



**Republic v Gati (Criminal Case E011 of 2021)
[2024] KEHC 11965 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E011 OF 2021
RPV WENDOH, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES NYAKERARIO GATI ALIAS MUTECHU ACCUSED

JUDGMENT

1. By the information dated 11/08/2021, James Nyakerario Gati Alias Mutechu 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 charge are that on 20/7/2021 at Taragai village Kuria East Sub County, he murdered Lucas Mahenye. The accused denied the offence and the prosecution called a total of eleven (11) witnesses. The prosecution was led by Prosecution Counsel Mr. Kimanthi and Mr. Kaino. When called upon to defend himself, the accused testified on oath. He was represented by Mr. Omwenga.
3. PW1 John Maroa Mwita , told the court that he has known Accused since childhood while the deceased was his cousin. He recalled 26/7/2021 about 5.00p.m. he went to drink changaa at Mukuria’s house while in company of one Masiaga and were joined by the accused and one Giseriro who started quarrelling; that accused stood up to fight Giseriro and one Magige intervened; that accused who by then was armed with a panga ran away and told them to wait for him there. He continued to take alcohol with the deceased and after a while, they left to go home. While on reaching the road, they found the accused hiding in a trench and he was able to see him because of moonlight as it was 9.00p.m; that accused held the deceased closely, chest to chest and he got hold of the accused; that accused stabbed the deceased with a spear; that the deceased who was armed with a sword and was accused cut the deceased on his back (left side of the ribs); that on being stabbed the deceased exclaimed that Nyakerario had killed him; that accused tried to pull the spear from the deceased but failed and that they both fell and that accused crawled away; that deceased got up walked a few steps and fell; that the deceased told him to go away because he would be framed for killing him. He then left the scene for



his home. Next day he went to report to the police. He denied over disagreeing with accused nor had he known of any disagreement between accused and the deceased.

4. PW2 Rose Wasai Joseph recalled that on 26/7/2021, she was at her home selling chang'aa when John Marwa and Masiaga went home", that her nephew was causing trouble threatening to hang himself and she left to attend to the child; On returning, she found the boy with the deceased who was advising the boy; that deceased was with his friend Masiaga; She went with deceased to her home, found John still taking alcohol and was informed that accused had been to her home and quarrelled with people and left. She said that the deceased and John left to go towards their homes. The next day, PW2 heard screams from next door and learnt that the deceased's body had been found on the road. She went to the road and saw deceased's body. PW2 did not know whom accused quarrelled with or who murdered deceased.
5. PW3 is Dr. David Keboyi who performed post mortem on the deceased on 2/8/2021. He found that the deceased had sustained a stab wound on the left side of the 6th intercostal space of the ribs and auxiliary line, was deep and extended to the left lung; that the wound caused bleeding and haemothorax i.e blood in the lungs.
6. He formed the opinion that the cause of death was severe haemorrhage secondary to a stab injury and the probable object used was sharp. He did not find the spear lodged in the deceased.
7. PW4 Charles Maroa Mahenye is the son of the deceased. He identified the deceased's body to the Doctor on 2/8/2022 for purposes of post-mortem. He observed the body which had an injury to the ribs. He did not know accused before.
8. PW5 Gabriel Marwa Tange a neighbour to both accused and deceased was at Mukuria Mwita's(PW2) home taking (changaa /alcohol) when Nyakerario (Accused) and one Chacha Serere disagreed after accused snatched Chacha's club and ran outside with it; that Lucas and John Borgas followed accused and got the club back and gave it back to Chacha; that the accused did not enter the house again.PW4 stayed at the place for a short while and left. Next day, at 6.00a.m. he heard screams, went to check and found the deceased dead on the road very near his home and a spear was still lodged in the deceased's body; that they followed a trail of blood which led to John's home and that John told them that accused killed Lucas. He identified the spear in court as what he found lodged in deceased's body.
9. PW6 Raphael Kwahu Assistant Chief Serigem sub location. Gekonga Division, recalled that on 27/7/2021 while at home, he received a call from a villager informing him of a murder incident. Next day, he received a call from Biasumi informing him that he knew who committed the offence and that he would find out his hideout. He was informed that the suspect had also been injured. He informed the DCIO. He went to Gitongoroma. Informed the Assistant Chief where accused was hiding and they found accused hiding under a bed in a house and had injuries to the hand and back; that accused was arrested in the house of one Tereri, accused's brother-in-law.
10. PW7 Jared Marwa Matutu, a carpenter, recalled that on 28/7/2021 at about 8.00p.m. he was home when James Nyakererio went there and asked for the road leading to his in-law home called Tereri; that accused informed him; that he had a dispute when drunk and was advised to leave the area or he would be beaten; that he had been attacked by three people who chased him and cut him and ran off that he had beaten them; that is why he had come to look for Tereri to enable the issue to subside. According to PW7, the accused had been stitched at the back of the hand near the elbow and the back.
11. PW8 Andrew Mogesi an Assistant Chief of Gitongoroma sub-location recalled 30/7/2021 when the Assistant Chief Rafael Kwahu asked him to go to Anti Stock Theft Unit Gitongoroma where there was a suspect of murder. He gave him the name of James Nyakererio. Together with police officers,



