



**Republic v Inzeze & 2 others (Criminal Case E141 of 2021)  
[2024] KEHC 15605 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15605 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E141 OF 2021  
AC BETT, J  
NOVEMBER 29, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANTONY INZEYE ..... 1<sup>ST</sup> ACCUSED**

**JULIUS MUHANDA INZIANI ..... 2<sup>ND</sup> ACCUSED**

**ELPHAS MUTENJE MUTEYU ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. Antony Inzeze, Julius Muhanda Inziani and Elphas Mutenje Muteyu, the accused persons herein were charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the offence are that, on the 12<sup>th</sup> day of October 2021 at Madioli village, in Murhandia Sub-location, in Kakamega East sub-county within Kakamega County, the accused persons jointly with another one not before court murdered Abiyodi Kisutu Imbache.
3. All the accused persons were examined and found to be mentally fit to take plea and stand trial. The accused persons pleaded not guilty to the charges as a result of which the case proceeded to hearing.
4. The prosecution called a total of seven (7) witnesses in support of its case, while each accused person offered a defence through sworn statements without calling any witnesses.

**Prosecution Case**

5. PW1 Dr. Dickson Mchana, who is a pathologist with the County Government of Kakamega, testified and produced the post mortem report marked Prosecution’s Exhibit 1 and authored on 22<sup>nd</sup> October



2021. He stated that when he examined the body of the deceased; externally the nails, lips and tongue appeared dark blue in colour. He further stated that the body had healed bruises with dark scars on both sheens around the left elbow area and the back of the right wrist. He testified that there was evidence of recent medical intervention. He stated that the deceased's lungs were solid as a sign of infection and that his liver appeared fibrous. He testified that on the deceased's head, there was an injury to the soft tissue below the skin on the scalp, a dead area on the hindbrain to the left, and a swelling of the entire brain. He testified that he formed an opinion that the cause of death was a severe head injury secondary due to blunt trauma following assault.
6. On cross-examination, PW1 stated that he opined the lungs and liver were most likely infected by bacteria. He stated that there were no injuries on the frontal of the head torso and front trunk. He also stated that no sharp object was used.
  7. PW2 Timothy Indeche, who is the deceased's son, gave his sworn evidence and testified that on 12<sup>th</sup> October 2021 he had gone to work and went back home at about 4:00 Pm. He stated that when he got home, his wife Vivian Muidera told him that a boda boda person had told her to tell him to go and get his father who was injured at Madioli. He stated that his wife decided to send his brother Reuben Acheya to go and check but the brother went there and did not get him. PW2 further stated that he decided to personally go to Madioli where he found the deceased at Madioli next to a tree. He also stated that when he called the deceased, he responded by crying and told him that Julius, Antony, Mutenje and Spoon had assaulted him.
  8. PW2 further testified that he was unable to carry the deceased, and he proceeded home to get a motorcycle. He stated that he got his brother Reuben Acheya with whom he went to the place and picked the deceased and took him home, changed his clothes, gave him food and lit for him the jiko. He claimed that he went to check on the deceased at about 1:00 a.m. and the deceased spoke to him but on returning at around 4:00 a.m. he was unable to speak. PW2 said that he decided to take the deceased to the hospital at Virhembe Nursing Home. He stated that the deceased was there for about two days and nights and was transferred to Kakamega Referral Hospital where he died. He stated that he took the body to the mortuary and decided to report the matter at Shisasari Police Station where he recorded a statement. He also claimed that he had made an earlier report pursuant to O.B No. 20/03/10/2021 of the people the deceased had claimed to have assaulted him. He claimed that the three accused persons were well known to him since the accused persons' home was approximately 300 meters from PW2's home. He stated after he made the report and recorded statements, he accompanied the police that evening to effect arrest together with the village elder, Dan Shiamba and Caleb Majoni. He also stated that on that evening, they arrested the 1<sup>st</sup> and 3<sup>rd</sup> accused and the 2<sup>nd</sup> accused escaped but later surrendered to the police at the station. PW2 stated that he did not know of any grudge between the accused and the deceased.
  9. On cross-examination, PW2 stated that the first report was made the day after the assault. He stated that Shisasari Police Station is different from Shinyalu police station. He stated that it is recorded that he made a report at Shinyalu Police but that is not true. He stated that in his statement he said that the deceased had told him that he was beaten by Antony, Julius, Mutenje, and Spoon and he claimed that his father had confused between Julius and his brother Athanas. He reiterated that it was him who gave out the names of the accused persons to the police. He stated that the injuries he saw on the deceased were a broken middle finger and a swollen top of the head without bleeding. He also stated that he went to look for his father where alcohol was sold since his father would drink but he said that the deceased was not drunk that day. He stated that he did not see the people who assaulted the deceased.
  10. In re-examination, PW2 stated that the relationship between Shinyalu and Shisasari is that Shisasari was delinked from Shinyalu so now Shinyalu has Administration police while Shisasari has regular police.



