



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kisanga & 2 others (Criminal Case 02 of 2022)
[2023] KEHC 18257 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 02 OF 2022
PJO OTIENO, J
MAY 26, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

HELLEN KAVAYA KISANGA 1ST ACCUSED

EDMOND KIZILI KEDOGO 2ND ACCUSED

JOTHAM CHASIMA ZARE 3RD ACCUSED

JUDGMENT

1. The three accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on the night of 9/5/2017 at Vunandi sub-location in Vihiga Sub-County within Vihiga County jointly with others not before court, the three accused persons unlawfully murdered Kepha Magome Chadaka.
2. PW1 was the wife to the deceased and on the 9th of May 2017, she was inside her house. Her husband, the deceased, came home drunk and allegedly informed her that he was feeling unwell, and mentioned it was his back. She checked his back and found what seemed to be whip marks. She told him it was because of his drunkenness and he began beating her. He then went into the bedroom and emerged with a panga and she escaped making her way to the Assistant Chief to report the incident, who happened to be the 1st accused in the dock. She went back to her house the following day and found her house locked from the inside and going in, found her husband lying on the sitting room floor.
3. On cross examination she told the court that she did not see either the 1st, 2nd or 3rd accused at her house. She also alleged that the deceased had locked himself in the house and that he drank alcohol all the time.



4. PW2 was a minor, the deceased's nephew. On the material day, he went into the kitchen to cook for the deceased when a knock was heard later on and in came the 3 accused persons. The 3rd accused, whom he mentioned he had known for 4 years, asked him where the deceased was. There was a lit lantern lamp in the house. They got the deceased out of the house while beating him. PW2 told the court that the 1st accused told him that they had no problem with him as they had gotten the person they wanted. PW2 stated that the 3rd accused was beating the deceased with a tyre whip. PW2 also stated that the 1st accused was telling the others to hit the deceased on the leg joints. He also stated that there were 4 other people who he could not identify, other than the 3rd accused, that were beating the deceased. He also mentioned that as that was happening, the 2nd accused was standing there. After beating him, the 1st accused told PW2 to go to bed. The following morning, he went to the deceased house that was locked from the inside.
5. On cross-examination, PW2 testified to having known the 1st accused as the assistant Chief and having known her for about one month. PW2 also testified to having known the 2nd accused for 4 years and the 3rd accused for 4 years. He further testified that the 1st and 2nd accused did not beat the deceased. He further testified that the 4 others who were involved in the beating had covered their faces and had rungus. PW2 also added that the 3rd accused struck the deceased all over the body.
6. On cross-examination by the court, PW2 mentioned that he saw what was happening outside by aid of the moonlight and it being a full moon, was very bright.
7. PW3 was the Medical officer who conducted the post mortem on the body of Kepha Magomere Chadaka. He testified that the body had multiple bruises on the back, face, defensive wounds, bruises on the left hand, bruises on his left shoulder and bruises on the knee. He found that the cause of death was cardiovascular failure secondary to blunt abdominal injury leading to multiple organ failure.
8. In the later stages of the proceedings, PW3 was recalled by the counsel for the accused persons for purposes of cross-examination on the cause and manner of death and is henceforth referred to as PW4. On cross examination, he restated what was on the post mortem report, that is, that the body of the deceased had a ruptured gallbladder and a blunt injury on the spleen. PW4 further testified that a tyre whip cannot cause such trauma. On the cause of death, he stated that it was due to multiple organ failure due to rupture of the gallbladder and could not tell how old the bruises were. Lastly, he testified that excessive use of alcohol can cause damage to internal organs.
9. On re-examination, PW4 testified that the multiple injuries occasioned on the deceased were consistent with an assault and not a fall.
10. PW5 was the Deputy O.C.S. He visited the scene of the crime on the morning the deceased was found lying on the sitting room floor by the police and his family. PW5 took the body to Mbale County Referral Hospital Mortuary where the post mortem was conducted on 15/5/2017. PW2 told PW5 that the three people who assaulted the deceased were the accused at the dock and he then proceeded to arrest the three and charge them with the offence they now face. He also testified to not having recovered any weapon from the scene.
11. On cross examination, PW5 testified that he only managed to arrest the three accused persons PW2 identified.
12. On re-examination, he stated that he did not ascertain if the deceased left his house on the night of the incident.
13. The court then ruled that the accused had a case to answer.



