



**Republic v Musoga & 4 others (Criminal Case 56 of 2015)  
[2023] KEHC 967 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 56 OF 2015  
PJO OTIENO, J  
FEBRUARY 17, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DAVID MUSOGA ..... 1<sup>ST</sup> ACCUSED**

**JOSHUA ANUSU ..... 2<sup>ND</sup> ACCUSED**

**WYCLIFF RUYA ..... 3<sup>RD</sup> ACCUSED**

**OSCAR AGUNINDA ..... 4<sup>TH</sup> ACCUSED**

**JAPHET IMBALE YAYA ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The five accused persons, are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* whose particulars are given to be that on the 2<sup>nd</sup> day of September, 2015 at Gimarani village, Givole Sub location, Jepkoya location within Vihiga County, the accused persons jointly with others not before court murdered Shadrack Jerusi.
2. The accused persons pleaded not guilty to the charge and the prosecution in pursuit of duty to discharge the legal burden of proof tendered evidence from nine (9) witnesses. At the close of the prosecution's case and determination of establishment of a prima facie case, the four accused persons gave evidence on oath but without calling any other independent witnesses.

**The Evidence**

3. The prosecution's case was opened with the evidence of Jescah Andiha, PW1 who testified that on 2/9/2015 she was her home making her house when she heard her brother in law call her son Allan and telling him that people were beating the 'mzee'. Together with her sons they rushed to the scene only



- to be forced to retreat back after being attacked with stones by the 1<sup>st</sup> accused. They stood about 100 meters away from the scene as they watched the 2<sup>nd</sup> accused, 4<sup>th</sup> accused and other people, known to her physically and not by name, beat up the deceased with stones and sticks. The chief and the assistant chief were then called and arrested the culprits by which time the deceased was dead.
4. On cross examination she stated that the incident occurred at 2 PM before the rains started and that she knew the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused by name as part of the attackers. She also noted that the 4<sup>th</sup> accused lifted a heavy rock and hit the deceased on the head.
  5. PW2, John Agoi Asukama testified that on 2/9/2015 at about 2 PM he heard children shouting, “they have killed mzee” and rushed to the scene where he found and witnessed the 4<sup>th</sup> accused hitting the deceased with a stone on the thigh while the 2<sup>nd</sup> accused was screaming and telling others, “finish him”. The chief was then called and the accused persons were arrested at different locations. On cross examination he stated that out of the five accused persons he only saw the 1<sup>st</sup> accused hit the deceased with stones.
  6. PW3, Shaban Allan Andiga testified that on 2/9/2015 he was at home when a young boy informed him that his father was being killed. He rushed to the scene where he found the 4<sup>th</sup> accused stoning his father who was lying on the ground while the 2<sup>nd</sup> accused was beating him with a stick. At that time the 4<sup>th</sup> accused was drunk and the 2<sup>nd</sup> accused ran away on spotting them. The 2<sup>nd</sup> accused, 4<sup>th</sup> accused and two other young men then chased them away with stones. He stood a distance as he watched the accused persons kill the deceased with stones, rungu and pangas. Among the attackers he knew the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons by name. He was only able to identify the 3<sup>rd</sup> and 5<sup>th</sup> accused physically. He affirmed that he saw all the accused persons beat the deceased but upon cross examination he stated that he did not see the 1<sup>st</sup> accused do anything on the deceased.
  7. PW4, was Peter Munai Keya, the assistant chief of Kapchemugoni sub location who testified that on 2/9/2015 at about 4 PM he received information from a village elder that the deceased had been killed. He rushed to the scene and found the chief, two other assistant chiefs from nearby sub locations and the District Officer with a crowd that had surrounded and cornered the suspects. The administrators were informed that one of the suspects had escaped and when they went to arrest him, they were confronted by people who were armed and were all forced to flee in different directions.
  8. On cross examination he stated that he found the accused persons having been arrested and was not aware if they were involved in the death of the deceased.
  9. PW5, John Koech Obei, a village elder, testified that on 2/9/2015, he heard screams, rushed to the scene and found the chief and DO who asked him to call PW4. At the time the deceased was already dead.
  10. PW6, Joyce Muyesu, the chief of Chepkoyai location testified that on 2/9/2015 at 3:30 PM he received information from a village elder about a murder. She rushed to the scene and informed the assistant chief, the DO and the OCS. She stated that two of the suspects were arrested nearby while others were sought from their homes.
  11. On cross examination she stated that the suspects were identified by members of the public.
  12. PW7, Harun Komoni, the assistant chief of Tigo sub location testified that on 2/9/2015 at 4PM he received a call from PW6 informing him of the murder of the deceased. He rushed to the scene where he found the body of the deceased on the road with stones near it. They were informed by the people at the scene about the identity of the five suspects, which information led to their arrest. The witness was informed of a sixth suspect and when they went to arrest him they were chased away by a mob with each of them running to separate directions.