11. PW3 Caleb Majoni, who is the deceased's brother, gave his sworn evidence and testified that he was at his workplace in Eldoret when he received a report from PW2 that his brother had been beaten and was in hospital and unable to talk. He stated that he later received information about his brother's death. He stated that PW2 had reported to him that the deceased had told him that he was beaten by Julius, Anthony and Mutenje. He further stated that he was in the party of the police that had arrested the 1<sup>st</sup> and 3<sup>rd</sup> accused while the 2<sup>nd</sup> accused surrendered himself later to the police.
12. On cross-examination, PW3 stated that according to him Shisasari is the same as Shinyalu Police Station. He also stated that the deceased's name is Abiud Atsah Kisitu but in his recorded statement he said the deceased was called Abiud Kisitu Lote. He also stated that he did not witness the assault. He also said that he knew the accused persons but could not assign names to the faces in court. He further stated that he attended the post-mortem at Kakamega County Mortuary and that the deceased had injuries on the head and when they opened the chest cavity the ribs were broken.
13. In re-examination, he stated that when they opened the chest cavity and the scalp, he had injuries on those two areas.
14. PW4 Lilian Mideva, who is the wife of PW2, gave her sworn evidence and testified that it was about 5:00 p.m. when she heard a motorcycle hooting while she was at home. She stated that she went to the gate after several hoots and met a rider wearing a helmet. She stated that the rider asked her the whereabouts of the owner of the house she was in, and she told him the owner, who is her husband, had gone to work. She further stated that the rider told her that that her husband's father, the deceased, had been assaulted and he was on the ground on the road and required assistance. She stated that when her in-law, Reuben Acheya went home, she informed him of the same and her in-law went on a motorcycle belonging to her husband to look for the deceased but failed to trace him. She testified that at about 6:05 pm the husband, PW2, came back home and she relayed the information to him. She stated that PW2 proceeded to search for the deceased where he found him in a homestead and that he went back with Reuben and brought the deceased back home. She further testified that she gave some food to the deceased, but the deceased did not eat. She stated that when she went to the house of the deceased, the deceased mentioned the name Mutenje as one of the people who had assaulted him. She stated that PW2 told her that the deceased had also mentioned Anthony as one of his attackers. She also testified that she had never met any of the accused persons before the date of the incident and that she did not know them. She stated that when she saw the deceased, he had a swelling on the left leg and hand. She testified that on the next day before her husband, PW2, went to work, he went to the deceased's house and called him, but the deceased was not responding. She stated that PW2 then decided to take the deceased to hospital at Virhembe where he spent one night before he was transferred to General Hospital at Kakamega where he died after three days.
15. On cross-examination, she stated that she recorded her statement at Shisasari Police Station. She stated that she went to the station with another Pasilisia Lachebereli approximately two days after the incident. She stated that what she recorded with the police was what she could remember better than what she could remember at the time of her testimony. She stated that at the time she did not know the 3<sup>rd</sup> accused since it is her second year in the village. She also stated that she knew Rosemary Alias Spoon, who is at large, better than she knew the accused persons. She also testified that she did not witness the events leading to the deceased's death, but she saw injuries on his head, hand, and leg. She stated that she did not mention anyone in her statement but she had told the police officer who was recording her statement that she heard the deceased mention the name Mutenje but he did not capture the same.