- they went to the home of Tereri, surrounded it and found him hiding under the bed. He was arrested and found with injuries on the right hand and the back which were stitched.
12. PW9 Kevin Ochieng Pesa, a clinical officer at Ntitaru recalled that on 26/7/2021, he attended to Nyakererio Gati, who alleged to have been attacked by three (3) people who were known to him; that he had a deep cut on the back 8cm long and 1cm deep and on the right lower arm a deep cut wound of 6cms long and 1cm deep; the bone was exposed and they managed to stop the bleeding and stitched the wounds. He produced the treatment notes (P.exh.3) On 5/8/2021, he signed a P3 form in respect of the same person. (Pexh.4.)
 13. PW10 Cpl. Livingstone Katui of DCI Migori scenes of crime received photographs, taken by Cpl. James Oluga who is now deceased, He identified the signature of the said Cpl. Whom he had worked with for four (4) years, which he had certified. He certified the photographs and they were of the scene where deceased's body was found. They also included, a metal spear, panga and club; injuries that deceased sustained. They had been signed and stamped on 1/7/2022.
 14. PW11 Samuel Kamau is the Investigating Officer in this matter. On 27/7/2021 he received a report of Murder at Targai-Biasumu Road and proceeded to the scene. He found the body of a dead man with a spear still lodged in the body and was in a pool of blood. He took possession of the spear PExh.1, recorded witness statements and ascertained the deceased to be Lucas Mahenye Chacha. They started to search for the suspect till 30/7/2021 when he was arrested at Gitongorama here he was hiding.
 15. When called upon to defend himself, accused gave unsworn statement. He recalled on 26/7/2021 when he went to Paul's cousin's home at 11.00a.m. drunk changaa there till 5.00p.m. when it got finished, he went to Mukuria's (PW2) place with Paul's Cousin to take more changaa. At Mukuria's, he found two other people, Kiberenge, Magige and Mukuria; that when taking changaa, they heard screams and all went to find out. They learnt that a boy had threatened to commit suicide but was found and they went back to Mukuria's house and at about 8.00p.m. Nyakererio told him that he was making noise and should buy people alcohol or leave, that he refused to leave and it is then Gererio got up to hit him with a stick with a nut; that Gererio also had a simi while he had a panga; When Kibarengi intervened and stopped Gererio and told accused to leave him, he had drunk since early in the day; that he got up and left, escorted by a friend till his gate. He denied knowing the deceased and said that there were many people; that on the road, he met three people who claimed to be police; they asked where he was coming from and pushed a torch at his face; that he had a panga and one of the people came near him to cut him but he blocked with his hand and even cut him on the left hand and back. He showed the court the scars with stitch marks. He fell on being cut and did not see what the people were armed with; that one of them said that accused had sold potatoes and had money and that is how he knew they were robbers; He managed to recognize one as John Marwa Mwita (PW1); That he got up, held him by his collar and he left his spear on the ground; Accused took it and threw it at him to save himself. He denied knowing who the spear injured, then he left the people on the road and went home. Next day he reported to Ntitaru police station, was issued with a P3 form and was admitted in hospital for one night; that he went to get his money from his in law on 30/07/2022 from where he was arrested and was informed of the deceased's death. He denied having any reason to kill the deceased. He said that he reported that he was attacked but not that he had injured any of the attackers.
 16. Both Counsel filed submissions, The prosecution Counsel Ms. Kogos submitted that the three ingredients required to prove a charge of Murder was proved; that as regards death of deceased, PW1,2 and PW3 testimonies confirmed that the deceased told. PW2 performed post mortem and found the deceased with a wound inflicted by a sharp object and died of excessive bleeding.