13. On cross examination he stated that when he arrived at the scene, he found the five people had been arrested.
14. PW8, No xxx Sergeant Herbert Majani and the investigating officer testified that on 2/9/2015 he was at the police station when the deputy OCS and Inspector Oyugi informed him of an incident at Chepkoyai location. He mobilized other officers and they went to the scene where they found the chief and the assistant chief having arrested the suspects to the murder of the deceased. He then rearrested the suspects and recorded statements from witnesses. He also produced three stones and two sticks which he had collected from the scene.
15. On cross examination he stated that he was informed that the deceased was in a group that was advocating for a Christian way of conducting circumcision which collided with another group which advocated for a traditional way of conducting circumcision.
16. PW9, Dr Dickson Mchana, a consultant pathologist at Kakamega County Referral Hospital produced a post mortem report prepared by Dr Munga in relation to an autopsy conducted on the body of the deceased. He stated that Dr Munga opined that the deceased died due to multiple injuries following trauma.
17. On cross examination he stated that the deceased had injuries to the head and neck and they appeared to have been caused by blunt objects.
18. It is worth noting that at the time of giving a ruling on a case to answer, it was brought to the attention of the court by Mr Ondieki, Counsel for the accused persons, that the 1<sup>st</sup> accused had died on March 1, 2022 at the age of 70 years. The case against 1<sup>st</sup> accused thus stood terminated and this judgment is therefore concerned with only four accused persons. In the judgment Joshua Anusu, initially 2<sup>nd</sup> accused shall be 1<sup>st</sup> accused while Japheth Imbale Yaya shall be 4<sup>th</sup> accused.
19. Each of the accused four persons gave own sworn statement without calling any additional witnesses. DW1, Joshua Anusu testified that on 2/9/2015 he was at home where a circumcision ceremony was taking place. At about 2 PM he heard an unusual noise from the direction of his grandfather's home, the 1<sup>st</sup> accused, and decided to head there where he found people fighting. He saw people beat the deceased who was like a grandfather to him. He made noise and the people dispersed. Shortly after the police arrived, they were told to board a police vehicle, driven to the police station, ostensibly to record statements only to be placed in the cell. On cross examination he stated that he saw people by the name Omido and Esehawe beat the deceased.
20. Oscar Aguninda, accused 3, gave evidence as DW2 and testified that on 2/9/2015 he was at home receiving visitors before the initiation celebrations started. At about 2:30PM, he heard noises from the 1<sup>st</sup> accused's home and decided to head there. On his way, he saw a crowd on the road and only spotted the 1<sup>st</sup> and 2<sup>nd</sup> accused. On getting to the scene he found the deceased beaten with stones and lying on the ground and that he appeared dead. He then went to the 1<sup>st</sup> accused's home to find out what had happened and while there the police summoned them to go and help load the body of the deceased into the police vehicle. he obeyed, assisted but was later forced to board the vehicle and was taken to the station under arrest. On cross examination he stated that 2<sup>nd</sup> and forth accused persons only appeared at the scene after the police arrived and that he had been accused falsely because the people he saw beat the deceased had not been charged.
21. DW3, Wycliff Ruya, accused 2, testified that he was cousin to the 3<sup>rd</sup> and 4<sup>th</sup> accused and that he was on his way to buy cigarettes when he was arrested by the police. On cross examination he told the court that on reaching the scene he saw many people and was told to help board the body into the police



vehicle only to be arrested and driven to the police station. He added having seen, Dw4 as they boarded the body into the police vehicle and not before.

22. The last accused Japheth Imbale Yaya testified as DW4 stating that on 2/9/2015 he was at home and decided to take his phone to the market for charging. On reaching the center, he saw police officers calling his co accused persons to help load the body of the deceased into the police vehicle. He was asked to join and help which he did and thereafter they were asked to get into the land cruiser and headed to the police station. On being cross examined, the accused said that he never saw any other person other than his co-accused persons and on reexamination he said that it was starting to rain and the crowd had dispersed.
23. Both counsel opted to offer no submission and left it to court to evaluate the evidence then render a verdict.

