



**Republic v Nyongesa (Criminal Case E20 of 2022)  
[2024] KEHC 15602 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E20 OF 2022  
DK KEMEL, J  
DECEMBER 6, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EVANS MUKHWANA NYONGESA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Evans Mukhwana Nyongesa, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on 9<sup>th</sup> July 2022 at Namawanga village in West Nalondo Sub-Location in Bungoma Central Sub-County within Bungoma County murdered Petrolina Machuma Makokha.
2. The prosecution called seven (7) witnesses in support of its case.
3. PW1 was Fredrick Wanjala Makokha who recalled that on 9<sup>th</sup> July 2022 at 8.00 p.m. he visited some of his neighbours and they decided to have a drink. According to him, the accused refused to consume the drink claiming that he had been looking for him and that he ordered him to leave. He left the chang'aa den and proceeded to his home wherein he recounted the events of the night to his parents and they advised him to lodge a report with the accused's brother. He proceeded to the home of the Accused person's brother but he only found his wife, and as he was in the process of explaining to her the events as they occurred with the accused, the accused came back home and demanded to know what he was doing at his brother's house. He testified that at that moment the accused got hold of his neck and assaulted him as he dragged him towards the road until his mother intervened and in her company he headed home as she walked behind him. The accused rushed back to his house and came back armed with a metal rod which he used to hit his mother on the head from behind. He told the Court that his mother fell down and that he raised an alarm as he demanded to know why the accused had attacked his mother. The village elder responded to his alarm and the accused returned back to the scene armed with a panga while threatening to cut everyone trying to approach him. He told the Court that his



mother was taken to the hospital where she succumbed to her injuries and the following day, in the company of the accused they proceeded to a nearby police post where they lodged a report. He told the Court that the dispute was between him and the accused as the accused never argued with his mother.

On cross-examination, he told the Court that the accused hit his mother with a stick and that his witness statement recorded on 10<sup>th</sup> July 2022 was silent on that claim as well as the claim that his niece was present at the scene. He told the Court that he knows the weapon that was used to assault his mother and that the same was recovered. It was his testimony that he was at the chang'aa den as he wanted to drink but the accused scared him away and that he was only at the home of the accused's brother to alert him that his father requested his attention and presence at his home. He denied allegations that he was armed with a panga and a hammer and that it was false that he was the one who hit his mother with a metal bar. He told the Court that the incident occurred at night.

On re-examination, he told the Court that it was a police officer who recorded his statement and they also recovered the weapon from the accused. He confirmed that the incident occurred at night and that there was some lighting from the skies.

4. PW2 was Linet Nelima Musamali who told the Court that he recalled on 9<sup>th</sup> July 2022 at around 8.00 p.m. while at home she heard someone call out for her husband, Jumba, but since he was not around she alerted the person of the same. She proceeded outside and confirmed that it was PW1 who went ahead to inform her that he wanted her to relay a message to her husband that the accused herein had harassed him. As they spoke, the accused person arrived home and started to confront PW1 who was armed with a hammer and a panga. She told the Court that PW1 threatened to kill the accused and that she went about her business back in her house as the two argued. According to her, as the commotion between PW1 and the accused persisted, she decided to approach the scene only for her to find the mother of PW1 had fallen down. She went back to her house and that the accused was in his compound while PW1 stood outside blaming him for the demise of the deceased.

On cross-examination, she told the Court that she does not know who killed the deceased person and that several people converged at the scene. She confirmed that she never saw any metal rod and that it was PW1 who was armed with a hammer and panga. She told the Court at that point she could not tell if the accused and PW1 were drunk. She insisted that she did not see the niece of PW1 at the scene.

5. PW3 was Simiyu Stephen Makhanu who testified that on 9<sup>th</sup> July 2022, at 8.20 p.m. while at his house he was alerted of the injury on the deceased. He rushed to the scene where he found the deceased lying on the ground near the house of the accused herein while the accused and PW1 were arguing. He spotted a metal rod and that PW1 was assaulting the accused herein while blaming him for injuring the deceased. According to him, the accused went into his house only to return with a panga but he quickly intervened and the accused disappeared while PW1 proceeded to run around seeking help. He told the Court that he left the scene at 9.30 p.m. and that the deceased was taken home. The following day on visiting the deceased he observed her condition was getting worse and they organized to have her taken to the hospital where she succumbed. They apprehended the accused who informed them that his aim was to hit PW1 and not the deceased. On 10<sup>th</sup> July 2022, in the company of the police officers they proceeded to the house of the accused where they recovered the metal rod.

On cross-examination, he told the Court that the accused accidentally hit the deceased when she intervened to stop the dispute between PW1 and the accused. He confirmed that he was not present when the incident occurred and that he did find PW1 assaulting the accused with a stick and that the accused had no weapon.

