



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mukaisi (Criminal Case 55 of 2018)  
[2024] KEHC 3005 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3005 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 55 OF 2018  
SC CHIRCHIR, J  
MARCH 21, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ATANAS MAKHUYI MUKAISI ..... ACCUSED**

**JUDGMENT**

1. Atanas Makhuyi Mukaisi ( The Accused), was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the 30<sup>th</sup> day of August, 2018 at Muchina Village, Mukhonje sub-location, Ilesi location, in Kakamega East sub-county, murdered one Cleophas Ng'ang'a Inziani
3. The accused denied the charge and the matter went to full Trial.

**The Evidence.**

4. PW1 recalled that on 29.8.2018 about 8.30 pm, she was having supper when she heard screams from outside, and she went to investigate. She found that the accused had hit the deceased with an axe. The deceased had fallen down and was crying. He was uttering that the accused had hit him with an axe. The accused on the other hand was telling the deceased "nilikuambia Leo utafika nyumbani" translating to "I told you will go home today"
5. She claimed that she could see the two clearly since there was moonlight, and had carried a torch. She further told the court that the deceased had been hit on his stomach. The deceased gave him the phone Number of his mother and she put a call to her.
6. She stated that the deceased's mother (pw4) came together with some of her relatives to assist the deceased. It was her evidence that the deceased was still alive. He could talk but could not walk



7. During cross examination by the accused counsel, she stated that she heard the deceased scream, and when she went to investigate, found the accused and the deceased . She did not see the accused hit the deceased. He stated that he did not know if the two had a previous altercation. She did not also hear either of them quarrel.
8. She further stated that she saw the accused walking away with the Axe. She found only the deceased and the accused on the scene and reiterated that she heard the deceased say that the accused had hit him with an Axe.
9. PW2 testified that the accused was his friend and that he used to accommodate him. He recalled that on 29/8/2018 at 8.00 p.m he was called by the deceased 's mother and told that the accused had hit the deceased . He did not come out but told pw4 to inform the Authorities. He further told the court that although the accused used to live in his house he did not see him that day. The following morning, the accused arrived and informed him that he had hit the deceased. He ordered him out of his house, and the accused left.
10. PW3 was the pathologist, Dr. Dixon Mchana . He conducted the autopsy on the deceased's body on 4.9.2018. The procedure was witnessed by Douglas Okanda and Vanier Makomere. On examination , he found that the abdomen had thickening of the lower lining of abdominal cavity and was filled with pus; there was perforation of the 3<sup>rd</sup> segment of the small bowel with a diameter of 0.6 cm; the spleen had features of inflammation, there were Muscular system injury of muscles underlying the lower abdomen. He concluded that the cause of death was due to severe infection, due to perforation of small bowel due to force trauma. He produced the post- mortem report (PEXB 1).
11. On cross- examination , he opined that the pus must have formed 48 hours after the injury and that he did the post- mortem 5 days after death . He stated that if one fell into something raised it could cause such injury; that falling on a tree stump can also cause a similar injury.
12. On re-examination, he stated that being hit can equally cause such injury. He however refuted the suggestion that the injury could have been due to a fall as there were no defence injury.
13. PW4 was the mother of the deceased. She testified that on 29.8.2018, at 8.00pm, she was called by PW1 to come and see her son who had been hit by the accused. when she reached the scene, she found her son lying on the ground. PW1 told her the accused hit him and went away. The deceased was in the homestead of pw1 , he was alive and talking . The deceased told her that the accused hit him .She called some relatives who came and assisted her to take the deceased home. She further told the court that they postponed the trip to the hospital due to lack of transport. The following day, she took the deceased to kakamega General hospital. The deceased died as he was being prepared for surgery.
14. On cross -examination the witness stated the accused told him that the accused is the one who hit him. She did not witness the assault, and did not find the accused on the scene.
15. PW5 recalled that on 29.8.2018 while they were having supper, they heard something falling outside, and a voice crying out saying ""umeniua" meaning "you have killed me" while another voice said "Nilikuambia Itatoka hapo" meaning "I told you will leave here" . Her mother stepped out; the injured person was brought in . Her mother called the deceased's mother . The mother called some people and the deceased was taken away. She knew the accused as he was an employee of her uncle She also knew the deceased as he was a neighbour. She heard the deceased saying that he was hit with an Axe by Makhuyi.
16. On cross- examination she told the court that she did not witness the assault. She stated she heard the voice of the accused uttering the words " Nilikuambia utatoka hapa" . The deceased told them he was hit on the stomach with an Axe.



