



**Republic v Mbai (Criminal Case 29 of 2019)  
[2023] KEHC 20786 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 29 OF 2019**

**TM MATHEKA, J**

**JULY 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JAMES MBAI ..... ACCUSED**

**JUDGMENT**

1. The accused person, James Mbai, is charged with Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is alleged that on the 28<sup>th</sup> day of March, 2019 at Nakuru West Sub-County within Nakuru County, he murdered Geoffrey Onyango Otieno
2. On 24<sup>th</sup> July, 2019, the accused person pleaded not guilty to the charge. The prosecution called four (4) witnesses to prove their case.
3. PW1, Stephen Otieno Oroka, father to the deceased, testified that on 28<sup>th</sup> March, 2018 at around 7.30 p.m., his younger brother rang and told him that the accused had a quarrel with the deceased. He left Shabab and proceeded to the scene at Ponda Mali where he witnessed the accused person with boda boda riders beating the deceased herein using an iron rod. He summoned a taxi and took the deceased to Provincial General Hospital where he died at midnight while undergoing treatment. Thereafter he went to report the incident at Rhonda Police Post.
4. He testified that he went back to Rhonda where he found police officers who told him that the accused had reported that he had fought with some young men. He went home and rang the accused person demanding to know why the accused had fought with his son yet he knew his family. He told the court that the accused told him they would talk the following day.
5. On cross examination he told the court that parts of his statement were not correct. He denied that he recorded that he received a phone call from his brother Omondi telling him that his son had stabbed and robbed one James Mbai of a phone. He insisted that he found the incident going on and people



- beating his son with a y-12 metal rod, which was not recovered. He insisted that he found a crowd of 20 people and the accused was one of them beating his son. He said it was in his statement despite the fact that the prosecutor confirmed that it was not in his statement that he had seen the accused beating his son.
6. PW2, John Onyango Odindo, a neighbour to the deceased recalled that on the fateful day while at Ponda Mali area he met and witnessed six (6) people including the accused person beating the deceased using a rungu and an iron rod. He proceeded and made a report about the incident to the deceased's mother. He also testified that at the time he found the deceased being beaten PW1 was not present at the scene.
  7. On cross examination he said five people were coming from the opposite direction and were holding the 'child' and one of them was beating him. He said it was an iron rod and a rungu that were being used. It turned out that in the statement he said he passed these people and ten (10) minutes later he heard a cry and reported to the mother.
  8. He said the child he was referring to was the deceased. He said he saw the accused with the weapons and he was the one beating the deceased.
  9. PW3, No 58494 Sergeant Julius Kurgat, testified that on 28<sup>th</sup> March, 2018 at about 2135 hours he was on duty at Rhonda Police station when the accused person came and reported that when he was escorting one of his friends to the main road at Mzee Moja he met a gang of three people who confronted him, a woman who was passing by screamed and the members of the public came, pursued the thugs and managed to get hold of one of them whom they beat up seriously and left at the scene.
  10. He said he proceeded to the scene in company of PC Maraga but they did not find anybody. Upon inquiry, people nearby told them that colleagues of the injured person came back to the scene and took him to an unknown place.
  11. On 29<sup>th</sup> March, 2018 at about 2pm, PW1 came and made a report to the effect that his son was attacked by people in company of the accused whereby he sustained injuries and was taken to the hospital where he died while undergoing treatment. That he found him at the hospital where he had been taken. On 17<sup>th</sup> April 2018 the post-mortem was conducted. The officer opened an inquest file and forwarded it to the DCIO and the state counsel. He was directed to arrest the accused person and charge him with the offence.
  12. On cross examination, he testified that the accused is the one who reported the incident. That he visited the scene but they did not find the body or the murder weapon. He stated that the PW1 reported that the deceased was attacked by the mob in company of the accused but however nobody saw the accused attack the deceased. He said he conducted an investigation and then opened an inquest file. He said that the report was that the deceased was attacked by a mob but the accused was the only one who was mentioned. He said he was directed to charge the accused on the basis of the witness statements. He said they did not find any weapons but he said they were crude weapons based on the injuries on the body, he told the court he did not have enough evidence to support murder charge that is why he opened an inquest file but that an inquest file could turn into murder file.
  13. PW4, Dr. Titus Ngulungu, a pathologist, testified that on 17<sup>th</sup> April, 2018 he conducted a post-mortem on the deceased's body. Externally, there were features of lack of oxygen before death, cyanosis, swelling on left head, bruises of head, limbs and chest. He said that bruises were irregular meaning different objects were used to cause them. That the bruises were multiple measuring between 20mm to 100mm in length. He concluded that the cause of death was severe head injury attended by epidural hematoma. Multiple blunt force trauma throughout the body keeping with fatal assault.