6. PW4 was Daniel Wanjala Nyongesa who testified that he is a village elder in Namawanga village and that on 10<sup>th</sup> July 2022, at around 7.00 a.m. he received a call from PW3 alerting him of the events



that occurred on the night of 9<sup>th</sup> July 2022. He proceeded to visit the home of the deceased and do his enquiries of the parties involved in the scuffle. He established their identities and proceeded to escort them to Sikata Police post where they were interrogated and it was established that a metal rod was used in the attack. They proceeded to the house of the accused wherein they recovered the metal rod.

On cross-examination, he told the Court that it was PW3 who alerted him of the events that occurred. He confirmed that he was the one who opened the house of the accused and handed over to the police the metal rod. He insisted that he went to the home of the deceased on 10<sup>th</sup> July 2022 and that he did record a statement with the police on 10<sup>th</sup> July 2022.

7. PW5 was Dr. Ombongi Haron who testified that he is attached at Bungoma County Referral Hospital and that he did perform an autopsy on the body of the deceased herein on 18<sup>th</sup> July 2022. He told the Court that on the external examination of the body he observed a bruise on the right side of her head and on internal examination he observed a depressed linear skull fracture with a massive subdural hematoma. His prognosis was that the cause of death was severe head injury due to blunt force trauma. He produced before this Court the post mortem report dated 18<sup>th</sup> July 2022 as PEXH.2.

On cross-examination, he told the Court that the bruise was caused by a blunt object and that the injury was on the right side (parietal region).

8. PW6 was Geoffrey Barasa Wolayo who testified that the deceased herein was his elder sister and that on 18<sup>th</sup> July 2022, he witnessed her post mortem examination. He told the Court that his brother was also present.

9. On-cross-examination, he confirmed that together with his brother they witnessed the post mortem exercise on their deceased sister and that the injury was on the head.

10. PW7 was No. 62215 CPL Edwin Nyongesa who testified that he is based at Nalondo Police Station and that on 10<sup>th</sup> July 2022, at 11.00 a.m. he received a report from Sikata Police Post of a suspect who was brought in by the clan elder. He rushed to the Police Post and found the accused herein and the charges levelled against him was that he had injured the deceased herein at 8.00 p.m. on 9<sup>th</sup> July 2022. He found out that the victim had already been rushed to the hospital and he visited the scene in the company of the accused. He told the Court that they recovered a metal rod from his house after a thorough search and that they proceeded to the hospital wherein he established that the deceased was still unconscious. He proceeded to conduct his investigations wherein he established that the accused had quarreled with PW1 and this attracted the attention of the deceased leading to her attack as well. He told the Court that he proceeded to record the statements of the witnesses and established that the deceased died after four days on 18<sup>th</sup> July 2022, to be precise. After the post mortem was conducted, he proceeded to charge the accused herein with murder. He produced in Court the recovered metal rod as PEXH1.

On cross-examination, he told the Court that he did not see injuries on the deceased and that the accused entered his house and brought with him the metal rod that he used to injure the deceased herein. He told the Court that no inventory was prepared for the recovery of the weapon and that no DNA analysis was conducted. He confirmed that the accused had a dispute with PW1, that the accused was not accompanied by any weapon to the police post and that no photograph of the scene were taken.

11. At the close of the Prosecution's case, the accused herein was found to have a case to answer and was thus put on his defence. He opted to tender a sworn testimony.

12. DW1 was Evans Mukhwana Nyongesa, who testified that he is the accused herein and that he denied the charges he is facing before this Court. According to him, on 9<sup>th</sup> July 2022, at around 3.00 p.m.



he went for a drink at a certain place in the area he resides and he was later joined by PW1 and they proceeded to drink until 9.00 p.m. He later left to head home and arrived there at 9.30 p.m. He told the Court that he suddenly heard a knock at his door and on checking, he saw it was PW1 and before he could talk someone else appeared with a panga and rod and they proceeded to attack him. He raised an alarm and locked himself inside his house. The villagers turned up and later left and he proceeded to lodge a report with the clan elder only for him to be picked up with PW1 and taken to Chemai Police Post. He told the Court that during the incident the deceased herein was not present. He insisted that at the release of PW1, the police demanded a bribe of Kshs. 10,000/=but he had no money and that the following day the DCIO came to him and ordered him to sign certain documents. He denied attacking the deceased herein with a metal rod and that the said metal rod was not produced in Court as an exhibit.

