



**Republic v Mbogo (Criminal Case 10 of 2015)
[2024] KEHC 13625 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 10 OF 2015
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER NJERU MBOGO ACCUSED

JUDGMENT

1. The accused was charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on 05th January 2015 at Kathande village, Kianjokoma sublocation, Kagaari North West location within Embu County, the accused murdered Milka Warue Mbogo. The accused person pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1, Roselyne Muthanje Mbogo, the accused's sister, stated that she was inside the house asleep with other family members including the deceased, her mother. That she was awoken by the smell of petrol and when she looked outside the window, she saw someone throwing petrol on the windows and she woke up her other family members to get out of the house. That as soon as she left her room to go to the deceased's room, she met the accused who hit her with a piece of wood on her shoulder and then he proceeded to the deceased's room. That the other people in the house started crying and went outside and they heard the deceased asking the accused (whose other name is Muturi) 'Muturi unanikatakata kwa sababu ya shamba?'
3. That they raised alarm and people gathered to rescue them but the deceased had been injured and the accused had already taken off. That she was afraid to enter the deceased's bedroom. That the deceased was taken to Kianjokoma hospital where they were referred to Embu Level 5 Hospital, having sustained injuries on her head, back and shoulder. On cross-examination, she stated that there had been a court case regarding land where other members of the family were given land but the deceased was not. That



- she did not list the names of the people who were in the house that night because the police did not ask her.
4. She stated that there was enough light in the house to enable her to identify the accused and when the crowd gathered, she told them that it was the accused who was in the house although they did not find him there. That when members of the public went to look for the accused in his house, his wife told them that he was not there that night. That the accused was carrying a panga and a piece of wood when she saw him in the house that night and he went to the deceased's bedroom. That some of the other family members were also hurt during the incident and that the accused accessed the house by breaking in.
 5. PW2 was John Njiru Njeru, a neighbor of the deceased, who stated that he heard distress calls from the home of the deceased and he woke up and went to her home. He found the deceased's family members outside the house and when he asked what had happened, they told him that the deceased had been cut. He stated that he went inside the house where he found the deceased in her bedroom lying in a pool of blood. That he called the area chief and they arranged for transport to the nearby hospital where the deceased was offered first aid and referred to Embu Level 5 Hospital where she was pronounced dead on arrival.
 6. That they reported the matter at Embu Police Station and then returned home where they were told that the police and chief had visited the scene. That the family members told them that it was the accused who had attacked the deceased. He testified that he went to the accused's house together with other people and they found a half-full jerrycan of petrol under his bed and the jerrycan was part of the evidence in court.
 7. On cross-examination, he stated that the accused was dealing with wood using a power saw and that it was not unusual to find petrol in his house. That when they went to the accused's house, they were not accompanied by police and his wife told them that the accused was not at home at that particular time but he had seen him earlier that day. That the deceased's house had lights outside and inside and the children of the deceased said that it was their brother the accused, who had cut their mother with a panga.
 8. PW3 was Rose Karimi Mbogo who stated that she was woken up by the noises of some people breaking into the house and she switched the lights on. That the people who included the accused went into the deceased's bedroom and she heard the deceased screaming and asking the accused why he was killing her because of a piece of land. That she joined the deceased in screaming and then the accused left the deceased's room and forced his way into her room where he attacked her and cut her finger and hit her on her shoulder. That the accused was carrying a panga and a piece of wood. That they looked for motor vehicle and took the deceased to Kianjokoma subcounty hospital and they were referred to Embu level 5 Hospital where the deceased was pronounced dead on arrival.
 9. On cross-examination, she stated that it was not true that the power to the deceased's house had been disconnected. That she did not witness when her mother was being cut but she saw the accused holding a panga which he also used to attack her. That she was treated at Embu Level 5 Hospital where she was given a P3 but she did not report the incident to the police. That the police visited the scene twice that night and the 2nd time, she was there and she took them to the accused's house. That there has always been a land dispute since the death of her father in 1995 and the accused had placed a caution on the land. That as of 2015, the accused was dealing in wood but he was not trading at home, rather, he was not keeping his tools at home. That when the deceased was attacked, she said "Muturi unaniua kwa sababu ya shamba?". That Muturi is the accused's other name.



