



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Tanda (Criminal Case E038 of 2021)  
[2024] KEHC 11922 (KLR) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11922 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE E038 OF 2021  
AC MRIMA, J  
OCTOBER 7, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**SAMUEL WANYONYI TANDA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused herein, Samuel Wanyonyi Tanda, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were as follows: -

On the 4<sup>th</sup> August 2021 at Unoja village in Namanjalala sub-location, Kwanza Sub-County within Trans Nzoia County, jointly with others not before Court murdered Simion Karanja.

3. When the accused was arraigned and charged before Court, he denied committing the offence thereby prompting the hearing of the case against him.
4. After the close of the prosecution's case, the Court found that a prima facie case had been established against the accused. The accused was placed on his defense. The Accused elected to give sworn testimony and called a witness.

**The Prosecution's case:**

5. The Prosecution called a total of 6 witnesses.
6. PW1 was the mother of Simion Karanja, the deceased in this case. She was Bendeta Nanjala. PW2 was a brother to the deceased. He was Charles Murunga. Another brother of the deceased testified as



- PW4. He was Romano Karani. PW3 was Dr. Dennis Nanyingi, a Senior Medical Officer at the Kitale Teaching and Referral Hospital. No. 65438 Sgt. Leonard Kimichiri based at Matisi Police Station testified as PW5 whereas PW6 No. 63264 PC Marti Langat was the investigating officer attached at the DCI Kwanza Sub-County office.
7. PW1 and PW2 were eye-witnesses. They testified on what happened to the deceased on the 3<sup>rd</sup> August 2021.
  8. According to PW1, she was at her home in the afternoon of the fateful day when she heard commotion outside her house. On ascertaining, she found a very hostile group of people gathered claiming that she had altered a boundary. She attempted to cool them down in vain.
  9. The deceased, who had gone for a brief walk, returned and found the people thereat. He asked them what the problem was and as he was addressing them, one person in the crowd stepped forward and stood near another who was next to where the deceased was. PW1 saw what was happening.
  10. PW1 testified that the person who stepped forward was the Accused. The Accused then removed a knife and passed it on to one Wamalwa who stood next to the deceased. In a split of a second, Wamalwa stabbed the deceased at the back with the knife given to him by the Accused. The deceased fell and the crowd dispersed.
  11. PW2, who worked as a boda boda rider in Kitale town, was called by his wife and informed that PW1 was being attacked by their neighbours. He rushed home and found the crowd still gathered. He identified several of them including one Wamalwa who asked him why they had put a fence. PW2 explained that it was for purposes of restraining cattle from destroying their crops.
  12. As PW2 was engaging Wamalwa, the Accused [who was a brother to Wamalwa] and their uncle one David arrived. PW2 saw the Accused with a knife and a chain. PW2 further testified that it was the Accused who approached Wamalwa and handed over the knife to him. By then, the deceased was pleading with the group that the matter be dealt with by their parents as they did not know much about its history.
  13. PW2 was shocked to see Wamalwa turn to the back of the deceased and stabbed him once with the knife. The deceased fell and the crowd dispersed. PW2 held the deceased and saw the stab wound on the back. He then rushed to Matisi Police Station to lodge a report.
  14. As PW2 went to the police, the deceased was rushed to hospital where he was admitted. The deceased, however, did not survive much as he passed on that night.
  15. Investigations were initiated by the police.
  16. On 6<sup>th</sup> August 2021, PW5 was on normal routine patrol with his four other colleagues within Rafiki area in Matisi. They were also looking for a suspect wanted for an assault charge. They did not find him and proceeded to Forkland area.
  17. As they went around the area, they spotted two suspects who were wanted for robbery with violence. They gave chase and arrested them. One of them was the Accused in this case. They took them to Matisi Police Station.
  18. At around 6pm, the DCIO-Kwanza went to the Matisi Police Station and informed PW5 that the Accused herein was also wanted in connection with an offence of murder. PW5 handed the Accused over to officers from the DCI.
  19. PW5 knew the Accused well as the police had previously arrested him over various offences.



20. PW6 was called by the Deputy DCIO Kwanza Sub-County in the evening of 6<sup>th</sup> August 2021. He was then attached to Kwanza DCI offices. He was informed of the murder incident at Namanjalala area and that the suspect was at Matisi Police Station. He was to take charge of the investigations. PW6 proceeded to the station in the company of other officers and they collected the suspect, who was the Accused herein. They took him to Kitale Police Station. As it was getting late, PW6 decided to visit the scene the following day.
21. In the morning of 7<sup>th</sup> August 2021, PW6 while in company of other officers proceeded to the scene. They visited the home of the deceased and interrogated several people over the incident. They also recorded witness statements. PW6 also visited the Accused at Kitale Police Station and recorded his statement as well.
22. PW6 also organized for a post mortem examination of the body of the deceased. It was conducted on 13<sup>th</sup> August 2021 at Kitale County Teaching and Referral Hospital mortuary by PW3. The body was identified by PW2 and PW4.
23. Externally, PW3 found a deep-stab wound at the right fifth intercostal aspect. Internally, there was massive blood in the chest, the right lung was collapsed, right diaphragm was ruptured and the liver had a penetrating wound at the right lobe. There was also a lot of blood in the stomach.
24. According to PW3, the cause of death was penetrating thoracic and abdominal injury with internal bleeding secondary to assault. Dr. Dennis Nanyingi filled in a Post Mortem Report, signed and stamped it. He produced the Report in evidence.
25. On cross-examination, PW3 stated that the fatal wound had linear edges indicating that it had been caused by a sharp object.
26. On completion of the investigations, PW6 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information dated 17<sup>th</sup> August 2021. The accused was accordingly charged after undergoing a mental assessment which certified him to be mentally fit to stand trial.
27. With the foregoing evidence, the Court found that the accused had a case to answer. He was placed on his defence.