On cross-examination, he told the Court that on 9<sup>th</sup> July 2022, at 8.00 p.m. he was at the chang'aa den in the company of two others and that he only left the place at 9.30 p.m. for his house. He concurred that he did disagree with PW1 inside his compound and that he had not suspected PW1 to be the thief who had stolen his maize. He told the Court that he made a report to the clan elder on the theft of his maize and he does not know how the deceased met her death. He told the Court that PW1 threatened and assaulted him but he does not have an OB number or P3 form to substantiate the claims. He confirmed that he had no grudges against PW1 and that he never assaulted him.

On re-examination, he told the Court that he raised his report with the clan elders and not the police and that he does not know who injured the deceased as he was not at the scene.

13. DW2 was Fred Simiyu Okumu who testified that he is a boda boda operator and that the accused herein is his neighbor. According to him, on 9<sup>th</sup> July 2022, at 9.00 pm while at his house, the accused herein sought help as he was being attacked by PW1. On rushing to the scene, he found the accused herein had a sun king lamp and he was able to see the deceased and he was scared of the actions by PW1 who was armed with an iron rod and panga. He told the Court that it was later on that the brother to PW1 who arrived at the scene dissuaded him and took him back to his house. He told the Court that the deceased was later rushed to the hospital and that he did not see the deceased at the scene. He told the Court that he knew the accused since childhood and that he was a peaceful person. He told the Court that he did not see the accused assault the deceased and that he is not aware of any squabbles between the families of the accused and the deceased.

On cross-examination, he told the Court that the accused herein is his neighbor and that he is a peaceful man in the area. He confirmed that he would fill badly if the accused is sent to jail.

14. At the close of the defence hearing, parties were directed to file and exchange their respective written submissions. Both the Prosecution and defence counsels did not comply with the Court directive.
15. I have considered the evidence of both the Prosecution and defence as presented. I find the only issue for determination is whether the Prosecution proved its case against the accused beyond any reasonable doubt. The offence of murder is provided for under Section 203 of the Penal Code as follows;

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

16. To secure a conviction for the offence therefore, the following ingredients ought to be established beyond reasonable doubt; (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; (c) and that the accused had harboured malice aforethought.



17. In establishing its case, the Prosecution is under obligation to prove each of the ingredients beyond reasonable doubt. It is trite that the burden of proof lies on the Prosecution in all cases save only for a few statutory offences. Proof of beyond reasonable doubt has however been stated not to mean beyond any shadow of doubt. The standard is discharged when the evidence is so strong that only a little doubt is left in his favour. (See *Miller Vs Minister of Pensions* [1947] ALL ER 372.)
18. The fact of the death of the deceased is not in doubt. There is ample evidence from the testimony of PW5, the doctor who conducted the post mortem on the deceased's body and the evidence of PW6, the brother to the deceased who was present during the post mortem examination. PW5 produced in Court a post mortem report dated 18<sup>th</sup> July 2022 marked as PEXH 2, which indicated the cause of death as severe head injury due to blunt force trauma. This ingredient of the offence was duly proved by the Prosecution.
19. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic -vs Boniface Isawa Makodi* [ 2016] eKLR that referred to the case of *Guzambizi Wesonga -vs- Republic* [1943] 15 EACA 65 where it was held;

“ 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”.
20. The deceased herein was found to have died from severe head injury due to blunt force trauma. As stated above, there is no doubt that the death of the deceased was caused by the injuries that she sustained on the head as was detailed in PEXH 2. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before Court irresistibly points to an unlawful act that led to the death of the deceased following an attack. Accordingly, I find and hold that the death of the deceased was caused by an unlawful act.
21. On whether the Prosecution proved beyond reasonable doubt that it was the accused herein who committed the unlawful act which caused the death of the deceased, the accused denied committing the unlawful act leading to the deceased's death. The question is, who caused the unlawful act that led to the demise of the deceased? From the evidence on record, it is only PW1 who testified that he saw the accused attack the deceased. His evidence is that on 9<sup>th</sup> July 2022 at 8.00 p.m. he visited some of his neighbours and they decided to have a drink. According to him, the accused refused to consume the drink claiming that he had been looking for him and that he ordered him to leave. He left the chang'aa den and proceeded to his home wherein he recounted the events of the night to his parents and they advised him to lodge a report with the accused's brother. He proceeded to the home of the accused's brother but he only found his wife, and as he was in the process of explaining to her the events as they occurred with the accused, the accused came back home and demanded to know what he was doing at his brother's house. He testified that at that moment the accused got hold of his neck and assaulted him as he dragged him towards the road until his mother intervened and, in her company, he headed home as she walked behind him. The accused rushed back to his house and came back with a metal rod which he used to hit his mother on the head from behind. He told the Court that his mother fell down and that he raised an alarm as he demanded to know why the accused attacked his mother
22. PW1 further testified that the accused went back into his house only for him to return back to the scene armed with a panga while threatening to cut everyone trying to approach him.