17. As regards identity of the deceased, Counsel urged that PW1 saw accused attack the deceased; that PW2 told the court that accused had informed him of being injured by somebody during the attack.
18. On malice aforethought, Counsel observed that the accused waylaid and ambushed the deceased and attacked him with a weapon that was likely to cause death. Counsel urged the court to convict the accused for murder.
19. The accused's Counsel filed submissions. He challenged PW1's testimony as not being credible because PW1 was the last person to be seen with deceased alive; that PW1 never shouted for help though under attack; that PW1 left the deceased when injured and went home; that PW1's evidence on how the incident occurred does not add up and submitted PW9's evidence that the injuries to accused's forearm were defensive in nature; the PW1's conduct after the event is also suspect.
20. As to whether PW2 was truthful, Counsel relied on the witness statements to the police which were not produced in evidence. He urged that the witness was not credible for denying that he served accused with alcohol contrary to the other evidence.
21. Accused urged the court to disregard PW1's testimony and accept the accused version of the events of the day; that accused's narration is corroborated by the medical evidence is more believable Counsel urged that if there is any injury to a body it was in self-defence as accorded in Section 17 of the Penal Code. He relied on the case of *Mokiva v Republic* (1978-80) eKLR 1337 and *Mungai V Republic* 1984 KLR and *Palmer V Rep.*(1971); that accused was under attack and so he acted quickly by using the weapon that the attackers had and that what he did cannot be said to be excessive force. Counsel urged the court to return a verdict of not guilty. I have duly considered all the evidence tendered before this court and the rival submissions. The accused faces a murder charge under Section 203 of the PC. The ingredients of Murder under the said section that the prosecution needs to prove through that evidence are as follows
 - (1) The death of the deceased;
 - (2) That the death was caused by unlawful act or omission by the accused;
 - (3) That the accused possessed malice afterthought.
22. The burden of proof in criminal cases that the prosecution has to discharge is beyond reasonable doubt. This was the legal position discussed in the case of *Woolmington V DPP* (1935) AC 485 and *Miller V Minister of Pensions* (1947) 2 ALL ER 372 at 373 In this later case, Lord Deming stated as follows:

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The Law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course, it is doubt but nothing short of that will suffice”
23. Taking cue from the above decision, this court will have to evaluate all the evidence tendered to establish whether the ingredients of murder were proved.
 - (1). Death of deceased. PW1 who was with the deceased on the fateful night and at the time of attack, and PW2 who went to the scene next day, saw the spear still lodged in the deceased's body the next day. PW5 and 6 also saw the deceased's body at the scene. PW4, the deceased's son identified the body to the Doctor (PW3) who performed the post mortem and found that the



deceased died of severe haemorrhage due to stab injury by a sharp object. There is no doubt that the deceased did not die of natural causes but an injury inflicted to left side of the intercostal space of the ribs, that extended to the lungs.

- (2) Whether accused caused the death by unlawful act or omission;
24. From the accused's own admission, there is no dispute that he was at Mukuria's (PW2) home on 26/7/2021 taking alcohol. What he disputes is seeing the deceased at PW2's place. PW1,2 and PW5 all confirmed that the deceased was at PW2's house too and left the place with PW1. Though PW2 denied having seen accused, she was aware that the accused had been to her house and disagreed with somebody. Infact accused did agree that when at PW2's house he disagreed with one Gesariro (Keseriro) a fact that was confirmed by PW1. PW5, who was also taking changaa at PW2's house confirmed that both the deceased and accused were present at the scene. Both PW1 and 5 agreed that accused did not disagree with deceased. It is PW5 who seemed to shed more light on the disagreement at PW2's house that accused snatched Gesariro's club and went outside and that it is the deceased and one other John who followed and asked accused to return the club to Gesariro and that thereafter accused did not return into the house but left
25. I find that there is overwhelming evidence that PW1,4 5, the accused and deceased were all drinking at PW2's house on 26/7/2021. I do not believe accused's assertion that deceased was not at the drinking den that evening.
26. The only witness to the incident is PW1. The court must take into account the fact that being night, the conditions for identification were not favourable. However, the accused does agree that he was at the scene on the said night. He agreed that he injured somebody though he never reported to police that he had injured anybody. The question is which of the two versions is true, PW1's or accused's account on how the deceased met his death.
27. There is no dispute that the confrontation that both PW1 and accused talk of took place at night. PW1 said it was about 9.00p.m. According to him, he identified the accused using moonlight and that he came face to face in contact with him when he tried to separate accused from the deceased as they had held each other and further that he knew accused since childhood. Infact the accused did admit that PW1 was present at the scene but that instead he is the one who was attacked. I have keenly considered the defence and I found too many glaring contradictions. At first the accused told the court that from PW2's house he was escorted up to his gate by a friend, Gesiro. However, he then talked of having been attacked along the road. It is not clear what had happened to his friend. From accused's narration of events, he was attacked by three people that he met and that one tried to hit him but he blocked with his left hand. However, I find that the injuries on the accused's back are consistent with PW1's explanation that the deceased on being attacked had a panga with which he cut the accused on the back. Accused did not explain how the injury came to be on his back. After the attack the accused sought treatment made a report of an attack and even obtained a P3 form. However, he never reported the fact that he had injured one of the attackers with a spear when he threw at them.
28. Accused also told the court that he recognized PW1's voice, a person he knew so well. It is very surprising that when he made the report to police, he never mentioned PW1 as one of the attackers. It would have been expected that the first report would contain the fact of injuring one and that he identified one of the assailants. Failure by accused to make that report raised serious doubts in his defence. PW6 and 8, both Assistant Chiefs who were involved in the arrest of accused testified to finding accused hiding under a bed in the home of his brother-in-law one Tereri on 30/7/2021. PW7 told the court that the accused had sought direction to the said home on 28/7/2021 and confirmed to him to have been injured and having injured somebody. Accused's explanation that he had gone to his