#### **The Defence:**

28. The accused elected to give sworn testimony and called a witness one Patrick Were who testified as DW1.
29. The accused raised the defence of alibi. He stated that he spent the whole of the 4<sup>th</sup> August 2021 at DW1's Mapakay Club where he had been contracted to play music. That, he reported at 8am and left after 7:30pm.
30. The Accused, therefore, contended that it was not possible for him to have been the one who stabbed the deceased at around 6pm.
31. DW1 was the owner of the Mapakay Club. He affirmed that the Accused had reported at the Club and spent the whole day playing music until 7:30pm when he left.
32. With the above evidence, the Accused closed the defence case.



33. The Court then directed parties to file their respective rival written submissions. Miss. Rutto, Learned Defence Counsel filed her written submissions dated 26<sup>th</sup> February, 2024 wherein it was vehemently submitted that the offence was not proved as required in law.
34. While referring to some decisions, the Defence urged this Court to dismiss the information and acquit the Accused.
35. The Prosecution presented its written submissions dated 13<sup>th</sup> December 2023 wherein it submitted that the State had established all the required ingredients to the required standard of proof, being beyond reasonable doubt, against the Accused.
36. The State urged the Court to find the accused guilty as charged. It also made reference to some decisions.

#### **Analysis:**

37. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
38. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

#### **The death and its cause:**

39. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
40. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased dead and a Post Mortem examination conducted on the lifeless body. The body was later released to its relatives and was subsequently buried.
41. The second way in which the death of the deceased was proved was through the evidence of PW3, a Medical Doctor who conducted the autopsy on the body of the deceased. He opined that the cause of death was penetrating thoracic and abdominal injury with internal bleeding secondary to assault. That expert evidence was not contravened.
42. This Court, therefore, finds and hold that the death of the deceased and its cause in this case were proved to the required standard.

#### **Whether the accused committed the unlawful act which caused the death of the deceased:**

43. In this matter, there was direct eye-witness account on how the deceased met his death. That was the evidence of PW1 and PW2, which evidence has already been captured above.
44. The Accused challenged the evidence of PW1 and PW2 on two fronts. First, that the witnesses were untruthful and, second, that according to the evidence he was not the one who stabbed the deceased, but one Wamalwa who was still at large.



45. The Court will now deal with the two objections raised by the Accused.
46. As to whether the witnesses were truthful, this Court observed the demeanors of all the witnesses as they testified. The Court made no adverse remarks on any of them or their credibility. To this Court, the witnesses were forthright and withstood cross-examination. The Court believed them. Therefore, this Court does not agree with the Accused that the witnesses were untruthful.
47. On the contention that it was instead one Wamalwa who stabbed the deceased, the Court's attention is drawn to the provision of Section 21 of the Penal Code.
48. The said provision is on the doctrine of common intention and states as follows: -

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

49. The Court of Appeal in Nairobi Criminal Appeal No. 49 'A' of 2017 Stephen Ariga & another v Republic [2018] eKLR discussed the said doctrine in a case where police officers who had shot and killed a motorist who was stopped on a road block, but refused to obey the order to stop were convicted on account of the doctrine of common intention by the High Court.
50. In its judgment, the appellate Court stated as follows: -

Turning to the issue of common intention, Section 21 of the Penal Code, defines common intention as follows: -

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

What common intention implies was set out by the predecessor of the Court in Wanjiru d/ o Wamerio versus Republic 22 EACA 521 as follows: -

Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

51. In dissecting the doctrine further, the Court stated as under: -

The ingredients of common intention were enunciated in Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

1. There must be two or more persons;
- (2) The persons must form a common intention;
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- (4) An offence must be committed in the process;
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.



52. In applying the above ingredients to the facts of the case, the Learned Judges had the following to say: -

Applying the above ingredients to the rival submissions on the proof or otherwise of the elements of common intention as against the appellants, it is our finding that it was not disputed that the appellants are the only members of the patrol crew who shot at P.W.2' vehicle during the second shooting incident. This therefore satisfies the first ingredient of the need of two or more persons being participants in the execution of the act complained of. The second ingredient requires the forming of the common intention. It does not say that the said forming of a common intention must be before the execution of the act complained of. Both appellants were categorical in their testimonies and correctly so in our view, that their sole but separately formed reason for shooting at P.W.2's vehicle from the rear was to immobilize it. There is no evidence that the two consulted each other before firing at P.W.2's vehicle. The common intention which was to immobilize the vehicle was formed in the course of their separately intending to shoot at the rear of the vehicle with a view to immobilizing it. Ingredient two (2) is therefore also satisfied.