10. PW4 was Lilian Wanjira Karimi who stated that she was sleeping in the same house as the deceased and other family members when PW1 woke them up and told them that someone was pouring petrol inside the house. That the accused had broken into the house and he went into PW3's room where she was also sleeping and he was armed with a piece of wood and a panga which he used to cut PW3's hand. That the accused went to the deceased room and they heard the deceased telling him in ki-embu language "you have killed me".
11. That when the accused left the house, they went to her room and they found her lying in a pool of blood. That the deceased was taken to hospital where she died. She testified that the accused is her uncle with whom she lived in the same compound and she knew that the incident was triggered by a land dispute. On cross-examination, she stated that she did not witness the accused cutting the deceased. That the main entrance door to the house and the door to the deceased's bedroom had been broken and she positively identified the accused as the intruder.
12. PW5 was Mark Nyaga Karangi who was the area chief at the time of the incident. He stated that he was at his home when PW2 called to inform him that a woman had been attacked by thugs at her home and she was in bad condition. That he told PW2 to find means to take her to hospital and then he called the OCS Runyenjes Police Station and they convened at the scene. That he went into the deceased's room and ascertained that she had been cut with a panga. That the deceased died after she had been taken out of the house. On cross-examination, he stated that when he arrived at the scene, he was not given names of any suspects.
13. PW6 was John Muriithi who works as a bodaboda rider. He testified that he was called by one Regina Njoki, the accused's wife, who asked him to go to her house so that she could send him to buy some nails and sharpen a panga. That he ran the errands and when he returned, she told him to leave the things as a particular place since she was not home. That the following day, he got the news that someone had killed his mother. On cross-examination, he stated that there was nothing unusual about the errands she sent him to run for her since she was a farmer. That the accused was not at home on that day.
14. PW7 was Inspector Isaack Nzwili (Retired) who was the investigating officer in the case. He stated that on the night of the incident, he was on patrol when the OCPD informed him about the incident at Kianjokoma. That they proceeded to the scene where a crowd had gathered and the area chief informed them that an old lady had been cut with a panga by her son and she had been taken to hospital. That he went inside the house to the place where the deceased had been attacked and they found a lot of blood there. He stated that while they were at the scene, members of the public began chasing another son of the deceased called Wilson Munyi accusing him of colluding with the deceased to kill the deceased.
15. That they intervened and took Wilson Munyi to the police station but the accused was not found on that day. That they later returned to the scene with scenes of crime personnel who processed the scene. That some members of the family gave the police a jerrycan of petrol which was said to have been found in the accused's house. Witness statements were collected at the police station and the accused and his wife also went to the police station where the accused was arrested pending further investigations which led to his arraignment. He testified that Wilson Munyi was found not to have any connection with the incident and he was released. That the jerrycan that was given to the police contained a little petrol but the same was not analyzed because it had no connection to the case. That the murder weapon was not recovered.
16. On cross-examination, he stated that the people at the scene told him that the person who attacked the deceased had covered his face with a cloth partially. That when he saved Munyi and the accused's wife from the irate mob, he did not look for the accused because the mob became violent. That the witnesses named the accused as a suspect when their statements were being recorded, even though some



witnesses refused to give statements. The people who gave him the petrol jerrycan did not tell him that the accused was dealing in timber and that he owned a power saw.

17. PW8 was Jacob Murimi Karimi, a grandson of the deceased, who stated that he was also in the house when PW1 raised alarm about some people who were outside the house. That they began screaming and soon afterwards, the entrance door was broken into and he climbed into the ceiling. That the man who entered the house was the accused and he went straight into the deceased's bedroom being armed with a panga and a piece of wood. That from the ceiling, he saw the accused cutting the deceased twice with a panga on her head and he heard the deceased saying "Muturi, why have you killed me?"
18. That the accused entered other rooms and cut PW3 with a panga on the left hand and then went and hit PW1 with a piece of wood before he ran away. That he climbed down from the ceiling and they raised alarm and went to the deceased's bedroom where they found her on the floor having sustained injuries on her head. That he looked for a vehicle and they took the deceased to Kianjokoma Hospital where first aid was administered before they were referred to Embu Level 5 Hospital, where she was pronounced dead on arrival. Her body was taken to the mortuary and they recorded their statements with the police. He stated that he climbed to the ceiling because the accused had threatened to kill him, his mother and his grandmother if they did not vacate the land which he claimed belonged to him and his brother Munyi.
19. On cross-examination, he stated that the ceiling was the safe place suggested by his aunty and from the ceiling he had a good view of the whole house since the lights were on in all the rooms and the ceiling only covered the table room and veranda. He stated that he was staying at the deceased's house with his mother because he was fearing for his security when he was living with Wilson Munyi his uncle when he learned of their plan and threats. That he is not among the people who went to the house of the deceased.
20. PW9 was Valentine Mwendu Muthanje, PW1's daughter, who stated that she was sleeping in the same bedroom with her mother when her mother alerted her that someone was outside. That they switched on all the lights and they saw the accused throwing petrol inside the house then he went and broke the main door and entered. That he hit her mother with a piece of wood and told her "mumenizoea".
21. That the accused proceeded to the deceased's room where she heard how the accused was beating her and the deceased asked him why he was killing her. That she joined the other family members in raising alarm and the deceased was taken to hospital but she died upon arrival. She stated that the accused was wearing a mavin hat but his face was not covered. On cross-examination, it was her testimony that there was light outside and inside the house that night and she saw the accused armed with a piece of wood and a panga.
22. PW10 was Joakim Macharia testified that he was called by his cousin Catherine Wanjira who told him that their grandmother had been killed by their uncle. That he went to the scene at 8AM the next morning and then he joined other people in looking for the murder weapon. That they went to the home of the accused where they found a half-full petrol jerrycan and they took it to Runyenjes police station. On cross-examination, he stated that the accused had been involving him in problems but he never reported to the police. That he was surprised to learn that the police delinked the petrol jerrycan from the incident.
23. PW11 was Dr. Godfrey Njuki Njiru who produced the postmortem report authored by Dr. Kimani, his colleague who examined the body of the deceased. According to the report, the deceased had multiple cuts on the head and neck. She had a cut wound which had gone through the skull bone approximately 10CM on the parietal occipital region. That there was bleeding on the brain tissue and



