



**Republic v Dokota (Criminal Case E003 of 2021)
[2024] KEHC 8173 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E003 OF 2021**

**JN ONYIEGO, J
JUNE 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ABDI OMAR DOKOTA ACCUSED

JUDGMENT

1. The accused person herein 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 on 26.04.2021 at Malkamansa area, Saka Location within Tana River County he murdered Issa Aden Roba. Upon arraignment in court, he pleaded not guilty and a plea of not guilty was accordingly entered.
2. The case proceeded to full trial in which case the prosecution called Six (6) witnesses in support of its case:
3. PW1, Mariam Bundit Fodh testified that on 06.04.2021, she was at her home when the accused person entered her house. That she was together with Issa, her nephew, and Khadija and some young children. That accused person who was armed with a bow and arrows asked of Issa's whereabouts to which she responded that he was praying. It was her evidence that the accused proceeded to shoot Issa on the head before running away. She stated that the accused person was a person well known to her as they are cousins. She further stated that the accused person was in his normal state of mind and that at no time has he ever been mentally sick.
4. PW2, Khadija Aden testified that on the material day, while at home with Mariam Bundit, Issa Aden Doba and some young children, the accused person entered the house while armed with a bow and arrows. That the accused called out on Issa who was praying and upon Issa facing him, he shot him on the head and thereafter ran away. That upon being rushed to the hospital, Issa died. She stated that the accused person was a person well known to her



5. PW3, Ismail Dungichu stated that Hawa, the wife to the accused had previously been beaten by the accused and so, he had taken her to a nearby private hospital. That on the fateful day, the accused entered his house while armed with a bow and arrows and ordered him to stand up and tell him where he had taken his wife. He recalled that the accused person shot at him but fortunately, he managed to run away and hid in his house.
6. He further stated that, upon the accused seeing him again, he bounced back with the intention of shooting him but he was restrained by his brother in law, Yusuf. That he proceeded to pray but while at it, he heard screams from his brother, Aden Roba's house. Upon responding to the said screams, he found Issa lying down on the ground with an arrow on the head. In the process of rushing the deceased to Madogo hospital, he died on the way. It was his case that the accused is a brother to his father in law and that he knew him very well.
7. PW4, Aden Roba Kisho testified that on the day when the deceased lost his life, he was at the shamba. That Ismail called informing him that Abdi had confronted him with arrows in his house and so he needed help. Given that he was far, he called Abdi Bagacha who he directed to go help Ismail. That after a short while, Ismail called thus informing him that his son had been killed. Upon rushing home, he found Issa lying down on the ground with an arrow stuck on his head. On rushing him to Madogo Hospital, he unfortunately passed on. He stated that the accused person was a person well known to him for he is married to his sister.
8. PW5, No. 240545 IP Kimeli Busienei stated that on 26.04.2021, DCI Madogo informed him of a body that had been taken at the station with an arrow on the head. He was thus directed to take the body to Garissa hospital and in the company of the parents of the deceased, they took the body to Garissa hospital where the deceased was confirmed dead. The body was thus moved to the mortuary where post mortem was done and an arrow removed from the head of the deceased.
9. On 27.04.2021, he received information from Shaka Police station that the accused had surrendered himself and so he proceeded to arrest and took him to Madogo Police station. He commenced investigations and thereafter charged him. On cross examination, he stated that the accused shot the deceased for the reason that he wanted to leave with his wife but his in laws resisted. That the accused person lived with the wife within the homestead of the deceased's parents.
10. PW6, Dr. Hassan Hadwa Ragow stated that he performed an autopsy on the body of the deceased; That upon examination, he found the whole body covered with blood. That an arrow was embedded on the left side of the head and upon removing it, the brain matter came out. It was his opinion that the cause of death was brain injury due to bleeding. He produced the postmortem form as Pex 1.
11. At the close of the prosecution's case, this court ruled that the accused person had a case to answer and put him on his defence.
12. The accused person in his unsworn statement stated that he knew the deceased as he was his brother in law. That on 23.04.2021, he had a disagreement with his wife Hawa and so, the deceased and Ismail demanded to know why he had assaulted their sister. That they were armed with arrows hence a fight ensued and, in the process, Issa fell on the arrow. That he escaped to his parents' house but was later arrested and taken to Shaka Police station. He said that he was shocked to learn of the deceased's death but the same notwithstanding, they have since resolved the dispute.
13. Parties were therefore directed to file final written submissions which the prosecution did not file. The accused on the other hand relied on submissions dated 10.05.2024 filed by Mwalimu Advocate wherein it was urged that the prosecution did not prove its case beyond any reasonable doubt. That it was the