As for the 3rd ingredient, the unlawful purpose in the instant appeal does not result from the decision to shoot but from the end result of the shooting act complained of. We find nothing in the said ingredient to suggest that the unlawfulness of the act complained of can only result from factors that go to prove the onset of the action and not from the end result of the action. We find ingredient three (3) satisfied. As for ingredient four (4), it is undisputed and as correctly found by the trial Judge that the action resulting in the fatal shooting was not premeditated. That is why the Judge termed it unlawful, because it was unintentional. What the appellants intended by shooting at the rear of P.W.2's vehicle, which was accepted by the trial Judge was to immobilize the vehicle. Unfortunately for them, one bullet fatally injured the deceased. Ingredient four (4) was satisfied.

As for ingredient five (5), we find as did the trial Judge that P.W.2's vehicle was in motion. The intention to fire at P.W.2's vehicle was on impulse, allegedly provoked by the alleged failure by P.W.2 to stop. The appellants ought to have known that since it was at night, there was the possibility of their ability to focus only on the rear tyres of the vehicle could have been impaired, resulting in the bullets landing on other parts of P.W.2's vehicle as it in fact did happen. That is why there were bullet holes at the rear of the vehicle instead of these being concentrated on the tyres as the appellants intended target. In this regard, we agree with the Judge's finding that the very fact that P.W.2's vehicle was in motion should have been warning enough for the appellants to anticipate the possibility of the presence of a person or persons other than the one propelling it. Likewise, it is also our view that there was the possibility of the occupants of P.W.2's vehicle being injured in the process of the appellants' attempt to immobilize it which was not also remote and could not be ruled out. The appellants therefore must be taken to have intended the consequences of their actions, and especially for their failure to exercise some restraint when discharging their firearms, especially at night and directed at a moving vehicle.

53. The above decision, therefore, gives this Court the appropriate guidance on how to handle the issue of doctrine of common intention as it unfolded in the instant case.

54. The first ingredient was satisfied in that there is cogent evidence that a lot of people had gathered at the homestead of the deceased and confronted PW1 over a boundary dispute.

55. The second ingredient involves the persons forming a common intention. In this case, the crowd ambushed PW1 at her home for one reason. It was that PW1 had interfered with a boundary. Efforts



by the deceased, PW1 and PW2 for dialogue fell on deaf ears. The crowd was intentional that harm, and nothing less, was to visit the family of PW1 for the 'sin' the family had committed. Such state of affairs, satisfies the requirement that indeed the persons formed a common intention.

56. The third ingredient calls for the common intention to be towards prosecuting an unlawful purpose in conjunction with one another. In this case, it was apparent that the persons intended to pursue an unlawful intent. The Accused was armed with a knife. He gave the knife to Wamalwa who instantly stabbed the deceased from the back. The crowd then dispersed immediately after committing the unlawful act.
57. The cumulative actions taken by the Accused, Wamalwa and the rest of the members yielded into the killing of the deceased. Causing death in such circumstances constitutes an offence in Kenya. The fourth ingredient was, hence, satisfied.
58. By attacking the deceased with a sharp knife on the back that ripped the deceased's right lung, right diaphragm and the liver was an act of such a nature that its commission was a probable consequence of the prosecution of an unlawful purpose. The fifth ingredient was also proved.
59. The upshot, therefore, is that Section 21 of the Penal Code is applicable in the circumstances of this case. There is evidence that the Accused in being part of the crowd, confronting PW1 and her family, giving his knife to Wamalwa and escaping after the deceased was stabbed constituted the Accused's common intention to commit the offence with the rest of the members of the group.
60. As such, on the basis of the doctrine of common intention, this Court finds and hold that the Accused, together with others not before Court, committed the unlawful act which caused the death of the deceased.

#### **Whether there was malice aforethought:**

61. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
62. Section 206 of the Penal Code defines 'malice aforethought' as follows: -
  206. 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.
63. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.



64. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

65. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

66. The deceased sustained one major injury. It was a stab on the back that went through the deceased's right lung, right diaphragm and the liver.

67. Such injuries were on the critical parts of the human anatomy. It goes beyond any peradventure that once such parts are subjected to serious injuries, then death was eminent. Inflicting such injuries on someone can only be intentional. The rationale was apparent that it was to deprive the deceased of his life.

68. The accused and his accomplices must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. Furthermore, the other persons who were with the Accused disappeared and are still at large.

69. By considering the cumulative actions of the accused and his accomplices in the manner in which the killing of the deceased was executed, it is without any shred of doubt that the attackers, including the accused, purposed to kill the deceased.

70. The prosecution, therefore, proved malice aforethought in this case.



**Disposition:**

71. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
72. Drawing from the foregoing, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
73. The accused herein, Samuel Wanyonyi Tanda, is accordingly convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.
74. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 7<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court in the presence of:

Miss. Rutto, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