16. On re-examination, she stated that Spoon is married in the area the accused persons came from, but she does not know her relationship with the accused. She also stated that the said area is where the deceased was found.
17. PW5 was Violet Khasandi Madegwa who gave her sworn evidence and stated that she lives in Itenyi sublocation where she is a casual labourer. She testified that on 12<sup>th</sup> October 2021 at about 1 p.m., she was at home preparing lunch for her children. She heard screams from her neighbour called Spoon but held back to complete preparing lunch. She stated that when she went out, she found someone with a stick beating another man who was on the ground. She testified that it was Spoon holding the stick and beating the deceased. She affirmed that she could not see Spoon in court. She further testified that she asked Spoon to stop, and she stopped. She stated that as she was going back to her house, she met Julius, who is the 2<sup>nd</sup> accused, and he asked her what was happening, and she explained to him the events. She further stated that the 2<sup>nd</sup> Accused went to witness the occurrence for himself. She stated that the 2<sup>nd</sup> accused later reported to her that he went and helped the deceased with a walking stick to walk home and that he saw the deceased going home and did not see him again. She testified that the 2<sup>nd</sup> accused is her nephew, the 1<sup>st</sup> accused is her in-law, and the 3<sup>rd</sup> accused is her husband. She stated that on the material date her husband, the 3<sup>rd</sup> accused, had gone to the river to look for sticks to construct a shed for utensils. She also stated that the 1<sup>st</sup> accused was in his house. She further stated that she only witnessed Spoon beating the deceased. She stated that she was not defending the accused persons on the account of being relatives.
18. On cross-examination, PW5 stated that she is related to the accused persons. She also stated that the deceased was not related to them. She testified that Spoon is married in the same home as her and said that Spoon's husband is called Silas. She stated that Spoon disappeared from the day of the incident and that she never met her again. She further testified that she did not see anybody else beat the deceased apart from Spoon. She also stated that she recorded her statement willingly without influence or intimidation.
19. On re-examination, PW5 stated that when she went to the scene the assault incident had happened, she only saw the deceased and Spoon.
20. PW6 No. 221542 Sergeant David Gari gave his sworn evidence and testified that he is stationed at Shinyalu Police station where he was still stationed in 2021 when the incident happened. He stated that on 18<sup>th</sup> October 2021, he was at work when he was instructed by the OCS to go to Itenyi Sub location and arrest some suspects. He stated that he was accompanied by some colleagues to the home of Rose alias Spoon but they did not get her. He further stated that they went to a nearby home and arrested the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. He stated that on the next day, the 1<sup>st</sup> accused surrendered himself to the police station and the matter was handed over to the DCI for further investigations. He testified that the names of the suspects were given by Timothy Indeche, PW2, vide O.B 07/18/10/21.
21. On cross-examination he stated that he said in his statement that the report was on 19<sup>th</sup> October 2021 and 12<sup>th</sup> October 2021. He stated that he did not mention Timothy Indeche in his statement as the person who reported the incident. He further stated according to the statement in the Investigations Diary, the 2<sup>nd</sup> and 3<sup>rd</sup> accused were arrested on 18<sup>th</sup> October 2021. He testified that they did not get Spoon, but she was the main suspect since the incident took place in her house and she was alleging the deceased had stolen her jembe. He also stated that he did not see the body of the deceased which had been taken to the mortuary earlier.
22. On re-examination, PW6 stated that according to the investigations diary the OB No. is 07/12/10/2021 therefore he made a mistake when he said 07/19/10/2021 in his statement.



23. PW7 No. 89090 Police Constable Julius Samoei gave his sworn evidence and testified that he has been stationed at Kakamega East since 2021. He stated that on 18<sup>th</sup> October 2021, he was given a report of murder by the DCI over the murder of the deceased herein. He stated that the deceased had been admitted at Kakamega County General Hospital having been admitted there with a history of assault five days earlier. He stated that he visited Shinyalu Police Station and established that three suspects had been arrested in connection with the murder. He stated that PW2 had said that, by a dying declaration, the deceased told him that the accused persons had assaulted him. He further testified that he recorded the statement of PW2 and their witnesses and attended the post-mortem examination on the deceased on 22<sup>nd</sup> October 2021. He stated that after he completed his investigations, he forwarded the file to the ODPP for perusal and was given a go ahead to charge the accused persons with the current charge of murder. He further stated that he charged and presented the accused persons before the court for plea taking. He testified that he visited the scene and established that there was a fourth suspect called Rosemary alias Spoon who was still at large. He told the court that he tried to recover the jembe suspected to have been used on the assault, but he did not get it. He stated that he saw no visible injuries on the body of the deceased. He also stated that there was no eyewitness to the murder, but the deceased did mention the accused persons in his dying declaration.
24. On cross-examination, PW7 stated that he received the instructions on 18<sup>th</sup> October 2021 and by which time all the three accused persons had been arrested by PW6. He stated that he visited the scene on 19<sup>th</sup> October 2021 and took witness statements at the police station on various dates. He stated that his investigations were hinged on the report by PW2. He stated that Athanus is an Alias for Julius Muhanda. He testified that the report was on 18<sup>th</sup> October 2021 and reference to 19<sup>th</sup> October 2021 by the arresting officer must be an error. He further testified that he was not aware that Spoon was the main suspect and that he was still looking for her, but he had never met her. He stated that he was not made aware of any grudge between the three accused and the deceased, but he was aware of the dispute between the deceased and Spoon. He stated that he never saw visible injuries on the body of the deceased.
25. On re-examination, PW7 stated that the deceased was assaulted on 12<sup>th</sup> October 2021 and he died on 17<sup>th</sup> October 2021.
26. The prosecution closed their case, and the accused persons were placed on defence.

