



**Republic v Ndiema (Criminal Case E015 of 2021)  
[2024] KEHC 767 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E015 OF 2021**

**DK KEMEL, J**

**JANUARY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JONATHAN KIPYEGON NDIEMA ..... ACCUSED**

**JUDGMENT**

1. The Accused herein Jonathan Kipyegon Ndiema, was charged with the offence of murder contrary to sections 203 as read with section 204 of the [Penal Code Act](#), Cap 63. The particulars of the charge are that on the 26<sup>th</sup> Day of March, 2021 at Kaboywo sub location Mount Elgon sub-County within Bungoma County, with others not before this Court, jointly murdered Ronald Matui.
2. The accused denied the charges and a trial commenced in which the prosecution called a total of eleven (11) witnesses in support of its case. PW1 was Gideon Kachuwai who testified that the deceased was a neighbour and that the accused was an uncle. He recalled on 25<sup>th</sup> March 2021 the deceased came to his compound to enquire if he was interested in purchasing a parcel of land but that he informed him to be patient for a week to enable him finalize his work first. After a week, he visited the land together with the deceased and they entered into an informal ten-year lease at Kshs. 100,000/= as they knew each other. He proceeded and prepared the farm for planting maize on 26<sup>th</sup> March 2021, in the presence of his driver, Samuel Tukei, Chesebe plus Olando and the deceased herein. He stated that the accused was quarrelling with his brothers and father and that after a while he saw several stones being pelted their way by those claiming that the land was theirs. He alerted the police and they left the farm. He spotted some women screaming as the accused threw stones towards the deceased and another brother of his who were in his direction. They claimed that the deceased illegally leased their land without their consent. He quickly left the place and later learnt that the deceased had been killed. On cross examination, he told the Court that he was not aware that the land belonged to the grandparents of deceased and accused and that there was a dispute on the same. He also stated that he did not witness the



killing of the deceased. On re-examination, he told the Court that he could not identify the individuals who were throwing the stones towards the deceased.

3. PW2 was Daniel Olando who testified that he is the brother-in-law of the accused herein. He recalled on 26<sup>th</sup> March 2021 he was sent by PW1 to go to a certain farm which he had leased for purposes of planting maize. That a large crowd of people started advancing towards him and out of fear for his life, he ran away. He later learnt that somebody had been killed. He further told the Court that he was in the company of PW1 and that he never knew the deceased as he was not able to see him. On cross examination, he told the Court that he found PW1 at the farm and that he could not tell the identity of those making noise as they were many. He did not make any report with the police.
4. PW3 was Samuel Tukei who testified that he recalled on 26<sup>th</sup> March 2021 he was sent to a certain farm to prepare it for planting of maize by his employer (PW1). After working on a two-acre portion, he heard noises from several people at the farm and out of fear he fled. He was with PW1, PW2 and one Dennis Chesebe. He told the Court that he did not know the identity of the villagers and could not tell what exactly transpired thereafter as he fled for his life. On cross-examination, he told the Court that he does not know the accused herein and could not recall seeing him on 26<sup>th</sup> March 2021. He further clarified that he did not see the identity of the persons who made the noises and threw stones.
5. PW4 was Denis Chesebe who testified that he recalled on 26<sup>th</sup> March 2021 he received a call from PW1 who directed him to releases some fertilizer to be used in a certain farm for planting but did not visit the farm.
6. PW5 was No. 69563 PC Japheth Mutua who testified that he is stationed at Kaptama Police Station and he recalled on 28<sup>th</sup> March 2021 he left for Kitale nursing home mortuary where he witnessed the post mortem examination of the body of the deceased herein.
7. PW6 was Dr. Davis Nangili who testified that he is a senior medical officer at Kitale Referral Hospital. He recalled on 28<sup>th</sup> March 2021, he performed a post mortem examination on the deceased herein. He noted that the external appearance revealed two open wounds on the scalp temporal area and the right parietal area. He observed that the body had bruises on the face, posterior aspect of the thorax and both upper limbs. On the internal appearance, the head had haematoma on the right temporal parietal area. He further noted that the nervous system also had haematoma at the right temporal parietal area between the meninges and the brain. The brain was compressed on the affected sides. He formed the opinion that the cause of death was head injury secondary to assault. He proceeded to produce the post mortem report dated 28<sup>th</sup> March 2021 as Exhibit 1. On cross examination, he told the Court that the deceased had multiple bruises on the body and some of those injuries were affiliated with those inflicted by a mob. He further told the Court that the cause of death was head injury secondary to assault which would have been caused by other means not related to assault.
8. PW7 was No. 7814 Pc Samuel Koech who testified that he is based at Kaptama Police Station. He recalled of 22<sup>nd</sup> April 2021 he was instructed together with his colleague to take over a murder case. The instructions were that two suspects be arrested namely the accused herein and one Victor Kiptoo both residing in Museng Village. With his colleagues, they arrived at the village where they managed to apprehend them and handed them over to the DCIO Mt. Elgon. On cross-examination, he told the Court that he was the arresting officer and that he did not know the suspects prior to the instructions of arrest. He further told the Court that he arrested two suspects but could only see one in Court. He could not tell on the whereabouts of the other one Victor Kiptoo. On re-examination, he told the Court that he arrested both the accused herein and Victor Kiptoo but could only see the accused alone in Court.



