



**Republic v Muhando & another (Criminal Case E005 of 2021)
[2024] KEHC 13342 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE E005 OF 2021
JN KAMAU, J
OCTOBER 29, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

NAAMAN MAI MUHANDO 1ST ACCUSED

DORA AYUKO MUHANDO 2ND ACCUSED

JUDGMENT

Introduction

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 24th day of July 2021 at Eburnago village, Tongoi Location, Emuhaya Sub-county within Vihiga County jointly murdered Silas Angatsa Pius alias Masembe.”
2. The Prosecution’s case was heard on diverse dates between 8th March 2022 and 15th February 2023 when it closed its case. Musyoka J who previously handled this matter took the evidence of Phanice Andesa (hereinafter referred to as “PW 1”), Dixon Mchama (hereinafter referred to as “PW 2”), Josephat Mmumangali (hereinafter referred to as “PW 3”), Millicent Akoth (hereinafter referred to as “PW 4”), Ayub Opeiwa Oongwa (hereinafter referred to as “PW 5”), Leonida Achango Arungula (hereinafter referred to as “PW 6”), James Andonyi Obubayi (hereinafter referred to as “PW 7”), Damaris Olesi (hereinafter referred to as “PW 8”), No 71021 Philip Cheruiyot (hereinafter referred to as “PW 9”) and No 86722 CPL Isaack Leteipa (hereinafter referred to as “PW 10”).
3. On 21st July 2023, Musyoka J. found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence.



4. This court became seized of this matter on 26th September 2023 on which day the 2nd Accused person indicated that the 1st Accused person had died. On 14th December 2023, No 59986 Corporal Thomas Bii testified that he went to the 1st Accused person's home and confirmed that he had indeed died. Consequently, the Prosecution withdrew its case against the 1st Accused person under Section 87A of the Criminal Procedure Code Cap 63 (Laws of Kenya).
5. The case proceeded against the 2nd Accused person only. The defence case was heard on 12th March 2024. This court therefore took the evidence of the 2nd Accused person who testified as "DW 1".
6. On 26th June 2024, the Prosecution was directed to ensure that it places its Written Submissions in the court file. However, as at the time of writing this Judgment, the same had not been placed in the court file. This court checked the e-filing portal and did not find its Written Submissions. Only the 2nd Accused person had filed Written Submissions. The same were dated 15th April 2024 and filed on 16th April 2024. The Judgment herein is therefore based on the evidence on record and the said 2nd Accused person's Written Submissions only.

Legal Analysis

7. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Silas Angatsa Pius alias Masembe (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?
8. 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

9. Notably, the 2nd Accused person did not submit on this issue. 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 cause of the deceased's death was a pertinent issue.
11. The 2nd Accused person did not submit on the question of proof of the deceased's death. On the other hand, PW 2 tendered a Post mortem Report dated 15th August 2021 in respect of the deceased herein as an exhibit in this matter. After conducting the post mortem examination, he formed an opinion that the cause of death was multiple injuries secondary to blunt force trauma following assault.
12. 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