17. PW6 was the investigating officer. He told the court that on 31.8.2018 at about 7.00 a.m, he received a phone call ,informing him that there was a suspect who had presented himself at the station; that the suspect had reported that on 30.8.2018 he had assaulted the deceased and the deceased had died. He testified he and one inspector Kio went to the crime but found nothing at the crime scene. They went to the hospital and saw the deceased's body. Later he arranged for post mortem which was conducted on 4.9.2018. He further stated that he recorded the confession of the accused and the other witnesses' statements.
18. During cross examination, he confirmed that he was the one who recorded the confession and reiterated that the accused voluntarily turned himself in at the station.
19. The Accused was put on his defence and he opted to give a sworn statement.
20. DW1 told the court that the deceased was his friend and that on the fateful day, the deceased demanded for his money from him. The money in question were proceeds of changaa which the accused had sold on behalf of the deceased. The deceased had a slasher and an Axe, he stated. He got hold of the 2 weapons and a struggle ensued. In the process the Axe fell on the deceased and hit him on the stomach. He later went and explained to Joseph ( PW2 ) what had happened. Two days later he came to know that the deceased had died. He went to the police and reported that he had had an altercation with the deceased. He had never had any disagreement with the deceased.
21. On cross- examination, he told the court that he went to see Joseph after the altercation and informed him what had transpired. He stated that he had sold chang'aa for both the deceased and Joseph and he had given Joseph the deceased's share of the proceeds of changaa. Joseph was to hand over the money to the deceased. . When he went to see Joseph he wanted to find out if the deceased's share of the money reached him. He stated that the deceased raised the two weapons and he reacted by dropping whatever he had, and held the deceased . They struggled. He pushed the deceased and he fell , and the axe fell on him. He claimed that when he went to the police, it was to report that he had a fight with the deceased. when the deceased fell , he ran away. He denied attacking the deceased. He further stated that mabel (PW1) lied to the court .
22. He further testified that he went to police to report that he had been assaulted . He did not have an OB extract of such report.
23. During re-examination, he stated that when he went to report the incident, he did not know that the deceased had died.
24. On cross examination by the court he stated that when the deceased fell, he told the accused that he had been hit and he was holding his stomach. He stated that the weapons fell before the deceased went down He later stated that when the deceased fell he was still holding the weapons.

### **The Accused's submissions**

25. It is the Accused's submission that he acted in self- defence.
26. He further submits that self-defense was a defence to criminal liability and that the burden to negate self-defense lied with the prosecution.
27. He further submits that he used reasonable force demonstrated by the fact that he used the blunt side of the Axe to hit the deceased.
28. On the element of malice a forethought ,he relied on the case of Rex versus s/o Ochen 1945 12 EACA 63 and held that the prosecution failed to prove the motive behind the alleged murder of the deceased



since none of the witnesses could testify to any bad blood between the deceased and the accused.. It is his submission that the prosecution has therefore failed to prove menrea .

29. It is his final submission that that the prosecution failed to prove actus rea or mens rea and hence the case has not been proved beyond reasonable
30. The prosecution did not file any submissions.

### **Determination**

31. Section 203 of the penal code defines the offence of murder as follows: "any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder."
32. For the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond reasonable doubt.
33. In Anthony Ndegwa Ngari v Republic [2014] eKLR, the elements were reiterated as follows:
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.
34. On the first ingredient, Dr. Dixon Mchana opined that the cause of death was due to severe infection due to perforation of small bowel due to force trauma. The body was identified by the deceased's two relatives . The fact of death and its cause was therefore proved.

### **Did the Accused caused the death of the deceased?**

35. In his defence the Accused readily admitted that he had an altercation with the deceased; that the deceased was the aggressor , as it is the deceased who first attempted to attack him. It was his evidence that the deceased raised an Axe and a slasher and he reacted by getting hold of him. They struggled and the axe fell on the deceased. He denied attacking the deceased.
36. However looking at the totality of his evidence ,I do not buy the narrative that the Axe fell on the deceased, and this is why: Firstly he admitted to have pushed the deceased to the ground. It raises the question , if the deceased is the one who was still holding the weapons at that point, how is it possible that the Axe could have fallen on him.

Secondly , he admitted to the court that the weapons first fell off before the deceased reached the ground; yet in his evidence in chief , he had stated : "The Axe fell and hit him in the stomach" The question is : who / what went down first, the Axe or the deceased? Am inclined to believe , based on his own contradictions, that the Accused attacked the deceased.

