



**Republic v Korir (Criminal Case 24 of 2015)
[2024] KEHC 2259 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE 24 OF 2015
JK SERGON, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DENNIS KORIR ACCUSED

JUDGMENT

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Particulars of the offence are that, the accused on 22nd November, 2015 at Londiani Township, Londiani District within Kericho County, jointly with others not before this court, murdered Josephat Kiptoo Yegon.
2. The accused person pleaded not guilty to the charge and the prosecution called nine (9) witnesses to prove its case.
3. APC Jared Ochieng Ratego (PW1) stated that he has worked as an administration police officer for over ten years, he is currently stationed at Chepseon Divisional Headquarter. On the material day at around 1:00 AM he was leaving Kamungei Bar in Londiani heading back to the main stage at Barsiele to board a vehicle to take him back to Tuya AP Camp, Londiani where he was based at the time, when he met four people, he noted their complexions and the clothes they were wearing and that one of them had a mark above the right eye. He stated that he was able to see them because the place was well lit with security lights, the four men assaulted him as he fled he came across a club called Lucky Boy where he met his colleagues from law enforcement, they took him to Londiani District Hospital for medical treatment.
4. PW1 stated that at the time he was attacked there were no people within the vicinity, however, there was a man on a motorbike about 10 meters away, who was shouting “leave him alone” and that as he ran towards Lucky Boy looking for help he turned back and saw the man with the panga attack the



- boda boda operator. He testified that after he went to hospital he was discharged the following day. He reported the incident at Londiani Police Station. He produced the P3 Form filled at Londiani District Hospital MFI - 1.
5. PW1 stated that on 23rd November, 2015 he went for an identification parade at DCIO Londiani Police Station, the identification parade had ten people, he was called upon to identify the person who had attacked him and he was able to identify the accused whom he described a tall, slender and dark guy who was dressed in blue jeans, white sneakers and a white sleeved shirt, he had a mark on the right eye. He further stated that the most distinctive aspect of the accused was the mark above the eye, he first saw him on the night of the attack, he was the one with the panga and subsequently attacked the motorcycle rider while at the identification parade his clothes had stains of blood. The identification parade report was marked as MFI - 2.
 6. PW1 stated that after he was discharged from hospital he learnt that the person they attacked on the material night had succumbed and found him lying face down near a supermarket. He was able to tell it was the same person they attacked on the material night as the person was attacked 10 meters from where he was attacked and further that he was able to tell because he is a well trained police officer. On cross examination, he conceded that he had a few drinks on the material night, however, 2-3 drinks would not make him go berserk, he was stable and the area was well lit as it was business center, he was able to identify the accused person based on his scar, stature, complexion and the clothes he was wearing, he also had a panga with which he assaulted him. He stated that after the men attacked him he suffered a cut on the head, shoulder and his glasses were broken. He reiterated that the people who attacked him also attacked the deceased. He confirmed that after the attack he fled from the scene and therefore did not know what happened after he fled from the scene.
 7. PW1 was recalled for further cross examination, he confirmed that on the night of the attack he met four men but was attacked by one person, the one with a scar and further that charges of grievous harm were preferred against the accused and judgment delivered, however, he withdrew the case. He maintained that the man who attacked him attacked the boda boda operator and that he was able to identify him at an identification parade the following day on account of the distinctive scar on his face and the blood stained clothes.
 8. Paul Kibiegon Tanui (PW2) father to the deceased, testified that on the material day, he was at home when he was informed that his son Josephat Kiptoo Yegon (the deceased herein) who was a boda boda operator had not come home. A friend to one of his other son Moses Yegon called and informed him that their brother was lying at Londiani Town, Moses informed PW2 who rushed to the crime scene and found a large crowd outside Yakwai Hotel and his son was lying there on a pool of blood, he was lying face down with saw deep cuts on the right side of the neck and in the middle of the head. The police took photographs and took the deceased to Molo District Hospital. He recorded a statement at Londiani Police Station. He attended the post mortem. He stated that as they were leaving for Molo some young men were brought to the police station, they had been arrested in connection with the death of the deceased. On cross examination, he confirmed that he did not know the accused or if the accused was involved in the murder rather he only found out that he had been arrested.
 9. Cosmas Rono (PW3) testified that on the day before he was in the company of the deceased at Serena Bar, after having several drinks PW3 left for Member Bar which was adjacent to Serena Bar in search of a lodging area for the night, he secured a single room for the night and soon afterwards he and Wilbon parted ways with the deceased person who left for his home. The following day he and Wilbon learnt that Josephat the deceased herein had been killed, they went to the scene and found the deceased lying in a pool of blood. He was at the crime scene when the police took the body of the deceased. He informed the police officers at the crime scene that he had been with the deceased. He recorded his statement



