



REPUBLIC OF KENYA



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**Republic v Isako (Criminal Case 6 of 2020)
[2025] KEHC 1249 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL CASE 6 OF 2020**

JN NJAGI, J

JANUARY 31, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

GODANA ADANO ISAKO ACCUSED

JUDGMENT

1. The accused herein 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 26th May 2020 at Kalagesa area in Dukana in North Horr sub-county within Marsabit County he murdered one Guyo Bonaya sora (herein referred to as the deceased).
2. The prosecution called 10 witnesses in the case at the end of which the court found the accused to have a case to answer and placed him to his defence.

Prosecution Case

3. It was the evidence of Guyo Bonaya Kofu PW2 that he was on the night of 26th May 2020 sleeping in the bush in the open at a place where he and other people were looking after their animals. He was in the company of the deceased, the accused and other two people. The place where they were sleeping was surrounded by a shrub fence. He was woken up by the sound of a gun-shot at around 2 am. He then saw the deceased lying dead next to where they were. The accused was seated a few meters away from him. He had a gun. The accused said that he is the one who had killed the deceased after mistaking him for an intruder. One of their colleagues called Galgalo Godana took the gun from the accused. He PW1 and Galgalo Godana went to a nearby manyatta to report the killing. The gun was left with one Guyo Elema. After reporting they went back to the scene of the shooting. Later in the day some people went to the scene and took away the body of the deceased for burial. At 5 pm, one Kobe Haro



- and another called Robe Guyo went to the place and said that they had been sent to collect the gun. He and Galgalo Godana gave it to them. He recorded his statement with the police.
4. The area chief PW3 testified that he received the report of the killing in the morning. He went to the scene. He was told by PW2 and others that the accused is the one who had killed the deceased. He went to a nearby manyatta and found the body of the deceased having been buried. He and other people went to where the accused was near his manyatta and arrested him. They were told that the gun that had been used in the killing had been left at the scene. He sent Godana Haro and Roba Guyo to pick it. They went and brought it. It was handed over to the OCS who was at that time with them. They took the accused to Dukana police station. Later after about a month the DCIO went to him and said that they wanted the body examined. He showed him the grave. The OCS came with a pathologist. The body was exhumed and a post mortem was conducted.
 5. Roba Guyo Kancora PW4 and Godana Haro Bobo PW5 confirmed that the chief PW3 sent them to pick the gun from the scene of the shooting. They said that they were given the gun by Guyo Bonaya PW2 and Galgalo Godana. It had 2 rounds of ammunition. They went and handed it over to the OCS.
 6. It was the evidence of the then OCS, Dukana police station, C.I. Peter Mbuvi PW 9 that he received the report of the killing from the chief PW3 on the evening of 26/5/2020. He was informed that the suspect had been arrested. He travelled to the area and the suspect, the accused was handed over to him. Godana Haro (PW4) handed over to him a Mark 4 rifle serial No. W9460 with 2 live rounds of ammunition. He took the accused to Dukana Police station and placed him in the cells. On the following day he visited the scene of the shooting where he recovered a .303 spent cartridge. He recorded statements of those who were with the deceased during the shooting. He later handed over the firearm and the investigation file to the DCI North Horr. On the 2/7/2020, he took the government pathologist to the grave of the deceased where the body was exhumed and the pathologist conducted a post mortem on the body.
 7. Cpl Nicholas Yego PW8 testified that he was at the material time stationed at North Horr DCI Office. That on 27/5/2020 he was informed of the death of the deceased herein and travelled to Dukana on the following day. He met the OCS who handed over to him a gun said to have been recovered from the suspect, the accused. The accused had been arrested by members of the public and was in custody at the police station. They escorted him to Marsabit. On the 2/7/2020 he, PW8, escorted the government pathologist to the grave of the deceased where the body was exhumed and the pathologist conducted a post mortem.
 8. It was further evidence of PW8 that he took the rifle, the magazine, the 2 rounds of ammunition and the spent cartridge to the ballistics examiner. He later received a report from the ballistics examiner. He charged the accused with the offence of murder. During the hearing in court he produced the Mark 4 rifle, the magazine, the 2 rounds of ammunition and the spent cartridge as exhibits, P.Exh.2, 4, 5 and 6 respectively.
 9. A scenes of crime officer from DCI Headquarters PW7 testified that he attended the grave where the body of the deceased was exhumed on 2/7/2020 and examined by Dr. Johansen Oduor. He took photographs of the body. He was shown the scene of the shooting and took photographs. During the hearing he produced the photographs in court as exhibits, P.Exh. 7(i) - (xlv). He produced his report and accompanying certificate as exhibits, P.Exh. 8(i) and 8(ii) respectively.
 10. A ballistics examiner PW6 testified that the examination of the Mark 4 rifle, the 2 rounds of ammunition, the spent cartridge and the magazine was done by a colleague, CI James Onyango, of the DCI Ballistics Laboratory Nairobi who found the rifle and the rounds of ammunition to be a firearm and ammunition respectively as defined in the [Firearms Act](#). That a microscopic examination of the



fired cartridge showed that it was fired from the Mark 4 rifle, P.Exh. 2. PW6 produced the report in court as exhibit on behalf of CI James Onyango who prepared the report, P.Exh.3(b).

