



**Republic v Obare (Criminal Case E016 of 2021)  
[2024] KEHC 16375 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E016 OF 2021  
RN NYAKUNDI, J  
DECEMBER 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DUKE OBARE ..... ACCUSED**

**JUDGMENT**

1. DUKE OBARE was charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 5<sup>th</sup> March, 2021 at BOMAS BAR in Turbo Shoopping Centre, Turbo Sub-County within Uasin Gishu County murdered ABEL JUMA.
2. The accused entered a plea of not guilty, which obligated the prosecution to disprove his innocence in accordance with Article 50(2)(a) of *the Constitution*. The prosecution was led by Mr. Mark Mugun, while Mr. Nyambegeera served as legal counsel for the defendant.
3. To satisfy their evidentiary burden, as mandated by Sections 107(1), 108, and 109 of the *Evidence Act*, the prosecution presented testimony from four witnesses to establish the constituent elements of murder, a criminal offense that contravenes Section 203 and is punishable under Section 204 of the Penal Code.
4. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the Penal Code, it must prove four essential elements beyond reasonable doubt:
  - a. The death of the deceased
  - b. That his death was through unlawful acts or omission of the accused
  - c. That the accused had malice aforethought as defined in Section 206 of the Penal Code



- d. As such, the quality of identification evidence placed the accused person at the scene of the crime.

### **The evidential summary in support of the Prosecution's case**

5. PW1, Ms. Mary Muhere Lidanya, who was the wife of the deceased, stated that on 5<sup>th</sup> March 2021, her husband left for Turbo Town and upon returning at around 9PM in the evening, she noted that his shirt was torn and clothing were full of dirt. He further complained of chest pains and difficulty breathing. Upon interrogating him, he said that he had been assaulted by a person known to him as "Mkisii" at the Bomas Pub in Turbo Town. She took him to various hospitals within Turbo Sub County but his condition only worsened as the deceased was at some point vomiting blood aside from the chest pains. The Deceased eventually died on 6<sup>th</sup> March 2021 at Turbo Sub County Hospital while undergoing treatment. Upon her own interrogation and independent investigation, she found out that the person known as Mkisii was an employee of the Forest Department in Turbo Town. According to PW1, the deceased succumbed to the injuries in the course of undergoing treatment at the medical facility in which later he had to identify the body during the post mortem examination.
6. PW2, Mr. Joseph Mukhwana, a brother to the deceased, was present at the post mortem examination where he was informed that at the time of his death, his brother had 2 broken ribs and that his stomach was ruptured indicative of the fact that he had been assaulted.
7. PW3 Sgt Joseph Kiboi on oath stated in court that at the time of the incident he was a police detective attached to Turbo Police station, that is when he received a telephone call from a colleague by the name Juma requiring a means of transport to take him to the hospital. During their conversation PW3 sought better particulars of why Juma was desirous of a means of transport and that is when he was informed that the deceased had been assaulted by a "mkisii" suspect. He rushed to Turbo Sub-county district hospital where he was informed that the deceased had succumbed to death.
8. PW4 was Clement Korir who testified as an officer as an officer of the Kenya Forest Services attached to Turbo Sub-station. To the best of his recollection, PW4 on the due date of 5<sup>th</sup> March, 2021, he was at Bomas Bar with other customers taking some alcoholic drinks, who included the accused person. In the course of the social evening, the accused was seated at the counter when he saw Juma rise up from the seat and went to the counter. In a little while he saw a fight erupt with the accused and the deceased culminating in the accused being and the deceased thrown to the floor. It was further the evidence of PW4 that following that incident, one Samuel picked him up from the floor. That is when it was decided that a vehicle be hired to take the deceased to his house to avoid any further altercation. The witness was left behind to continue taking his drinks and at the end of it all he left for his homestead. According to PW4's testimony he learned the following day Juma had succumbed to death following the injuries sustained. The witness further told this court that during the confrontation, the accused had stepped on the deceased while they were having drinks at the Bomas Club and both of them had taken some alcoholic drinks.
9. PW5 Dr. Wanambisi who testified and confirmed that the cause of death was respiratory failure caused by blunt chest injury i.e. a huge force applied to the chest, a thromboembolism, which translates to a blood clot as well as chemical peritonitis, which is a leakage of sterile fluids or food in the peritoneal cavity also caused by blunt abdominal injury. Aside from this, the Pathologist noted other injuries such as a massively distended abdomen, free blood in the chest cavity, a bruised lung and 2 left fractured ribs. The Post Mortem was furnished as exhibit 1.
10. The last witness for the prosecution was PW6, CPL Lorna Kerubo who also happened to be the investigating officer surrounding the death of the deceased. It was the evidence of PW6 that the