9. PW8 was Hillary Laibich Ndiema who testified that he recalled on 26<sup>th</sup> March 2021 in the company of the deceased they went to work at a certain farm to plant crops. The farm belonged to their family and that the succession Court in Kitale had directed that the farm be allocated to the female children of the deceased. The female children leased the farm to one Harry Kimutai and that they were sent to go supervise the planting process by the lessee. While at the farm using a tractor planter, the accused herein emerged while in the company of other people while armed with stones. He was hit on the leg by the accused and he fell down. The deceased advised them to flee as the accused pelted the deceased with stones until he fell down. He told the Court that his assailant was one Victor Chebaimoi and they hit the deceased on the head. On cross examination, he told the Court that he recorded a statement with the police and which stated that Caren, his sister raised an alarm and they saw people start pelting stones at them and that it was the mob that attacked them. He further noted that it was his sister Judith Maigut who paid the hooligans to attack them and that the deceased had a separate land measuring 300 acres while the one where the incident occurred measured 89 acres. He told the Court that he was the first person to be hit by the accused and that the accused's father is his brother.
10. PW9 was Leonard Amila Wanyonyi who testified that he recalled on 26<sup>th</sup> March 2021 while on his way to visit the area chief he saw tractors planting a farm nearby. He decided to approach them and engage them in some small talk before he went his way. As they conversed, some motorcycle riders arrived ferrying four women who quickly alighted and started screaming. After ten minutes, some young men, about ten in number, arrived at the farm carrying stones led by the accused herein. They started pelting stones at the persons who were at the farm prompting an exchange between those at the farm and the young men. He saw PW8 being hit and who fell down. He told the Court that the accused was the assailant who pursued the deceased whom they pelted with stones until he fell down. He did not leave the scene but could not manage to approach the deceased. He told the Court that the accused was well known to him as he was a neighbour. On cross examination, he told the Court that he was a neighbour to the accused whose family were wrangling in Court for three years over land. He recorded a statement with the police stating that he was at the scene of the crime but he could not recall all the faces of the mob. He told the Court that at the time of the incident, the accused was not living in the area and that the accused, the deceased and PW8 are from one family. The four women who arrived with the motorcycles screaming were Chemisto Ndiema, Caren Cheboki plus their two relatives. On re-examination, he told the Court that it was the accused who pelted the last stone on the deceased.
11. PW10 was Dancun Ndiema who testified that he recalled on 26<sup>th</sup> March 2021 while on his way to look for some change for purposes of paying labourers who were with his father (PW8), he came back to find him injured lying on the ground with several stones near him. He noticed PW8 had injuries on the head and leg, and he quickly arranged to rush him to hospital. He also found the deceased lying on the other part of the farm. The accused, who is a cousin was not at the scene when he arrived. On cross examination, he told the Court that when he came back to the farm with the change to pay the labourers, he found the incident had already occurred. He also stated that his father has the Court order authorizing him to supervise the land on behalf of his sisters.
12. PW11 was No. 78205 Pc Martin Mutunga who testified that he was the investigations officer in this case. He recalled on 26<sup>th</sup> March 2021 he was alerted by his senior to go and investigate an incident of mob justice within Kaboywo area of Kaptama. They were not able to make it there thus directed the OCS Kaptama to attend to the scene on 27<sup>th</sup> March 2021. They revisited the scene where they established that the deceased was murdered by mob justice by villagers. Their investigations established that a piece of land in dispute was leased out to PW1 for farming. The deceased and PW8 went to supervise the same and this angered some of the family members who attacked them. The deceased's body was taken to the mortuary and he immediately started recording the statement of PW8 who was