14. On cross examination he said the injuries were caused by multiple objects. He said it was written on the post-mortem form that the deceased was beaten by members of the public.
15. The Accused person on his part gave sworn evidence but did not call any witnesses. He denied killing the deceased. His testimony was that on the material day he was at home in Rhonda with his visitor called Alex. At around 8.30 pm he escorted him. Outside his gate, he met three young men who attacked him saying that he was the one who had reported them to the Police. That the deceased was one of them. He said a lady by the name Adhiambo passed by and he saw the three (3) men holding him. She screamed saying that “Baba Kerina is being beaten at the back of the house” and a crowd of people formed, and the three men run away. He thereafter went back to the house. Twenty minutes later he heard people saying “ndio huyu ndio huyu tumempata”. When he returned outside he found a crowd of people had surrounded the deceased outside the gate. He did not move near to the crowd and could not tell whether the said crowd was armed. At around 9:00 pm, he proceeded to Rhonda police Station and reported that he had been attacked. He did not go to the hospital as he did not sustain any injury. He confirmed he had seen the deceased on the ground after he had been beaten however he never mentioned it when he reported his case. It was his testimony that after recording his statement he went back home. Upon reaching his home he found the crowd was still there and he heard someone saying that the deceased had been taken to the hospital.
16. He said he knew PW1 as they were in the same Chama but denied knowing PW2. He confirmed he never followed up on his case with the police. It was his further testimony that after the deceased had been buried, the Police officer one Kurgat who had recorded his statement called him to the station. Upon arrival he was arrested and charged with this case.
17. The state chose to rely on the evidence on record.

#### **Accused Person’s Submissions**

18. Through his counsel the accused framed two issues for determination. Namely:
  1. Whether the prosecution has proved its case beyond reasonable doubt.
  2. Whether the accused had malice aforethought when he allegedly killed the deceased.
19. Regarding the first issue, the counsel for the accused person submitted that for Prosecution to secure a conviction on the charge of murder, it has to prove four elements against the Accused person set out in *Anthony Ndegwa Ngari v Republic* [2014] eKLR, as follows: -
  - a. The death of the deceased occurred;
  - b. That the death was due to unlawful act or omission
  - c. That the accused committed the unlawful act which caused the death of the deceased; and
  - d. That the accused had malice aforethought.
20. It was submitted that there was no sufficient proof that the accused person killed the deceased. That the evidence of PW2 who was the sole eye witness herein was uncorroborated and implausible as he failed to give accurate accounts of events that transpired that fateful night.
21. The counsel in support of this position relied on the cases of *Cleophas Otieno Wamunga v Republic* [1989] eKLR & *Robert Onchiri Ogeto v Republic* [2004] eKLR which discussed the credibility of the testimony of a single eye witness on identification of a perpetrator.



22. The counsel for the accused person submitted that from the evidence of PW1 and PW2 inference of guilt on part of the accused person cannot be drawn.
23. On the second issue, the counsel submitted that from the evidence on record, the prosecution failed to prove that the accused had the intention to cause grievous harm to the deceased in accordance with the provisions of section 206 of the Penal Code.
24. The counsel submitted that the issue of mob justice was dealt with in the case of David Ciayu Njogu v Republic [2007] eKLR- That the court noted as follows:

“There was no evidence that the people who beat the deceased, whoever they were, met together and agreed to attack the deceased. It was a spontaneous act. In those circumstances, although as Mr Kaigai said, the appellant did not heed entreaties to stop further beating of the deceased, we are unable to read malice aforethought in his actions. The evidence shows an unruly mob attacked the deceased. In those circumstances it cannot be said the circumstances support the finding that the killing was with the necessary malice aforethought.”
25. They thus urged this court to find that the accused person had no malice aforethought.

### **Analysis and Determination**

26. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under Section 203 as read with Section 204 of the Penal Code are:
  - i. That the deceased died.
  - ii. That the death was caused unlawfully.
  - iii. That there was malice aforethought; and
  - iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

### **The death of the Deceased**

27. There is no doubt that the deceased died. PW1 testified that the deceased died at midnight while receiving treatment at Provincial General Hospital. He also confirmed he attended the post-mortem of the deceased. PW4, the pathologist confirmed that the cause of death was as a result of severe head injury attended by epidural hematoma and multiple blunt force traumas throughout the body keeping with fatal assault.

### **That the death was caused Unlawfully**

28. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See Republic v Boniface Isawa Makodi [2016] eKLR where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”



29. PW4, the pathologist confirmed that the bruises on the deceased's body were irregular meaning different objects were used to cause them. It is therefore clear that the deceased did not die from a natural cause and thus his death was unlawfully caused.

