



**Republic v Mwachizia & another (Criminal Case 31 of 2014)
[2019] KEHC 10899 (KLR) (4 December 2019) (Judgment)**

Neutral citation: [2019] KEHC 10899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 31 OF 2014
DO CHEPKWONY, J
DECEMBER 4, 2019**

BETWEEN

REPUBLIC PROSECUTION

AND

HUSSEIN MWERO MWACHIZIA 1ST ACCUSED

DZOMBO JABU MWERO 2ND ACCUSED

JUDGMENT

1. The accused persons, Hussein Mwero Mwachizia and Dzombo Jabu Mwero are charged with Murder contrary to section 203 as read with section 204 of the [Penal Code](#).

The particulars of the offence are that:

“On the night of 29th day June, 2014 at Ngalani Village, Mwereni sub-location, Mwereni Location in Msabweni District within Kwale County, the accused persons jointly with others not before court murdered Christine Punga Wangoni”.

2. The accused person was first arraigned in court on 4th August, 2014, whereby plea-taking was deferred until such time that the accused person will have had his mental capacity established by a Psychiatrist and assigned counsel by the Deputy Registrar of this court. The charge and information were read out to the accused person and he pleaded “Not Guilty”, to the offence of murder on 8th September, 2014.
3. The trial commenced on 12th February, 2015 with the prosecution calling nine (9) witnesses. On being placed on defence, the accused persons opted to give sworn statements in defence and called two witnesses.
4. In brief, the prosecution’s evidence was that on 29th June, 2014, the family of Mwero Mwachizi Mwero, the 1st accused person herein and that of Chrispine Punga Wangoni (the deceased herein) had a meeting



with regard to a land boundary dispute at about 9.30am. It was stated that on the deceased's side, there was Mwachupa Wangoni, Dena Mrenje, Nyange Wangoni, Wangoni Ntembe and Joseph Kinge, while on the accused person's side were Mwero Sombo, Mwadeni, Jumbero and others. That in the course of the meeting, the accused person asked that they go for an oathing ceremony. However, the 1st accused person and his brother Jumbero rose up and objected to this while saying that they were not willing to go for oathing but they would use a *panga* to resolve the issue. As a result of this, the meeting could not go on and since there was no security, it was disbursed.

5. It was the prosecution's evidence that the deceased and other elders went to Mwembeni at about 2.30pm. But by the following morning, the deceased had not returned home, only to be found having been murdered and his body thrown into river Ramisi.
6. The matter was reported to the police station and the police in the course of investigations, the police retrieved the deceased's body from the river and escorted it to Msambweni Hospital mortuary where a post mortem examination was conducted. But before that, the scene and body were photographed.
7. It was alleged by PW9, that the accused persons were suspected of having killed the deceased and were arrested on 1st August, 2014 as they were trying to escape. They were searched and found with a *panga* and hammer. They were charged with the offence herein after investigations were complete.
8. The accused persons were placed on defence. They each opted to give sworn statements in defence each and called no witnesses.
9. The 1st accused person, Hussein Mwero Mwachizi gave evidence that there was a land dispute involving the deceased, Chrispine Punga Wangoni and Mwero Mwachizi Mwero, his cousin at his home in Mgalani Village of Mwereni area in Kwale. He told this court that in this land dispute, the deceased was representing no one while Mwero Mwachizi was representing the Mwero family. The 1st accused person went on to state that on 29th June, 2014, there was a meeting where the boundaries were to be identified on the land in dispute. He represented the Mwachizi family at the meeting which was held on his land at Mgalani Village with many people in attendance. The 1st accused person also stated that he had one Mwavandu Nyae as a witness while the deceased had Wangoni Kidunguli and his son Joseph Mwero Punga as witnesses. He also said that the meeting was presided over by the Assistant to the Ward Administrator. The 1st accused told court that the purpose of the meeting could not be fulfilled as the deceased refused to have the boundaries identified and demanded for oath-taking. The meeting was then called off and he went back to his home. According to the 1st accused person, he went to harvest maize from his farm at Mamba, where he stayed with a neighbour for nine (9) days. He identified his neighbour as David Kikate. He returned home after nine (9) days to find that Punga, the deceased had been murdered.
10. The 1st accused person denied issuing threats nor saying that 'pangas would move'. He said they did not discuss anything and the meeting was called off. He denied having been involved in the murder of the deceased in this case and said that he was only implicated in the matter.

When cross-examined by the prosecution, the 1st accused person reiterated that no meeting was held and that the minutes produced herein as exhibit are a lie. He said that he stayed at Mamba for eight (8) days and none else saw him there.

