



**Republic v Avugwi & another (Criminal Case E009 of 2022)  
[2024] KEHC 16228 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E009 OF 2022  
JN KAMAU, J  
DECEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HESBON AVUGWI ..... 1<sup>ST</sup> ACCUSED**

**DANIEL KIVISHA ..... 2<sup>ND</sup> 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 26<sup>th</sup> day of August 2022, at Chadungunyi Village in Busali East Location, within Vihiga County jointly murdered Charles Andambi Agesa.”
2. This matter was previously heard by Musyoka J. This court became seized of the same on 7<sup>th</sup> March 2023. The Prosecution’s case was heard on diverse dates between 7<sup>th</sup> March 2023 and 27<sup>th</sup> July 2023 when it closed its case. On 25<sup>th</sup> September 2023, this court found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on 29<sup>th</sup> January 2024.
3. The Prosecution’s Written Submissions were dated 5<sup>th</sup> April 2024 and filed on 8<sup>th</sup> April 2024. Although this court directed that the Accused persons file their Written Submissions by 26<sup>th</sup> August 2024 and/ or place the same in the court file by 30<sup>th</sup> August 2024 if already filed, the same were missing in the file as at the time of writing this Judgment. This court checked the e-filing portal and noted that the same had not been filed. The Judgment herein is therefore based on the evidence on record and the said Prosecution’s Written Submissions which the parties relied upon in their entirety.



## **Legal Analysis**

4. The issues that were put before this court for consideration were as follows:-
  - a. Whether or not Charles Andambi Agesa (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?
5. 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**

6. 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**

7. The cause of the deceased’s death was a pertinent issue. Dr Collins Masika Were (hereinafter referred to as “PW 6”) tendered a Post mortem Report dated 1<sup>st</sup> September 2022 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 the deceased’s death was lung collapse secondary to frail chest due to trauma most likely from a blunt object.
8. 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**

9. The Accused persons did not deny having been with the deceased on the material date of 25<sup>th</sup> August 2022. However, they denied injuring and/or killing him.
10. On its part, the Prosecution reproduced the evidence that was adduced during trial and submitted that it had linked the Accused persons to the murder of the deceased.
11. The 1<sup>st</sup> Accused person testified that he knew the deceased as his neighbour as they hailed from the same area. He stated that on 25<sup>th</sup> August 2022, he prepared his children for school and left for work. At 5.00 pm, he returned home and found his children were back from school. His in-law, one Emily, told him that the deceased had come looking for him several times.
12. The 2<sup>nd</sup> Accused person came when he heard the 1<sup>st</sup> Accused person call the deceased who had come to his house. They asked him why he was looking for the 1<sup>st</sup> Accused person and he said that there was someone who wanted to buy a duck from him (the 1<sup>st</sup> Accused person).
13. When they went to check the ducks, they found one was missing. The 2<sup>nd</sup> Accused person asked the deceased why he was asking for a duck when he knew that it was missing and he took a whip and whipped him. The deceased told them that he had been sent by his brother’s wife and they told him that they would not sell the duck to her. He added that the deceased admitted to having stolen the said