- he concluded that the cause of death was severe head injury. He also produced a mental assessment report authored by Dr. Thuo who found the accused person fit to stand trial.
24. After the close of the prosecution's case, the court found that the accused person had a case to answer and he was placed on his defense. However, the accused sought for and was granted several adjournments to enable him seek the services of another advocate and when the matter was mentioned on 27th March 2023, the accused failed to attend court and his whereabouts were unknown since then going forward. Warrants of arrest were issued against him and the Investigating officer informed the court that the accused is at large with efforts to arrest him being unfruitful.
 25. The Prosecution applied to the court to have the case continue and be determined without the accused who had waived his rights under Article 50 of *the Constitution*. The formal application was allowed through a ruling delivered on 23rd October 2024 where the court ordered, inter alia, that the proceedings against the accused proceed in his absentia. The defense case was deemed as closed in the absence of the accused person and the prosecution prayed for a judgment date.
 26. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
 27. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused person herein faces the charge of murder under sections 203 as read together with 204 of the Section 203 of the Penal Code provides:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
 28. In the case of Republic v W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, as follows:
 - “For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”
 29. The first element is death and cause of death. PW11 established that the deceased suffered several injuries to the head and concluded that the cause of death was severe head injury.
 30. The second thing is to prove that the accused is responsible for inflicting the fatal injuries upon the deceased. PW1, PW3, PW4, PW8 and PW9 were all in the house with the deceased on the night of the incident. They all testified that PW1 was the first one to raise alarm and she told everyone that there was someone outside throwing petrol inside the house. PW1 switched all the lights on and they all testified that they saw the accused breaking the main door to the house and entering the house while armed with a piece of wood and a panga. They also described that the accused was wearing blue jeans, a long brown/khaki coat and a marvin hat on his head, which was covering a part of this face. That the accused hit PW1 with the piece of wood on the shoulder and then went to the deceased's bedroom.
 31. These witnesses testified that they heard the deceased asking the accused why he was killing her or why he was killing her because of land. From the evidence, PW8 is the only one that testified to having seen the accused hacking the deceased with a panga because he was on the ceiling of the house. It was his



testimony that when PW1 woke everyone up, he was afraid and so he climbed on the ceiling and from there, he had a good view of the whole incident since the light in all the rooms were on.

32. He stated that there was a ceiling board covering only on the veranda and the table rooms and so he could see directly into every room in the rest of the house. He stated that he saw the accused hacking the deceased with a panga on the head and he also saw him beating PW1 and PW3. According to PW11, the deceased succumbed to severe head injuries. This is sufficient proof that the accused was present at the scene and he caused the death of the deceased by hacking her on the head.
33. Though the other witnesses did not see the accused cutting the deceased, the evidence on record is that the accused was the only person who entered the deceased's house at the material time and he was armed with a panga and a piece of wood which he was holding on the right and left hand respectively. PW1 and PW2 are the accused person's sisters and they knew him quite well. It was also the testimony by all the witnesses that there was sufficient light both inside and outside the house and they were able to see the accused and recognized him at the scene which was inside the deceased's house. The further evidence is that when the accused started attacking the deceased, she called him by his name and asked him why he would kill her over land. It is therefore, my considered view that the accused person was positively identified as the perpetrator.
34. The prosecution also has to prove that the accused person bore malice aforethought or that he intended to murder the deceased. Malice aforethought is defined and well explained under section 206 of the Penal Code 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.”

35. Further, the court in *Republic v Njeru & 3 others (Criminal Case 2 of 2019)* [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another Vs Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit Vs Uganda*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court



of Appeal for Eastern Africa stated thus on the issue: It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

36. PW7 testified that the murder weapon was not recovered in this case. However, PW6 testified that the wife of the accused had called him earlier that day and sent him to go and sharpen a panga for her. That he did so and brought back the sharpened panga. Given the established cause of death and the manner in which the fatal injuries were inflicted, coupled with the testimonies of how the accused broke into the house and forced his way to the deceased’s bedroom, it is evident that the accused person intended to kill the deceased in cold blood.
37. Therefore, I find that the prosecution has proved its case against the accused beyond reasonable doubt. The accused person is hereby found guilty of the offence of murder contrary to section 203 of the Penal Code and he is convicted accordingly.
38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the State

.....for the Accused person