11. The 2nd accused person, Dzombo Jabu told court that on 28th June, 2014, he was at work at Ukunda. He however, went on to tell court that in 2012, he had disagreed with Chrispine, the deceased who had claimed that he was having an affair with his wife, Joyce. They fought and the deceased had him charged in Kwale Law Courts in three cases being Cr. Case No.1362 of 2012, Cr. Case No.389 of 2012 and Cr. Case No.661 of 2013. A meeting was convened for them to be reconciled by their parents and he was



fined Kshs.21,000/= at the Chief's office, which he paid on condition that on the date the cases would be coming up for hearing, the deceased would withdraw the same. The 2nd accused person was not able to find the deceased until his mother told him to go to Hussein Mwero Mwachizi's home where there was a meeting. The 2nd accused proceeded to the home of Hussein. He wanted to give Joseph fare so he could attend court on the hearing date. He had called the said Joseph on phone and explained why he was looking for him. He gave Joseph fare, he then heard Ndzera Chipi ask

Hussein Mwero if he was ready for the meeting and Mwero indicated he was not. She also asked Chrispine if he was ready for the meeting, and he indicated that he wanted them to go for oath-taking. The meeting was then called off.

12. According to the 2nd accused person, he never heard anyone threaten another. He denied threatening anyone. He also denied saying that '*panga zitatembea*'. He also said that after giving the deceased Kshs.2000/= as fare to court, he went back to Ukunda, where he was residing. As for the court case, the 2nd accused person said he went to court where he met the deceased and he indicated to him that he was not going to withdraw the cases since his father had been murdered and that he was going to add more cases. He was then arrested and a hammer likely to be used as an exhibit recovered.
13. When cross-examined, the 2nd accused person told court that he had no idea that there would be a meeting involving a land dispute. He did not deny that he was present at the meeting.
14. DW3 - David Kikata, testified that on 29th June, 2014, the 1st accused person, who is called Mwero went to his home at 5.00pm and told him that he had gone there to harvest maize on his farm. They then had supper and he went to sleep in his house. He said that the 1st accused person stayed at Mamba Village for about a week and left with the food he had gone to collect for the family.
15. DW4, Dzombo Ndegwa Mwero told court that he knew the accused persons in the dock and that on 29th June, 2014 he was at his place of work at Ukunda and then left for his house at Mwembeni to attend a meeting. He said that at the meeting, he found Dzombo Jadu, the 2nd accused person herein. DW4 testified that meeting was about a dispute over a piece of land between the 1st accused person, Hussein Mwero and Chrispine Punga, the deceased and it was presided over by the Assistant Ward Administrator from Mwangulu. DW1 said that the meeting did not proceed and it had to be disrupted because the deceased, Chrispine was insisting on them going for an oath-taking ceremony. The parties were not reconciled and they were all dispersed. Counsel for the accused persons, Mr. Gichana filed written submissions on 28th October, 2019, where he acknowledged that the fact of the deceased's death and cause of it were not in dispute. He also submitted that there is no direct evidence as to who caused the deceased's death and that all the evidence that was adduced by the prosecution was purely circumstantial.
16. The court in the case of *Antony Ndegwa Ngari v Republic* [2014]eKLR, provided three elements/ingredients of the offence of murder which must be proved to secure a conviction against the said offence. These three elements/ingredients are listed as followed:-
 - a. Death of the deceased occurred and the cause;
 - b. That the accused committed the unlawful act which caused the death of the deceased; and,
 - c. That the accused had malice aforethought.
17. "Malice aforethought" is defined under section 206 of the *Penal Code* as:-

"... shall be deemed to be established by evidence proving anyone or more of the following circumstances:-



- a. An intention to cause 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 persons, 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."
18. On the issue of the deceased's death, it was the evidence of the prosecution's witnesses that after the meeting to resolve the land dispute between the family of the deceased and that of the 1st accused person aborted on 29th June, 2014 and people dispersed, the deceased was found murdered and his body recovered from the river bed of river Ramisi the following day. The accused's body was taken to the morgue where a post mortem examination was conducted by PW7 who concluded that cause of his death was severe head injuries as a result of assault by sharp, heavy weapons. It is note-worthy that the deceased's death and its cause has not been disputed or rebutted by evidence adduced by the defence.
19. As for whether the unlawful death of the deceased was caused by the accused person, it is in evidence that the accused persons were arrested and charged for that.
20. According to the prosecution's evidence, at the meeting to resolve the land dispute between the deceased and 1st accused person's family, a proposal by the deceased to have the parties go for oath-taking was rejected by the 1st accused person who was alleged to have said that the dispute would not be resolved in any other way but by use of a panga. Infact it was said by PW1 and PW2 that the 1st accused person specifically said in Kiswahili language that:-
- "Panga litatembea"* (translated into English language to mean "a *panga* will move")
21. The witness said that the 2nd accused person who was also in attendance at the meeting supported the 1st accused person by saying that this dispute would have been resolved a long time ago and that that was the only way to go. And the following day, the deceased was found dead and thrown into river Ramisi, having been cut severally on the head.
22. Due to the utterances of threat at the aborted meeting on 29th June, 2014, the two accused persons were arrested after traps were set for them. It was alleged that the two were trying to escape but were intercepted on the road from Ndabanye to Lungalunga. Although as submitted by the accused persons' counsel that no-one saw the person(s) who caused the death of the deceased, the evidence of PW1, PW2, PW3 and PW4 clearly indicate that the accused persons had vowed that the land dispute would only be resolved by use of a *panga* and indeed the following day, the deceased was found having died from cut wounds, which according to PW7 (doctor) were caused by sharp and heavy weapon.