### **Defence Case**

27. The 1<sup>st</sup> accused testified vide sworn evidence and stated that he comes from Shinyalu, Madioli village and he works as a mason. He acknowledged that he knew the deceased person. He acknowledged that he knew why he was in court and stated that he was arrested three years ago. He stated that he did not know how the deceased met his death and that he only saw him on a public access road near his compound. He stated that he saw the deceased from his compound. He testified that he was arrested after the deceased's demise. He averred that he did not have a grudge with the deceased. He acknowledged that he knows Spoon and that her compound and his are 100 meters apart. He stated that his compound and the deceased's compound are three to four kilometers apart. He further stated that the police arrested him in his house, but they did not take anything from his house. He also stated that he has not seen Spoon during the period he has been out on bond. He stated that he knew he was arrested because of revenge.
28. On cross-examination, the 1<sup>st</sup> accused stated that he knew the deceased for about 30 years. He stated that at home he is known as Anthony Inzeye Mambili and denied being known as Athanus. He stated that amongst the 3 accused persons, none is known as Athanus. He stated that he was herding cows



in his compound, and he saw the deceased walking on the road and that he appeared to be in a good physical state. He denied seeing injuries on the deceased. He stated that the deceased informed him that he was assaulted because he had stolen Spoon's jembe. He stated that when they heard of the deceased being sick, the deceased's children sent the police to arrest them. He stated that he heard of the deceased being sick after 3 days. He further testified that he saw Spoon assaulting the deceased in her compound at around 2:00 p.m. and he asked Spoon to leave the deceased alone. He stated that Spoon took the jembe and left the deceased alone. He further stated that the accused got up on his own and walked towards his compound. He testified that he did not know why the deceased mentioned the accused persons' names and said that maybe the deceased feared telling his children that Spoon had assaulted him. He stated that he witnessed the assault incident from his compound, but he did not see the 2<sup>nd</sup> accused. He stated that he did not see the 2<sup>nd</sup> accused speaking with the deceased and neither did the 2<sup>nd</sup> accused see him.

29. Upon re-examination, the 1<sup>st</sup> accused reiterated that he saw the deceased at around 2:00 p.m. and that by that time he had already been assaulted. He acknowledged that he saw the person who assaulted the deceased and that he witnessed the incident from his house which was about 200 meters away. He stated that he did not see the 2<sup>nd</sup> accused. He also stated that he was arrested alongside the 3<sup>rd</sup> accused and the 2<sup>nd</sup> accused was arrested the following day.
30. The 2<sup>nd</sup> accused gave his sworn evidence and stated that he comes from Shinyalu, Madioli sub-location, and works as a farmer. He acknowledged knowing the deceased even before the case was brought but he stated that he had no relationship with the deceased. He denied being involved with the murder. He stated that on the material date, he was at home visiting his mother who lives in the same village as him. He reiterated that the deceased's home is about three to four kilometers away from his home. He further stated that Spoon was with the deceased. He also stated that he heard that Spoon had assaulted the deceased. He testified that when he arrived, he found that the deceased had already been assaulted. He stated that at his time of arrival, he did not find Spoon. He testified that he found the deceased on a public access road near his compound and stated that his compound is near Spoon's compound. He further stated that Spoon had never gone back home since the incident. He testified that his wife had reported to him that the deceased had stolen Spoon's jembe. He averred that he went to the police station the day after the assault incident because the police had come to his house the previous night and asked his wife to inform him to report to the police station. He denied ever having a grudge against the deceased. He stated that he did not witness anything, and neither was he taken by the police officers to the scene of the crime. He averred that when he found the deceased, it was daytime and that he did not see any of his co-accused. He stated that Spoon disappeared since she was the perpetrator of the offence.
31. On cross-examination, the 2<sup>nd</sup> accused stated that he had known the deceased for a long time since they went to the same primary school. He stated that they would meet often depending on the circumstances. He further stated that he found the deceased on the road at about 8:00 p.m. and the deceased informed him that Spoon had assaulted him.
32. The 3<sup>rd</sup> accused gave his sworn evidence and stated that he comes from Madioli village and works as a farmer. He denied knowing anything about the demise of the deceased. He stated that Spoon was married to Silas who lived near them. He also stated that Spoon was married into their family, but she came from the same family as the deceased. He averred that on the material day, he did not see Spoon, but he heard that the quarrel the deceased had with Spoon was to do with a jembe. He stated that he was arrested about a week after the incident and a day after the co-accused. He stated that he lived in his home and denied ever running away or hiding from his house. He stated that he and his co-accused