13. The 2nd Accused person did not deny having been with the deceased on the material date of 24th July 2021. However, she denied having injured, beat and/or killed him.
14. It was her case that PW 1's evidence was inconsistent and that the evidence of PW 2, PW 3, PW 4 and PW 5 did not directly attribute the cause of death to her as required under Section 63 of the Evidence Act. She was emphatic that none of the Prosecution witnesses directly witnessed the assaulting or killing of the deceased. She submitted that the Prosecution did not therefore meet the threshold of the standard of proof, being beyond reasonable doubt.
15. She added that despite PW 3, PW 6 and PW 7 alleging that she was wielding weapons, no such weapons were availed during trial as exhibits. It was her contention that cumulatively, the chain of circumstances was incomplete to place her at the scene. In this regard, she placed reliance on the case of Abanga alias Onyango vs Republic Criminal Appeal No 32 of 1990 (UR)(eKLR citation not given) where it was held that the circumstances when taken cumulatively had to form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
16. She further contended that PW 1's testimony that she witnessed the alleged assault was never corroborated by the testimonies of the other nine (9) witnesses. She asserted that they gave contradicting evidence. She was categorical that the Prosecution failed to sufficiently prove the element of mens rea on her part for the charge of murder to be complete.
17. She added that none of the Prosecution witnesses laid emphasis of there having been bad blood or animosity between her and the deceased that warranted there being a basis of mens rea. In this regard, she relied on the case of Said vs Republic [2022] KECA 27 (KLR) where it was held that the judge did not take into account the evidence about information from an informer in his evaluation of whether the elements of the offence of murder were proved.
18. She asserted that her evidence was corroborated by the evidence of some of the Prosecution witnesses that there was no direct link between her and the cause of the deceased's death. It was her case that the Prosecution had not proved its case beyond reasonable doubt. She therefore urged this court to acquit her.
19. Her testimony was that on the material date of 24th July 2021, she was at home washing utensils when the deceased, whom they shared a fence came and started insulting her and her mother. Their house had been broken into two (2) days previously and fifteen (15) hens stolen. The deceased's jumper was recovered.
20. As he was insulting her and her mother, she went inside the house and came out with the jumper. This provoked the deceased to attack her. They struggled as the deceased beat her and she screamed. This attracted a crowd of people who came and beat the deceased on allegations of stealing. The following day at about 7.30 pm-8.00 pm, she heard that the deceased had died.
21. PW 1 testified that on the material day she was walking home when she saw the 1st and 2nd Accused persons beating the deceased at his home. She saw the 1st Accused person with a rungu and a panga. The 2nd Accused person had a stick and that they were saying that they would beat the deceased and burn him. The 2nd Accused person was hitting him on the upper part of the body while the 1st Accused person was hitting him on the lower part of the body.



22. She told the court that the two (2) Accused persons forcefully hit the deceased several times until he defecated on himself. He was also bleeding on his arms, abdomen, legs and the forehead. He asked for forgiveness as they asked him where he took the chicken. They then tied him on a bed and continued beating him. He was watching through a window. He died at his home. She positively identified the 1st and 2nd Accused persons at the dock. Her evidence was corroborated by that of PW 5.
23. PW 3 testified that on the material day, he was feeding his cattle when he saw children running towards a scene. He went to see what was happening. He saw the deceased who had been beaten and had an injury on the head. The 2nd Accused was asking him to show her where he had taken the chicken. A crowd of people had milled around. She approximated the number of people to have been more than one hundred (100). His evidence was that at the material time, the 1st and 2nd Accused persons were holding rungu.
24. PW 4 told the Trial Court that the deceased was a nephew in the family. On the material day, he sent her children, Dorothy and Damaris to fetch water but they came back running and told her that the 2nd Accused person was fighting the deceased. He went to the deceased's house and found him seated on the bed and his legs broken. He had been injured by a rungu. He did not see who hit him. He pleaded with him to stop the children from killing him as the chicken were at Abdi's. He saw the 1st Accused person holding one (1) rungu. He later heard that the deceased died. He did not see any crowd of people.
25. PW 5 found when the deceased had already died. He went to his house and saw him bleeding on his back and having defecated on himself.
26. PW 6 stated that on the material day, she was on her way home from a funeral when she met PW 4 who told her that the deceased was being beaten by the 1st and 2nd Accused person. She pointed out that when she went to the deceased's home, she found him already beaten and blood was flowing from his mouth. She saw the 1st Accused person with a "fimbo." The 2nd Accused person had a whip. The deceased told them that the chicken were at Abdi's. When they went to Abdi's home, the 1st Accused person asked him where the chicken were and Abdi slapped him.
27. Her evidence was corroborated by that of PW 7 who said that he went to the deceased's house and he was still alive. He saw the 1st Accused person with a rungu and the 2nd Accused person with a moderately thick stick.
28. PW 8 was the deceased's sister. She identified the deceased's body for post mortem purposes. She stated that he had injuries on the left arm, leg and head and was swollen.
29. PW 9 arrested the 1st and 2nd Accused persons. PW 10 testified on behalf of No 88180 PC James Kioko Murendo who was the Investigating Officer and produced his Statement as exhibit in court.
30. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 saw the 1st and 2nd Accused persons beat the deceased on the material date. PW 1, PW 3, PW 4, PW 5, PW 6 and PW 7 saw him bleeding and his body full of injuries. PW 1, PW 3, PW 4, PW 6 and PW 7 saw the crude weapons the Accused persons were carrying at the material time.
31. PW 1, PW 3, PW 4 and PW 6 were all neighbours to the 1st and 2nd Accused persons and knew each other. They all placed the Accused persons at the scene of crime. They each spent sufficient time communicating with them as they beat the deceased at the material time. The incident happened during daytime. There was, therefore, sufficient light that was favourable for the positive identification



