed skull fracture.



20. Was the death caused by an unlawful act? Article 26 of *the Constitution* provides that every person has the right to life and that a person shall not be deprived of life intentionally except as authorized by law. See *Gusambizi Wesanga vs Republic* [1948] 15 EACA 65 where the Court stated:
- “ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”
21. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained on the head as was detailed in Pex 1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted. However, according to the investigating officer, the deceased sustained fatal injuries in the course of a fight involving many people. Accused claimed to have sustained serious injuries as well in the course of the fight. Nobody challenged his testimony regarding the injuries sustained by him during the fight thus occasioning him heavy scars on his body.
22. From the testimony of pw1 to pw5, it was the accused who occasioned the fatal injuries on the deceased. The accused did not deny fighting with the deceased who was in a group of people who allegedly attacked him. The evidence of pw1-pw5 is well corroborated. The person who inflicted the unlawful fatal injuries on the deceased was the accused. The question is, Was there justification.
23. From the prosecution evidence, it is apparent that a group of people among them the deceased were offended by the attack of one Mohamed by the accused hence marched to the accused’s home with a view to knowing why accused had attacked Mohamed. It is in the course of that confrontation that a fight ensued leading to various individuals sustaining injuries. However, from his conduct and the manner in which he was armed and viciously attacked the deceased, his action was excessive in the circumstances hence an unlawful act.
24. On whether the accused had malice aforethought when he unlawfully inflicted injuries on the deceased, the prosecution has a duty to prove the same pursuant to section 206 of the Penal Code. What can be deduced from section 206 (a-e) is that, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. Time and again, courts in interpreting section 206 have stated as such in various authorities. In the classic case of *Republic vs Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
25. In the instant case, the evidence adduced by the prosecution shows that the aim of the deceased’s attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were as follows: a cut wound on the right elbow and a tear on the right ear and a depressed skull fracture.
26. An attack on one’s head is akin to an attack on the life of a person. In my humble view, the attacker had the ultimate intention of eliminating the deceased for whatever reason. Considering the fact that the accused got armed with a panga and aimed at the deceased’s head is a clear manifestation that reasonably he was expected to know that his actions were likely to cause grievous harm with the possible consequence being death. He did not even cut him once but severally suggesting that he was determined to kill the deceased hence proof of malice a forethought.
27. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.



28. Accordingly, I find the accused person guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 9<sup>TH</sup> OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**

