



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. 28 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MATHAYO LUKAVILO SIFUNA.....ACCUSED**

**RULING**

1. The accused is facing a charge of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 27<sup>th</sup> April, 2016 at Shikutse Sub-location in Lukume Location in Kakamega North Sub-county he murdered Francis Okonga Yeswa (herein referred as the deceased).
2. The prosecution case is that the accused is a son to the deceased. The accused and the deceased were living in the same homestead. That on the material day the deceased and the accused were at home. Other family members who were at home were the wife to the deceased PW1 (who is a step-mother to the accused), the accused's step-brother Peter Okonga PW2 and the accused's step-sister Janet Nabuyi PW8.
3. That the accused took a jembe and started to plant flowers on a portion of land outside his father's homestead. His father told him to stop working on that portion of the land as he had shown him his portion of the land elsewhere on the farm. The accused did not heed. The two started to quarrel.
4. That the deceased took an axe and wanted to attack the accused with it. His wife PW1 snatched the axe from him. She went to keep it in the house. The accused was by then armed with a panga and a jembe. He cut the deceased with the jembe on the head. The jembe stuck on the head. The incident was witnessed by PW1, PW2, PW5 and PW8. Haron Mulunda PW6 who had been passing by and was attracted by the quarrel into the homestead of the deceased also witnessed the incident. The accused disappeared after assaulting the deceased.
5. The deceased was taken to Kakamega County Referral Hospital. He was admitted. He died on the following day.
6. On the 28/4/2016, the accused was arrested by the administration policemen from Lukume AP Post in the company of the area Assistant Chief PW4. He was taken to the Chief's office. The Assistant Chief PW4 then went to the homestead of the accused. He found a jembe near where the incident had taken place. He took it to the Chief's office.
7. PC Kiplagat PW9 of Kabras Police Station received the report of the killing. He went to Kakamega Referral Hospital where he found the body of the deceased. He then went to Lukume AP Post and re-arrested the accused from the administration policemen. The Assistant Chief PW4 gave him the jembe found at the homestead of the deceased. The accused was taken to Malaba Police Station. On the 5/5/16,

Dr. Muchana PW7 conducted a post-mortem on the body. He found it with a deep penetrating cut wound on top of the scalp with a fracture of the skull. He formed the opinion that the cause of death was due to raised pressure in the brain secondary to a cut wound.

8. The case was initially heard by Justice Sitati who heard the evidence of PW1 – 8. After she went on transfer I took over the matter and heard the evidence of PW9, the investigating officer. At the close of the prosecution case I made a finding that the accused had a case to answer and placed him to his defence. Upon the court explaining the provisions of section 211(1) of the Criminal Procedure Code, the accused opted to remain silent and offered no defence.

9. It was the evidence of the deceased's wife PW1 that she was picking vegetables in the garden when she heard shouts at home. She went there and found the accused and deceased quarrelling. The accused who had a jembe and a panga was planting flowers. His father was telling him not to plant flowers there as that was not his allotted portion of the shamba. The deceased moved closer to the accused. The accused pushed him. The deceased fell down. He got hold of an axe which was nearby. She, PW1, grabbed the axe from the deceased. She took it to the house. When she came out of the house she found the accused having cut his father with a jembe on the head. The jembe was stuck on the head. The accused tried to pull it out but it did not come out. He ran away with his panga.

10. The deceased's daughter PW8 testified that she was inside her house when she heard the accused and the deceased quarrelling outside. She came out. She appealed to the accused to stop the quarrel. He did not listen. The accused abused the deceased. The deceased took an axe with the intention of cutting the accused. Her mother PW1 took the axe from the deceased. The accused was armed with a jembe and a panga. She tried to take the jembe from him. The accused pushed her. Both of them fell down. The accused rose up and went to where the deceased was and cut him with the jembe on the head. He tried to pull out the jembe but it stuck. He ran away with the panga into a sugar plantation.

11. The accused's step brother PW2 testified that he was inside the house when he heard a quarrel outside. He went out of the house and found the accused and the deceased quarrelling. His father was telling the deceased not to plant flowers at the place he was planting. That the accused lifted up a jembe and wanted to cut his sister Janet (PW8). Janet pushed him and he fell down. When he got up he went straight and cut the deceased with the jembe on the head. The accused tried to remove the jembe but it stuck. He ran away with a panga into a sugar plantation.

12. PW6 who is a boda boda operator testified that he was passing on the road outside the home of the deceased when he heard an altercation between the accused and the deceased. He entered into the homestead. He stood a distance away. The deceased asked the accused why he was trespassing on other people's land when he, the deceased, had shown him his portion of the land. The accused was armed with a jembe and a panga. He cut the deceased on the head. The accused ran away into a sugar plantation.

13. PW3 testified that he was attending a funeral near the home of the deceased when he received a report that the deceased had been injured. He went to the home of the deceased and found him with a cut on the head. He was taken to hospital.