- still at the hospital. Two suspects were arrested by the OCS Kaptama but one was later released. On cross examination, he told the Court that he did not have evidence that the accused planned to kill the deceased and that his investigations established that more people were involved in the incident but fled the area. On re-examination, he told the Court that the existing land dispute played a key role in the occurrence of the incident.
13. The Court upon analysing the evidence, established that the prosecution had established a prima facie case against the accused who was thus placed on his defence. The accused opted to tender sworn evidence and called one witness.
  14. DW1, Jonathan Kipyegon Ndiema, testified that he is a peasant farmer from Saboti Constituency in Trans Nzoia County. He denied the charges levelled against him. According to him, the deceased herein was his uncle and that they had no differences prior to the incident but there were some wrangles with regard to the land on 26<sup>th</sup> March 2021. He told the Court that he received a call that their farm at Kaboywo was being planted by strangers and that he decided to rush there so that he could find out what was happening. He told the Court that before his arrival, there was a certain motorbike that followed him and carried the three sons of one Laibich Ndiema, who was his uncle. He told the Court that they were armed with pangas and attacked him. According to him, they cut his hand and hit his ribs, even though he was not aware of their motive. Subsequently, they forced him onto their motorbike and took him to the farm. On arrival, they met a large crowd at the gate who questioned his assailant and why they assaulted him. He further told the Court that, he managed to escape from the area and rushed home and that he later learnt that the deceased had been killed. He reported the incident at Kitwamba Police Station and was issued with an OB No. 01/26/03/2021. He was further treated at Kaboywo dispensary. He was later arrested on 22<sup>nd</sup> April 2021, together with his cousin Victor Kiptoo. He clarified that the land in question belonged to his grandfather who died in 2003 and that his father died in 2005. He finally testified that there was peace until 2012 when some of his uncles and aunts filed a case at Kitale vide succession cause and that the same is yet to be finalized. On cross-examination, he told the Court that he did not avail the OB abstract and that none of his assailants were arrested. He further testified that he failed to avail any evidence showing that he was assaulted. On re-examination, he told the Court that he was alone prior to the attack.
  15. DW2 was Godfrey Samri Kwalia testified that he was a resident of Trans Nzoia County and a peasant farmer. According to him, he has been working on farms owned by the accused's several family members. He recalled on 26<sup>th</sup> March 2021 he saw the accused prior to his three cousins catching up with him and placed him onto a motorcycle that sped off. He later learnt that an incident had occurred at a place nearby. On cross-examination, he told the Court he saw the accused driving a tractor and that he came back on foot after about 30 minutes. He told the Court that he did not know where the accused was heading to and couldn't tell what he had gone to do there and that he did not know where the accused had come from with the tractor. On re-examination, he told the Court that he saw the accused person being picked up by his cousins.
  16. At that juncture, the defence closed its case and learned counsels were directed to file their final submissions.
  17. On perusing the Court, it is noted that both parties failed to file their respective submissions.
  18. I have given due consideration to the evidence adduced by both prosecution and defence. I find the issue for determination is whether the prosecution has discharged its burden of proof beyond the requisite threshold of proof which is that of beyond any reasonable doubt against the accused herein.



19. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all cases save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. *Miller v Minister of Pensions* [1947] All. E.R. 372. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, the Court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused.
20. In a charge of murder as the case herein, the prosecution must prove that there was a death of a human being and that it was caused unlawfully with malice aforethought, either directly or indirectly by the accused.
21. The post-mortem report on the examination of the body of the deceased prepared by Dr. Davis Nangili (Pw6) was neither objected to nor controverted. The said doctor formed the opinion that the cause of death was head injury secondary to assault. He proceeded to produce the post mortem report dated 28<sup>th</sup> March 2021 as Exhibit 1. On cross examination, he told the Court that the deceased had multiple bruises on the body and some of those injuries were affiliated with those inflicted by a mob. The body had bruises on the face, posterior aspect of the thorax and both upper limbs. On the internal appearance, the head had haematoma on the right temporal parietal area. He further noted that the nervous system also had haematoma at the right temporal parietal area between the meninges and the brain. The brain was compressed on the affected sides. The doctor's evidence thus established the fact that there was death of the deceased as well as the cause of the death.
22. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016] eKLR that referred to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”
23. The deceased in this case was found to have died from head injury, secondary to blunt trauma. There was a suggestion by counsel for the accused that the cause of death was a head injury secondary to assault which would have been caused by other means not related to assault. This means it was upon the prosecution to ensure that the allegation that the accused caused the head injury on deceased was backed by supporting evidence and hence i find it safe to presume that the death was unlawful.
24. The purpose to cause death is known as malice aforethought. It's a mental component that can only be deduced from the circumstances surrounding the death. The type of weapon used, the parts of the body attacked, the number of times the weapon was used on the victim, and the assailant's behaviour before, during, and after the attack are all factors considered by the Courts.
25. Accordingly, the evidence of PW1, PW8 and PW9 did attest to witnessing the assault on the deceased. However, it can be inferred from what was used as the murder weapon and given the presumed force used on such a sensitive part of the body being the head, neck and upper limbs, it can safely be inferred that death was the desired outcome of whoever the assailant was. Further, on the internal appearance the head had haematoma on the right temporal parietal area, the nervous system also had haematoma at the right temporal parietal area between the meninges and the brain, and that the brain was compressed



on the affected sides. The injuries caused by a blunt object pointed to an intention that death of the deceased was the desired outcome.

26. I have carefully evaluated the entire evidence and I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the ingredients of the offence of murder earlier identified hereinabove. It is not in dispute that there was death and that the cause could be established. The pathologist (PW6) established the cause of death as head injury secondary to blunt trauma. On the question of the accused's participation, this Court finds that, in the absence of any evidence to the contrary, the evidence of PW1, PW8 and PW9 does establish participation of the accused person. The said witnesses confirmed seeing him assaulting the deceased while they were all at the farm. In arriving at the above conclusions, I am satisfied that the essential ingredients of the offence of murder, as well as the accused person's participation therein has been met by the prosecution as the defence evidence has not shaken the same. In the English case of *Woolmington Vs DPP* [1935] A.C 481 Lord Viscount Sankey stated the legal burden of proof in criminal case as follows:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle is part of the common law of England and no attempt to whittle it down can be entertained.”

27. Looking at the entire evidence, I find that there was direct evidence linking the accused to the crime. The testimonies of PW1, PW8 and PW9 irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. It transpired that the said three witnesses witnessed the accused pelting stones that hit the deceased. Further, it was the evidence of PW8 that it was the accused who pelted the deceased with stones until he fell down. The accused was thus placed at the scene of the crime. Indeed, the accused in his defence testimonies confirmed having been at the said farm but that he was forcefully taken there and that on arrival they met a large crowd at the gate. All the said witnesses were quite categorical that they saw the assailant clearly whom they knew as they hail from the same location and confirmed that the lighting was quite good. Further, the said witnesses all confirmed that they had no problems previously with the accused. Hence, I find that accused was placed squarely at the scene of crime. The defence claim that he was the one who was assaulted was a mere allegation as no evidence of the alleged OB report nor a P3 form capturing the sustained injuries was available. DW2's evidence did not cast any doubt on the Prosecution's evidence as it is clear that he only saw the accused being picked up by his cousins which contradicts the accused's evidence that he was forced onto the bike. This thus leaves no doubt that the defence evidence has not shaken that of the prosecution which is quite overwhelming against the accused. Land is a contentious issue in our society and from the evidence laid bare by the witnesses, it is clear that this particular farm was subject of a succession cause before another Court. The accused had the malice aforethought in that they viewed the farm to belong to his family and the involvement of his uncle on the same to the extent of cultivating it was not a move he was willing to allow. The actions by the accused and the mob left no doubt that the death of the deceased was the desired result. I am therefore satisfied that the prosecution's evidence against both accused is overwhelming. It transpired from the evidence that there was no altercation between the deceased and the accused before the attack which implied that the accused and his group had come prepared to kill over the land matter. I find that the accused had malice aforethought since



it came out clearly in the evidence that he was the one who used the last stone that snuffed out the life of the deceased.

28. In the result, it is my finding that the prosecution has proved its case against the accused beyond any reasonable doubt. I find Jonathan Kipyegon Ndiema guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly.

It is hereby ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Jonathan Kipyegon Accused

Olonyi for Accused person

Miss Kibet for Prosecution

Kizito Court Assistant

