



**Republic v Kivuvo (Criminal Case E014 of 2023)
[2024] KEHC 9528 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E014 OF 2023
WM MUSYOKA, J
JULY 26, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID MUTUA KIVUVO ACCUSED

JUDGMENT

1. The accused, David Mutua Kivuvo, faces a murder charge, based on sections 203 and 204 of the [Penal Code](#), Cap 63, Laws of Kenya. It is alleged that on 29th May 2023, at Nangwe village, Mayenje Sub-Location, Matayos Sub-County, within Busia County, he murdered Mark Kivuvo. He denied the charge, and a trial ensued, where 7 witnesses testified. The 7 witnesses can be grouped into 2. 4 were family members, that is to say PW1, PW2, PW3 and PW4; and the other 3, that is to say PW5, PW6 and PW7, were State functionaries. Of the 4 family members, none of them witnessed the accused assault or do anything to the deceased that would have caused or led to is death.
2. PW1 testified to have heard screams from the house where the deceased was. When she rushed there, she found the house locked from inside, and she could hear movement inside. She neither saw the accused at the scene, nor heard his voice. She left the scene briefly, to seek help, and when she came back, the door had been opened, and the deceased was lying there badly hurt. She telephoned PW2, who in turn telephoned PW3 and PW4, and they mobilised to have the deceased rushed to hospital, where he died.
3. PW5, the area Chief, was the one who arrested the accused, after he was allegedly alerted of a family fight, by the area liguru. He went to the scene, and found that the deceased had been taken to hospital, but the accused was within the compound, and he arrested him, and after interrogating him, he allegedly said he indeed had assaulted the deceased in an effort to discipline him. PW6 performed the post- mortem on the body of the deceased, and opined that the cause of death was an injury to the head. PW7 investigated the matter.



4. I put the accused on his defence, in a ruling that I delivered on 11th April 2024. The accused testified on 8th May 2024. He denied assaulting the deceased, saying that he was arrested after he came home from hospital.
5. The accused filed written submissions. He submitted that there was no direct evidence that connected him to the death, and that the ingredients of malice aforethought had not been established, He cited [Sawe v. Republic](#) [2003] KLR and [Republic v. Andrew Omwenga](#) [2009] eKLR.
6. The elements of the offence of murder are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that he caused the same with malice aforethought. See [Republic v. Andrew Omwenga](#) [2009] eKLR.
7. On the death, there is ample proof that the deceased died. His relatives, that is to say PW1, PW2, PW3 and PW4 confirmed that he died at hospital, where he had been taken for treatment. PW5 also saw the body of the deceased at the hospital. PW6 conducted post-mortem on his dead body.
8. On the cause of death, the evidence of the medical officer, PW6, is crucial. He testified that the body had bruises on the lower limbs and the anterior and posterior aspects of the legs, and a cut wound on the front parietal region of the head. He formed the opinion that it was the head injury which caused the death.
9. On the role of the accused in the causation, there was no direct evidence. None of the witnesses from the family, that is to say PW1, PW2, PW3 and PW4 testified to seeing the accused at the scene, and him causing any form of injury on the deceased. None of them placed him at the scene. It was PW5 who arrested the accused. He did not see him in the act, for he got to the scene after the deceased had been removed to hospital. He acted on information from a liguru, who did not himself testify. He said that the accused informed him that he had disciplined the deceased, but no formal confession was recorded from the accused, which accorded with the relevant law. As it is, there is no concrete evidence connecting the accused to the death. No weapon was recovered, according to PW7, which could have been linked to the accused, although PW6 had alleged that the accused had produced a weapon. So, other than the tale from PW5, that the accused made a confession to him, there is nothing concrete that links the accused to the death.
10. The sense that I get is that the witnesses from the family, that is to say PW1, PW2, PW3 and PW4 were less than candid. They probably knew more than they informed the court, and I suspect that they withheld information to protect the accused. What I also sense, from the testimonies of PW5 and PW7, is that there were probably other individuals who knew or witnessed what transpired, but did not come forward to testify against the accused. PW5 talked of a liguru informing him, of a family fight. The liguru was not called to testify on how and what he knew about that fight, and who was involved. PW7 also testified of being told of how the deceased was assaulted by the accused, and with what weapons, and how he collapsed unconscious, but he did not disclose who gave him all that information. Those unnamed persons were not called to testify in court.
11. The last consideration should be whether the accused person caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the [Penal Code](#). One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. Malice aforethought, in that case, would be inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever.



12. The deceased, according to PW6, died of injuries that had been inflicted on him, with PW6 particularly pointing to the head injury. That would suggest that, if the injury was inflicted by a person, that person either intended to kill the deceased, or cause him a dangerous injury, or intended to commit a felony on him, indifferent to the consequences. The cumulative effect of that would be that there would be malice aforethought.
13. Malice aforethought can be ascribed on the accused person only if it was him who inflicted the fatal injuries on the deceased. Were the injuries that caused the death of the deceased inflicted by the accused herein? None of the witnesses who testified saw the accused person assault the deceased, or inflict any form of injury on him. The alleged connection to that injury is the statement by PW5, that the accused confessed to having disciplined the deceased, which meant assaulting him. As indicated above, that alleged confession was not followed up by the police, for there was no formal recording of the confession in accordance with the law. In the absence of such formal confession, there would be absolutely nothing that links the accused to the death, and, therefore, no basis for ascribing any malice aforethought on him.
14. Overall, it is my finding and holding that the offence of murder has not been sufficiently proved against the accused person herein, and I do hereby acquit him, David Mutua Kivuvo , under section 306 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya, of the murder of Mark Kivuvo. He shall be set free from remand custody, unless he is otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 26TH DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Obimba, Advocate for the accused person.