Thirdly, according to the pathologist ,in case of a fall , there would be signs of defence injuries, which was absent on the deceased's body. It ca not therefore be possible that the deceased could have fallen on the Axe.
37. On the other hand the Accused told the court that indeed he had a confrontation with the accused , that the deceased was the aggressor and he only acted in self -defense and that in so doing he used reasonable force. His counsel has submitted that it is upon the prosecution to disapprove this plea, which she submits, they had failed to.
40. The pertinent question is whether the defence of self-defense is sustainable?



41. On the defence of self – defence ,section 17 of the penal code provides as follows: “ Subject to the express provisions in this code, or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of a person or property shall be determined according to the principles of English common law”
42. The common law principles were spelt out in the case of *Palmer v Republic* [1971] AC 814 in which it was held: -
 

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected.....”
43. Locally, the Court of Appeal in *Ahmed Muhammad Omar & 5 Others v. Republic* Cr. Appeal No. 414 of 2014 dealt with the defence of self-defense in great detail . The court stated as follows: “That test for self-defense was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be” ..... “The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in *DPP v. Morgan* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in *DPP v Morgan* (supra) it was held that:”.....if the appellant might have been laboring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”
44. Thus the use of force used in self defence ought to be proportional to the imminent danger and harm it could cause on a person .
45. In this case, the accused claimed that he met the deceased who was carrying a slasher and an axe. That the deceased raised both the slasher and the Axe ; that got hold of him and a struggle ensued, and in the process, the deceased fell down and the axe fell on him on the stomach. However in cross examination he admitted he pushed the deceased. His counsel has also submitted that he acted in self- defence; that the force was reasonable, demonstrated by the fact that he used the blunt side of the Axe.
46. Also in the case of *In Mokwa Vs Republic*, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force.
47. The pertinent question then is, was the force too excessive? The Accused submission is that he used the blunt side of the Axe. That may be true, but then the force was directed on the stomach, a delicate part of the body. Indeed according to the pathologist, the impact caused perforation of the small bowel. He



must have known that directing the axe on the stomach had the potential of causing a fatal injury. If the force was directed on the deceased's upper or lower limbs, for instance it would still have disabled him, but less likely to kill him. The force used was excessive and the defence of self- defence is not plausible and I dismiss it.

48. What about provocation? This defence has not been specifically pleaded but that does not bar this court from looking at the evidence and make a finding on whether there was provocation . The accused told the court that the deceased raised both the slasher and the axe, but he managed to get hold of them. He used the axe to allegedly to defend himself.

49. Section 207 of the Penal Code provocation is a defence to murder. That Section provides that: -

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section , would constitute murder , does the act which causes death in the heat of passion caused by certain provocation as hereinafter defined , and before there is time for his passion to cool, is guilty of manslaughter only”

50. The accused readily admitted that there was an altercation. The reason for the quarrel emerges in his cross- examination . The quarrel was about the proceeds of sale of changaa. The deceased was asking for his money. From the Accused testimony he had given the money to one Joseph ( PW2), and the PW2 was to hand it over to the deceased. The accused told the court that he went , apparently after attacking the deceased, and inquired from PW2 if he had handed the deceased his money.

51. It is evident therefore that the killing was not planned. It is evident that a quarrel ensued and got out of control. I find that there was no intention on the part of the accused to kill the deceased. There is also evidence that upon learning of the deceased's death he turned himself in. Although the accused alleges that he went to the police station to report a fight , and that he made the report before getting the news of the deceased's demise , he had no Occurrence Book ( OB) Extract to show that such a report was made. I find the evidence of PW6, that the Accused turned himself in , upon learning of the death of the deceased to be more plausible. The circumstances of the fight , its cause and subsequent conduct of the accused, make me conclude that the accused had no malice aforethought, and therefore the prosecution as failed to prove the charge of murder.

52. The fact remains that the Accused attacked the deceased but the aforementioned circumstances indicate that killing was not planned . There was no malice on the part of the accused

The circumstances of this case as set out shows that this was an act prompted by provocation.

53. I will accordingly reduce the charge of murder to manslaughter.

54. I find the Accused guilty of manslaughter contrary to section 202 as read with section 205 of the penal code and convict him accordingly

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21<sup>TH</sup> DAY OF MARCH 2024**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin- Court Assistant

Ms. Chala for the state

Ms. Mburu for the Accused.



Accused- present.