11. The pathologist, Johansen Oduor PW10, testified that on the 2/7/2020 he travelled to Dukana at the grave of the deceased herein where the body of the deceased was exhumed and he conducted a post mortem on it. He found the body in the process of decomposing. It was dressed in a shirt and a T-shirt. The T-shirt had a hole on the front right side of the chest and another hole on the back on the left side on the shirt. Further examination showed a fracture of the left humerus bone at the neck region and another multiple rib fracture on the left side on the front part. The left clavicle bone was fragmented. There was blood in the chest cavity. He opened the body and found the internal organs decomposed. From the examination he formed the opinion that the cause of death was due to chest injuries due to a gun shot. He completed a post mortem report and signed it. During the hearing he produced it in court as exhibit, P.Exh.9.
12. A brother to the deceased, Haro Bonaya Saro PW1 stated that he identified the body of the deceased to the doctor who conducted the post mortem report.

Defence Case

13. When placed to his defence the accused stated in a sworn statement that he was on the material night at the grazing field, 'fora', in the company of 5 other people including Guyo Bonaya PW2. They were sleeping. That at around 3 am he was woken up by gun shots. He inquired from his colleagues as to what was going on and he was told that someone had been killed. He did not know who had been killed. He said that he had no gun. He denied that he is the one who killed the deceased. He denied in cross-examination that he told Guyo PW2 that he is the one who killed the deceased.
14. No submissions were filed in the case.

Analysis and Determination

15. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond all reasonable doubt. Lord Denning in *Miller vs Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say on that standard of proof:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

16. The accused is charged with murder under Sections 203 as read with section 204 of the [*Penal Code*](#) that state as follows:

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

204. Any person who is convicted of murder shall be sentenced to death.”



17. The elements of the offence of murder under sections 203 and 204 of the Penal Code were stated in the case of Republic Versus Andrew Omwenga (2009) eKLR to be as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder 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 the 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”.

18. It is therefore my duty to interrogate the evidence tendered before the court and determine whether the offence of murder has been proved against the accused beyond reasonable doubt.

Death and cause of death of the deceased person

19. The death of the deceased person was witnessed by Guyo Bonaya Kofo PW2 who was with the deceased at the scene where the deceased met his death. It was his evidence that the deceased was shot with a gun. That evidence was corroborated by the pathologist, Dr.Oduor PW 10, who examined the body and ascertained the cause of death as a result of gun-shot wound on the right side of the chest. I have no reason to doubt the findings of the pathologist. His evidence was not challenged. The deceased therefore died as a result of a gun-shot.

Whether the accused committed the unlawful act which caused the death of the deceased

20. The evidence that tended to connect the accused with the killing of the deceased is, first the evidence of Guyo Bonaya Kofo PW2 that the accused said immediately after the shooting that he is the one who had shot and killed the deceased after mistaking him for an intruder. This amounts to a confession of killing the deceased. The accused in his defence however denied confessing to PW2 that he is the one who had killed the deceased. The question is whether the confession is admissible.

21. A confession is defined in S.25 of the Evidence Act in the following terms:-

“A confession comprises words or conduct, or a combination of words and conduct from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

22. The law is that evidence of confession to a private citizen is admissible in a criminal trial and can be considered against an accused person. In the case of Sango & Another –v- Republic C.A. Malindi Cr. Appeal No. 1/2013, the Court of Appeal considered the issue and stated that:

... subject to the normal safeguards a confession to a private citizen is admissible and maybe proved in evidence against the accused person.

23. The court has however to satisfy itself that the confession was made voluntarily and that it was true. In the above cited Court of Appeal decision, the court stated that:



Earlier, in *Parvin Singh Dhalay V. Republic*, supra, the court accepted on principle that a confession can be made to a private citizen and noted that in that appeal the confession in question was made to persons who were not in authority. It concluded thus:

“But a confession to criminality remains a confession whether it be made to a person in authority or to a private person and once the confession is repudiated or retracted or both repudiated and retracted, the confession requires corroboration unless the court is, for cogent and solid reasons, satisfied that the confession, though not corroborated, cannot be but true.” (Emphasis added).

24. The manner of treating confessions was stated in the case of *Kanini Muli v Republic* [2014] eKLR where the Court of Appeal held that as follows:

In *Wambunya V. Republic* [1993] KLR 133 this Court stated that a trial court should accept any confession, which has been repudiated or retracted with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. (See also *Tuwamoi V. Uganda* [1976] EA 91 and *Thiongo V. Republic* [2004] 2 KLR 38).

