



**Republic v Tabu (Criminal Case 18 of 2019) [2024] KEHC 6391 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6391 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 18 OF 2019  
SC CHIRCHIR, J  
MAY 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID MALIKA TABU ..... ACCUSED**

**JUDGMENT**

1. David Malika Tabu was charged with murder contrary to Section 203 as read with Section 204 of the [penal code](#).
2. The particulars of the charge are that on 5/4/2020 at Ematete village, Mushiangubu sub-location, Mulwanda location in Khwisero sub-county within Kakamega county murdered Charles Nyawonga Ameso. (Deceased).
3. The Accused denied the charges and the matter went to full trial.

**Analysis of the evidence and determination.**

4. Section 203 of the [penal code](#) defines 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."
5. In [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR, the elements of the offence of murder were expounded 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.
6. For the prosecution to secure a conviction, each of the above elements must be proved beyond reasonable doubt.



### **The Death of the Deceased.**

7. On the death of the deceased, the PW1 conducted an autopsy on the deceased's body and he concluded that the deceased died of intro-curvical hemorrhage secondary to trauma. He opine that a sharp object was probably used . The post-mortem Report (PEXb1) indicate that the body was identified by one Joseph Ayemba and Edward Ngane. Thus the fact of death and it's cause was therefore proved .

### **Whether the accused herein caused the death of the deceased.**

8. None of the prosecution witnesses witnessed the accused attacking the deceased. Thus the prosecution's rests primarily on circumstantial evidence.
9. Circumstantial evidence was defined by the court of Appeal as “ evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved..... It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics.....” ( Ref: *Ahamad Abbolfathi mobammed & Ano vs Republic* ( 2018) e KLR
10. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“ Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

11. Also in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal held : “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.” ( Emphasis added)

### **What are the circumstances in this case?**

12. PW1 told the court that the deceased was her brother-in-law, a brother to her husband. on the material day, people came running into her compound and at the same time she heard the Accused growling. He knew his voice as he was a neighbor. The Accused's mother told her that the Accused had cut the deceased. And she needed help in taking the deceased to hospital. She rushed to the home of the Accused's mother. They found the Accused brandishing a panga while patrolling the compound and



- still growling. The accused chased them away. An Aswani then came and confronted the Accused and the commotion stop. That gave them to get access to the compound.
13. They found the deceased lying at the door of the deceased's mother's house. He had been cut on his head, teeth, face and neck. She identified the accused in the dock.
  14. She further stated that they did not get a chance to check what happened to the panga which the accused had been holding as they were focused on taking the deceased to the hospital. At cross-exam she stated that the home of the deceased and the accused were adjacent.
  15. PW2, was Wycliffe Amunga Auba a neighbor to the Accused. He was in his house when he heard screams from outside. The Accused was mentioning his name and that of the deceased. He heard the Accused said he was tired of being arrested and he was coming to cut him and the deceased. The witness armed himself with a rake and told his son, (PW6) to take up a rungu. When he got out of his house, the accused retreated to his home. They chased him to his (Accused compound). When they reached the accused home, the accused started throwing stones at them. He further stated that when he saw the deceased's body at the door of the mother of the accused, he realized the situation was dangerous and decided to go back home to protect his family. He told the court that the accused was his relative. He further told the court that his relationship with the Accused was acrimonious; that the Accused was a changaa (local brew) brewer, and whenever the police came to arrest him, he always believed that he was the one who alerted the police. He never witnessed the Accused cutting the deceased.
  16. PW3 was the deceased's wife. He told the court that the deceased's left home and went to a neighbour's home in response to a woman screaming there. She was calling out to the deceased using the deceased's other name " Fati". Later on , at about between 6:30 to 7pm a child by the name Veronica came to tell her that Charles ( the deceased) had been cut. She went towards the home from where the screams were coming from with one Shikolo. She met the accused chasing each other with one other person, she could not identify. When they arrived at the accused's home they found the deceased lying down on the door of the Accused's mother's door. She did not witness the Accused cut the deceased.
  17. PW6 was the son of PW2. He saw the Accused hitting the gate of his home with a panga. He heard him call out his father Amunga telling him to come out. His father took a Rungu; and told him that they should confront the accused. This was at their home. They struggled with the Accused. He raised a stone as if to hit PW2 but PW2 evaded. A crowd started forming. The accused ran to his home which was about 200 metres away. They followed him. The Accused was saying "someone must die so that people can eat meat". He saw the deceased lying down with blood oozing from his head.
  18. At cross-examination he said, they ran after the accused, but he ran into a maize plantation. It was after that, that he saw the deceased on the ground bleeding.
  19. PW7 was the investigation's officer. He told the court that after the incident, the Accused disappeared to an unknown place. Thereafter he got information that the deceased wanted to surrender. He arranged for a meeting with him and when he came, he came, he took him to custody. He confirmed that the person he arrested was at the one at the dock. He never recovered the weapon.
  20. He further told the court that the accused used to sell changaa and he was frequently being arrested by the police. He used to complain that Wycliffe and the deceased were the ones relaying information to the police.
  21. The accused was put in his defence . I n his unsworn statement, he told the court that the deceased, PW2 and PW6 were the ones who attacked him; that he decided to get hold of the deceased because he had a panga. That as he struggled with the deceased the panga cut him.