- did not assault the deceased and claimed that the deceased's kin were implicating them for a reason not known to him.
34. He stated that on the material day, he left home at 11:30 a.m. and returned at 2:00 p.m. he averred that when he found the deceased, he was seated alone. He further stated that the deceased asked him to give him support and that he gave the deceased a walking stick to aid him walk. He stated that the deceased was later found at a grazing field, but he denied going to the grazing field. He averred that he did not know how the deceased met his injuries.
  35. On cross-examination, he stated that on the material date, he had gone to a construction site and returned at 3:00 p.m. He stated that he was working with others and that he could bring the people he was working with as witnesses, but he did not know whether they would come to testify. He further denied seeing the deceased on that day. He averred that he heard the news of the deceased being assaulted from women neighbours. He further testified that he met both the 1<sup>st</sup> and 2<sup>nd</sup> accused on the material date since they live near the road. He stated that he first met the 2<sup>nd</sup> accused who informed him that the deceased had been assaulted by Spoon over a jembe. He also stated that he also did not see Spoon on the material date.
  36. On re-examination, the 3<sup>rd</sup> accused reiterated that at the time of his arrest, the deceased had not yet died. He also reiterated that he did not see the deceased.
  37. At the completion of the trial, each party filed their written submissions.

### **Prosecution's Submissions**

38. The prosecution submitted that murder is defined under Section 203 of the Penal Code as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
39. The prosecution further submitted that the definition as set out in Section 203 of the Penal Code carries the ingredients of the offence of murder which must be proven beyond any reasonable doubt if the court trying an accused person is to convict him or her for the offence of murder.
40. On the first ingredient which is to prove that the deceased herein died, the prosecution submitted that PW1, Doctor. Muchana, confirmed that before he conducted a post-mortem on the body of the deceased, the body was identified to him by Caleb Machoni and Timothy Indeche as being the body of the late Abiyodi Kisitu Imbache and that after the post-mortem he issued a burial permit No. 1914924. The prosecution averred that the identification of the body and the subsequent issuance of a burial permit in respect to that body confirmed that Abiyodi Kisitu Imbache had died.
41. On the second ingredient which is to prove that the death was caused by an unlawful act, the prosecution submitted that Article 26 (1) of *the Constitution* guarantees everyone the right to life. The prosecution cited the case of Republic v Boniface Isawa Makodi [2016] KEHC 162 (KLR) where the court defined the acts that are unlawful and stated as follows:

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self-defence or in defence of property”
42. The prosecution further submitted that from the post-mortem report which showed that the cause of death of the deceased was a severe head injury secondary to blunt trauma following assault, the death



of Abiyodi Kisutu Imbache was not from natural causes or from an action excusable by law but from assault which is an unlawful act as defined in law.

43. On the third element which is to prove that the accused persons are the perpetrators of the unlawful act that culminated in the death of the deceased, the prosecution submitted that there is no direct evidence since the prosecution did not provide an eye witness to the assault. They further submitted that the prosecution can still rely on circumstantial evidence to link the accused persons to the offence they have been charged with. The prosecution cited the case of *Abanga alias Onyango V Republic Cr A no 32 of 1990 (ur)* where the court stated:

“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 cogently and firmly be established
- ii. Those circumstances should be of a decline tendency unerringly pointing toward the guilt of the accused
- 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”

44. The prosecution submitted that their case heavily relies on the dying declaration of the deceased. They relied on Section 33(a) of the *Evidence Act* Cap 80 of the laws of Kenya which states that:

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- a. relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”

45. The prosecution further submitted that they are only required to show that the deceased could not have been mistaken in his identification of the accused as it was stated in the case of *Charles Njonjo Gituro v Republic [2019] KECA 855 (KLR)* and in the case of *Moses Wanjala Ngaira v Republic [2019] KECA 955 (KLR)*.