14. The Assistant Chief PW4 testified that he received a report that the accused had seriously injured his father. He went to the deceased's home. He found the deceased lying outside the house of the accused. He was bleeding profusely from the head. They took him to hospital. On the following day he received a report that the deceased had died. He went and arrested the accused at Lukume Market with the assistance of administration policemen. They took him to Lukume AP Camp. He went to the home of the deceased where he retrieved the jembe the accused had used to cut the deceased with. He handed it over to the police.

15. PW5 is the person who identified the body of the deceased to the doctor who performed the postmortem.

## Analysis and Determination

16. The offence of murder is defined as follows in section 203 of the Penal Code:-

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

17. This definition gives rise to four ingredients of the offence which the prosecution has prove beyond reasonable doubt. These are:

- a) The fact of the death of the deceased.
- b) The cause of such death.
- c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person,
- d) Proof that said unlawful act or omission was committed with malice aforethought – See **Anthony Ndegwa Ngari –Vs- Republic [2014] eKLR.**

18. The death of the deceased was proved by the doctor PW7 who confirmed that the body had a deep penetrating cut wound on top of the scalp with a fracture of the skull. The doctor formed the opinion that the cause of death was due to raised pressure in the brain secondary to a cut wound. I have no reason to differ with the opinion of the said doctor. There is then no doubt as to the fact of death of the deceased and the cause of his death.

19. The accused’s step-mother PW1, his step-brother PW2, step-sister PW8 and a passer-by PW6 all testified that it is the accused who cut the deceased on the head with a jembe. PW2, PW6 and PW8 witnessed the accused inflicting the injury. PW1 came out of her house and found the accused having cut the deceased. The evidence of the four witnesses was not controverted. The doctor PW7 confirmed that the deceased died as a result of a cut wound on the head. The prosecution thereby proved that the accused is the one who committed the act which caused the death of the deceased.

20. The accused inflicted the injury on the deceased over a quarrel over the deceased’s land. The act of the accused inflicting the injury on the deceased was unlawful and without excuse.

21. Section 206 of the Penal Code provides that malice aforethought is deemed to be established when any of the following circumstances are proved by evidence adduced against an accused person:-

- 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 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.*

22. In **Republic V Silas Magongo Onzere Alias Fredrick Namema [2017] eKLR** Nyakundi J. considered the issue of malice aforethought and held that:-

*“The state through the prosecution must establish facts that are consistent with existence of malice*

*aforethought on the part of the accused. This leads to the question when can a court infer malice aforethought in the crime of murder?*

*The Eastern Court of Appeal favoured this approach in the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63. The court held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:*

- (1) The nature of the weapon used.*
- (2) The manner in which it was used.*
- (3) The part of the body targeted.*
- (4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.*
- (5) The conduct of the accused before, during and after the incident.*

*I am satisfied that the Tubere test case continue to be the guide even in the latest cases in interpreting the circumstances and definition of malice aforethought under section 206 of the Penal Code i.e. George Ngotho Mutiso v Republic [2010] eKLR, Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990, Karani & 3 Others v Republic [1991] KLR 622.”*

23. The Court of Appeal in **Daniel Muthee Vs Republic Criminal Appeal No. 218 of 2005 (UR)** cited in the case of **Republic Vs Lawrence Mukaria & Another [2014] eKLR** considered what constitutes malice aforethought and held that malice aforethought was established where the appellant cut the deceased with a sharp object on the head. Said the court:-

*“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”*

24. The said court in **Joseph Kimani Njau V Republic [2014] EKLR** also considered what constitutes malice aforethought and held that:-

*In the case of Nzuki – vs- Republic, (1993) KLR 171, this Court stated that malice aforethought is a term of art and emphasized that:*

*“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 ..... In the case of Isaak Kimanthi Kanuachobi – vs- Republic -(Nyeri) Criminal Appeal No. 96 of 2007 (ur), this Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal Code:-*

*“There is express, implied and constructive malice. Express malice is proved when it is shown that*

*an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008).*

25. In the instant case the accused used a jembe to inflict a very serious injury on the deceased that led to his death. The injury was inflicted on the head. The blow was so heavy that the jembe sunk deep into the deceased's head that the accused was unable to pull it out. It is evident from the force of the blow that the accused intended to cause the deceased grievous harm. Malice aforethought is thereby to be implied. The prosecution has proved that the accused killed the deceased with malice aforethought.

26. In the foregoing, the prosecution has proved all the ingredients of the offence of murder against the accused person. The charge has been proved beyond all reasonable doubt. I find the accused guilty of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.

**Delivered, dated and signed in open court at Kakamega this 16<sup>th</sup> day of May, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Munyendo holding brief for Miss Wilunda for accused

Mr. Ng'etich for State

Accused - present

Court Assistant - George