of the 1st and 2nd Accused persons. This could not have been a case of mistaken identity. Identification was by way of recognition.

32. This court was thus persuaded to find and hold that PW 1, PW 3, PW 4 and PW 6 positively identified the 1st and 2nd Accused persons as having been the persons who beat the deceased on that material date.
33. The 2nd Accused person did not demonstrate that there was any motive for PW 1, PW 3, PW 4, PW 5, PW 6 and PW 7 to have colluded to frame her and the 1st Accused person as the people who unlawfully caused the deceased's death on that material date.
34. Her assertions that the runcus were not produced as evidence and that the Prosecution witnesses' evidence was full of inconsistencies were therefore rendered moot.
35. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find her evidence to have been watertight enough to have weakened the inference of guilt on their part.
36. Consequently, it was this court's finding that the 2nd Accused person's 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 4, PW 5, PW 6, PW 7, PW 8, PW 9 and PW 10.

IV. Malice Aforethought

37. Having found and held that the 2nd Accused person's defence was not sustainable as she was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not she had malice aforethought in causing his death.
38. She placed reliance on the case of *Republic vs Paul Omondi Odongo* [2019] eKLR where the court relied on the case of *Republic vs Tumbe s/o Ochen* [1945] 12 EACA 63 wherein in determining whether malice aforethought had been established the court considered the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted, either a single stab/wound or multiple injuries and the conduct of the accused before, during and after the incident.
39. 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. It was further held that in determining existence or non-existence of malice, one had to look at the facts proving the weapon used, the manner in which it was used and part of the body injured.
40. Section 206 of the Penal Code provides the definition of malice aforethought and it reads as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed 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 killed 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.”



41. The ingredient of malice aforethought can therefore be express or implied. It can be deemed to have been established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not.
42. The evidence showed that the Accused persons beat the deceased saying that he had stolen chicken. PW 1, PW 3, PW 4, PW 5, PW 6 and PW 7 saw him bleeding and his body was full of injuries. PW 1 saw the 1st Accused person hit the deceased on the lower body part with a rungu while the 2nd Accused person hit him at his upper body with a stick. PW 3 even pleaded with them not to beat the deceased.
43. The thorough beatings the 1st and 2nd Accused persons meted on the deceased could only have been intended to kill him for the theft of the chickens that were never recovered. The seriousness of the injuries that he sustained was confirmed by PW 2. Upon conducting the post mortem examination, he observed that the deceased had swelling on the front and back of trunk, bleeding under the side of the scalp and under brain and the brain was internally swollen, neck bone fracture and extensive soft tissue injuries on the trunk, upper and lower limbs. 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.
44. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the 2nd Accused person had asserted. The beatings the deceased suffered at her hand and those of the 1st Accused person were not only unlawful but they could not be said to have been bereft of malice aforethought on their part. It was clear that both the 1st and 2nd Accused persons acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
45. It was immaterial that the deceased was a thief as the 1st and 2nd 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.
46. Having analysed the evidence that was adduced by both the Prosecution and the 2nd Accused person, 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 1st and 2nd Accused persons herein. The same was with malice aforethought and the ingredients that had been set out in Section 203 of the Penal Code had been proven:-
 - 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.
47. The Prosecution presented cogent evidence to suggest that the 2nd Accused person intended to do grievous harm to the deceased. The serious injuries that the deceased sustained was proof that she had knowledge that the act or omission would probably cause the deceased's death or grievous harm which were ingredients of malice aforethought.

Disposition

48. For the foregoing reasons, the upshot of this court's decision was that the 2nd Accused person herein be and is 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).
49. It is so ordered.



DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE

