



**Director of Public Prosecutions v Muthee & another (Criminal Case 47 of 2016) [2024] KEHC 2261 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 47 OF 2016  
TW CHERERE, J  
FEBRUARY 29, 2024**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... PROSECUTOR**

**AND**

**PATRICK MUTHEE ..... 1<sup>ST</sup> ACCUSED**

**SAMUEL KABERIA MUTHEE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Patrick Muthee and Samuel Kaberia Muthee (Accused 1 and 2 respectively) are who are father and son are charged with the offence of murder contrary to Section 203 as read with section 204 of the [Penal Code](#) cap 63 of the Laws of Kenya in that on the night of 05<sup>th</sup> August, 2016, they murdered Josephine Mwonjiru who was their sister and aunt respectively.
2. The first witness, a 13-year-old boy, son of the Josephine Mwonjiru stated that his mother Josephine Mwonjiru, was killed on the night of 05<sup>th</sup> August, 2026 in the middle of the night while she was sleeping. It was his testimony that though the house was dark, he identified Accused persons who are his uncle and cousin respectively from the light of torches that were in their possession. The boy rushed to the house of Joseph Mwonjera to seek assistance. Mwonjera accompanied the boy back to their home where he opened the house that was locked from outside and using a torch saw Josephine Mwonjiru lying dead on a bed upon which he reported the matter to the area chief. The witness further stated that the following day, he was in company of the area assistant chief when they met Accused 1 coming from to Muthara Police Station. That the assistant chief requested Accused 1 to accompany them back to the police station and upon reaching there, Accused 1 was arrested and locked up.
3. James Mwenda Mwita, the assistant chief confirmed that he met Accused 1 coming from Muthara police station where he had reported that his son Kaberia had murdered his sister Josephine Mwonjiru. That he requested Accused 1 to accompany him back to the police station and he informed police that



Accused 1 was one of the suspects in the murder and it was on the basis of his report that Accused 1 was arrested and locked up.

4. The investigating officer confirmed that on 05<sup>th</sup> August, 2016 about 07.14 am, Accused 1 reported vide OB 02/05/08/2016 that his son Samuel Kaberia arrived home at about 03.00 am armed with a bloodstained panga and informed him he had killed his aunt Josephine Mwonjirua. The witness also confirmed that it was immediately after making the report that Accused 1 was arrested whereas Accused 2 was subsequently arrested in Archers Post on 05<sup>th</sup> December, 2016. It was the evidence of the witness that Accused 1's report was disregarded and both Accused persons charged on the basis of the evidence by the son of Josephine Mwonjiru (deceased).
5. In his defence, Accused 1 maintained that he did not know about the murder of his sister until his son Samuel Kaberia (Accused 2 herein) arrived home at about 03.00 am armed with a bloodstained panga and informed him he had killed his aunt Josephine Mwonjirua. The witness stated he reported the matter to police but on his way out of the police station, he met PW3 who took him back to the police station where he reported that Accused 1 had killed his sister and on the basis of the report, he was arrested and subsequently charged with an offence that was committed by his son.
6. Accused 2 stated that on the material night, he went to drink illicit brew at the home of his aunt Josephine Mwonjiru and while there was attacked by Josephine Mwonjiru and her sons who included PW1. He stated that he fought back with a panga in self defence and not intending to kill Josephine Mwonjiru. He stated he escaped from home after a huge crowd gathered at his parents' home the following day and threatened to kill him and his father (Accused 1 herein)

### **Analysis and Determination**

7. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence. Any doubt raised by an accused person is to be given to that accused.
8. I have considered the evidence on record and the issues for determination is whether the DPP has proved the three main ingredients of murder i.e the death, that Accused person/s committed the murder and that they were actuated by malice. (See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).
9. In *Republic v Andrew Muecha Omwenga*, Maraga J (as he then was) considered the provisions of section 203 of the *Penal Code* and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

“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 that 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.”



**a. The death of the deceased**

10. That Josephine Mwonjiru died was confirmed by a postmortem form which reveals that she suffered a multiple deep cut on hands, scalp, back with fracture of skull and had died of excessive bleeding from the cuts as shown on the post mortem form PEXH. 1.

**b. Proof that accused person either jointly or severally committed the unlawful act which caused the death of the deceased**

11. In order to establish the accused's culpability, the prosecution relied on the evidence by PW1 who stated the light from torches that Accused persons had enabled him to identify them as his uncle and cousin as they killed his mother.
12. The offence was committed at night and the first issue for determination is whether Accused 1 was positively identified.
13. I have considered the evidence of visual recognition against the Accused 1 as adduced by PW1. Evidence of visual identification should always be approached with great care and caution (see *Waitbaka Chege v R* {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (*Gikonyo Karume & Another v R* {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another v R*, {195} 20 EACA 166; *Wamunga v R*, {1989}).
14. In the case of *Maitanyi v Republic* (1986) KLR 198, the Court of Appeal Court stated as follows in relation to identification at night
- “... That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.
15. In this case, the prosecution failed in its duty to lead evidence as to the nature of the torch light that the attackers had, the strength of the light, its size and its position relative to Accused 1 thereby rendering the evidence of identification unreliable.
16. Accused 1 having denied committing the murder, I find that the uncorroborated evidence by PW1 cannot be said to be so strong as to hold a conviction.
17. Concerning Accused 2, he conceded killing Josephine Mwonjuru but raised the defence of self defence on the ground that he had been attacked and injured by Josephine Mwonjuru and her two sons including the 1<sup>st</sup> prosecution witness.
18. Of interest to note however is that PW1 was neither cross-examined concerning the alleged attack on Accused 2 nor did Accused 2 lead any evidence to support his claim that he sustained injuries during the incident.
19. The evidence by PW1 is that they were sleeping when his mother was attacked and killed. Consequently, I find that Accused 2's is an afterthought and it is rejected.



### **Malice aforethought**

20. In *Morris Aluoch v Republic* Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of *Rex v Tubere S/o Ochen* (1945) 12 EACA 63 with approval where it was stated as follows:

“If repeated blows inflicted the injury, then malice aforethought could well be presumed.....”.

21. In this case, there is evidence of repeated blows on the hands, skull and back. The repeated blows caused deep cuts from which Josephine Mwonjuru died of excessive bleeding.
22. The injuries inflicted on Josephine Mwonjuru were aimed at the most delicate parts of the body i.e the head and Accused 2 ought to have known that such grave injuries could possibly cause grievous harm or the death of Josephine Mwonjuru.
23. Right to life is protected by Article 26 of the *Constitution* and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). The death of Josephine Mwonjuru was intentional and unlawful.
24. Having considered all the evidence in this case, I find that the defence by Accused 1 raises a reasonable doubt and he is acquitted. On the other hand, Accused 2 is found guilty and is convicted accordingly.

**DELIVERED AT MERU 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances:-

Court Assistants - Kinoti/Munene

Accused 1 - Present

Accused 2 - Present

For Accused 1 - Mr. Muriuki Advocate

For Accused 2 - Mr. Mawira for Mrs. Kaume Advocate

For DPP - Ms. Rita Rotich (PC-1)