23. In the case of *Neema Mwandoro v Republic* [2008]eKLR, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan*[1928] 21, Cr. App. 220, where the court stated that:-
- “Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proportion with accuracy of mathematics”.
24. However, when relying on circumstantial evidence, the court is called upon to exercise caution, while recognizing the dangers of relying on circumstantial evidence without exercising its caution, the court in the case of *Teper v R*[1952] AC at page 489, had this to say:-
- “Circumstantial evidence must always be narrowly examined; if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be such that there are no other co-existing circumstances which would weaken or destroy the influence.”
25. The question that arises from the evidence on record, is whether it was a coincident that after the said utterances by the accused persons, the deceased was killed and in the manner that was stated by them. It is note-worthy that the accused persons did not rebut the evidence that they made the utterances that are alleged to have been made by them at the aborted meeting. The accused person have also not disputed that there was a land dispute which was meant to be discussed at a meeting that was held on 29th June, 2014 but the same did not go on.
26. In their defence, the accused persons denied threatening the deceased with death. The 1st accused person stated that after the meeting he left for Mamba where he has a farm and was staying with a neighbour by the name David Kikata (herein referred to as DW3). He said that he returned home after 9 days only to find the deceased had died.
27. The 2nd accused person on the other hand, told court that he attended the meeting where he had gone to give one Joseph fare so he could attend court at Kwale and withdraw the cases against him, he went back to his place of work at Ukunda after it aborted. He told court that he was arrested on 1st August, 2014 at Mwangulu where he wanted to board a vehicle.
28. It was the evidence of the Arresting Officer, PW9 that he and his colleagues Fred Mungare and PC Sulusu arrested the accused persons as they tried to escape on a motor cycle on the road from Ndabaya to Lungalunga. It is worth-noting that this evidence was not rebutted by either the accused persons as each one of them tried to give an impression that they were arrested separately.
29. The 1st accused person called a witness to confirm that he had stayed with him at Mamba where he had gone to harvest maize but it was noted by this court that in his evidence, the witness struggled to remember the name of the 1st accused person. Also, the 1st accused said that he stayed with DW3 for nine (9) days but DW3 told court that the accused person stayed on his farm where he has a house for one (1) week, except for having supper at his house on the 29th June, 2014 and breakfast the following day.
30. As for the 2nd accused person, his witness Dzombo Ndegwa Mwero only gave an account of how he had been with him at the meeting of 29th June, 2014 and they parted ways at Ukunda when they returned there in the evening. This clearly meant that he could not have been in a position to tell where the 2nd accused person went or did on the night of the incident.



31. There was evidence by PW3 Dena Mriphe that he had been with the deceased at Mwereni canteen on the alleged day and they parted as each left for their respective homes. He said that the deceased called him at 7.00pm to say that he was in trouble and he decided to follow him. He then heard noise in the forest from people he could not see. He saw he identified the voice of Mwero who was saying

“lets carry this thing! It is finished”.

That he then also heard Dzombo say

“lets take it away”.

32. PW3 also identified a hammer that was found near the scene as belonging to the 1st accused person who he said he had lived with and so he knew the hammer. However, this evidence was never followed up by the Investigating Officer. But this does not negate the inference of guilt of the accused person as brought out by the circumstantial evidence of their utterances by the prosecution’s witnesses prior to the death of the deceased.

33. Having weighed all these evidence and circumstances surrounding the death of the deceased, this court is satisfied that the co-existing circumstances have not negated the inference of guilt of the accused persons.

34. With regard to the issue of whether the prosecution has proved malice aforethought on the part of the accused persons, it is not denied that there was a land dispute between the family of the 1st accused person and that of the deceased, with the 2nd accused person being a member of the 1st accused person’s family. It is also evident and not disputed that the 2nd accused person also had a number of cases at Kwale Law Courts which had been instituted against him by the deceased and his son, Joseph. So clearly, the motive of why they would want the deceased dead was there.

35. The deceased is alleged to have died from the cut wounds that were inflicted on his head. In applying the guiding principles on malice aforethought from the provisions of Section 206 of the [Penal Code](#) and case law available, this court finds that the deceased was cut on the head with a sharp instrument, which was the cause of his death, and this only goes on to show the accused knew that the act of cutting the deceased on the head with a sharp object would either cause him death or greivous harm. They even went ahead and threw his body in river Ramisi with his hand tied to a heavy stone so as to ensure the body was completely immersed in water. By this action, it is clear that they wanted him completely dead and could not take any chances of him being rescued or surviving the injuries.

36. In conclusion, this court is satisfied that the prosecution has proved their case against the accused persons for the offence of Murder and the two are therefore guilty of the Murder of the deceased. The court then proceeds to convict them accordingly.

Orders shall issue accordingly.

**JUDGMENT DELIVERED IN OPEN COURT, DATED AND SIGNED AT MOMBASA THIS
4TH DAY OF DECEMBER 2019.**

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ocholla, counsel for the State



Mr. Muyalle counsel holding brief for Mr. Gichana counsel for accused.

Accused - present

Court Assistant - Mwanaidi

