



**Republic v Kombo (Criminal Case E008 of 2020)
[2024] KEHC 585 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E008 OF 2020**

**A. ONG'INJO, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

HAMISI SAID KOMBO ACCUSED

JUDGMENT

1. The accused Hamisi Said Kombo faces a charge of murder contrary to Section 203 as read together with Section 204 of the [Penal Code](#) Cap 63 of the Laws of Kenya.
2. Particulars of the offence are that on 9th September 2020 at Bin Saife Properties, at Splendid Mwembe Tayari, within Mombasa Town within Mombasa County murdered Wilson Munywoki Mulive.
3. The prosecution called 15 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

Prosecution Case

4. PW1, Hamza Hassan Mwendu, said that in September 2020, he was working with Bomu Security and he had been assigned to work at Fantasy Club and Hotel within Mombasa Town. That on 8.9.2020 at 6.00 pm, he reported on duty at his place of work as he was working at night. That the following day when he was leaving work, he found someone had died. He said that when he reported on duty, he went to the neighbouring premises where Khamisi and Wilson were working as guards to change into his uniforms. That their places of work are next to each other. PW1 informed court that he found Khamisi and Wilson on duty and after changing, he went and sat on a chair facing the premises where he guards. He said that he knew both Khamisi and Wilson and that he had worked there for 2 weeks but got close to Khamisi who said that he was also an Islamic teacher.



5. PW1 said that at 5.30 am, Khamisi went to where he was and told him that he was going to the mosque. That PW1 asked him where he was going to put his clothes and that Khamisi told him that his colleague was still asleep inside the premises and that he had tried to knock but he did not respond. That at 6.00 am when PW1 went to knock, there was no response and when he looked through the gate, he saw Wilson lying about 10 meters away. That he realized the gate was not locked and that he entered through the small gate. He said that Wilson was facing down, a stone was on the head and there was a pool of blood. PW1 said that he was in shock and when he came out, he found someone who had packed a car outside. That the person went with him into the compound and that they confirmed that Wilson had died. That the person then called the police. PW1 said that Khamisi would leave at 5.30 am and sometimes at 6.00 am but on the material day, he did not understand where Khamisi had come from.
6. PW2, Edwin Ogada Achwal, said that Wilson Munywoki was also an employee of SBS and his friend. That Wilson was employed to go and help him and Khamisi so that they could work in shifts and get offs. He said that there was a cordial relationship between them. That there was a time when Wilson lost his phone where he used to sleep and when he asked PW2 about it, he told him he had not seen it. That when Wilson asked Khamisi about it, Khamisi responded with anger and that he went to report in the office that PW2 and Wilson were against him but they discussed and resolved the issue. PW2 further informed court that on 9th September 2020, Mwinyi called him and informed him that Wilson had been killed. That later, Mwaka, an employee in the office called and told him that he should go back and report on duty as there was no guard since Khamisi had been arrested. He said that he went to the scene and found blood stains.
7. PW3, Hamisi Abdalla Madzinga, said that Wilson the deceased was his friend and that on 8.9.2020 at around 4.00 pm, he went to the deceased's place of work and that Wilson was a guard during the day. That the night guard, Khamisi, reported at about 6.00 pm and PW3 left with the deceased but they parted ways at Splendid where PW3 went to pick his wife. PW3 said that he did not see or talk to Wilson again. That on 9.9.2020, he went to town at around 11.00 am and when he passed by the deceased person's place of work as usual, he was informed that his friend had passed on. PW3 said the deceased and Khamisi differed but the dispute was resolved.
8. PW4, Twahir Salim Said, informed court that on 9.9.2020 at 5.45 am, he was outside SBS gate inside the car and the guard to the neighbouring premises was seated near the car. That the guard told PW4 that there was someone inside the premises who looked drunk. That when they opened the gate, they saw blood and body of the deceased. That the body lay facing up and there was a carton box placed on the face and a stone on top. That he thought the deceased was Khamisi his guard. PW4 said that he took photographs and notified his uncle Said Seif and reported that a guard had been killed. That he stayed at the scene until 9.00 am when the police went and processed the scene. PW4 identified Khamisi as the accused in the dock.
9. PW5, Zahra Nyamoita Maenga, the accountant for SBS said that in 2020, they had Ogada as the day guard and there was also Khamisi and Wilson. She said that on 9.9.2020 in the morning, she was in her house when she was informed that there was a crowd of people at their offices. That when she went to the office, she found a crowd of people at the gate but the gate was still closed. That she was told someone had been killed at the parking lot. She said the office entrance is accessible from the outside and when she entered the office, she found the police at the parking lot. That she was called at the scene where she went and found the deceased. PW5 said that the police gave her an ID and asked her to read the names and it was the name of Wilson Munywoki but she was not told where they got the ID. That she saw Khamisi at 11.00 am, about 2 hours later. That she went to Urban Police and recorded her statement. She identified Khamisi as the accused in the dock.