**Whether the accused person directly or indirectly participated in the commission of the alleged offence.**

30. The case for the prosecution on this issue was presented through the evidence of PW1 and PW2.
31. PW1 was the father of the deceased. His testimony with respect to the fact that he lost his child was a mixture of hearsay and recantation of his statement to the police.
32. He claimed in court to have witnessed his son being beaten by the accused and other people. However, in his own statement to the police he began by saying that he was in his house with a friend when his brother Omondi rang him and told him that his son, the deceased had stabbed and stolen a mobile phone from one James Mbae.
33. He conceded that after the phone call he proceeded to Mzee Moja but denied that he told the police that he found his son lying there with serious injuries and instead told the court that he found his son being beaten. He told the court he found more than 20 people beating the deceased and specifically that he saw the accused beat him. Asked to point out in his statement to the police that he indeed saw the accused beat the deceased, he insisted that it was there, the prosecution was asked to point it out in the PW1's statement the specific place where he recorded that he had seen the accused beat the deceased and she stated categorically that it was not there.
34. It is clearly evident from the evidence that the PW1 did not see or witness the alleged attack on his son but found when the incident had ended and that he only knew about it from the phone call he received from his brother Omendu.
35. The PW1's testimony in court in which he contradicted on denying his own statement to the police makes his evidence incredible.
36. He recorded his statement when his memory was still fresh and he cannot claim that so many months after March the story has changed. He confirmed that the Investigating Officer PC Kurgat recorded his statement. When PC Kurgat testified the issue as to the source of the PW1's statement never arose.
37. The prosecution treated PW2 as their eye witness. He said it happened at 7:30 pm and he was from market. He met 6 people coming from the opposite direction and they were holding one person and that he identified the accused as one of them. On cross examination he said there were 5 people holding the 'child' while one was beating the 'child'. It turned out that this was not in his statement. It also turned out that in his statement to the police he did not see any beating but only heard screams 10 minutes after he passed those people. In court he claimed the beating happened in front of him yet in his statement he said that he heard screams 10 minutes after passing them.
38. The Investigating Officer who was PW3 told the court that upon conducting his investigations he was of the view that he did not have sufficient evidence to support a charge of murder against anybody. His view was that there was need to conduct an inquest. That first he received the report from the accused about being confronted by three people and a woman who witnessed the attack screaming and upon her screams a mob came out and pursued the attackers one of whom had been seriously injured and left for dead.
39. The following day he received a report from PW1 that his son had been attacked by a mob in the company of the accused person and that he found him at the hospital where he had been taken by



other people. It is this Investigation Officer who recorded statements of all the witnesses and came to the conclusion that he would not charge anyone with the killing of the deceased and he made that recommendation to the ODPP and the DCI.

40. The pathologist confirmed that the deceased suffered multiple injuries caused by multiple blunt objects. He produced the post-mortem report in which it clearly indicated that the deceased had been beaten by a mob and was declared dead on arrival.
41. In his testimony in his defence the accused person reiterated the information he gave to PW3 PC Kurgat that he had been attacked somewhere, had raised an alarm, a mob formed, pursued the thugs amongst whom was the deceased who was roughed and beaten. That he went and reported to the police.
42. The accused person concedes that he was at the scene at some point but as the victim of an attack by a gang. It is noteworthy that according to the statement of PW1 this information is that reached him; that his son had robbed and stabbed Mbae and was beaten by a mob.
43. It is not in dispute that the accused person made a report to the police on the same night that the incident happened. This is highlighted by PC Kurgat.
44. So we have two scenarios; neither of which was investigated further because the PC Kurgat formed the conclusion that this could only be settled through an inquest. He recorded the statements of PW1 and PW2, which were contradicting and inconsistent and backed the testimony of the accused person.
45. In any event the prosecution did not establish any motive on his part.
46. Is it possible that what PW2 heard was scream of the woman who saw the accused being attacked?
47. PW2 did not move close to where the attack was taking place, he did not speak to the 6 people he said he saw, he did not state how he identified the accused person but more importantly he stated categorically that PW1 was not there when this alleged attack took place.
48. No murder weapons were recovered. The scene was not processed and other than the discredited evidence of PW1 and PW2 there is nothing else to connect the accused with the death of the deceased. The defence by the accused person remains unchallenged and creates sufficient doubt as to whether he committed the offence he is accused of.
49. It is unfortunate that a person died but the case for the prosecution fails the test of beyond a reasonable doubt.
50. I find therefore that the charge is not proved beyond a reasonable doubt. I make a finding of not guilty and acquit him accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> JULY 2023.**

.....

**MUMBUA T. MATHEKA**

**JUDGE**

In the presence of:-

Court Assistant: Daisy

For state: Ms Murunga

Ms. Daye holding brief for Mr Orege for he accused

Accused; present virtually in open court in Nakuru