at Londiani Police Station after which he was arrested and interrogated, while in police custody an identification parade was done, he was part of the parade with ten people, whereby a person who had been attacked was called upon to identify his attackers and he subsequently identified the accused as his attacker. He identified the deceased's motorcycle, which the deceased who was a boda boda operator would occasionally ferry him with. On cross examination, he confirmed that he was with the deceased the night before at a bar then they parted ways when the deceased left the bar at around 10:00 PM. He confirmed that the identification parade consisted of ten people. He reiterated that he was arrested as soon as he recorded his statement however the OCPD intervened and he was not charged rather he was treated as a witness.

10. Joseph Too Sang (PW4) a watchman at several premises within Londiani Town testified that on the material day while he was on patrol, he stumbled upon someone lying on the ground near a wines and spirits shop, the person had deep cuts on the forehead. He rushed to Londiani Police Station to report the matter. Police officers came to the scene and picked the body. He recorded his statement at the police station. On cross examination, he confirmed that he did not witness the attack on the deceased person which led to his demise.
11. Marwa Rioba (PW5) number 49593, he stated that on the material day he and his colleague PC Makwai were summoned by the OCS CI Nzomo to go and collect the motor cycle of the deceased, they found the motorcycle amidst a crowd of boda boda operators who led them to the suspects who were in rental house near a pub known as Disco. The watchman led them to where the two suspects were sleeping. They apprehended the two suspects and took them into police custody. The case was handed over to the CID. He was able to identify the accused person on the dock as the person he arrested on the material day. On cross examination he reiterated that his duty on the material day was merely to apprehend and surrender the suspect to police custody.
12. Sgt. Peter Oliech (PW6) number 36066 the investigating officer stated that on the material day he received a call from his colleague instructing him to visit a crime scene within Londiani Town. He testified that upon arrival at the crime scene, they found the body of the deceased in a pool of blood, beside the deceased there was a ID Card belonging to the deceased. The deceased had two deep cuts on the right side of the head and a deep cut on the right side of the neck, photographs of the crime scene were taken and the body moved to Molo District Hospital for a post mortem. He stated that following information, the accused and Mary Wairimu were arrested. He produced the photographs of the crime scene MF1 3 (a) - (f). He further stated that they received information that before the assailant murdered the deceased, they assaulted an officer known as Jared Ochieng Ratego. He stated that upon arresting the accused an identification parade was conducted by C.I Kogo and the accused identified as one of the people who murdered the deceased and attacked the officer. The accused was therefore charged with other not before court with the instant offence. On cross examination he maintained that he was the investigating officer in the case. He confirmed that they received information from members of the public which led to the arrest of the accused. He reiterated that the accused was one of the persons who killed the deceased which was corroborated by PW1 who stated that he saw four people who attacked him then proceeded to attack the deceased.
13. Chief Inspector Paul Nzomo (PW7) number 234804 stated that he was previously posted at Londiani Police Station as OC Crime on the material day they received a report that there was a body of a male person was lying outside a Wines and Spirit, he informed his colleagues and proceeded to the crime scene and on arrival found members of public surrounding a dead body in a pool of blood, he cordoned off the crime scene. While at the crime scene he examined the body and observed that the body had deep cuts on the top part of the head. Photographs were taken and the body was loaded to a police vehicle. While they were transferring the body from the crime scene some members of the



