



**Republic v Nzyimi (Criminal Case 20 of 2020)
[2025] KEHC 13456 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 20 OF 2020
TM MATHEKA, J
SEPTEMBER 26, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SIMON MUTUKU NZYIMI ACCUSED

JUDGMENT

1. The accused person is charged with murder contrary to section 203 as read with section 204 of the penal code. the particulars are that on 20th June 2020 at Ikalyoni village Ikalyoni sublocation in Kilungu subcounty within Makueni County he murdered Benson Nzyimi Tom.
2. The Prosecution called seven witnesses to prove their case and the accused testified and gave a sworn statement of defence.
3. The case for the prosecution is that the accused person is the second born son of the deceased and PW5 Juliet Nthambi Tom.
4. The Accused Person was a student at the Multimedia University but dropped out and went to live with his father after the father retired . At the material time his mother was working in Nairobi and living with their 3rd born .Their first born as already married.
5. The deceased and the accused were living in the same homestead as PW1, a brother of the deceased. On the 20TH June 2020 PW1 Joel Kaumbulu Nzyimi was with a deceased his brother and at around 4:30 PM they parted ways at around 5:00 PM.
6. The next day he went to the deceased's home around 8:30 PM to give him the church program. He did not find him so he put the church program under his door. The next day which was a Monday he went to the deceased's home and found the son, the accused who told him that the deceased had left on Sunday morning and had not gone back home. He did not ask for details. On Tuesday he went back



- and asked the accused whether the deceased had come back. He told him that he had not come back and that he had not told him where he was he had gone to. On Wednesday PW1 asked the accused and the accused told him that the deceased had not come back .
7. It is on this date that PW1 rang PW5 who was in Nairobi and asked her whether her husband had gone to visit him. She told him that he was not in Nairobi and told him to enter the house and check whether her husband was in the house . He told her that the only way could do that is if he called the chief . He met the chief around 4:00 PM who was PW2. The chief told him that he had been rang by PW5 to check for the husband. They proceeded to the house and they found the accused. The chief asked him the whereabouts of his father and the accused said he did not know.
 8. They entered the house and found that the bedroom was locked. The house had more than four rooms including the sitting room. The deceased bedroom had external padlocks which was locked. The chief proposed that he would climb on a ladder to peep into the room as there was no ceiling, they went and looked for a ladder and a son of the PW1's cousin said he had noticed some flies lingering nearby. They got a ladder and when the chief climbed and peeped into the room and said nothing , James a son of PW1's s cousin told the chief that there was flies nearby and the chief told him to peep. The chief then asked the accused person for the store keys .
 9. He gave out the keys without a problem and in the store they found the deceased's body. The chief told PW1 the brother had been killed with a mattock . The chief then called the police and the body was taken to the mortuary . The PW1 was called to the station where he recorded the statement . He said he heard the accused tell the police that he was the one who had killed his father. He later witnessed the postmortem on the 27th of June 2020 at Kilungu Hospital and identified the body for postmortem .He noticed that the deceased had an injury at the back of the head.
 10. He told the court that the accused had been taken to a rehabilitation centre because he was using 'substances' He said he did not know the reason why the accused had killed his father.
 11. PW3 and PW4 testified how they assisted PW 1 and the chief PW2 to search for the deceased.
 12. PW5 the wife to the deceased and the mother to the accused testified that when PW1 called her to find out where her husband was, she called the chief to check. She learnt that the body of her husband was found in their house. She told the court that the accused had a mental health issue and gave details of his treatment over the years. She said the accused did not know what he was doing.
 13. PW6 No 83125 PC Daniel Mwingi the I.O testified how the police received a call to go to a murder scene at Kola. They met the Chief PW2 who led them to the scene and they found the deceased in a room used as a store with a mattock at the back at the back at the head.
 14. That the accused told the police that they were not on good terms with the father because he had refused to give him money and had confiscated his phone. That he was acting in self defence.
 15. PW7 produced the postmortem report and confirmed that the cause of death was due to severe head injury. There was deep cut wound on the upper back left side of the head. That the injury was so deep that he bled into the chest .
 16. At the close of the case the trial Judge Hon Dulu J put the accused on the defence.
 17. I heard the defence.
 18. The accused made a sworn statement. At first, he said that the investigating officer told him that he had killed his father. He also testified about his mental illness. On cross examination he told the court that he had a history of substance abuse of alcohol and cannabis sativa.