25. In this case I am satisfied that the accused confessed to Guyo Kofo PW2 that he is the one who had killed the deceased after he had mistaken him for an enemy. The accused had not been prompted by anybody when he uttered the said words. The accused was at the time carrying a gun and the deceased lay there dead. According to PW2 none of the other people he was sleeping with had a gun except the accused. PW2 said that he had no grudge against the accused. I find that the accused voluntarily confessed to PW2 of having killed the deceased. The confession can only have been true.

26. It was the evidence of Guyo Kofo PW2 that after the shooting one Galgalo Godana had taken the gun from the accused. That later in the day he and the said Galgalo Godana handed over the gun to Roba Guyo (PW4) and Godana Haro PW5. The two confirmed that they took the gun from the said people. In court Guyo Kofo PW2 identified the gun P.Exh.2 as the one they took from the accused and handed it over to the other two. PW4 and PW5 identified the gun as the one they were given by PW2 and handed over to the police.

27. From the evidence adduced, I have no doubt that the accused was the owner of the Mark IV rifle, P.Exh.2. He was found with it immediately after the shooting and it was confiscated by a colleague of PW2. I find that the rifle is the one the accused used to kill the deceased.

28. The other evidence tending to connect the accused with the killing of the deceased is the evidence of CI Mbuvi PW9 that he collected a spent cartridge at the scene of the killing. The cartridge together with the rifle recovered from the accused were sent to the ballistics laboratory, Nairobi where they were examined by a ballistics examiner, IP James Onyango, who found the rifle and the 2 rounds of ammunition to be a firearm and rounds of ammunition respectively as defined in the *firearms Act*. The officer did a further microscopic examination on the spent cartridge, P.Exh.6, that revealed that it bore markings produced by a firearm discharge. The officer did a further microscopic examination of the cartridge, P.Exh.6, in conjunction with test cartridge cases fired from the Mark IV S/N W9640 rifle and it revealed that the spent cartridge, P.Exh.6, was fired from the said Mark IV rifle. The officer noted sufficient matching firing pin indentation markings, ejector markings and breach face markings that formed the basis of his opinion.

29. From the above evidence, there is no doubt that the spent cartridge, P.Exh.6, that was recovered from the scene was fired from the Mark IV rifle recovered from the accused. Arising from the accused's confession to PW2 it is not in doubt that the accused is the one who shot the deceased using the said



rifle that discharged the cartridge recovered from the scene, P.Exh.6. The confession of the accused was corroborated by the evidence of the ballistics examiner that his rifle P.Exh.2 is the one that discharged the cartridge P.Exh. 6. It was thus proved that the accused is the one who killed the deceased. The killing was unlawful.

Whether the accused killed the deceased with malice aforethought

30. The third and most important ingredient for the offence of murder is whether accused killed the deceased with malice aforethought.
31. The offence of murder is defined as the unlawful premeditated killing of one human being by another. The Black's Law Dictionary Tenth Edition Page 1776 states murder to be the killing of a human with malice aforethought.
32. Section 203 of the [Penal Code](#) states: -
Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
33. Malice aforethought is defined in Section 206 of the [Penal Code](#) in the following terms:
 - (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
 - (c) An intent to commit a felony.
 - (d) An intention to facilitate the escape from custody of a person who has committed a felony.
34. In this case the only evidence that indicates the circumstances in which the accused shot the deceased is his confession that he is the one who shot him after he mistook him for an intruder. The evidence is that the deceased was sleeping at the same place with the accused. The deceased seems to have left the place and when he was coming back the accused shot him dead. There was no evidence that the accused inquired from him as to who he was before he shot him dead. This was negligent use of a lethal weapon, a gun.
35. Section 202(1) of the [Penal Code](#) provides as follows:
 - (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
36. Section 205 of the [Penal Code](#) provides that:
Any person who commits the felony of manslaughter is liable to imprisonment for life.
37. In shooting the deceased without first establishing who he was, the accused caused the death of the deceased by unlawful omission. I do not find an element of malice aforethought in the killing of the



deceased. Without proof of malice aforethought, the charge of murder is not proved. In the case of *Roba Galma Wario vs Republic* [2015] eKLR, it was held that;

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

38. The same view was held in *Nzuki vs. Republic* (1993) KLR 171, where the Court in substituting a charge of murder with manslaughter stated that:

In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

39. I find the offence committed in this case to be manslaughter and not murder. I accordingly find the accused guilty of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* and convict him accordingly.

DELIVERED, DATED AND SIGNED GARSEN THIS 31ST DAY OF JANUARY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Halake for Accused

Mr. Kilenyet HB Mr. Otieno for Respondent

Court Assistant – Jarso