investigation shows that both the deceased and the accused on the material day were having a drink at Bomas bar. That during the social evening, PW6 told the court that from the investigations and the witnesses who recorded their statements showed that there was a fight between the accused and the deceased which resulted in the deceased sustaining injuries. That is when it was decided by the customers and the owner of the bar that the deceased be rushed to Kobil hospital and later referred to Turbo Sub-County for further management but later, he had to succumb to death and subsequent a post mortem examination conducted. It is from the cumulative effect of the investigation that a decision was made to have the accused person charged with the offence of murder contrary to Section 203 of the Penal Code.

11. Thereafter, at the close of the prosecution's case, the accused was placed on his defense in which he elected to give a sworn statement. His narrative on oath contained the following highlights. The accused acknowledged that on the 5<sup>th</sup> March, 2021, he went to Bomas bar at Turbo where he joined other customers including police driver Sammy Kiarie for a social evening. He also admitted that police officer PC Juma being present at that bar. Like any other customers, the accused person told the court that he ordered for his drink while seated at the counter while other police officers sat at the corner of the bar. The accused further recalled that it was the deceased who emerged and pushed him out of the counter including taking away his beer and proceeding to pour it down. That is how a fight ensued and later the deceased left the bar for his home. He was to be arrested later for an offence he did not commit. He denied ever killing the deceased person.
12. Learned Counsel Ms. Kirenge in buttressing the case for the prosecution filed submissions dated 19<sup>th</sup> December, 2024. Counsel submitted on the Key elements for the offence of murder. Ms. Kirenge submitted that it is undisputed from the post mortem produced as evidence that the deceased died on 6<sup>th</sup> March, 2021 at 8:30PM after undergoing treatment for chest pains that begun on the evening of 5<sup>th</sup> March, 2021 after coming from Bomas Pub in Turbo Town. That the findings of the pathologist prove that the death was unlawfully caused as a result of an assault/grievous harm to the deceased.
13. On the element of Malice aforethought, learned counsel cited the provisions of section 206 of the Penal Code and relied on the case of *Kaburu v. Republic (Criminal Appeal 103 of 2023)* (2024) KECA 536 (KLR) and the case of *Republic v. Ali Kajotot Ali* (2021). Drawing from the evidence of PW4 and PW5, counsel stated that it is not disputed that the accused person was present at the Bar that evening and he even admitted to having brushed shoulders with the deceased. That PW4 and PW5 confirm that the alias "Mkisii" indeed refers to the accused – Duke Obare. Learned counsel further submitted that it is hard to fathom that the accused did not retaliate to the said act of being slapped by a drunken officer while he was busy enjoying his drink as he has explained in his defense to this court, however, this tilts in the prosecution's favor towards proving that the accused was indeed not provoked.
14. According to learned counsel, the actions of the accused persons on the night of 5<sup>th</sup> March, 2021 amount to that of implied malice as it was a sudden but deliberate act of aggression causing grievous harm and immense pain on the deceased, PC Abel Juma, leading to his subsequent death.

### **Analysis and determination**

15. The tragic events of March 5, 2021 present this court with the task of evaluating criminal culpability in the context of what began as a bar altercation but ended in death. The prosecution's case rests substantially on a combination of direct and circumstantial evidence, requiring careful examination not only of the witness testimony but also of the medical evidence establishing causation and intent.
16. The cardinal principle in criminal law, as articulated in *Woolmington v DPP* (1935) AC 462, remains our guiding star, the prosecution bears the burden of proving guilt beyond reasonable doubt. This



principle takes on heightened significance in a capital offense where the stakes could not be higher. The court in the said case stated as follows:

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt, subject (to the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