22. The above is a summary of the facts. Do the above circumstances point to the accused as the perpetrator of the crime? My answer is in the affirmative as I will demonstrate hereafter.
23. According to PW1 when she and others reached the accused's home he was holding a panga, he was growling and patrolling the compound. He chased them away. The imperative question is why was he chasing people away, who wanted to come to the rescue of the deceased If was the injury of the deceased was accidental as he claimed in his defence?
24. PW2 heard the accused complaining about him and the deceased. That he was coming to cut "fati" (the deceased) and him (PW2). What transpired at PW2's home shows that just as he had vowed, he was now coming for PW2. PW6 testified that the accused raised a stone to hit PW2 but PW2 evaded him. A crowd formed and that is when the accused ran away. Thus, it is evident that having done with one of his intended victims he was coming for the 2<sup>nd</sup> one, only that he was overpowered.
25. PW1 testified that she saw the accused brandishing a panga Although the weapon was never recovered , this evidence is corroborated by that of PW6, who testified that the Accused was hitting their gate with a panga. If, as accused claimed that he had struggled with the deceased because he was holding a panga, why was he still holding the panga at pw2's gate?
26. Further according to PW7, the investigations officer, the accused went into hiding and only surfaced on the 4<sup>th</sup> day to present himself to the police. This part of the witness testimony remained firm under cross- examination. Further the accused did confirm this is his defence. If the Accused had cut the deceased accidentally or in self-defence, there was no need to go into hiding.
27. In summary, the brandishing of the panga , preventing others from coming to the rescue to of the deceased and the fact that he had vowed to that someone must die so that people can eat meat; his going into hiding after the incident point to the accused as the perpetrator. All these circumstances taken cumulatively point to the accused , and not any other person as the person who killed the deceased.
28. I have considered his defence. He told the court he struggled with the deceased because the deceased had a panga, and as he struggled to take the panga from the deceased the panga cut him He added that the panga did not go deep
29. However this is contrary to the findings of the post-mortem report. According to the said report, the deceased suffered a cut wound on the mandibles measuring 2x3 cms; There was a cut-wound on the frontal region measuring 1x3cm, another cut wound on the scalp measuring 1x2cm and bruises on the neck.
30. Thus contrary to the allegation by the accused there were more than one cut on the body of the deceased. If the cut was accidental, then it would just have been a single cut only. What explains the several cuts if the panga accidentally cut him? I find that the accused was not being candid on what transpired. His defence is not tenable and I hereby dismiss it.
31. I am satisfied that the prosecution has proved that the accused, and not any one else , is the one who attacked the deceased and which attack caused his death.

### **Was there malice aforethought**

32. Section 206 of the [penal code](#) sets out the circumstances which constitute malice aforethought as:
  - a an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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.( Emphasis added)
  - c An intent to commit a felony
  - d An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony”.
33. The accused inflicted at least 3 cuts on the deceased, one of which was on the head of the deceased . There were also bruises on the neck; He prevented people from the quick rescue of the deceased. He must have known the said injuries had the potential to kill the deceased. I am therefore satisfied that the malice aforethought was proved.
34. In conclusion it is my finding that the prosecution has proved its case beyond reasonable doubt and I find the Accused guilty of murder contrary to section 203 and 204 of the penal code, and I convict him accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS ,THIS 30<sup>TH</sup> DAY OF MAY 2024**

**S. CHIRCHIR**

**JUDGE**

In the presence of:-

Godwin- Court Assistant

The Accused.