Submissions by the Accused Persons

14. The accused persons submitted that the deceased had superficial bruises on the back, face, shoulder, left hand and knees. They also referred to the weapon PW2 testified to have been used by the 3rd accused as a soft whip and not capable of causing the death of the deceased. They also submitted that the prosecution failed to establish the motive and malice aforethought for the alleged offence.

The State's Submissions

15. The prosecution submitted that motive is not necessary to prove murder. They conceded that the deceased had died from cardiovascular failure following blunt abdominal injury leading to multiple organ failure and submitted that the accused persons were positively identified. Concerning malice aforethought, they submitted that the 1st accused's intention was manifested by the fact that she directed the actions of the 5 people that allegedly beat the deceased. For the 2nd accused, his lack of action, that is standing and watching as the deceased was being assaulted, showed that he had a common intention to cause grievous harm just as the 5 others were beating the accused. Finally, the state submitted that the accused persons failed to discharge their evidential burden.

Determination

16. I have considered the witnesses' evidence, the parties' submissions and the authorities relied on. In my view, there are two issues for determination:

Whether the prosecution proved their case beyond reasonable doubt.

Is motive an element needed to prove murder?

Whether the prosecution proved their case beyond reasonable doubt

17. The three accused persons herein were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code defines murder as when any person who of malice aforethought causes death of another by an unlawful act or omission is guilty of murder.
18. To establish murder, the prosecution must prove the following:
 - a) That the death of the deceased occurred
 - b) That the actions or omissions of the accused persons caused the death of the deceased
 - c) That the actions of the accused persons which led to the death of the deceased were unlawful actions and
 - d) That there was malice aforethought in the actions of the accused.

a) Whether the death of the deceased occurred

19. The death of the deceased was evidenced by the post mortem conducted on the body of Keph Magome Chadaka on the 15th of May 2017 and that his death was caused by multiple organ failure due to blunt abdominal injury.
20. It was further confirmed by PW3, the medical officer that conducted the post mortem, that the body which he conducted the post mortem on was that of the deceased.



b) Whether the actions or omissions of the accused persons caused the death of the deceased.

21. The deceased's cause of death was evidenced as multiple organ failure due to blunt abdominal injury.
22. Relying on the evidence of PW2, I will be assessing the 1st accused liability in the matter. Once again referencing the definition of murder as per section 203; "any person who of malice aforethought causes death of another by an unlawful act or omission is guilty of murder." The unlawful act occasioned on the deceased by the 1st accused was directing the 4 others on which of the body parts of the deceased to hit.
23. PW2 stated as follows in respect to what the 1st accused was saying during the assault:

"Hellen (the 1st accused) was telling the others to hit Magomere on the leg joints."
24. The unlawful act occasioned on the deceased by the 1st accused was directing the 4 others on which of the body parts of the deceased to hit. Seeing as the deceased's cause of death was multiple organ failure due to blunt abdominal injury, and that the 1st accused directed the beating of the deceased on which body parts to hit, establishing his cause of death by virtue of her directions would not be a reach. PW2's evidence is corroborated by the post mortem report that revealed the deceased cause of death as multiple organ failure caused by blunt abdominal injury. It would also not be a reach to infer that the rúngus used by the 4 other people not before this court, directed by the 1st accused, would cause such an abdominal injury.
25. The 3rd accused, as per PW2's testimony, was using a tyre whip to beat the deceased. PW3, the medical officer confirmed that the injuries to the organs could not be caused by a tyre whip. I also, frankly, fail to see how a tyre whip could eventually lead to organ failure caused by blunt abdominal injury and therefore do not see the element of causation satisfied through these means.
26. Whether there was positive identification of the accused as people who caused the death of the deceased. The first issue to dispel here is whether the lantern lamp lit by PW2 was sufficient for him to see the 3 accused. Seeing as a lamp is a common source of light for a lot of households in the country, it does provide a significant amount of light for at least identifying the people in the house. Moreover, seeing as PW1 knew the 1st accused for about one month and the other two accused for 4 years each, I have no doubt in my mind that they were correctly identified.

c) That the actions of the accused persons which led to the death of the deceased were unlawful actions

27. The cause of death as stated was multiple organ failure due to blunt abdominal injury. Evidenced by PW2's testimony, the 4 other people and the 3rd accused assaulted the deceased that led to his eventual death. The 1st accused directed the assault by virtue of the same testimony. Assault is an unlawful action contrary to section 250 of the [Penal Code](#).

d) That there was malice aforethought in the actions of the accused

28. Section 206 of the [Penal Code](#) provides that:

"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;
 - c. an intent to commit a felony;
 - d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
29. The 3rd accused, by virtue of PW2’s testimony, was the only one among the 3 accused persons beating the deceased with a tyre whip. Intention to cause grievous harm can be inferred by virtue of the multiple strikes that were occasioned on the deceased. He is said to have struck the deceased all over the body. I find that the conduct of the accused person in repeatedly striking the victim with a weapon was prolonged and deliberate and must have been intended to occasion to the deceased at least grievous harm if not outright death. That 5 people, the 3rd accused and 4 other people not before the court, were beating the deceased as he was lying on the ground, for a prolonged duration demonstrates use of excessive force by the intended to occasion grievous harm or an intention to kill.
30. Malice aforethought in the 1st accused’s actions can be made out in PW2 testimony. That the 1st accused stated while getting the deceased out of his bedroom, that they had gotten the person they wanted. This statement implies a premeditation of the offence and supports the argument of an intent to cause the death of or to do grievous harm.
31. Further on the 1st accused’s intent, the 4 other people who beat the deceased had covered their faces and had rungus as per the eye witness’ testimony. These actions suggest steps to conceal their identity and therefore, premeditation. By covering their faces, individuals demonstrate an awareness of the illegal nature of their actions and a desire to avoid identification by witnesses or law enforcement. Such evidence can be used to support the argument that they had a deliberate and conscious intent to cause the death of or to do grievous harm which is a key element in establishing malice aforethought. Seeing as the 1st accused directed their actions, she also was aware of how the other 4 people who beat the deceased appeared and was aware of the consequences of their actions.
32. In establishing the 2nd and 3rd accused person’s liability, I make reference to section 20(1)(b) of the *Penal Code*:-
- “When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.”
33. This provision seems to me to mean that individuals who assist or facilitate the commission of the offence by actively helping or creating conditions that make it possible for another person to commit the offence will be deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it.
34. Firstly, did the 3rd accused help or create conditions that made it possible for another person to commit the offence? The third accused asked PW2, the eye witness, where the deceased was and proceeded to



remove him from the house. He also admitted, in his submission, to using a whip in assaulting the deceased. All of these actions show active participation in the assault and suggest a shared intention. His physical involvement satisfies the ingredient for section 20(1)(b) and is held liable as a principal offender.

35. Further, section 21 of the [Penal Code](#) provides:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

However, the 3rd accused's participation did not cause the death of the deceased, his active participation in beating the deceased with a whip, revealed a common intention to prosecute an unlawful purpose.

36. In assessing the 2nd accused's liability, I will also be referencing section 20(1)(b) of the [Penal Code](#). Did the 2nd accused omit to do any act for the purpose of enabling or aiding another person to commit the offence? By virtue of PW2 testimony, the 2nd accused stood and watched as the 5 others beat the deceased and his lack of action sends the message that he conceded to the assault being occasioned on the deceased and in the absence of a rebuttal by the accused persons despite being put on their defense only shows they are not in disagreement.

37. The 2nd accused's passive presence of being part of the group and watching the 5 others assault the deceased implies that he had knowledge of the illegal actions and was complicit in some way and could also imply that he condoned or supported the criminal behaviour and therefore, a common intention. However, his presence could also be interpreted as an indication of fear or coercion. It can imply that he was prevented from intervening or speaking out against the unlawful behaviour because you were put under duress, threatened, or intimidated by the other parties involved. However, in the absence of such a defence, the 2nd accused's silence is a communication that his participation was intentional. From the actions of the 2nd accused, they all shared an intention to cause grievous harm to the deceased and by virtue of section 21, he is deemed to have committed the offence of murder.

Is motive an element needed to prove murder?

38. The court in [John Mutumuma Gatobu v Republic](#) (2015) eKLR held that the law does not require proof of motive in order for the offence of murder to stand proved. Further, section 203 of the [Penal Code](#) makes no reference to such a requirement.

39. In the final analysis, it is my finding, firstly, that the prosecution has proved beyond reasonable doubt the charge of murder against the three accused persons. Secondly, I find the 1st, 2nd and 3rd accused persons guilty as charged and convict them of the murder contrary to section 203 as read with section 204 of the [Penal Code](#).

Dated, signed and delivered at Kakamega this 26th day of May 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Ms. Chala for the Prosecution/State



Ms. Mburu for the Accused persons

Court Assistant: Polycap

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