19. However, he told the court that on 20th June 2020 he found his father in a small house outside the home sated . Beside him there was an axe. He said he took it and struck him on the head and the neck, saying that he had come to the conclusion that his father was pursuing him for murder. He said his father had withdrawn his privileges, electricity bills, pocket money . He said his father was coming at him the wrong way.
20. I have carefully considered the evidence before me and the only issue is whether the prosecution has proved the charge against the accused beyond a reasonable doubt. I must also consider whether the accused person falls within the exemption provided for by s. 12 of the Penal Code.
21. It is the duty of the prosecution to establish each of the ingredients of murder as set out by s. 203 & 206 of the Penal Code. In Republic vs Andrew Omwenga [2009] eKLR the court held that
- “For the offence of murder to be proved, the prosecution must prove beyond reasonable doubt the following three ingredients:
- (i) The death of the deceased and the cause of that death,
 - (ii) That the accused committed the unlawful act or omission which caused the death, and
 - (iii) That the accused had malice aforethought.”
22. Death of the deceased and the cause of that death, the perpetrator
23. The accused was the one who was left with his father at home. He had the keys to the room where his father lay dead for three days . he lied severally to his uncle that he did not know where his father was. He later admitted to having struck him with the axe because his father had withdrawn his privileges, stopped giving him money and confiscated his phone.

Malice aforethought

24. The accused is said to have suffered mental illness. His mother said he did not know what he was doing but it is clear that the accused was aware of what he did and why. He was angry with his father for withdrawing his privileges , took an axe and struck him. He also concealed the body and lied about his father’s whereabouts. The penal Code provides that every person is presumed to be of sound mind until the contrary is proved . This is at s. 11. At s. 12 it states :
- A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.
25. There is evidence that the accused was in 2018 was admitted at Fountain of Hope Treatment Centre for three months . he was diagnosed with schizoaffective mental disorder. He was treated, discharged on treatment and directed to resume his education. He was also treated at Avenue Hospital. The Psychiatrist at Mathari Teaching and referral hospital did not find any record of treatment there and stated as such .
26. Having reviewed the evidence it is my view that although the accused had a disease of the mind the actions and the reason for the action demonstrate that at that time, he knew what he was doing and



why. He had the presence of mind to think about what the father was denying him, to kill him and hide his body, to lie about his whereabouts.

27. Seeking to answer the question whether there was malice aforethought the learned Judge in *Republic v Eregai* [2025] KEHC 731 (KLR) stated

Furthermore malice aforethought has been considered in several cases. The Court of Appeal in *Odio v Republic* [2024] KECA 1544 (KLR) stated that: -“

20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In *Nzuki vs. Republic* [1993] eKLR, this Court defined malice aforethought as: ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237.”

39. Furthermore, in the case of; *Tubere s/o Ochen* {1945} 12 EACA 63 the court (COA?) stated that in considering whether there was malice aforethought, the court will look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also *Dafasi-Magayi v Uganda* {1965} 1 EA 667). (emphasis added)

28. The accused was upset with his father. He picked an axe, struck him on the head and the neck, the impact caused bleeding in the chest.
29. This in my view established the fact of malice aforethought on the part of the accused person.
30. In the circumstances I find that the charge is proved beyond a reasonable doubt.
31. I find the accused person guilty of murder c/s 203 as read with s. 204 of the Penal code and convict him accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH SEPTEMBER 2025

MUMBUA T MATHEKA

JUDGE



Accused present

Ms Ongonga for accused

Mr Kazungu for State

CA Chrispol

