



**Republic v Makutwa (Criminal Case 14 of 2021)
[2024] KEHC 14857 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 14 OF 2021
JN KAMAU, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPHAT AMBUBI MAKUTWA ACCUSED

JUDGMENT

Introduction

1. The Accused person herein was 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 2nd day of October 2018 at Isanda village, Ebukanga Location, Emuhaya Sub-County within Vihiga County murdered, Akasiba Tuti Esaanya.”
2. The Prosecution’s case was heard on diverse dates between 18th October 2022 and 22nd February 2023 when it closed its case. P.J Otieno J. took the evidence of Aggrey Etale (hereinafter referred to as “PW 1”), Rhoda Isike (hereinafter referred to as “PW 2”), Pius Ambuvi (hereinafter referred to as “PW 3”), Margaret Minayo Kidigu (hereinafter referred to as “PW 4”), Dr. Omondi Obudho (hereinafter referred to as “PW 5”), No 235120 PC Mildred Igadwa (hereinafter referred to as “PW 6”), No 77250 Corporal Cyprian Nteere (hereinafter referred to as “PW 7”) and No 86722 Corporal Issa Leteipa (hereinafter referred to as “PW 8”).
3. On 23rd March 2023, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence.
4. This court took over the matter on 27th April 2023 and parties asked it to proceed from where the matter had reached. The defence case was heard on 21st November 2024 when the Accused person testified.



5. The Prosecution's Written Submissions were dated 24th April 2024 and filed on 2nd July 2024. On 9th July 2024, the Prosecution's counsel informed the court that the Accused person's counsel had indicated that she had filed her Written Submissions. However, the same were missing in the court file as at the time of writing this Judgement.
6. Before writing its judgment, this court checked the e-filing portal and noted that there was a document that had appeared to have been filed but it failed to upload. The Judgment herein is therefore based on the evidence on record and the said Prosecution's Written Submissions only.

Legal Analysis

7. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not Akasiba Tuti Esaanya (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. 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. The Prosecution was emphatic that it was the Accused person's unlawful act (assault) that led to the death of the deceased. It submitted that PW 5 testified that he conducted a post mortem on the body of the deceased and he formed an opinion that the cause of death was severe head injury secondary to blunt force trauma with resultant epidural haematoma. He produced the said Post Mortem Report dated 19th November 2018 as an exhibit in this matter.
11. It was therefore clear from PW 5's 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 the Perpetrator of Deceased's Death

12. The Accused person denied having injured, hit and/or killed the deceased on the material date of 2nd October 2018. His testimony was that on the material date of 2nd October 2018 at 3.00 pm, he was making a wooden structure covered with a blanket as a bait for termites. He went to check on his cows. When he came back, he found PW 1 had covered the said structure. When he confronted him, PW 1 started beating him and he fell down. He screamed and neighbours came. PW 1 threw a jembe at him but it missed him and when he threw at him again, he ran away and did not know what happened thereafter. When they met later that day, they had an altercation and he ran away. He denied having seen the deceased at the crime scene or knowing how he sustained the injuries that led to his death.



