



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Omulama & 2 others (Criminal Case E004 of 2022)  
[2024] KEHC 9266 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E004 OF 2022**

**JN KAMAU, J**

**JULY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**RANDON ANDANJE OMULAMA ..... 1<sup>ST</sup> ACCUSED**

**ELIJAH ENOCK AMUNGUI ALIAS SOMO ..... 2<sup>ND</sup> ACCUSED**

**AGGREY ALIJA AHOLI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The Accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-  
  
“On the 22<sup>nd</sup> day of April 2022 in Khusikulu Location, Luanda Sub-county within Vihiga County jointly murdered Zaphania Olongo Chimoto.”
2. The Prosecution’s case was heard on diverse dates between 20<sup>th</sup> September 2022 and 15<sup>th</sup> April 2023 when it closed its case. On 18<sup>th</sup> April 2023, this court found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on 18<sup>th</sup> July 2023.
3. This matter was partly heard by Musyoka J. He took the evidence of Chimolo Olieba Otieno (hereinafter referred to as “PW 1”), Humphrey Kote Oyoko (hereinafter referred to as “PW 2”) and Refa Atika Munai (hereinafter referred to as “PW 3”).
4. This court became seized of this matter on 7<sup>th</sup> March 2023 on which day the Accused persons and the State indicated that they wished to proceed with the matter from where it had reached. This court therefore took the evidence of Dr Dickson Mchana Mwalundindi (hereinafter referred to as “PW



4”), Robert Lumumba Malunda (hereinafter referred to as “PW 5”), No 63454 Sgt Lennox Barasa (hereinafter referred to as “PW 6”), the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons who testified as “DW 1”, “DW 2” and “DW 3”.

5. The Prosecution’s Written Submissions were dated 18<sup>th</sup> August 2023 and filed on 21<sup>st</sup> August 2023 while those of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons were dated 3<sup>rd</sup> July 2024 and filed on 30<sup>th</sup> July 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

6. The issues that were put before this court for consideration were as follows:-
- a. Whether or not Zaphania Olongo Chimoto (hereinafter referred to as the “deceased”) died?
  - b. If so, was his death caused by an unlawful action(s) and/or omissions?
  - c. If so, who caused the unlawful action(s) and/or omissions?
  - d. Was there malice aforethought in the causation of the deceased’s death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

#### **I. Proof of Death of The Deceased**

8. The Accused persons submitted that the deceased’s death had been proved by PW 4 and two (2) other witnesses. On its part, the Prosecution submitted that there was no controversy as to whether the deceased died as the same was not contested by the defence.
9. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

#### **II. Proof of Cause of The Deceased’s Death**

10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons placed reliance on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR where it was held that the elements of the offence of murder were proof of the deceased’s death, proof that the deceased’s death was a result of unlawful actions and/or omissions and proof of malice aforethought in the unlawful actions and/or omissions.
11. They further cited Article 50(2)(a) of *the Constitution* of Kenya, 2010 and the cases of Woolmington v DPP 1935 AC 462, Miller v Minister of Pensions 1942 AC and Bakare v State 1985 2NWLR where the common thread was that proof beyond reasonable doubt need not reach certainty but must carry a high degree of probability.
12. They did not submit on the question of proof of the deceased’s death.
13. The cause of the deceased’s death was a pertinent issue. PW 4 tendered a Postmortem Report dated 30<sup>th</sup> April 2022 in respect of the deceased herein as an exhibit in this matter. After conducting the postmortem examination, he formed an opinion that the cause of death was failure of circulation of blood secondary to blunt force trauma following assault.



14. It was therefore clear from his evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

### III. Identification of Perpetrator(s) of Deceased's Death

15. The Accused persons did not deny being with the deceased on the material date of 22<sup>nd</sup> April 2022. However, they denied injuring and/or beating him.
16. It was their case that the evidence by the Prosecution's witnesses did not necessarily point to them as the persons who caused the deceased's death. They reproduced the evidence on record and argued that the evidence of PW 3, PW 5 and PW 6 was inconsistent. They added that the rungu that the witnesses claimed they used to hit the deceased were not produced as evidence. They contended that their defence was consistent and had no contradictions.
17. They placed reliance on the case of Anthony Ndegwa Ngari v Republic [2014] eKLR where it was held that the elements of the offence of murder were proof of the deceased's death, proof that the deceased's death was a result of unlawful actions and/or omissions and proof of malice aforethought in the unlawful actions and/or omissions.
18. They further cited Article 50(2)(a) of *the Constitution* of Kenya, 2010 and the cases of Woolmington vs DPP 1935 AC 462, Miller vs Minister of Pensions 1942 AC and Bakare vs State 1985 2NWLR where the common thread was that proof beyond reasonable doubt need not reach certainty but must carry a high degree of probability.
19. They submitted that the Prosecution had not proved the offence herein beyond reasonable doubt and urged the court to acquit them.
20. On its part, the Prosecution submitted that they did not dispute having been at the scene of crime. It pointed out that they were properly identified by the Prosecution's witnesses.
21. The 1<sup>st</sup> Accused person testified that on the material date, he was at his home when his brother, the 2<sup>nd</sup> Accused person arrested a thief stealing arrow roots in his shamba. He stated that the thief was the deceased. He further testified that he helped the 2<sup>nd</sup> Accused person take the deceased to the Sub-Chief who directed them to Emuhaya Police Station.
22. He pointed out that when they reached Emuhaya, they were attacked by a group of people making them to run away and left the deceased there. He denied having had a rungu. He also denied having beaten the deceased.
23. The 2<sup>nd</sup> Accused person also denied killing the deceased. His evidence corroborated that of the 1<sup>st</sup> Accused person. He averred that on the material day, he was at home when he went to his farm and realised that his arrowroots had been stolen.
24. He said that when he followed the path where the arrowroots had been stolen, the footsteps led him to the deceased's house. He stated that he did not find the deceased in his house and when he inquired, he was told that he had passed with some luggage. He told the court that he found the deceased at the road standing with PW 2 and with a bag on his back. When he removed the bag, he found the said arrowroots.
25. His further testimony was that he met the 1<sup>st</sup> Accused person and together they took the deceased to the Sub-Chief who directed them to Emuhaya Police Station but that before they got to Emuhaya,



