



**Republic v Sulubi & another (Criminal Case 48 of 2017)  
[2025] KEHC 6783 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6783 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 48 OF 2017  
WK MICHENI, J  
APRIL 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**AMANI SULUBI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES BINGO ALIAS SIMPLE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The particulars of the offence are that on 23<sup>rd</sup> September 2017 in Sirini, Junju Location, the accused persons murdered Patrick Madu Nyenyo. The accused persons pleaded not guilty and a plea of not guilty was duly entered for each accused person and a psychiatric report was conducted that concluded that the accused persons were fit to stand trial before the matter proceeded to full hearing.

**Prosecution's Case**

2. PW1 was Edward Madu Nyenyo, the older brother to the deceased persons. It is his testimony that on 23<sup>rd</sup> September 2017 at around 11:00 pm, his brother, Benard Madu, called him stating that the deceased had been murdered at his home. He made arrangements to go to the deceased's home in Sirini. Upon arrival, he stated that he found the deceased on the floor of the house, with a hole in his head with blood and brains oozing out of the injury. He then asked the deceased's wife (Mama Chris), who was present at the time of the murder, about the circumstances that led to the death of his brother.
3. PW1 stated that she responded that the men, whom she was unable to identify as a torch was shone in her eyes, stoned the door of the house to forcefully enter the premises and proceeded to stone the deceased thereafter. She further stated that one used a metal stick to inflict injuries upon the deceased's



head and proceeded to throw it under the bed. PW1 then proceeded to Kijipwa Police Station to record his statement. He stated that he did not know the persons who killed the deceased.

4. Upon cross-examination, PW1 identified the 1<sup>st</sup> accused person as the deceased's son. He said he did not know the 2<sup>nd</sup> accused person. He stated that the 1<sup>st</sup> accused used to quarrel with the deceased about allegations of him being a witch who bewitched the 1<sup>st</sup> accused's mother.
5. PW2 was Chiro Madu Nyenyo, an older brother to the deceased person. It is his testimony that he received a call from "Mama Chris", who told him they were attacked, and their door was broken. That the deceased's wife, who said she saw no less than 4 men, asked the men who they were, and they told her to keep quiet otherwise they would "finish him"; a knife was held at her, and they shone a torch at the deceased who was struck on the head.
6. He further stated that he saw that the deceased and a stone lying on the floor of the bedroom. PW2 stated that he did not know who killed the deceased but avers that the 1<sup>st</sup> accused disagreed with his father, after which the deceased requested him to go resolve the dispute between them, of which the 1<sup>st</sup> accused did not attend. That the deceased told him that the 1<sup>st</sup> accused threatened to kill the deceased prior to the incident.
7. Upon cross-examination, PW2 stated that although he did not inform the police of the threat disclosed to him by the deceased, he was aware that the deceased told Kijipwa Police that he was threatened by the 1<sup>st</sup> accused person.
8. PW3 was Dr. Ruth Nyangi who produced the Postmortem Report of the deceased's body that was conducted by one Dr. Noor Mohamed who was unable to be present as he was on post graduate study leave. She stated that she was a pathologist in Kilifi County Teaching Referral Hospital. According to the report, the body was identified by the deceased's brother, Benson Madu and his father, Johnson Madu on 5<sup>th</sup> October 2017 at Kilifi County Hospital.
9. The Postmortem disclosed that the body contained lacerations on the head region, 2 deep cuts in the occipital area, a deep cut on the left mastoid area and a depressed frontal skull fracture. The Postmortem concluded that the cause of death was severe brain haemorrhage, secondary to head injury.
10. Upon cross-examination, she stated that was authorised to present Postmortem Reports as the in charge of the pathology department at the hospital and that she was familiar with Dr. Noor Mohamed's signature and handwriting.
11. PW4 was Chief Inspector Kiptoo who testified that he was one of the Investigating Officers in Mtwapa. That on 23<sup>rd</sup> September 2017, he was woken up to proceed to Sirini Village in the company of other officers due to a murder. Upon arrival they found the deceased covered in a pool of blood. That, upon inquiry, they were told a group of men attacked the deceased claiming he was a witch. He states that it was known that one of the perpetrators was the son of the deceased, known as Amani Sulubu who, alongside James Bingo, David Keya, Justus, Charles and Rashid had left Maweni at 7:30 pm and arrived in Sirini at around 9pm.
12. That the accused persons were said to have hired 2 motorcycles, being operated by one Fondo Safari and Edison Rimba, which were to wait a distance away from the scene of the murder. That after half an hour from their arrival, the accused persons returned and gave instructions to return to Mtwapa. PW4 states that at 2:00 am on the 23<sup>rd</sup> of November 2017, he carried out arrests for the aforementioned Amani, James, Edison and Fondo. That, in the course of investigations, the 1<sup>st</sup> accused person confessed to killing his father and that Edison and Fondo were motorcycle riders whom they hired. The confession was recorded by Dennis Wekesa, the OCS in Kilifi.