- duck. He pointed out that 2<sup>nd</sup> Accused person went back to his house and he went to look for food for his children. He asserted that the deceased left and never came back. He said that he was arrested for the offence the next day.
14. He contended that the deceased was a thief who would steal vegetables from farms, fish from fish ponds and clothes hang outside and that he would be beaten by people for stealing. He pointed out that the deceased left his compound walking well and that it was not true that he was found in his compound unconscious.
  15. The 2<sup>nd</sup> Accused person testified that on the material date of 25<sup>th</sup> August 2022, he came home from work at around 4.00 pm and found the deceased and the 1<sup>st</sup> Accused person standing in the compound. He heard the 1<sup>st</sup> Accused person asking the deceased about a duck. The deceased told him that someone had sent him to buy a duck from him (the 1<sup>st</sup> Accused person). When the 1<sup>st</sup> Accused person went with the deceased to where the ducks were kept, he came back saying that one duck was missing. The 1<sup>st</sup> Accused person told the deceased that since he was the one who was looking for a duck, then he must have been the one who stole it. The deceased denied that assertion whereupon the 2<sup>nd</sup> Accused person hit him twice with a whip.
  16. He further stated that he did not whip the deceased after he admitted that he knew about the missing duck. He said that they dispersed and he went home and the 1<sup>st</sup> Accused person left to get vegetables for his family while the Accused person went away. He stated that the deceased never came back. He was categorical that the deceased left while walking and he only whipped him twice but did not beat him to a level unconsciousness. The next morning at 5.00 am, he was attacked by a mob who demanded that he produces the deceased. He was later arrested.
  17. On his part, Evans Zisoni Agesa (hereinafter referred to as “PW 1”) who was the deceased’s brother testified that on 25<sup>th</sup> August 2022 at about 6.30 pm, he was in his house when a neighbour, one Maureen, came and told him that the deceased was being beaten by the Accused persons for stealing a duck. He went to the Accused persons’ compound and found them beating deceased. He pointed out that they had a whip and stones.
  18. It was his evidence that the 1<sup>st</sup> Accused person had a whip while the 2<sup>nd</sup> Accused person was kicking and stepping on the deceased. They also beat him on the face. The deceased was bleeding. He lost a tooth. They also stepped on his chest. He further explained that it was the 2<sup>nd</sup> Accused person who was stepping on the deceased with a boot. He said that at the time, neighbours were watching and that when he tried to stop them, they were very hostile to him.
  19. The Village Elder, one Esaji came and told them to take the deceased home. He, together with his brother, Dishon Bwonya Agesa (hereinafter referred to as “PW 2”) took the deceased to his home as they had no money to take him to hospital. They later heard one Phyllis Musonye screaming that the deceased had died. The Accused persons were then arrested.
  20. PW 2 was also a brother to the deceased. His evidence corroborated that of PW 1. He stated that when he went to the scene of crime, he found the deceased lying at the entrance of the 1<sup>st</sup> Accused person’s house. He tried to speak to him (the deceased) but he did not talk back. He tried to make him sit but he could not sit. He was only opening and closing his eyes. He further stated that he only saw the 2<sup>nd</sup> Accused person.
  21. He said that two (2) village elders came, one Margret and another was Esaji. They interrogated the 2<sup>nd</sup> Accused person who admitted having hit the deceased with a whip. He added that the deceased had no



- shirt. He was only wearing a trouser and his body was swollen and covered with mud. He was emphatic that he saw 2<sup>nd</sup> Accused person whip the deceased.
22. He took the deceased to his house together with PW 1 and the next day at around 4.00 am-5.00 am, he called the deceased from outside but he did not respond. When he pushed the door and entered the house, he found his upper body on the floor and the lower part on the mattress. He had soiled himself with faeces. He went out and came back to clean him and dress him but he realised that he had died. He went and told the said Phyllis Musonye who screamed. He said that family members and neighbours came. The Accused persons were later arrested.
  23. Phyllis Kathila (hereinafter referred to as “PW 3”) testified that the deceased was her in-law and she knew the Accused persons who were her neighbours. She stated that on the material date of 25<sup>th</sup> August 2022, her grandchildren came running and told her that the deceased was being beaten at 1<sup>st</sup> Accused person’s house. When she rushed there, she found the deceased beaten and lying on his side outside the 1<sup>st</sup> Accused person’s house. He was bleeding from his nose and his tooth was broken. She said that she saw both Accused persons there. It was said that the deceased had stolen a duck. She pointed out that she saw the 2<sup>nd</sup> Accused person with a whip.
  24. Margret Vugusa (hereinafter referred to as “PW 4”) and Solomon Vuta (hereinafter referred to as “PW 5”) were the village elders. Their evidence corroborated that of PW 1, PW 2 and PW 3.
  25. No 67487 Corporal Thomas Kareithi (hereinafter referred to as “PW 7”) was the Investigating Officer. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4 and PW 5.
  26. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 saw the Accused persons beat the deceased on the material date. He also saw the 2<sup>nd</sup> Accused person stepping on the deceased on the chest. Both he and PW 3 observed that the deceased was bleeding and had a broken tooth. PW 2 saw the deceased’s body was swollen as a result of the beating by the Accused persons. PW 1, PW 3, PW 4 and PW 5 saw the whip that the 2<sup>nd</sup> Accused person had at the material time.
  27. Notably, PW 1, PW 2, PW 3, PW 4 and PW 5 all placed the Accused persons at the scene of crime. The incident happened when it was still day time. There was therefore sufficient light that was favourable for the positive identification of both of them as the perpetrators who beat the deceased on the material date.
  28. The 2<sup>nd</sup> Accused person did not deny hitting the deceased with a whip. Both Accused persons did not demonstrate that there was any motive for PW 1, PW 2, PW 3, PW 4 and PW 5 to have colluded to frame them as the people who unlawfully caused the deceased’s death on that material date. Their assertion that the deceased walked away from the 1<sup>st</sup> Accused person’s house by himself was not true as the witnesses were emphatic that the deceased was lying in the 1<sup>st</sup> Accused person’s compound badly beaten and had to be carried away from there.
  29. This court was therefore persuaded to find and hold that both Accused persons were positively identified by PW 1, PW 2, PW 3, PW 4 and PW 5 as aforesaid. They each spent sufficient time communicating with them at the material time. They were all neighbours and knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition.
  30. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the evidence of both Accused persons to have been watertight enough to have weakened the inference of guilt on their part.