- they met an angry crowd which threatened to beat them. They ran away leaving the deceased with the said crowd. He denied having beaten the deceased with a rungu and/or injured him.
26. The 3<sup>rd</sup> Accused person told this court that on the material day, he was weeding maize at his grandfather's land when at around 2.00 pm he heard someone shouting, "thief, thief". He stated that when he went to check what was happening, he found the deceased on the road. He denied having had a rungu on the said date. He also denied beating the deceased.
  27. Notably, PW 1 who was the deceased's father testified that on the material date, he was at home at around 9.00 am and 10.00 am when a child ran to him saying someone was being killed. He stated that he went to tell his wife and when he went to check what was happening, he found that the person was his son, the deceased herein. He testified that he found him seated with injuries and blood all over his body.
  28. He said that he could see knife injuries. He informed the Assistant Chief who informed the police. He also informed his wife who took the deceased home. However, by the time the police arrived that evening, the deceased had already died. He was emphatic that the deceased mentioned the 1<sup>st</sup> and 2<sup>nd</sup> Accused person as the people who grabbed him as he was talking to PW 2.
  29. PW 2 testified that the deceased was his friend and that on the material date, he was with the deceased when the 2<sup>nd</sup> Accused person came and grabbed the deceased asking him about the things that he took from him in the night. He stated that the deceased denied taking his arrowroots. He had a bag on his back and an umbrella on his hand. There were no arrowroots in the said bag.
  30. He told the court that the deceased and the 2<sup>nd</sup> Accused person began pulling at each other and he left only to learn later in the evening that the deceased was killed. He pointed out that he only saw the 2<sup>nd</sup> Accused person and did not see the other two (2) Accused persons. On his cross-examination, he stated that he did not witness the assault and did not know how the deceased sustained the injuries.
  31. PW 3 testified that he was the deceased's neighbour. He stated that on the material date, at around 9.00 am, he was called by children to go and see the deceased who had been beaten on allegations of stealing arrowroots from the 2<sup>nd</sup> Accused person. He told the court that when he went to the scene, he found the deceased lying unconscious and alone on the ground. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons then came with leaves of the arrowroot plant. He stated that the said persons threw the leaves on the ground and began assaulting the deceased using rungu.
  32. He pointed out that the 1<sup>st</sup> Accused person hit him on the head and legs. The 3<sup>rd</sup> Accused person hit him on his back. He further stated that he called the 2<sup>nd</sup> Accused aside who informed him that the arrowroots were his and had been stolen. He advised him to plant others. He said that PW 5 and one Evangelist Margret Ombima came to the scene. He left them there.
  33. PW 5's evidence corroborated that of PW 3. He testified that on the material date, he was from the market Khusikulu going to his house when he heard screams from Mmbukato stream and when he went to check what was going on, he found the deceased being beaten with rungu and was lying on the ground.
  34. He was categorical it was the Accused persons herein who were beating the deceased on the head, legs and the entire body. He further testified that he found leaves of arrowroots at the scene. He said that they told him that they were beating him because he had stolen their arrowroots. In his cross-examination, he confirmed that he saw all the Accused persons hitting the deceased.
  35. PW 6 was the Investigating Officer. He stated that he only called those witnesses who witnessed the incident. His evidence corroborated that of PW 1, PW 2, PW 3 and PW 5.



36. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 3 and PW 5 saw the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons beat the deceased on the material date. They were also able to see him bleeding and his body full of injuries. They also saw the crude weapons the Accused persons were carrying at the material time.
37. PW 1 also saw the deceased bleeding. PW 1 testified that the deceased told him that it was the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons who had attacked him. On his part, PW 2 saw the 2<sup>nd</sup> Accused person grab the deceased
38. PW 1, PW 3 and PW 5 all placed the Accused persons at the scene of crime. The incident happened during daytime. There was, therefore, sufficient light that was favourable for the positive identification of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused person.
39. This court was thus persuaded to find and hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons were positively identified by PW 2, PW 3 and PW 5 as aforesaid. They each spent sufficient time communicating with the Accused persons who were with the deceased at the material time. They were all neighbours and knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition.
40. The Accused persons did not demonstrate that there was any motive for PW 1, PW 2, PW 3 and PW 5 to have colluded to frame them as the people who unlawfully caused the deceased's death on that material date.
41. Their assertions that the rungs were not produced as evidence and that the Prosecution witnesses' evidence was full of inconsistencies and that the Prosecution failed to call some crucial witnesses raising doubts as to who actually killed the deceased were therefore rendered moot.
42. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the evidence of their evidence to have been watertight enough to have weakened the inference of guilt on their part. Their assertions that the Prosecution's evidence was inconsistent and/or it failed to call crucial witnesses thus fell on the wayside. The witnesses that the Prosecution availed were sufficient to have proven its case.
43. Consequently, it was this court's finding that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons' defence was mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 5 and PW 6.

#### **IV. Malice Aforethought**

44. Having found and held that the Accused persons' defence was not sustainable as they were positively identified as the perpetrators of the deceased's death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
45. They placed reliance on the cases of Republic v Godfrey Ngotho Mutiso 2008 ELR (sic) and James Masomo Mbacha v Republic [2015] eKLR among other cases where the common thread was that courts have sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe injuries to the victim.
46. They pointed out that the duty of the State under Section 206 of the Penal Code was to prove intent to kill or to cause grievous harm and in addition malice aforethought to obtain a conviction for the offence of murder. They relied on the case of Nzuki v Republic [1993] KLR 171 where it was held that malice aforethought was where there was intention to cause harm, intention to cause grievous bodily



- harm, where the accused knew that there was a risk that death or grievous harm would ensue from his acts and committed the acts without lawful excuse with an intention to commit a felony.
47. It was their contention therefore, that there was no malice aforethought in the commission of the crime herein on their part.
  48. The Prosecution also placed reliance on the case of *Nzuki v Republic (Supra)* and submitted that assault on someone resulted in bodily harm. It asserted that the extensive assault on someone results to bodily harm and that the grazes and bruises on the neck, face, all four (4) limbs and the entire back indicated severe and merciless beating.
  49. It added that the resultant blood clots all over was evidence of intention to severely injure the deceased. It submitted that the fact that the deceased was severally beaten to a point that he became unresponsive due to unconsciousness and later succumbed to the injuries was a manifestation of malice.
  50. In this regard, it relied on the cases of *Republic v Ongowo & 2 Others*[2022] KHHCIO KLB and *Dickson Mwangi Munene & Another v Republic* [2014]eKLR where the common thread was that where more than one (1) accused person was charged with the same offence of murder, Section 21 of the Penal Code provided that when two (2) or more people formed a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequences of the prosecution, the same constituted a common intention.
  51. It argued that the evidence that was adduced proved common intention by the Accused persons from their conduct and that it had proved beyond reasonable doubt that all they were guilty of the offence of murder. It thus urged this court to convict them as charged.
  52. This court had due regard to the case of *Morris Aluoch vs Republic* [1997] eKLR which cited the case of *Rex vs Tubere s/o Ochen*[1945] 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
  53. PW 3 and PW 5 testified that the Accused persons were beating the deceased while saying that he had stolen arrowroots. PW 1, PW 3 and PW 5 told this court that the deceased's face was covered with blood. He had injuries all over his body. PW 3 said that the 1<sup>st</sup> Accused person hit the deceased on the head with a rungu while the 3<sup>rd</sup> Accused person hit him at his back. PW 5 stated that he found the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused person beating the deceased on the head, legs and the entire body with a rungu. Further, PW 3 testified that he found the deceased lying on the ground unconscious. Women near the scene even pleaded with them not to kill the deceased.
  54. The 2<sup>nd</sup> Accused person confirmed in his evidence that his arrowroots had been stolen, although, the same were not recovered.
  55. From PW 6's investigations, PW 1, PW 2, PW 3 and PW 5 connected the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons to the deceased's death. The thorough beating they meted on the deceased could only have been intended to kill him for the theft.
  56. The seriousness of the injuries the deceased sustained was confirmed by PW 4. Upon conducting the postmortem examination, he observed that the deceased had extensive grazes and bruises on the face, neck all four (4) limbs and the entire back, extensive blood clots under the skull, moderate swelling of the brain, extensive blood clots injuries on the face, neck, all four (4) limbs and the back and the kidneys appeared black.



57. The extensive injuries all over the deceased's body and the fact that he did not die immediately were evident that he suffered greatly before he died.
58. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the Accused persons had asserted. The beatings the deceased suffered at their hands were not only unlawful but they could not be said to have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
59. It was immaterial that the deceased was a thief as the Accused persons had alleged. They took the law into their hands instead of taking him to the police so that the due process of the law could be followed.
60. Having analysed the evidence that was adduced by both the Prosecution and 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> the Accused persons and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
- a. Proof of the deceased's death'
  - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
  - c. Proof of malice aforethought in the unlawful actions and/or omissions.

### **Disposition**

61. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons herein be and are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
62. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JULY 2024**

**J. KAMAU**  
**JUDGE**