### **Issues, Analysis and Determination**

24. The offence of murder is defined in section 203 of the *Penal Code* to occur when one, who of malice aforethought, causes death of another person by an unlawful act or omission. Therefore, for the prosecution to achieve a conviction, all the ingredients contain in section 203 of the penal code ought to be proved beyond reasonable doubt. The ingredients of the offence that must be proved are; the unlawful cause of death by omission or commission while the offender is accentuated by malice aforethought. The presence or absence of the ingredients thus become the issues for determination by the court. Of course the unlawful acts, when proved must be associated with the accused as the perpetrator.
25. All the eye witnesses confirmed that the deceased, who was well known to them, died on the fateful day. PW9, the pathologist further confirmed that Shadrack Jerusi died due to multiple injuries following trauma caused by blunt objects. It is thus not in doubt that the deceased died from injuries inflicted upon him on the September 2, 2015 as charged and narrated by the eye witnesses.
26. Regarding the person(s) who inflicted the injuries, the totality of the evidence of the prosecution witnesses, makes it evident that the death of the deceased was caused by deliberate acts of commission. The question then is whose acts led to the death.
27. It was the evidence of PW1 that she saw the 1<sup>st</sup> and 3<sup>rd</sup> accused persons, people he knew by name, and the other two who she could recognize but did not know their names, beat the deceased. PW2 also stated that he saw and heard the 1st accused shout “finish him” as he was being beaten and it was also the evidence of PW3 that he saw the 1st accused beat the deceased with sticks. The 2<sup>nd</sup> accused person was a person well known to PW1, PW2 and PW3 having come from the same clan and living in the same village. On cross examination, the 1st accused stated that he saw two people who beat up the deceased. He did not indicate if he gave this information to the police or intimated this information to his advocate at the onset of the case. what the evidence from both sides does is to place the 1<sup>st</sup> accused at the scene of the murder. His evidence that he was indeed there but did not lift a hand must be weighed against that by the other witnesses who saw him use stoned to hit the deceased. The court finds that the Evidence by Accused 1 was not sufficient to rebut the otherwise cogent evidence by PW1,2 and 3.
28. As against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4th accused’s participation in the killing of the deceased, the three was positively identified by PW1, 2 and 3 as being part of the gang which beat up the deceased. They knew accused 1 and 3 well by names. Even though PW2 did not know accused 4 by name his evidence was that he ran from the scene but was perused arrested and brought back as the witness was still at the scene. PW1 and 2 did identified 4th physically at the scene and later at the dock. Against that evidence, the version given by the accused persons did not displace, in material particulars their participation.



It thus the finding by the court that the four accused persons were identified and proved beyond reasonable doubt to have been present and participated in assaulting the deceased.

29. The next question is whether their assault on the deceased can be termed lawful. There was no justification by any of the accused persons that they had any lawful cause to assault the deceased as has been proved. In law, an act can only be lawful when so sanctioned by the law. In the circumstances proved and presented to court, it is not possible to justify the otherwise crude and barbarian way the deceased was assaulted and killed.
30. Having found that the accused persons were properly identified and proved to have unlawfully assaulted and caused the death of the deceased, the next question is whether the four were possessed of malice aforethought. The Court of Appeal in the case of *Nzuki v Republic* [1993] KLR 171 rendered itself on this point when it said: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous harm.
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. it does not matter in such circumstances whether the accused desires those consequences, to ensue or not. In none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.”

31. To determine whether or not the killing of the deceased was premeditated by the accused persons, this court will look at the events leading up to the murder and how the murder took place. It was the testimony of PW8, the investigating officer, that he was informed that the deceased was in a group that was advocating for a Christian way of conducting circumcision which collided with another group which advocated for a traditional way of conducting circumcision. The beating of the deceased was a result of this disagreement. The five accused persons, as initially charged, now four after the death of David Musoga, continually assaulted the deceased with stones and sticks with 3rd accused lifting a heavy stone which he smashed on the deceased’s head while the 1st accused uttered the words “finish him”. The court is in no doubt that the intention of the accused persons was to inflict grievous bodily harm if not to outrightly kill the deceased. It could only be harm if not death they expected from their actions.
32. Accordingly, I find that the prosecution successfully and beyond reasonable doubt, proved the accused persons to have unlawfully and while of malice aforethought, caused the death of the deceased. The court finds them guilty for the offence of murder as charged and enters a conviction against all of them.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF FEBRUARY, 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Ms. Chala for the Prosecution/State



Mr. Ondieki for the Accused

Court Assistant: Polycap