- deceased who confronted the accused while armed with a bow and arrows and in the course of the fight, the deceased got injured as he fell on the arrow.
14. The defence therefore contended that the case falls under sections 207 and 208(1) of the Penal Code as the accused attacked the deceased when temporarily deprived of the power of self-control and therefore had no malice aforethought. To that end, support was drawn from the case of *Republic v Hussein s/o Mohamed* [1942] EACA 66 where it was held that once legal provocation has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence of manslaughter and not murder is preferable irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation.
 15. This court was therefore urged to find that the accused herein acted in self defence and as such, the offence of murder was not proved.
 16. I have considered the evidence herein and submissions by the defence. Issues that arise for determination are; whether death of the deceased occurred; whether the accused caused the death of the deceased through an unlawful act; whether there was malice aforethought.
 17. It is trite that for the prosecution to secure a conviction on the charge of murder, it has to prove the above ingredients against an accused person. In *Johnson Njue Peter v Republic* [2015] eKLR, the elements of the offence of murder were listed as follows: -
 - (a) whether the death of the deceased occurred;
 - (b) whether the accused committed the unlawful act which caused the death of the deceased; and
 - (c) whether the accused had malice aforethought.
 18. The death of the deceased was confirmed by the testimony of PW1, 2, 3, 4, 5 and 6 who saw the deceased dead with an arrow stuck on his head. PW6 upon conducting post mortem examination formed the opinion that the cause of death was as a result of bleeding from the head. It therefore follows that death of the deceased was thus proved.
 19. On whether the accused person committed the unlawful act, *the Constitution* under article 26 is clear. It provides that the right to life is protected 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. *Daniel Nzioka Mbuti & another v Republic* [2021] eKLR and *Roba Galma Wario v Republic* [2015] eKLR. From the facts herein, it is clear therefore that the cause of death of the deceased was not excusable or authorized by law thus the same was unlawful.
 20. On whether the accused person was responsible for the death of the deceased, the direct evidence of PW1 and PW2 as corroborated with the evidence of PW6 overwhelmingly points at the accused person as the one who shot at and therefore killed the deceased. The same was buttressed by the fact that the accused person was a person well known to the said prosecution witnesses as they were not only related but were also staying in the same homestead.
 21. It is therefore clear that there was no mistaken identity hence positive identification through recognition which is not disputed by the defence. In fact, accused does not deny that he was at the scene of crime at the material time and that there was some confrontation between him and the deceased.
 22. On whether the accused person had malice aforethought, the court must determine whether he, with the intention to kill the deceased, inflicted injuries that resulted into the death of the deceased. There is of course no requirement in the Penal Code that one must have a motive for murder which is the unlawful killing of another with malice aforethought under Section 203 of the Penal Code.



23. Malice aforethought was described by the court of appeal in the case of *Nzuki v Republic* [1993] KLR 171 as follows; for an act to be referred to as murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.
- Intention to cause death
 - Intention to cause grievous bodily harm
 - Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
24. From the onset, the accused person mounted the defence of provocation urging that the deceased confronted him while armed with a bow and arrows and in the course of the fight, the deceased was pierced with an arrow that he fell on. In essence, he was raising the issue of self defence.
25. The defence of self- defence notwithstanding, the accused raised the defence of provocation as well. Section 207 of the Penal Code describes “killing on provocation” as follows;
- 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 sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.
26. Section 208(1) of the Penal Code defines “provocation” as follows-
- The term “provocation” means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
27. The implication of section 208 of the *Penal Code* is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation. [See *Wero v Republic* [1983] EA 549]. Furthermore, while the accused does not shoulder the burden of proving his defence, the prosecution must marshal evidence to disprove the defence beyond reasonable doubt [See *Kenga v Republic* [1999] 1 EA 141].
28. The Court of Appeal in *Peter Kingori Mwangi & 2 Others v Republic* [2014] eKLR expressed itself with regard to provocation as follows: -
- “For provocation to exist, the following two conditions must be established: -
- (1) The subjective condition that the accused was actually provoked so as to lose his self-control and
 - (2) The objection condition that a reasonable man would have been so provoked.”
29. According to the evidence of pw1 and pw2 both eye witnesses, accused confronted them demanding to be told where Issa the deceased was. When he was told that Issa was praying, he straight away



- approached Issa who was on his knees praying and shot an arrow into his head. According to pw1 and pw2, the attack was not preceded with any quarrel or fight between the deceased and the accused.
30. According to pw1 and pw2 both eye witnesses, there was no attack directed at the accused to infer provocation. The evidence on record reveals that accused had differences with his wife Hawa leading to Hawa leaving for her parents' house which was apparently within the same homestead.
 31. According to the accused, it was the deceased and one Ismail his brother in-laws who had contributed to their sister Hawa running away from her matrimonial house. Accused seems to have formed the opinion that the deceased and Ismail were shielding their sister and therefore keeping her at their home against his wish.
 32. For the accused to have armed himself with a bow and arrows, left his house and went straight to his in-laws' house and then demanded to see Issa who was then praying and then shot him with an arrow on the head without resistance, is sufficient enough to draw a reasonable inference that the accused had formed the intention to kill somebody and in this case Issa for the sole reason that he (deceased) and Ismail had prevented their sister Hawa from going back to his (accused) home.
 33. Considering that the accused aimed at the head and killed Issa at one shot, he reasonably ought to have known that his action could probably have caused grievous harm and therefore lead to Issa's death hence the desired result which was unlawful and intended thus the intention to kill (malice aforethought).
 34. From the nature of the lethal weapon used to execute the act, the part of the body targeted and the almost instant death of the deceased, conduct of the accused before shooting the deceased, accused cannot run away from liability. See *R v Stephen Sila Wambua Mathbeka* (2017)e KLR where the court held that malice aforethought can be inferred from the nature of the weapon used, part of the body targeted, manner in which the weapon was used and the conduct of the accused before, during and after the offence.
 35. The defence of self defence or provocation does not arise in the circumstances as the witnesses with whom accused had no grudge with did not see the deceased fight with the accused nor attack him. Accused's defence is just but an excuse intended to run away from responsibility.
 36. There was no justification at all in the accused arming himself and then proceeded to attack a person who was not armed. He had clearly formed the intension to kill hence proof of all the ingredients constituting murder to which I find him guilty as charged. Accused's defence is thus dismissed. Accordingly, accused is convicted for the offence of murder contrary to section 203 as read out with section 204 of the penal court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JUNE 2024.

J. N. ONYIEGO

JUDGE