10. PW6, Rosemary Njeri Gitonga, testified that in 2020 she was a resident at SBS properties and that the property had 2 gates, one at the front and the other at the back. She said that the front gate led to residential area while the back gate was for those with cars to exit. She said that both gates were manned by one askari during the day and another askari during the night. She said that the gates are usually closed except the pedestrian gate. PW6 informed court that she knew the 3 askaris and they were Ogada Khamisi and Wilson.
11. PW6 said that on 8.9.2020, she went back home at around 5.45 pm and Khamisi opened the gate for her. That on 9.9.2020 at 8.00 am when she was leaving, she got to the 1st floor and saw a crowd of people. She said that the police were taking photographs and there was a dead body covered with a carton box. That she was instructed to go back to the house until the scene is processed. That when she was interrogated she gave the names of the askaris she knew and the police told her that it was Wilson who had been killed. That she later recorded her statement at Urban DCI. She identified Khamisi as the accused in the dock.
12. PW7, Mwaka Aziz Mohamed, a secretary at SBS said that they had 3 guards namely Ogada, Khamisi and the deceased. That initially the guards' relationship was cordial but they differed and later reconciled. She said that there were allegations of witchcraft and Khamisi accused the deceased for it. That they spoke to them on two occasions about the allegations. That on 9.9.2020 at 7.30 am, she received a phone call from Kulthum who told her that one of the guards had been killed and when they arrived at the office, they learnt that it was Wilson who had been killed.
13. PW8, Phillip Kivyusyu Mwengi, an employee at SBS said that there are 2 gates for the entrance and exit. That the gates are usually locked and someone from outside cannot access unless it is open. He said that the deceased was a watchman and that in 2020, he complained that there were *Jinis* which were disturbing him and that he was being tormented when sleeping in his house in the pent house. That his family had tried to resolve the issue with herbs but it had been in vain. That since PW8 was a Christian, he told him that he would look for a pastor to pray for him but before they could do that he died. PW8 said that on 8.9.2020, he reported on duty at 8.15 am and he found the office was open and the deceased was on duty. That on 9.9.2020 when he reported on duty, he found the office door had been locked and there were police officers at the gate. That when he called Said and asked what was happening, he told him one of the askaris had been killed. PW8 identified Khamisi as the accused at the dock.
14. PW9, Bahati Mwanzia, testified that the deceased was her husband and that he complained that his colleague at work did not like him. That on 9.9.2020 she was at home when her mother went and informed her that her husband had been killed at his place of work. That when she tried to call him on phone, there was no response.
15. PW10, Kulthum Nassir, working at SBS said that they had 3 security guards namely Wilson, Ogada and Khamisi. That in March 2020, the guards had a misunderstanding and that there was no coordination between the 3. That PW10 left them with the concerned people and that she later learnt from Mwaka and Zahra that Wilson complained that he could hear people talking but he could not see them. PW10 said that on 9.9.2020 at 7.00 am, she was on the way to work when she saw a post of a dead body from Twahir. That the body was of a person who had died, the body was covered by carton boxes and the body was in their premises. That she was called and asked for Khamisi's number but she did not have it. That she was instructed to inform Mwaka to call Khamisi back to the office. PW10 identified Khamisi as the accused in the dock.
16. PW11, Paul Jamhuri Nyamai, the cousin to the deceased said that on 9.9.2020, he got a report that the deceased had been killed at his place of work. That he went to the scene in the company of other family



- members and relatives. That the deceased's employer took them to Urban DCIO and they were then taken to Coast General Hospital where they confirmed the deceased was Wilson. He said that post-mortem was done on 14.9.2020 at Coast General Hospital where he identified the body.
17. PW12, Dr. Nuzla Ali, from Coast General Hospital said that Dr. Zainab Baga filled the Postmortem Report. That the doctor was known to her but had gone for further studies. She said that the Postmortem Report was in respect of Wilson Munywoki Mulive. That externally the body had multiple deep cut wounds on the face and head resulting in multiple facial and skull bone fractures. That he also had deep cuts at the back of the neck penetrating the cervical spine. That he had a crushed jaw due to slashing, deep defence cut wounds on the right hand and around the wrist leading to fractures. That he also had fractures of the radial ulnar and several cut wounds on the left hand with partial amputation.
 18. PW12 said that on the head, there were multiple linear fractures and facial fractures of various bones. There was skull hematoma, epidural and subdural hematoma in the brain, there was brain damage, and fracture of the cervical column. The cause of death was established as hemorrhagic shock with severe traumatic head injuries due to sharp trauma to the face and head. She said that the Postmortem Report was dated 30.9.2020 signed by Dr. Zainab. She produced it as ExP-1.
 19. PW13, Simon Nyamai, a cousin to the deceased said that on 10.9.2020, he received a call from his mother who informed him that Wilson had been killed. That on 14.9.2020, he went to Coast General Hospital Mortuary where he identified the body of the deceased.
 20. PW14, Fuad Hassan Juma, a colleague to the deceased said that on 9.9.2020, he reported to work where he found a crowd of people and the police. That he heard people say a security guard had died. That he was shocked when he saw the guard and left. He said that he could not tell who, how and why the deceased was killed.
 21. PW15, No. 23xxxx CIP Ezekiel Ade attached to DCI Headquarters Cyber Crime Unit said that his duties are to receive electronic exhibits, perform digital forensics, prepare reports and produce in court as evidence. He said that he prepared a report in respect of 3 mobile phones that were forwarded to their lab for forensic analysis. That the 1st exhibit marked A was a mobile phone model 8310 make X-tigi IMEI – 357966910xxxxxxx. The 2nd exhibit marked B was a mobile phone make X-funny model 43 Prem IMEI – 359440079820119. The 3rd exhibit marked C was a mobile phone make Techno T 349 IMEI – 35649869xxxxxxx.
 22. PW15 said that the exhibits were sent to their lab requesting for extraction of text messages. He said that he extracted the text messages and prepared a report dated 26.9.2020 with lab reference CC4832/2020. That the exhibits were received at the lab on 25.9.2020. He produced the report as – chain of custody form dated 25.9.2020 ExP2(a) and the Report of Examination from Cyber Forensic Unit – ExP2(b).

Defence Case

23. The accused, Hamisi Said Kombo, gave sworn statement that on 8.9.2020, he reported on duty at 6.00 pm and found Hamisi Abdalla and Wilson Munywoki where he joined them and they stayed up to 7.00 pm when he left to go to the shoe maker. He said that he stayed with his colleagues up to 9.00 pm when he went out and stayed with another guard Hamza. He said that he left Hamisi Abdalla and Wilson inside the residential parking and that he stayed with Hamza up to 2.00 am. He said that when his phone battery was going low, he went to knock so that Wilson could open the gate for him to charge but the gate was not opened. He said that the gate was locked from the inside and he was guarding the shops outside. That the accused sent him a message to open but he did not respond.



24. The accused said that at 5.05 am, he went to the mosque to pray and that he had agreed with Wilson that he would go back home early to prepare his child for school. That after prayers he took a *matatu* to the ferry where he crossed over and used a *tuktuk* to get home. That Mwaka Abdul Aziz called him and he was surprised because it was the first time he was receiving such a call. That on the way, he was informed that his colleague had been killed and when he went to the office, he met DCI officers from Urban who handcuffed him and took him to urban. That his house was searched, interrogated and he informed them that he left Hamisi with the deceased and that he reported off before the main gate could be opened. That the main gate cannot be opened from the outside once it is locked from the inside.
25. The accused testified that he had no problem with Wilson and that they worked well. He informed court that he knew Wilson in 2016 when he went in as a reliever guard and when SBS wanted a permanent guard, Hamisi and Wilson both wanted the jobs. That he made a phone call to Wilson and asked him to go and try. That Wilson went and the office employed him on a permanent basis. That Hamisi Abdalla was not a guard but he kept on going to the place of work and they could chew miraa with Wilson while the accused guarded the shops outside.

Analysis and Determination

26. In consideration of the evidence of 15 prosecution witnesses and in consideration of the defence witnesses' sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
27. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
28. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR to include: -
- i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
 - iv. That there was malice aforethought.

Death of the Deceased

29. There is no dispute as to the death of the deceased Wilson Munywoki Mulive.

Death was Caused By an Unlawful Act or Omission

30. PW1 and PW4 testified that they found the deceased lying in a pool of blood within the premises that the accused person was guarding with his head or face covered with a carton box and a stone placed on it. Dr. Zainab who conducted the postmortem observed that the deceased had multiple deep sharp cut wounds on the face and the head resulting in multiple facial and skull bone fractures. There was also a



deep cut at the back of the neck penetrating the cervical spine and the deceased's jaw was crushed due to slashing. There was also a deep defence cut wounds on the right hand and around the wrist leading to fractures. A fracture of radio ulnar and several defence cut wounds of the left hand with partial amputation was also indicated. As a result of the examination, the doctor's opinion that the deceased died as a result of hemorrhagic shock with severe traumatic head injury due to sharp trauma on the face and head. The injuries that the prosecution witnesses have alluded to were neither self-inflicted nor accidental. It is no doubt therefore that the cause of death was through an unlawful act.

