



**Republic v Bendaro (Criminal Case 49 of 2018)
[2024] KEHC 2249 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 49 OF 2018
A. ONG'INJO, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MRAMBA ZUMA KUMBO BENDARO ACCUSED

JUDGMENT

1. The accused Mramba Zuma Kumbo Bendaro is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code.
2. The particulars are that Mramba Zuma Kumbo Bendaro on the 6th day of October 2018 at around 1700hrs at Chilibasi Village in Kasemeni Location Kinango Sub-County within Kwale County murdered Mbodze Lewa Ali.

Prosecution's Case

3. PW4 said she saw the accused person cut the deceased on the neck using a panga and she died instantly.
4. PW5, Chief of Kasemeni Location, testified that accused had escaped to go and hide in Gandini and Mbunguni locations and he informed the respective chiefs. That on 8.10.2018, Chief of Mbunguni location called and reported that a suspect had been arrested. PW5 reported to police at Taru and they went and collected him from Kwale Police Station. PW5 said the accused was a grandchild to the deceased. He said the accused alleged the deceased was a witch and that there was a case at Taru Police Station where accused had assaulted the deceased.
5. PW6, the Government Chemist Analyst, examined the panga and deceased person's blood stained clothes and found the panga tested negative for blood whereas the deceased clothes tested positive for human blood that generated female DNA profile.



6. PW7 said that accused person found him with Kapipi while he was talking to his mother, the deceased, and that the accused cut his mother. He said he was shocked and he ran away to go and call for help. Ndegwa Murabu, PW7, said the woman the accused cut is his grandmother and that they were not in good terms. PW7 said the deceased had restrained accused from bringing stones with a vehicle and the accused beat her using a log. He said the accused person swore to finish them, all and use the road by force.
7. PW8, Dr. Hassan Ahmed Kuche, examined the body of the deceased on 8.10.2018 and was of the opinion death was caused by haemorrhagic shock due to right severed great vessels of the neck caused by decapitation by a sharp object- ExP8.
8. PW9, Clinical Officer at Mariakani Hospital, Barrington Edward Charo, had earlier on 9.10.2017 treated the deceased for injuries inflicted by an assault. He produced the P3 Form – ExP9(a) and Treatment Notes – ExP9(b).
9. PW9, P.C. Josephat Rotich, was the Investigating Officer. He said he visited the scene in the company of Chief Inspector Chemwolo and CPL. Kigen as well as P.C. (Driver) Khalib and found the body of the deceased seated on a chair with the head hanging as there was a cut on the neck. He said the chair on which the deceased's body sat was in between 2 others, a sign that the deceased was seated with 2 others when she was attacked. When PW9 interrogated members of public, it was established that Mramba Zuma is the one who committed the murder.
10. PW9 processed the scene and took the body of the deceased to the mortuary for postmortem. He said accused escaped but on 8.10.2018 members of the public arrested him in Mbuguni in Matuga. On 9.10.2018, he was collected from Matuga and after investigations were conducted and completed the accused was taken to court. On 19.10.2018, the Area Chief recovered suspected murder weapon and handed over to PW9, the Investigating Officer, for investigations.

Defence Case

11. When placed on defence, the accused person in his sworn statement said that on 8.10.2018 he was at his grandmother's place in Matuga having lunch when he got a report that the Chief was calling him. That he accompanied the man who had gone to call him. That when he got to the Chief's place, he was interrogated and told to wait. That at 5.00 pm, a vehicle came from Kwale and he was handcuffed and made to board the police vehicle and he was taken to Kwale Police Station. That when he got to Kwale Police Station he was interrogated and asked if he killed and he denied.
12. That the next day at 4.00pm, police from Taru Police Station went to Kwale and collected him. That the following day he was interrogated concerning murder and he denied having killed anyone. That he was placed in the cells for 2 weeks for investigations before being brought to court. The accused said that in 2017 the deceased's family had a dispute with his family as the deceased obstructed the road and once when a truck came to deliver stones it almost had an accident as deceased had dug a ditch and put stones. That the deceased was standing by with about 12 children to witness how the lorry was going to have an accident but when the accused got out of the lorry the deceased started running away and she slipped and fell and got injured on the hands and ribs. That she had bruises and lacerations on the left elbow and face which were bleeding.
13. That Hamisi Kazungu, brother to deceased, took the deceased to the hospital and later to police station where they reported the accused, his father and his father's younger brother. That they received a letter requiring them at Taru Police Station on Friday. That by the time they were required at the police station he had already gone back to work in Mombasa. That when he got permission to go to Taru



Police Station he arrived at 2.00pm and found his father and uncle had been to the station and were allowed to go home and discuss the issue at home between members of the family.

14. That they went home where elders agreed that his father and uncle pays damages for injuries suffered by the deceased and the maize that was damaged. The accused said that the deceased, Hamisi Kazungu, his wife as well as Murabu Kalume were involving themselves in witchcraft and the villagers were not happy with them and letters were written to them threatening them with death due to witchcraft. That this culminated in the murder of the deceased. He said he was suspected to be among those who issued death threats but even after he was arrested the threats continued. He said Hamisi Kazungu and his wife were attacked and cut with pangas by unknown people. He said the Chief and Village elder were bribed by the people who killed Mbodze and attacked Hamisi and his wife and they were not arrested. He said that the village elder went to his home and found 2 children who got for him a panga from his house and the panga was brought to court as an exhibit.

Analysis and Determination

15. In consideration of the evidence of the prosecution witnesses and in consideration of the accused person's 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.
16. 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.'
17. 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.

Fact of Death

18. Fact of death of Mbodze Lewa Rai is not in dispute.

Whether death was caused by an unlawful act or omission

19. PW2, Mnyazi Nyawa, was with Mama Kapipi, PW4 - Nakondo Jumaa, PW7 - Ndegwa Murabu Kalume and the deceased when the accused emerged from the side where the deceased was and produced a panga he was holding from his back and cut the deceased on the neck.
20. PW8, Dr. Hassan Ahmed Kuche, examined the body of the deceased and was of the opinion that cause of death was hemorrhagic shock due to right severed great vessels of the neck caused by decapitation by a sharp object. The cause of death was not accidental or self-inflicted injury. It was an unlawful act that led to the said injuries.



Whether the Accused person participated in the commission of the unlawful act

21. The accused person was seen by PW2, PW4 and PW7 when he emerged and suddenly produced a panga and used it to cut the deceased on the neck, almost cutting off the head from the neck. There is no doubt the accused was identified as the perpetrator of the heinous act that deprived the deceased of her life.

Whether there was malice aforethought

22. 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”.

23. 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 v 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.”

24. 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.”

25. The accused had initially assaulted the deceased and a report was made to the police but when the accused and his father were summoned he refused to attend to the police station. Subsequently thereafter, he committed the murder herein. He attacked the deceased suddenly from behind aiming at chopping off her head and then escaped to go to Matuga where he was arrested. The use of a panga and ambush is evidence of malice aforethought. The aim at the neck is an indication the accused person’s intention was to cut off the life of his target as he did.



26. 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 pursuant to Section 322 (1) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 29TH DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia - Court Assistant

Mr. Ngiri for the Respondent

Mr. Otieno Advocate for the Accused - Present

Accused present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: No previous records. Accused may be treated as a first offender.

Mr. Otieno Advocate: We can take a date for mitigation.

Order: Mention on 14.3.2024 for mitigation, Victim Impact Statement and sentence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

PARA 29.

2.2024

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