23. The evidence against the accused is by a single witness i.e PW1 from his testimony it is clear that the identification was made at night after night fall.

24. In the case of Abdullah Bin Wendo vs. Rex 20 EACA 166, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

25. I have considered the evidenced of PW1, the sole eye witness in this case. The incident he describes took place at 8.00 p.m. It was in someone’s compound where he described that there were houses and he could see the accused’s movements as he went inside his house to take a metal rod and a panga. PW1 testified that the only source of light was the “skies light”. He also described that he saw the accused hiding in the bush at a distance. Based on his narrations, it is clear that he and the accused were in each other’s face as they were arguing. This is a clear indication that he saw the accused. In fact the two had met earlier at the changaa drinking den when the accused chased him away. I find that the circumstances under which PW1 saw the accused were not difficult for the correct identification as they were conducive for positive identification. In any event, both had been neighbours and had known each other quite well. PW1 also, told the Court that the accused was his neighbor and that earlier in the day they met up at the chang’aa den. This a case of recognition as I have closely examined the evidence adduced in this case and found that of PW1 directly pointing to the guilt of the accused. I find that the identification of the accused by PW1 was safe.

26. On whether the accused had malice aforethought when he unlawfully killed the deceased, under Section 206 of the Penal Code, 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- (c) an intention 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.”

27. The Prosecution has a duty to prove malice aforethought on any of the circumstances stated under Section 206 of the Penal Code. What can be deduced from section 206 (a-e), malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The Courts in interpreting the provisions of Section 206 have stated as such in various authorities. In the



- classic case of *Republic v 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.
28. In the instant case, 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 evidence as delivered by PW1 who told the Court that the deceased after intervening in their scuffle escorted him back home with the deceased walking behind him. Despite this, the accused still pursued them with a metal rod and assaulted the deceased with the same. Further, the nature of injuries suffered by the deceased which were as follows: on the head-there was a bruise on the right temporal region, depressed linear skull fracture involving the right parietal to the right temporal. On the nervous system- there was massive subdural hematoma right frontal parietal. On the spinal column-occipital with mid link shift. On the spinal cord-right sided brain contusion.
29. An attack on one's head is an attack on the life of a person. The accused had the ultimate intention of eliminating the deceased although the motive is unclear save that the accused was at that moment in conflict with PW1 herein. Nonetheless, motive is immaterial in proving one's criminal responsibility. That is clear from Section 9(3) of the Penal Code which provides that:
- “Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”
30. In case of *Joseph Wambirwa Mwanthi v- Republic, Criminal Appeal No 63 of 2005* (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”
31. However, the same Court stated in *Lubambula v R* [2003] KLR 683 that:
- “Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”
32. In *David Kipkemboi Ngetich v Republic, Nakuru Cr. Appeal No. 276 of 2006* (CA) the Court of Appeal stated that the relevance of motive is “is to contextualize the circumstances in which the offence charged was committed.”
33. In this case, as motive for the unlawful killing of the deceased was not clear from the evidence adduced, this Court will not speculate on the same. Only the accused knows why he attacked and unlawfully killed the deceased, as the accused had sought the metal rod to kill someone when he went into his house and came with it. Further, PW1 testified that even after attacking the deceased and leaving her lying on the ground, he still sought for a panga from his house with the aim of finishing off PW1 or anybody who dared to approach him.
34. On the alibi as raised by the accused, the accused in his defence hearing alleged that he was not at the scene at the time of the attack on the deceased as he was away at a chang'aa den.
35. In the case of *Kiarie v R* {1984} KLR The Court of Appeal laid down the following principle:
- “An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge



had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons.”

36. In R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 held:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

37. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See Nyakundi J IN Charles Kasena Chogo v Republic [2019] eKLR.

38. I have perused the trial Court record and I find that the accused raised the alibi defence during his defence evidence and the plea of alibi was never even part of the cross-examination. In R v Mahoney {1979} 50 CCC it was held:

“The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it.”

39. Subject to the above, the Prosecution could not have started investigations during defence hearing. Had the accused disclosed his defence prior to the said defence hearing, the prosecution would have investigated it.

40. In the end, I find and hold that the Prosecution has proved all the elements of the offence of murder against the accused beyond reasonable doubt.

41. Accordingly, I find the accused herein Evans Mukhwana Nyongesa guilty of the offence of murder as charged contrary to Section 203 as read with section 204 of the Penal Code. I convict him accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024**

**D K KEMEI**

**JUDGE.**

In the presence of:-

Evans Mukhwana Nyongesa..... Accused

M/s Wakoli for Onchangi ..... for Accused

M/s Kibeti.....for Prosecution

Kizito/Ogendo..... Court Assistant