Participation of the Accused in the Commission of the Alleged Offence

31. The accused person was on duty on the night in question and PW1, Hamza Hassan Mwendo, reported on duty and went to change into his guard uniform within the premises where the accused person was guarding as it was opposite his place of work. He found the accused and the deceased within the premises.
32. PW4, Twahir Salim Said, also confirmed that the accused was the night guard and when PW1 alerted him about the body within their premises and he found the body lying in a pool of blood, he initially told him that it was the accused person who had been killed.
33. PW6, Rosemary Njeri Gitonga, was a tenant at the premises where the offence was committed and she said that on 8.9.2020 when she returned to her residence at 5.45 pm, it is the accused person who opened for her the gate. PW6 said that the two gates at the premises in question were manned by one guard during the day and another guard during the night. She testified that on 9.9.2020 at 8.00 am when she was leaving to go to work, she got to the 1st floor and saw a crowd of people within the compound and police were taking photographs. She said there was a body covered with carton box within the compound where the police were taking photographs. She later learnt that Wilson, the day watchman, was the one who had been killed.
34. PW8, Phillip Kivusyu Mwengi, testified that the deceased on duty on 8.9.2020 and when he reported on duty at 8.15 am, the deceased opened for him. PW8 also alluded to complaints by the deceased who told him that he was being disturbed at night by *Jinis* in his pent house and he promised to bring in a pastor to pray but he died before a pastor could be brought.
35. PW9, Bahati Mwanzia, the wife of the deceased also testified that her husband had complained that his colleagues at work did not like him but she did not specify which of the colleagues.
36. PW10, Kulthum Nassir, also alluded to misunderstanding between the accused, PW2 and the deceased. She said whenever the three went to the office, it is her, Mwaka and Zahra who could speak to them. She said that the deceased had complained to Mwaka and Zahra that he could hear people talking but he could not see them. She said that one time she saw the deceased talking to himself and when it was suggested that he should go home, he refused.
37. From the evidence of prosecution witnesses, although the accused person alleges that he had not accessed the premises because it was locked from inside, PW1 found the small gate open and the accused person was the one on duty and therefore he had the obligation to ensure that the premises was locked and that if anyone accessed the premises during the night in question, it would have been with his permission.
38. PW1 further said that on the material night, the accused person went to where he was at 8.00 pm and at 9.00 pm and thereafter he only saw him again at 5.30 am when he allegedly said he was going to the mosque. PW1 did not say that he saw anyone else enter the premises where the accused person was guarding on the material night.



39. When the accused person left at 5.30 am, PW1 asked him where he was going to keep his clothes and the accused told him that his colleague who was asleep inside the premises was going to open for him. There is nothing to show that the deceased who was to be on guard duties during the day had taken over from the accused and 30 minutes after the accused had left, PW1 found the small gate to the premises open and the deceased who was supposed to be sleeping in a pent house inside the premises was lying dead with multiple injuries to the head and upper limbs and a carton box used to cover his head and reinforced with a stone.
40. From the evidence of bad blood between the accused and the deceased tendered by PW2, PW3, PW7, PW9 and PW10, and from the circumstances surrounding this case, the only conclusion that can safely be made is that the accused person committed the unlawful act that caused the death of the deceased.

Whether there was Malice Aforethought

41. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

42. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of [Isaac Kimathi Kanuachobi -vs- R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

43. The elements to prove malice aforethought were settled in the case of [Ernest Asami Bwire Abanga alias Onyango v R](#) (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

44. The savageness with which the deceased was inflicted with multiple cuts all over on the head, the face and the hands; the multiple fractures sustained; and the fact that a carton box was used to cover the



deceased on the face and the head and a stone placed on the carton box on the head of the deceased makes it clear that the accused did not intend that the deceased should not live. If he did not die because of the multiple fracture on vital parts of his body and profuse bleeding, he was bound to die because of suffocation from the carton box that was placed on his face and secured by a stone. Malice aforethought was therefore proved by the prosecution.

45. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly under Section 322(1) of the [Criminal Procedure Code](#).

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
25TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Mwaboza Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: We do not have previous records

Mr. Mwamboza Advocate in Mitigation: The accused is 31 years old. He resides in Likoni. He is blessed with one child and he is the sole bread winner. He is a single parent. The child has been suffering since 2020 when the father was placed in custody. The accused is remorseful for the incident that happened. He has never at any time been accused even before a village elder for any offence. From the testimony of PW7, Kulthum, there were misunderstandings that were being resolved amicably. Circumstances brought forth by prosecution witnesses, there is none who witnessed the murder. We humbly pray that a lenient sentence be passed.

Order: Mention on 15. 2.2024 for Victim Impact Statement, Pre-Sentence Report and sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

