



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mulinya & 3 others (Criminal Case 64 of 2018)  
[2023] KEHC 3499 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 64 OF 2018  
WM MUSYOKA, J  
APRIL 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**VICTOR LIYAI MULINYA ..... 1<sup>ST</sup> ACCUSED**

**NIXON MULINYA SETH ..... 2<sup>ND</sup> ACCUSED**

**EDWIN SHIVACHI SETH ..... 3<sup>RD</sup> ACCUSED**

**VICTOR ALULU MULINYA ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. On February 25, 2022, I delivered a ruling herein, where I found that the prosecution had established a *prima facie* case against the 1<sup>st</sup> accused person, Victor Liyai Mulinya, to warrant his being put on his defence. I found that no case had been established against the other accused persons, and I acquitted them. So this judgment is only with respect to the 1<sup>st</sup> accused.
2. 5 witnesses testified in this matter. None of them witnessed the assault on the deceased. PW1, Edwin Ngairah Mackenzie, was the local assistant chief, received a call from the 1<sup>st</sup> accused, reporting that a thief had been arrested at his home. PW2, Elijah Andekwa, was a village elder, PW1 conveyed the report from the 1<sup>st</sup> accused about the deceased, and instructed him to go to the scene, to investigate. He went there and found the deceased lying injured. PW3, Josephine Machuma, was the mother of the deceased. She got a report the following day, that he was missing from his place of work. PW4, Jared Nyongesa Kisanya, had allegedly seen the 1<sup>st</sup> accused and the deceased together, earlier that day, at a liquor den, drinking and playing draughts, and they left together, at 6.30 PM. PW5, Dr Dixon Mchana Mwaludindi, was the pathologist, who conducted an autopsy on the body of the deceased. The cause of death was head injury, following blunt force trauma, following assault.



3. I put the 1<sup>st</sup> accused on his defence. He denied killing the deceased. He denied even knowing him. He conceded that he was at the liquor joint, and drank liquor there, then went home, and at night, his home was attacked, he raised alarm, and neighbours responded. They subdued the deceased, and he only came out after that.
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 evidence of PW1, PW2 and PW3. PW5 carried out an autopsy on the body of the deceased. The cause of death was said to be head injury secondary to assault with a blunt object. The cause of death was not directly linked to the accused, for none of the witnesses saw him assault the deceased. 2 things were being linked to the death: the fact that PW4 saw him and the deceased together the previous day, and the fact that the body was found lying in his compound. The prosecution was, therefore, relying on circumstantial evidence.
6. Did the circumstances of the accused being seen together with the deceased earlier that day, and the body of the deceased being found in his compound, point to complicity in his death? The accused denied knowing the deceased prior to his death, and to being with him, at the liquor joint. PW4 alleged to have seen them leave together, on friendly terms, and did not testify as to whether they parted thereafter. The accused testified to his home being attacked at night, and to raising alarm, and to neighbours responding. It is instructive, that he was charged jointly with 3 others, those that I acquitted earlier on in these proceedings, ostensibly some of the responders to his alleged distress call.
7. Although PW5 opined that the cause of death was the head injury, he described multiple injuries that he noted, which were consistent with assault by several persons. He described the clothes worn by the deceased as bloodstained and soiled. There was a laceration on the right side of the head, 6 whipped lacerations and bruises on the entire back, smaller abrasions on the face and front of both legs and left side of the abdomen, extensive bleeding under the scalp, bleeding under the brain covering, and a swollen brain. The fact of these very generalised injuries suggested that he was assaulted by several individuals, which was consistent with the defence by the accused that he raised alarm, it was responded to, and it was the responders who dealt with the deceased. No one testified as to seeing him assault anyone. He should, accordingly, be accorded the benefit of doubt. The case against him is founded more on suspicion rather than on anything else. I have not found the circumstances of the death of the deceased being incompatible with his innocence.
8. As there is nothing pointing to the role of the accused person in the causation of the death of the deceased, the issue of malice aforethought does not even arise.
9. In view of everything stated above, I do not find the accused herein, Victor Liyai Mulinya, guilty of the offence of the murder of Walter Lovega, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I acquit him accordingly, under section 322 of the Criminal Procedure Code, Cap, 75, Laws of Kenya. He shall be set free, should he be still in remand custody, unless he is otherwise lawfully held. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS  
28<sup>TH</sup> 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.**

**Mr. Khayumbi, Advocate for the accused person.**