13. During cross-examination, PW4 stated that Edison and Fondo were released once it was established that they were motorcycle operators. That the murder was committed by Amani together with the 1<sup>st</sup> accused person and 3 others.
14. PW5 was Dennis Wekesa, a Senior Superintendent at the time of the incident who testified that he recorded the charge and cautionary statement of the 1<sup>st</sup> accused person. That the accused confessed that he was indirectly involved in the murder of his father as the deceased was thought to have killed 4 of his siblings namely: Shaban, Rama, Lillian and Shuku. That the deceased also intended to kill the 1<sup>st</sup> accused's mother, Rehema. That the deceased was sought after by multiple people. This led the deceased to be taken for oath taking in Kinango on 2<sup>nd</sup> September 2015.\*\*
15. That an angry crowd murdered his uncle and other relative, John Madu; and proceeded to threaten the 1<sup>st</sup> accused person to take them to his father. That he led them to his father's house, where they found that he had escaped to Kijipwa Police Station, after which the family decided that the father was to stop practicing witchcraft. A year later, the 1<sup>st</sup> accused's sister, Furaha fell sick and was taken for what the accused called 'kuhasa' and felt better. Around the same time, Shuku fell sick and died. That they went to a witchdoctor where they were told that the father was responsible for the deaths in the family. The 1<sup>st</sup> accused stated that these events led to the accused planning to kill the deceased on the fateful day where he went into the house, but remained in the living room as the other 4 went into the deceased's bedroom to "finish the work".
16. That the 1<sup>st</sup> accused, in his confession stated that they then returned to Mtwapa where they were arrested. PW5 stated that he followed all the procedures required to legally record a confession, in that he recorded the statement in Swahili and informed the 1<sup>st</sup> accused person of his rights who wished no one would be present as he made the statement. That he then proceeded to inspect and sign the statement.
17. The learned counsel for the accused, Mr. Egunza objected to the adducing of the above confession as it was averred by the 1<sup>st</sup> accused to be made under duress. The Prosecution concurred to this proposition as the document was found to have minimal evidentiary value. The confession was discarded.
18. PW6 was Edison Rimba Saidi, who was a motorcycle operator at the time of the murder. He states that on 23<sup>rd</sup> of September 2017, at 7:30 pm, the Accused persons hired two motorcycles from them where he and Fondo Safari, carried them to Vipingo, where they were instructed to wait for them. They came back half an hour later and told the witness to take them back to Mtwapa after which they were paid and went their separate ways. That he was arrested two days later and told he was a murdered. That he told the police that they transported the Accused Persons to a function and returned them and that they did not know them.
19. PW7 was Benson Madu Nyenyo, a younger brother to the deceased. He testified that on the date of the murder, he was called by his younger brother, Raphael who told him that the deceased was murdered in his home by unknown people. That he arrived at the murder scene at 2:30 am where he saw stones, sticks and metals which were utilised to inflict injuries on him. That upon asking "Mama Chris", she stated that she was hit with a stick on the hand and light slaps on her face and told if she did not "shut up, she would also be killed". That the deceased feared for his life after it was alleged that he was practicing witchcraft and reported death threats to Kijipwa Police Station where he mentioned Amani, Rashid, Justus and Charles.



20. Upon cross-examination, he stated that his brother's wife told him that she was unable to identify who the perpetrators were as they wore jackets and 'mbochori'. That the wife of the deceased did not say she saw the accused during the murder.
21. After the close of the prosecution's case, the court found that the accused persons had a case to answer, and they were placed on their defence. The court explained section 211 of the *Criminal Procedure Code* to the accused persons who opted to give sworn evidence as to their case and no further witnesses were provided.

#### **Defence Case:**

22. DW1 was the 1<sup>st</sup> accused person, Amani Sulubu, who testified that he denied the allegations that he murdered his father. He stated that he was on good terms with the deceased. That he was arrested in November 2017 and that his father died in 2016. That the officers assaulted him and blindfolded him, putting a gun in his mouth and forcing him to confess; no weapon was recovered from him in this process or at any time during investigations. That the deceased persons aforementioned who are siblings and cousins suspected of dying through witchcraft, died as a result of illnesses such as cholera and malaria.
23. Upon cross-examination, the 1<sup>st</sup> accused person stated that he accompanied family for the sole purpose of witnessing the oath taking. That the conclusion of the oath taking was that the deceased was indeed a witch.
24. DW2 was the 2<sup>nd</sup> accused person, James Bingo, who testified that he did not know the late Patrick Madu neither did he know the 1<sup>st</sup> accused person. That on the day of arrest, the police officers did not show the 2<sup>nd</sup> accused person a search warrant of a plot they claimed they had a problem with and proceeded to take him to the police station where he saw Edison Rimba and Fondo Safari, whom he used to see in the estate. That he was assaulted by the officers at Mtwapa Police Station who stepped on his head and chest. That Edison and Fondo disclosed that they mentioned that they were with the 2<sup>nd</sup> accused person upon inquiry and that led to his arrest.
25. That the 2<sup>nd</sup> accused person first met the 1<sup>st</sup> accused person in the cells in the police station and is unaware of any allegations. That he had no motive or reason to harm or kill Patrick Madu Nyenyo as he was not known to him.