13. PW 1 told the Trial court that on the material day at around 1.00 pm-2.00 pm, he was making a bait for termites when the Accused person, who was his neighbour, attacked him with a jembe and canes. When he asked him why he was attacking him, the Accused person told him that he wanted to kill him. He ran to the house of his employer, one Sila Nyaganga. He said that is where he lived alone (sic).
14. The Accused person continuously knocked on his door. When the deceased came to rescue him, the Accused person hit him (the deceased) twice on the head with the jembe. He came out of the house but the Accused person fled. The deceased was then taken to hospital in Yala. He died after a month.
15. PW 2's testimony corroborated that of PW 1. She testified that she knew the deceased and the Accused person as her neighbours. Her evidence was that on the material day at around 2.00 pm, she was going to buy sugar when he saw the Accused person aim a jembe at PW 1 who was making a termite trap. She waited for people to come. One of those people was the deceased.
16. She was categorical that she saw the Accused person hit the deceased on the head and he fell down. She said that one Ambuvi tried to snatch the jembe from the Accused person. When she went back home, she heard that the deceased died.
17. PW 3 was a step brother to the deceased. He testified that on the material day, he was seated under a tree when he heard PW 2 shout that his brother had been killed at the home of Silas. When he got to Silas' house, he found the Accused person holding a jembe. He was going round the house where PW 1 had locked himself.
18. He held the Accused person from behind and snatched the jembe as he was going to hit the deceased again. The Accused person then ran away. He called Moses, the Village Elder and handed over the jembe to him. He further testified that the deceased was taken to hospital at Yala and later to Kisumu. He confirmed having attended his post mortem. The jembe was produced as an exhibit in the case.
19. PW 4 was the deceased's wife. Her evidence was that on the material day, she was at home. The deceased left to give the cows water. She then heard someone shouting that her husband had been killed. She went to the home of Silas where she found PW 3 and others with her husband lying on the ground unable to talk. She corroborated PW 3's evidence that they rushed the deceased to Yala but he was referred to Kisumu.
20. She pointed out that the deceased was admitted at ICU in Aga Khan Hospital. She stated that the scan showed that he had injuries on the head. Her testimony was that throughout his stay in hospital, he could not speak. He died on 8th November 2018.
21. PW 6 was the arresting officer. She stated that on 2nd October 2018, she was at Esiruro Police Station when PW 1 reported that the Accused person had assaulted him and the deceased. She handed over the Accused person to PW 7 of Luanda Police Station, who re-arrested the Accused person. She also identified the jembe that the Accused person used to hit the deceased. PW 7 stated that the jembe was recovered by members of public who handed over the same to police officers.
22. PW 8 testified on behalf of the initial investigating officer who had been transferred. He produced the Investigating Officer's statement and jembe as exhibit in court.
23. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 2 saw the Accused person hit the deceased on the head with a jembe on the material date. PW 1, PW 2 and PW 3 saw the crude weapon that he was carrying at the material time.
24. This could not have been a case of mistaken identity. PW 1, PW 2, PW 3 and the Accused person were all neighbours and knew each other. They all placed the Accused person at the scene of crime. The



incident happened during the daytime. The light was sufficient for them to have positively identified the Accused person as having been the person who hit the deceased on the head with a jembe on that material date. Identification was by way of recognition.

25. The Accused person did not demonstrate that there was any motive for PW 1, PW 2 and PW 3 to have colluded to frame him as the person who unlawfully caused the deceased's death on that material date. They countered his evidence that he did not know what happened after PW 1 threw a jembe at him. It may very well have been that PW 1 interfered with his structure of termites. However, it was clear that he was the one who hit the deceased with a jembe when he went to rescue PW 1.
26. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find his evidence to have been watertight enough to have weakened the inference of guilt on his part.
27. Consequently, it was this court's finding that his 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 and PW 8.

IV. Malice Aforethought

28. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.
29. It was the Prosecution's argument that it had established malice aforethought on the part of the Accused person due to the injuries occasioned on the deceased.
30. It cited Section 206 of the Penal Code and placed reliance on the case of Republic vs Tubere s/o Ochen[1945] 12 EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
31. 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.
32. 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.”
33. The ingredient of malice aforethought could therefore be express or implied. It could be deemed to have been established by evidence which proved an intention to cause death of or to do grievous harm to any person, whether that person was actually killed or not.



34. The evidence showed that the Accused person hit the deceased on the head. The injuries he meted on the deceased could only have been intended to kill him. The seriousness of the injuries that the deceased sustained was confirmed by PW 5. A perusal of the Post mortem Report indicated that the deceased had a scalar scar on the right side of the head from the frontal region to the occipital region measuring 23cms, a fracture on the head encompassing the entire parietal region and two (2) blur holes on the right temporal region of the head. The fact that he died after a long hospitalisation was evident that he suffered greatly before he died.
35. This court was thus persuaded that the injuries the deceased sustained could not be said to have been bereft of malice aforethought on the part of the Accused person. It was clear that he had intended to cause the deceased harm which led to his death. There was no reasonable justification why he hit the deceased when the person he actually had a dispute with was PW 1 who he had contended had interfered with his termite bait.
36. Having analysed the evidence that was adduced by both the Prosecution and the 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 Accused person herein.
37. It presented cogent evidence to suggest that the Accused person intended to do grievous harm to the deceased. The serious injuries that the deceased sustained was proof that the Accused person had knowledge that the act or omission would probably cause the deceased's death or grievous harm which were ingredients of malice aforethought as set out in Section 203 of the Penal Code which demonstrated:-
- 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

38. For the foregoing reasons, the upshot of this court's decision was that the 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).
39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2024

J. KAMAU
JUDGE

