



**Republic v Itemere (Criminal Case 43 of 2014)
[2023] KEHC 3782 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 43 OF 2014**

**WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

THOMAS ITEMERE ACCUSED

JUDGMENT

1. 2 witnesses testified in this matter. One of them witnessed the assault on the deceased, by the accused. PW1 was at her home on the material day, for a memorial of her late daughter. There were young men in her house listening to music. A dispute arose amongst them, and the accused emerged from the house, and cut the deceased with a panga, on his head. He was rushed to hospital, where he died later. PW2 was the grandfather of the deceased. He got information about the assault.
2. I put the accused on his defence. He denied being at the scene, knowing the deceased and causing the death.
3. There is evidence that the accused attacked the deceased, and cut him with a panga on the head. He died thereafter, in hospital. No other witnesses testified. Crucially the pathologist did not take to the stand, and, therefore, there is no evidence as to the cause of the death of the deceased.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
5. On whether the deceased died, I have the eyewitness evidence of PW1. She did not see his body. She was only told of his death. She did not say that she attended his funeral. PW2, the grandfather of the deceased, said he died in hospital. He did not state whether he saw his body. He did not talk about identifying the body to the pathologist. He did not talk about interment. The death of the deceased was not established beyond reasonable doubt. As the pathologist did not testify, there is no evidence on the cause of his death. The cause of death cannot be inferred from the circumstances, for the testimony



of PW1 was very scanty. She merely said that the deceased was cut on the head, but she did not give details of the injuries, if at all, that he sustained, for the court to assess whether or not such injuries could have led to his death. As the cause of death was not established, the issue of causation and malice aforethought would also not arise. PW1 placed the accused at the scene, as she witnessed him assault the deceased, but no concrete evidence was led to prove the death, and to establish the cause of death, and without such evidence, there would be no basis of finding and holding that the accused caused the death.

6. It is my finding and holding that a case has not been made out against the accused person herein, to the required standard, of proof beyond reasonable doubt, that the accused person herein caused the death of the deceased herein, and did so with malice aforethought. I accordingly find him not guilty, and acquit him, under section 322(1) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, of the murder of Kelvin Lumbasi, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya.
7. The accused shall be set free, if he is still in remand custody, unless he is otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Rauto, Advocate for the accused person.