17. For the prosecution to secure a conviction on the charge of murder contrary to Section 203 of the Penal Code, it must prove four essential elements beyond reasonable doubt:
  - a. The death of Abel Juma
  - b. That his death was caused by unlawful acts or omissions
  - c. That such acts or omissions were committed by the accused.
  - d. That the accused acted with malice aforethought.
18. The fact and cause of death are established through compelling medical evidence. The post-mortem findings of Dr. Wanambisi (PW5) leading to the death of the accused are captured as follows: Free blood in the chest cavity, bruised lung parenchyma by fractured ribs on the left side; Bruised myocardium, with blood clot in the heart; massive straw-colored, free fluid on the peritoneal cavity mixed with food previously eaten, ruptured stomach wall, releasing stomach contents. The post mortem concluded that the cause of death was Respiratory failure due to massive hemothorax most likely from Blunt chest injury (huge force applied on the chest); thromboembolism and chemical peritonitis. The injuries paint a clear picture of significant trauma inflicted with considerable force.
19. The first two elements being the fact of death and its unlawful causation are conclusively established through both medical and testimonial evidence. The law presumes every homicide to be unlawful unless circumstances exist to render it excusable or justifiable, as established in *R v Gusambizi s/o Wesonga* (1948) 15 EACA 65. The No such circumstances have been demonstrated in this case.
20. The critical questions before this court center on the identification of the perpetrator and whether the acts were accompanied by malice aforethought. The prosecution’s case on these elements rests primarily on the testimony of PW4 Clement Korir, who was present during the altercation, supported by circumstantial evidence from other witnesses who encountered both the deceased and accused in the hours before and after the incident.
21. In evaluating identification evidence, particularly when it emanates from a single witness, the court must exercise utmost caution. As held in *Wamunga v Republic* [1989] KLR 424, where the only evidence against a defendant is evidence of identification, the court must examine such evidence carefully and be satisfied that the circumstances of identification were favorable and free from possibility of error. The court held:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied



that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

22. The reliability of PW4’s identification evidence is strengthened by the testimonies of PW1 and PW5. PW1, the deceased’s wife, who testified that upon returning home, her husband specifically identified his assailant as “Mkisii.” Through independent investigation, she established this to be the accused, an employee of the Forest Department. This evidence of recognition rather than mere identification adds considerable weight to the prosecution’s case.
23. The critical question before this court is whether the accused acted with malice aforethought. Section 206 of the Penal Code defines malice aforethought, and in determining whether the prosecution has proven this essential element, the court must examine both the circumstances of the incident and the context in which it occurred. The hallmark case of *R v Tubere s/o Ochen (1945) 12 EACA 63* gives a guideline on how malicious intent can be deduced. The court stated as follows:

“The weapon used i.e. whether it was a lethal weapon or not;  
The part of the body that was targeted i.e. whether it is a vulnerable part or not;  
The manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted, and  
The conduct of the accused before, during and after the incident i.e. whether there was impunity.”
24. The evidence presents a scenario significantly different from the calculated violence that typically characterizes murder. The events unfolded in a bar setting where both parties had been consuming alcohol. PW4 Clement Korir’s testimony establishes that the altercation erupted spontaneously when the deceased approached the counter where the accused was seated. No evidence suggests any prior animosity or premeditated intent. The quarrel had taken place between the accused and the deceased in the course of them having alcoholic drinks at Bomas bar. The said accused was not armed with any dangerous weapon but he applied excessive force using his feet and punches. Given this background, under the *Evidence Act*, it is a well-recognized maxim that evidence has to be weighed and not counted. In other words, it is the quality of evidence that matters and not quantity. It is also not necessary to insist upon a plurality of witnesses but it is the court’s duty to establish how reliable and trustworthy is the evidence before court. On appreciation of the oral evidence tendered by PW1 to PW6, this court is of the view that the elements of the offence in relation to the lesser offence of manslaughter has been established beyond reasonable doubt. In light of the medical evidence tendered by PW5, the findings arrived at show that the deceased succumbed to respiratory failure due to massive hemothorax most likely from blunt chest injury.
25. In terms of Section 202 of the Penal Code, when a person who unlawfully kills another under circumstances like the one displayed by the facts of this case and in this case where the accused person acted to cause death in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he will be guilty of an offence of manslaughter and not murder as provided under section 203 of the Penal Code. The provocation herein is traceable to the act of the deceased trying to take away the beer or drink was already in custody of the accused without any excuse of a justifiable course. He therefore deprived the power of self-control by inducing him to assault the deceased. My reading of the Penal Code on provocation under Section 207 as read with Section 208 does not state that the retaliation must be proportionate to the provocation or in other words the mode of retaliation must bear a reasonable relationship to the provocation if the offence is manslaughter. Common sense



and the facts of this case dictate that something ought to have happened on the evening of 5<sup>th</sup> March, 2021 for the accused to have attacked the deceased whom he knew prior to this incident.

26. The upshot of it is that the accused person is found guilty and convicted of the offence of manslaughter contrary to section 202 as punishable under section 205 of the Penal Code. The sentencing hearing is scheduled for the 17<sup>th</sup> January, 2025.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF DECEMBER, 2024.**

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**R. NYAKUNDI**

**JUDGE**

In the Presence of:

Mr. Nyambegera, Advocate for the Accused person

Ms. Kirenge for the DPP