public were informed that the deceased's motorcycle registration no. KMBC 358W was abandoned about 50 meters from the crime scene. He stated that he went back to the station and filed a situation report to police headquarters about the incident. The motorcycle was recovered by his colleagues and further that there were two suspects brought to the police station one was the accused and the other a female Mary Wairimu. The matter was taken over by DCI. He proceeded on transfer to Laikipia then Mandera, his current posting. On cross examination, he reiterated that he was the first officer at the crime scene and did not interrogate the members of the public and further that the two suspects were brought to the police station. He confirmed that at the site where the motorcycle was recovered by his colleagues there were several boda boda operators, his colleagues accompanied the boda boda operators to where the suspects were near Dyoso Bar. He confirmed that the arresting officers did not inform him about the link of the suspects to the offence.

14. Assistant Superintendent Samuel K. Kogo (PW8) No. 230219 stated that he was summoned to the scene by IP Nzomo OC Crime Londiani, he proceeded to the scene where he found his colleagues, the scene was secured the scene was subsequently processed and the body moved to Molo District Hospital. He stated that an Administration Police Officer had been attacked around the same place and time on the material day, he reported the attack and after he was interviewed, he said he could identify the attackers. He further testified that the suspect and a woman were brought by the public to the police station and placed in police custody and further that soon thereafter he conducted an identification parade. The accused was in an identification parade among 8 other people. The police officer identified the accused by touching. The accused was informed about the parade and consented. PW8 prepared the identification form, signed it and produced the same as PExh.2. On cross examination he stated that the accused had consented to the identification parade, however, he conceded that he did not explain to the suspect the purpose and rights of an identification parade. He reiterated that the identification parade constituted 8 people.
15. Dr. Rodgers Wangalia Namisi (PW9) a medical officer stationed at Molo Sub County Hospital stated that the autopsy on the deceased was conducted by his colleague Dr. Arthur Onono who formed the opinion that the cause of death was a sudden death secondary to acute massive subdural hemorrhage brought by sharp trauma delivered from behind. The doctor prepared a post mortem report dated 23rd November, 2015, which bore the stamp and signature of Dr. Arthur Onono, PW9 produced the post mortem report as PExh. 4. On cross examination, he stated that he joined Molo Sub County Hospital sometime in October 2018, hence did not know Dr. Arthur Onono who prepared the post mortem report and therefore he could not confirm his handwriting, he however confirmed that the document was from Molo Sub County Hospital and the said doctor had asked him to produce the post mortem as an exhibit in this case
16. Section 211 of the Criminal Procedure Code was compiled with, the accused opted to give a sworn statement and called no witnesses.
17. Dennis Kipkemoi Korir (DW1) a casual labourer elected to give an unsworn testimony in his defence, stated that on the material day he went to Paradise Bar to have a drink with his friend. He further stated that while they were drinking Mary Wairimu, who was his girlfriend, came and took him home which was about 200 meters away, at the time he was so drunk and could not recall the time they left for his house. When he reached home, he slept up to about 9:30 AM the following day when he and Mary Wairimu were apprehended, they were kept in police custody for a week after which they were informed that they were being charged with the offence of murder. He further testified that an identification parade was done of 10 people yet the identification parade form shows that the parade was composed of 8 people instead of 10. He stated that he did not know why he was arrested and charged with the instant offence, he maintained his alibi defence, he reiterated that on the material day he was at a bar



where he took drinks, got drunk and thereafter went home. He stated that he was not a boda boda operator.

18. The sole issue for consideration is whether the prosecution proved its case against the accused beyond reasonable doubt.
19. The offence of murder is provided for in section 203 of the Penal Code that provides as follows; “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” In Republic v Andrew Omwenga [2009] eKLR the court held: “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 the 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.”
20. The accused in this case was charged with the offence of murder contrary to section 203 of the Penal Code which defines murder as the unlawful killing of a person with malice aforethought.