46. The prosecution submitted that PW2 Timothy Indeché was informed by the deceased that he had been assaulted by Julius, Antony, Mutenje and Spoon. They averred that on cross-examination, PW2 was put to task on the names he had first indicated in his statement and he confirmed the names he had recorded in his statements as the names he had been told by his father which were the same names of Anthony, Julius, Mutenje and Spoon. They further averred that PW2’s evidence on the names was consistent and cogent.



47. The prosecution also submitted that the evidence of PW2 on the dying declaration was corroborated by the evidence of PW4 Lilian Mideva who claimed that when she went to the deceased's house, he mentioned the name Mutenje as one of the people that assaulted him.
48. The prosecution further submitted that the deceased could not have mistaken the identity of the people who had assaulted him because they were neighbours and had known each other for a very long time, a fact that even the accused persons confirmed.
49. The prosecution asserted that during the defence hearing, all three accused persons placed themselves at the scene on the day the incident happened. The prosecution further asserted that the evidence of the accused persons was very disjointed on how they did not see each other yet they portended to be at the scene almost at the same time. The prosecution contended that the accused persons all being at the scene of crime corroborates the names given by the deceased in his dying declaration. The prosecution further asserted that the fact that none of the accused persons reported the matter on that day shows that they were guilty of the assault.
50. The prosecution submitted that the evidence on the identification of the accused persons as the persons that assaulted the deceased as per the dying declaration has been corroborated and that it is cogent and the only inference that can be drawn is that the accused persons together with spoon assaulted the deceased that day.
51. On the last ingredient which is to prove that the accused persons had malice aforethought when they committed the crime, the prosecution relied on the case of *Rex V Tubere s/o Ochen* [ 1945] 1Z EACA 63:

“ In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it was used and the part of the body injured.”
52. The prosecution submitted that the part of the deceased's body that was targeted and fatally injured was the head and that the injuries were so grave that the deceased succumbed in a span of four to five days. They further asserted that the extent of the injuries suffered by the deceased showed that the accused persons were intended on causing grievous harm to the deceased which translates to having malice aforethought.
53. Lastly, the prosecution submitted that it has proven its case beyond reasonable doubt and prayed that the accused be convicted of the offence of murder as charged.

#### **Accused Persons' Submissions**

54. The accused persons in their submissions relied on the case of *Anthony Ndegwa Ngari v Republic* [2014] KECA 424 (KLR) where the court broke down the ingredients constituting the offence of murder which have to be proved beyond reasonable doubt as follows: -
  - a. The death of the deceased;
  - b. The death of the deceased was unlawful;
  - c. That in causing death there was malice aforethought on the part of the accused; and
  - d. That the accused was positively identified as the one who caused or participated in the killing of the deceased.
55. They submitted that the death of the deceased and the cause of death are not disputed.



56. They further submitted that PW2 Timothy Indeche testified that he was told by his deceased father that the accused persons together with Spoon had assaulted him but, in his statement, he recorded that his father told him that he was assaulted by Mutenje, Anthony Clement and Athanus. They asserted that Clement and Athanus are strange names to the proceedings. They contended that PW2 was not an eyewitness and that his evidence on who attacked his father is contradictory as the names cited in the statement are of different people.
57. The accused persons submitted that PW3 did not witness the incident and testified that he knew the accused persons but failed to put names to their faces.
58. The accused persons also submitted that PW4 Lilian Mideva's testimony given in court contradicted her written statement. They averred that in her written statement she did not mention any of the accused persons but during cross-examination, she testified that she only heard Mutenje being mentioned. They further averred that her testimony was purely hearsay.
59. The accused persons submitted that PW5 was an eyewitness and did not witness the accused persons. They also submitted that PW7 PC Julius Samoei testified that he did not recover any murder weapon used to assault the deceased. They further submitted that PW7 in his statement mentioned Anthony, Mutenje, and Athanus as the people who assaulted the deceased but did not mention Julius or Spoon.
60. The accused persons submitted that the prosecution witnesses did not witness the assault except for PW5 who witnessed it and only mentioned Spoon whom the investigating officer has not given any reasons why the key suspect has never been arrested and why she has remained at large throughout the trial. They submitted that the prosecution charged them based on hearsay evidence from the witnesses.
61. The accused persons contended that the prosecution is basing their case on a dying declaration and cited the case of *David Agwata Achira V R* [2003] eKLR where the Court of Appeal restated the law on dying declaration as was discussed in *Aluta vs R* [1985] KLR 543 as follows: -

“In every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused man and not subject to cross-examination.”
62. The accused persons submitted that the prosecution has not proven their case beyond reasonable doubt to enable this court to arrive at a safe conviction of all the accused persons herein. They further submitted that the names of the persons allegedly mentioned by the deceased do not tally with those of the accused persons in court. They also submitted that no malice has been proven against the accused persons in court and that they should not be made to suffer for the sins of another person not before court.
63. Lastly, the accused persons submitted that the accused persons be acquitted.