31. Consequently, it was this court's finding that both the Accused persons' 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 and PW 7.

#### **IV. Malice Aforethought**

32. Having found and held that the Accused persons' defence was not sustainable as they were positively identified as the perpetrators of the deceased's death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
33. 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.
34. 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.”
35. 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.
36. PW 1 testified that the Accused persons were beating the deceased for allegedly stealing a duck. PW 1 and PW 3 told this court that the deceased was bleeding and had lost a tooth. PW 2 stated that the deceased's body was swollen. PW 1 averred that the Accused persons beat the deceased while stepping on his chest. Further, PW 3 testified that he found the deceased lying on the ground unconscious.
37. The 1<sup>st</sup> Accused person asserted that the deceased was a thief and would steal vegetables, fish and clothes. He added that he would be beaten by people for stealing. The 2<sup>nd</sup> Accused person admitted that he whipped the deceased twice on the material day for alleged stealing of a duck.
38. From PW 7's investigations, PW 1, PW 2, PW 3, PW 4 and PW 5 connected both Accused persons to the deceased's death. The thorough beating they meted on him could only have been intended to kill him for the theft.
39. The seriousness of the injuries that he sustained was confirmed by PW 6. Upon conducting the post mortem examination, he observed that the deceased had bruises on the chest abdomen and his chest was frail. The extensive injuries and the fact that he did not die immediately were evident that he suffered greatly before he died.



40. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case. The beatings the deceased suffered at the hands of the Accused persons were not only unlawful but they could not be said to have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
41. It was immaterial that the deceased was a thief as they 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.
42. Having analysed the evidence that was adduced by both the Prosecution and the Accused persons, 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 both Accused persons herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
- 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.
43. Having said so, this court found and held that as the deceased left the home of the 1<sup>st</sup> Accused person while he was alive and he was not taken to hospital despite the severe beating, a charge of murder could not be sustained. He actually died in the wee hours of the morning having been beaten the previous evening at 6.30 pm. Although there was actus rea (unlawful action), the court was not certain of the existence of mens rea (intention) to commit the offence of murder because it cannot be known if the deceased would have survived had he been taken to hospital for treatment immediately after the incident.
44. This court was thus reluctant to come to the firm conclusion that the Prosecution did prove the offence of murder beyond reasonable doubt but instead found it fair in the circumstances of the case to find and hold that it was the ingredients of the offence of manslaughter that had been established.

### **Disposition**

45. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons herein be and are hereby convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code Cap 63 (Laws of Kenya) having been reduced from 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).
46. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**J. KAMAU**  
**JUDGE**