(a) Death and Cause of Death

21. In this case the death of the deceased person is not disputed, several witnesses testified that on the material day, the deceased was found lying face down in a pool of blood at the crime scene. Dr. Rodgers Wangalia Namisi (PW9) a medical officer stationed at Molo Sub County Hospital testified that the autopsy on the deceased was conducted by his colleague Dr. Arthur Onono who formed the opinion that the cause of death was a sudden death secondary to acute massive subdural hemorrhage brought by sharp trauma delivered from behind. The doctor prepared a post mortem report dated 23rd November, 2015, which bore the stamp and signature of Dr. Arthur Onono. PW9 produced the post mortem report as PExh. 4.

b. Whether the accused committed the unlawful act which caused the death of the deceased

22. On the material day PW1 the key prosecution witness placed the accused at the scene of crime, he testified that he was accosted by four men, however, the accused herein was the only one holding a panga and he assaulted him with the panga, then proceeded to attack the deceased a boda boda operator who had tried to intervene with the same panga, the boda boda operator was about 10 meters away. PW1 stated that he was assaulted at a business center, the area was well lit, there were no people in the vicinity save for the four men who accosted him, he therefore noted their complexions and the clothes they were wearing and that one (the accused herein) had a scar above the right eye. A day later, PW1 was able to identify the accused in an identification parade, described the accused as a tall, slender and dark guy who was dressed in blue jeans, white sneakers and a white sleeved shirt, he had a mark on the right eye. He further stated that the most distinctive aspect of the accused was the mark above the eye, he first saw him on the night of the attack, he was the one with the panga and subsequently attacked the boda boda operator 10 meters away. The accused’s clothes had stains of blood.
23. I have keenly gone through the evidence and I find that PW1 was the only identifying witness in the case, however, I find that he was able to identify his assailant on the material night and subsequently in the identification parade the following day. I find that his testimony is reliable and trustworthy. In *Abdala bin Wendo & another v Republic* (1953), 20 EACA 166 it was held that: “ Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct



identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

24. I therefore find that the accused persons' defense amounted to a mere denial. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person who unlawfully caused the deceased's death.

(c) Whether the Accused Person had Malice Aforethought.//**

25. For the charge of murder to succeed, it must be proved that they acted with malice aforethought. Section 206 of the Penal Code provides circumstances from which malice aforethought may be inferred. They are: "(a) An intention to cause 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; © An intention to commit a felony; (d)..." Having considered the facts of this case, I find that the accused person herein had malice aforethought, which can be inferred from his actions on the material day, he assaulted PW1 with a panga and proceeded to attack the deceased who was about 10 meters away with a panga. The accused person's assault on the deceased was motivated by the fact that the deceased had tried to intervene as the accused assaulted PW1 and I find that the accused's actions on the material day, were tainted with indifference, he was indifferent as to the outcome of the assault of the deceased using a panga; a fatal weapon. In Nzuki v Republic [1993] KLR 171, the Court of Appeal held that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows: "Malice aforethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result."

26. I have noted that the defence raised issue with the identification parade exercise and deemed it irregular as it was constituted of ten people instead of eight people as recommended in the police force standing orders, however, in Mwangi Mabita v Republic [1976] eKLR the Court of Appeal for East Africa (EACA) observed as follows; " Whether or not a parade is so irregular as to necessitate being disregarded is, in our view, a question of degree which has to be decided in the light of the circumstances of each case. In Mwango's case, the parade consisted of three persons including the accused. In Mboche's case there were seventeen people on the parade, including six suspects. In this case, there were fourteen people, two of whom were suspects. This was an irregularity, but not in our view one which caused prejudice or was such as to require the evidence as to the parade to be excluded." I find this irregularly did not prejudice the accused in any way and in any event the accused had consented to the identification parade exercise.

27. Accordingly, I find that the defense put forward by the accused person namely: Dennis Korir does not displace the prosecution's case. The prosecution has proved its case against the accused beyond reasonable doubt and in the premises, I find the accused person guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused person is hereby convicted for the offence of Murder..

DATED, SIGNED AND DELIVERED AT KERICHO THIS 29TH DAY OF FEBRUARY, 2024.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Prosecutor – Mr. Musyoki

Accused – Present in Person

Miss Koech for the Accused

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