## Analysis

64. It is trite that where there is an alleged offence of murder, the prosecution must prove the three elements of murder that were set out by the Court of Appeal in the case of *Joseph Githua Njuguna v Republic* [2016] KECA 305 (KLR) where the court stated as follows:

“Under section 203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are:

- (a) the death of the deceased and the cause of that death;
- (b) that the appellant committed the unlawful act which caused the death of the deceased;
- (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit z& 4 others v Republic* [2015] eKLR.”

65. It is not only for the courts to determine whether the prosecution has proven the existence of the said elements in a murder charge, but to also determine whether the prosecution has proven the existence of these elements beyond reasonable doubt.

66. The Court of Appeal in the case of *Nyanjui v Republic* [2023] KECA 1122 (KLR) citing the decision of Lord Denning in *Miller vs Ministry of Pensions* [1947] 2 All ER 372, addressed the evidentiary threshold to be met by the prosecution as follows: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

67. That being said, this court shall assess the charge against the accused persons in relation to the elements of murder as set out in the penal code and in precedent, and also in relation to the degree of proof that needs to be discharged in order to convict the accused persons.

### **a. Whether the prosecution has proven the death of the deceased and the cause of that death beyond reasonable doubt**

68. The court in the case of *Benson Ngunyi Ndungu v Republic* [1985] KECA 51 (KLR) stated as follows: -

“Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined.”



68. Additionally, the court in the case of Republic v Boniface Isawa Makodi [2016] KEHC 162 (KLR) expressed itself on the issue of proof of death of the deceased as follows: -

“The prosecution must prove by evidence that a human being identified as Raphael Cheserek is dead. One critical source to prove death is by way of medical evidence. This case incidentally was unique in the sense that the prosecution for reasons not stated did not avail evidence of the deceased known as relatives to positively identify the deceased body. The court had to contend with circumstantial evidence of PW1, PW2, PW3 and PW5 who were all formal witnesses by virtue of their role as public officers and a business man respectively.”

69. From the foregoing, it is cogent that the prosecution had a duty to prove to this court that the body of the deceased was positively identified by persons well known to him. The prosecution was also burdened to adduce medical evidence as to the cause of death of the deceased.

70. In the instant case, PW1 Dr. Mchana testified that when he performed the post-mortem on the body of the deceased, he noted that the body externally on the nails, lips, and tongue appeared dark blue in colour. He further stated that the body had healed bruises with dark scars on both shen around the left elbow area and the back of the right wrist. He stated that the deceased’s lungs were solid as a sign of infection and that his liver appeared fibrous. He testified that on the deceased’s head, there was an injury to the soft tissue below the skin on the scalp, a dead area on the hindbrain to the left, and a swelling of the entire brain. The doctor formed the opinion that the cause of death was a severe head injury secondary to blunt trauma following assault.

71. The doctor also confirmed that before performing the post-mortem, the body of the deceased was identified to him by Caleb Machoni, who is a brother to the deceased and Timothy Indeche who is the son of the deceased, as being the body of the late Abiyodi Kisitu Imbache.

72. Based on the aforesaid, this court is satisfied that the prosecution has proven beyond reasonable doubt the death and the cause of death of the deceased.

**b. Whether the prosecution has demonstrated beyond reasonable doubt that the accused persons committed the unlawful act that caused the death of the deceased**

73. On this matter, this court first seeks to establish whether the deceased’s death was caused by an unlawful act.

74. The court in the case of Republic v Irungu & another [2024] KEHC 1493 (KLR) in explaining unlawful acts cited the case of Gusambizi Wesonga vs Republic [1948] 15 EACA 65 where the court defined unlawful acts as follows: -

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence of property.”

The court further stated: -

“Pursuant to the aforesaid, excusable homicides are killings which result from accident or inadvertence, or done by persons who lack the capacity to commit crimes (such as very young children or persons who are legally insane), or in reasonable defence to self, or property.”