#### **Issues for Determination:**

26. The issue for determination herein is as follows:

#### **Whether the offence of murder has been proven beyond reasonable doubt.**

#### **The Law:**

27. Article 26 of the *Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by the *Constitution* or written law.
28. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
30. Section 206 of the *Penal Code* provides that:

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 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 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.

31. The Court of Appeal in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR delineated the elements of murder as follows:

“For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a. Proof of the death of the deceased and the cause of that death;
- b. That the death was caused unlawfully;
- c. That the accused had the malice aforethought; and
- d. That the accused person and no one else caused the death of the deceased.”

32. The Court of Appeal in the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows:

“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 subject;

- 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.”

33. The case of Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 hashed out the definition of the evidentiary standard of proof required in criminal cases as follows:-

“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.”

### **Analysis & Determination:**

34. The burden of proof is established as the responsibility of the state that bears the task to prove, beyond reasonable doubt, the guilt of the Accused persons. The Supreme Court in the case of *Bakare v State* [1985] NWLR pronounced itself as follows:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged.”

1. The Prosecution therefore relied on the evidence of seven witnesses in an attempt to secure a judgment against the accused person.
2. The first element to prove the offence of murder, is proof of death and the cause of the death. In this instance, the death of the deceased, Patrick Madu Nyenyo, is not disputed. Evidence to prove this fact has been corroborated by the testimonies of all the Prosecution witnesses and further buttressed by the evidence of PW3 who adduced the Postmortem Report that concluded the time and date of death as 12:30 am on 24/09/2017 respectively. As to the cause of death, the Postmortem reached the conclusion that the cause of death was severe brain haemorrhage secondary to head injury. Accordingly, it is my opinion that this element has been proven beyond reasonable doubt.
3. The second element to prove the offence of murder is that the death was caused unlawfully. Article 26 (3) of the *Constitution* of Kenya provides that the right to life is protected and can only be taken away under the circumstances authorised by the *Constitution*.
4. The High Court in the case of *Republic v Kagio* [2023] KEHC 647 (KLR) interpreted the above constitutional provision as follows:-

“Every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property.

35. The law does not provide for instances where witchcraft, as alleged by PW1, PW4 and PW7 to be the reason or a circumstance that sufficiently justifies the taking away of another’s life. Furthermore, evidence provided by PW1, PW2, PW4 and PW7 demonstrate that the murder was caused by the infliction of injuries by use of stones, sticks and metal rods. PW3 further provided the Postmortem Report which disclosed that the cause of death was severe brain haemorrhage, secondary to head injury.

36. It is my opinion that the Prosecution has discharged the standard of proof with regards to the element of the death being unlawful.

37. The next critical aspect was the identity of the perpetrators of the death. In this case there was no eye witness as the wife to the deceased stated that the attackers were masked. We also do not have any forensic evidence placing the two accused at the scene. We however have the evidence of Edison Rimba Saidi, PW6 who was a motorcycle operator at the time of the murder. He stated that on 23<sup>rd</sup>



of September 2017, at 7:30 pm, the Accused persons hired two motorcycles from them where he and Fondo Safari, carried them to Vipingo, where they were instructed to wait for them. They came back half an hour later and told the witness to take them back to Mtwapa after which they were paid and went their separate ways

38. The third element of identification is tied to the other element the prosecution needed to to prove the offence of murder is that the Accused has malice aforethought. The court in the case of Republic v Ali Kajoto Ali [2021] defined “malice” as follows:-

“In common speech malice usually means hatred, ill-will, malevolence or animosity, existing in the mind of the accused, but in the law of homicide its meaning is much wider. Malice, as the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don’t proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice.”

39. In this case the motive was the allegations of witchcraft which is a very common ground in this jurisdiction. There had been a series of deaths and calamities which though medically explained were attributed to the deceased. He was then taken for oathing after which he was killed. The court is satisfied that the first accused had the requisite motive. He then looped in A2.

### **Conclusion**

40. As noted above, we do not have any forensic evidence or eye evidence placing the accused persons at the scene. The wife to the deceased who was with him that night was not able to identify anyone since the people who got into the house were masked.
41. There was some evidence that accused one was not in good terms with his father and he may have been motivated by the with craft ideas allegation to want to murder him. The motive is however one element of the murder.
42. We do not have specific evidence placing him at the scene of the murder as the motorcycle riders did not place him at the exact scene.
1. Accordingly, I find that all the elements of the offence were not proved and accordingly I acquit the two accused person of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*
  2. It is so ordered.

**DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2025.**

**WENDY KAGENDO MICHENI JUDGE**

In the presence of:-

The 2 Accused Persons and their Advocate Mr Egunza Mr Ngiri for the State

Bebora Court Assistant

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

**THE JUDICIARY OF KENYA.**



**MOMBASA HIGH COURT**