brother-in-law's place to look for money when he was so seriously injured is not convincing at all. This court is convinced that accused's conduct speaks volumes. When arrested he was fleeing from being caught because of what he had done.

29. In his submissions, the accused raised the issue of self-defence, that if he injured anybody, it was in self-defence. Self-defence is available as a defence under section 17 of penal code provides as follows
- “Subject to any express provisions in this code or any other hand in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law”
30. At common law, the defence of self defence is available to one who proves that he used reasonable force;
1. To defend himself.
 2. To prevent attack to another person.
 3. To defend his property.
31. The same common law is applicable in Kenya by dint of section 17PC. The said law has been applied in several cases.
32. In the court of appeal case of Ahmed Mohammed Omar and 4 others v Republic 2014 eKLR the court recognized the common principles of defence and held as follows
33. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be a way of revenge or punishment or by way of paying off an old score or maybe pregression. There may be no longer any link with a necessity of defence.... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which cases as a defence it is rejected. In a homicide case, the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury
34. Further, In Ahmed Omar (Supra) the court further said “..... If self defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful”.
35. In Palmer V Republic 1971 ALL E.R.1071 the court said- that there was no rule that excessive force in defence of the person which in all cases lead to a verdict of manslaughter. There are nevertheless instances where that results is a proper one in the circumstances and on the facts of the case being considered.
36. In this case, the accused never alluded to the defence of self defence. He merely denied the offence till the tail end of his defence that he alleged that he threw a spear at his attackers. I have already found



above that his defence is not believable. I prefer the evidence of PW1 that it is accused who waylaid them and attacked the deceased. It is reason for attacking the deceased it have arisen from the fact that deceased intervened when accused had snatched a club from Gesariro. If anybody called in self-defence, it was the deceased. This court is satisfied that in its totality, the evidence points at accused as the person who way laid, attacked the deceased killing him on the spot.

Proof of malice aforethought.

37. Malice aforethought is defined in Section 206 of the PC, as follows;

In the CRC 12/2018 Republic V Juma Kituko Mwambegu (2020) eKLR. In the case of Rex V Tubere s/o Ochen (1945)1 Z EACA 63, the Eastern Court of Appeal observed;

“in determining existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured”

38. In the case of Hyam V DPP (1974) AC the court held that

Malice aforethought in the crime of Murder is established by proof beyond reasonable doubt when during the act which led to the death of another ,the accused knew that it was highly probable that, that act would result in death or serious bodily harm”.

39. Again in Ernest Asami Bwire alias Onyango V Rep EACA 32/1999 the court held;

the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased”.

40. In this case, the act of piercing a person in the chest with a spear can have only one consequence, death. The accused had left PW1 and the deceased at the drinking den, went home and armed himself with a spear or 2, and lay in wait. His actions points to nothing but an intention to cause the death of he deceased. Malice aforethought was thus proved.

41. I must point out this, that accused and others are said to have been drinking alcohol but he never raised the defence of intoxication. Besides his actions of going home arming himself with a spear and lying in wait for deceased would oust such a defence.

42. In the end, this court is satisfied beyond any doubt that it is the accused who attacked and intentionally caused the death of the deceased. I find him guilty of the Offence of Murder as charged and convict him accordingly.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 3RD DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

In the presence of:-

Ms. Ikol for the state

Court Assistants Juma/Emma

Mr. Achola H/B for Mr. Odingo

Accused - present