75. In the instant case, the post-mortem report that PW1 adduced did not show any element of an excusable homicide. The inference made as to the cause of death of the deceased is that the deceased suffered a severe head injury, secondary to blunt trauma following assault.
76. Pursuant to the doctor's evidence and the post-mortem results, it is clear that the deceased's death was not under natural or accidental circumstances. This court finds that the prosecution has proven beyond reasonable doubt that the death of the deceased was unlawful.
77. This court is also invited to evaluate, whether on the evidence placed before it, it has been proven beyond any reasonable doubt that it is the accused persons who caused the death of the deceased.
78. The prosecution herein relies heavily on the dying declaration given by the deceased to one Timothy Indeche who claims that the deceased mentioned the names of the accused persons as the people who assaulted him.
79. The court in case of *David Agwata Achira v Republic* [2003] eKLR directed itself on dying declarations as follows: -

“In The case *Okale v R* (supra) the court stated that: - “In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration”.

80. The court in the case of *Philip Nzaka Watu v Republic* [2016] eKLR also directed itself as follows on dying declaration: -

“Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

81. From the foregoing, it is necessary that this court is cautious in assessing the evidence that has been placed before it regarding the dying declaration of the deceased.
82. PW2 testified before this court that when he found the deceased in Madioli village, the deceased mentioned the names of Julius, Anthony, Mutenje, and Spoon as the people who assaulted him. When PW2 recorded his statement at the police station, he recorded that the deceased reported to him that he was assaulted by Mutenje, Anthony, Clement, and Athanus. On cross-examination, PW2 stated that his father had confused between Julius and his brother Athanus. It is clear that there is a contradiction in the reporting of the dying declaration of the deceased. Clement and Athanus are strange names to these proceedings, the only names consistent with the accused persons in court in PW1's statement are Mutenje and Anthony. It is also clear that PW1 did not mention Spoon in his statement but mentioned her name when he was testifying in court.



83. The prosecution in their submissions stated that the dying declaration had been corroborated by the evidence of one Lilian Mideva PW4. PW4 testified in court that when she went to the deceased's house, the deceased mentioned to her the name Mutenje as one of the people who had assaulted him. In her statement recorded at the police station, PW4 did not mention anything regarding the deceased mentioning the name Mutenje as one of the people who had assaulted him. In cross-examination, she stated that she had mentioned the Name Mutenje to the police officer who was recording her statement, but he did not capture the same.
84. PW5 Violet Khasandi Madegwa is the only eyewitness produced by the prosecution and she testified that on the fateful day, she only saw Spoon beating the deceased with a stick. She did not testify to seeing any of the accused persons at the scene of the incident on that day.
85. The accused persons in their submissions claimed that there are major contradictions in the statements of the prosecution witnesses since the names alleged to have been mentioned by the deceased do not tally with those of the accused persons in court.
86. The court in *MTG v Republic* [2022] KEHC 189 (KLR) while addressing contradictions in evidence rendered itself as follows:-

“Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.”

87. It is safe to ask ourselves whether the contradictions alleged herein are substantial and relate to the material facts of the case or if they amount to a mere trifling inconsistency. The major contradiction noted in the instant case is the names identified by the deceased to be of the persons who assaulted him. PW2 claims to have been given the names of the accused persons by his father as the persons who had attacked him. It is however clear that PW2 has on two occasions, before this court and while recording his statement, given different names regarding persons who assaulted his father. I am of the opinion that a dying declaration by a deceased person is a very important component in a prosecution's case for a witness to merely allege confusion of the same. PW2 also testified that he reported the incident of the deceased's assault the next day after the assault. I find it rather absurd that PW2 could possibly confuse or omit some of the names that were mentioned to him by his father just a day after he had received the information bearing in mind the weight of the information.
88. This court is of the opinion that the contradictions noted in PW2's recorded statement and on his evidence in open court, regarding the names of the persons who assaulted the deceased, have occasioned a fundamental flaw in the case of the prosecution that as they were further compounded by the evidence of PW5 whose evidence also had the same contradictions.
89. I find that it is not certain, based on the evidence adduced by the prosecution, that it is the accused persons who inflicted the injuries that resulted in the death of the deceased.



90. Based on the foregoing, I do not deem it necessary to assess whether the prosecution has proven that the accused persons bore any malice aforethought since this court is of the opinion that the prosecution has not sufficiently proven that it is actually the accused persons who caused the death of the deceased. That being said, it is however important to note that it was established, both from the prosecution and the defence testimonies, that the accused persons neither had a grudge against the deceased nor did they have any existing dispute.
91. In conclusion, I find that the prosecution has not sufficiently proven a case against the accused persons, and I acquit them accordingly. The accused persons are ordered set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

All Accused persons present

No appearance for Counsel for the Accused

Court Assistant: Polycap

