



**Republic v Mabia (Criminal Case 32 of 2018)  
[2023] KEHC 24866 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 32 OF 2018  
PJO OTIENO, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MAURICE LIUBA MABIA ..... ACCUSED**

**JUDGMENT**

1. The Accused, Maurice Liuba Mabia, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 13<sup>th</sup> day of June, 2018 at Shiralio Malinya Sub-location in Kakamega Sub-County within Kakamega County, the Accused person murdered Boniface Bulemi.
2. The Accused person pleaded not guilty to the charge and in order to discharge its burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from five witnesses whose evidence can be summarized as below.
3. PW1, Joseph Mumayi Kapanga, who considered the Accused as a brother, testified that on 14/9/2018 at about 8AM he was at his house when he heard people moving towards the house of the deceased. He followed them and found the Assistant Chief who blocked them from entering the deceased's house. The police then came and asked him and others to help remove the body of the deceased from his house to the police vehicle and later the mortuary. He stated that the deceased had cut wounds on the hands, legs and private parts. He also stated that he did not know what caused the death of the deceased.
4. On cross examination he stated that the wounds on the deceased appeared to have been inflicted by a sharp object though no weapon was discovered by the police in the deceased's house.
5. PW2, Dr. Dixon Mchana, a Consultant Pathologist at Kakamega County Referral Hospital gave evidence that he examined the body of the deceased on 19/6/2016 and observed that he had a cut wound on the inner side of the left leg, his brain was severely swollen and that there were some small



- blood clots on the surface of the heart. He formed the opinion that the deceased died due to shock secondary to mixed force trauma following assault. The autopsy report was produced and marked as P.EXH1. On cross examination he stated that he did not inquire about the medical history of the deceased.
6. PW3, No. 235461 CIP Silvester Olalo attached at Malava police station and the Investigating Officer testified that on 14/6/2018 at about 2000hrs he was at the station when he received information of a murder incident and the names of the people who were suspected to have committed the act. In the company of other officers, they proceeded to the home of the suspects namely, Morris Liumba and Patrick Ashiovo and arrested them. The following day he interrogated them and the Accused informed him that the home of his son by the name of Edward Ingusi had been broken into by the deceased on 13/6/2018. He then took the deceased to his house and asked him to strip naked and caned him with a stick which was produced and marked as PEXH 2. He then burnt down the clothes. The Accused took him to where the stick was hidden which stick was equally identified by Accused's wife, Dolorosa Khasiala who informed the witness that she and Patrick Ashiono had pleaded with the Accused to stop assaulting the deceased to no avail. He stated that the deceased was a son to the Accused and a step son to Dolrosa. He claimed that during his investigations he found that the son, Patrick, had not participated in the killing of the deceased. On cross examination he stated that he was led to where the clothes had been burnt but did not pick any ash.
  7. PW4, Dolorosa Khasiala, step mother to the deceased and wife to the Accused, testified that on 13/6/2018 she left her home and returned at 3PM. At about 7PM she heard people talking outside and she went out and found the Accused holding the deceased and caning him with a stick which he uses to herd cattle. He asked him to stop which he did and the deceased ran away. At that time the deceased had worn a shirt, a sweater on top and trousers. She said that the deceased was a trouble maker and on that day, he had broken into the house of his son by the name of Edward, put his clothes there and then disappeared for three weeks.
  8. On cross examination she stated that she saw the Accused beat the deceased on the buttocks and that he saw the deceased walking back to his house and she did not see him bleed.
  9. On re-examination she stated that when Patrick came to the scene of the beating, the Accused had stopped canning the deceased.
  10. PW5, Patrick Liuba Muchendisi testified that on 13/6/2018 at about 6-7PM he was at home when he saw the deceased pass in the company of the Accused. He heard commotions and when he went outside he found his mother holding the Accused to stop beating the deceased. He restrained the deceased while his mother held the Accused and he watched the deceased go to his home with no visible injuries. The next day he was informed that the deceased had died. He went to his house and found his body on the ground with swellings on his hands and no blood on his body. He stated that the Accused canned the deceased because he broke into brother's house and stole things.
  11. On cross examination he stated that he did not see the Accused beat the deceased.
  - 12 The evidence of PW5 marked the close of the prosecution case and the court ruled that a prima facie case had been established against the Accused person and he was thus placed on defence.
  13. The Accused offered own sworn evidence and testified that on 13/6/2018 he woke and found that the house of his son Edward had been broken into and that he suspected the deceased, who had a reputation of being a thief. He went to the deceased's house but did not find. Later in the evening, he found the deceased at his home and asked him to accompany him. He asked him to confess to the break in but he refused and after PW4 and PW5 joined him the deceased tried to run away but he got hold



of him. He then took a rod and threatened to beat the deceased who then admitted to breaking in into the house. PW5 then asked the deceased to go to his house which he did. The next day he heard that the deceased had been killed. He went to his house and found his clothes, mattress and blankets were missing and there was a woman in the house not known to them. On cross examination he stated that he was annoyed but did not punish the deceased by beating.

14. The testimony of the Accused marked the close of the defense case with parties proceeding to file their respective written Submissions.
15. The Prosecutor submits that the offence of murder had been proved beyond reasonable doubt against the accused in that the post mortem report produced by Dr. Mchana confirmed that the deceased had died due to circulatory collapse secondary to mixed forced trauma following assault, which is an unlawful act. They argue that it was the evidence of PW4 and PW5 that it was the Accused who beat the deceased whereafter the deceased went to his house where he was found dead the next day.
16. On the intention of the Accused to kill the deceased, the Prosecution argues that this can be deduced from the extensive injuries on the deceased's body which include abrasions on the forehead, both upper limbs, upper trunk and legs as well as a superficial cut on the left leg and extensive injury to the scalp which caused bleeding into his right muscles. It is thus urged that the injuries were fatal in nature to infer that the Accused had the requisite malice aforethought.
17. In his submission the Accused contend that the prosecution has not proved its case to the required standard to warrant a conviction. He posits that the evidence of PW3, the Investigating Officer, on what he was told by the Accused is mere hearsay and does not amount to an admission. He submits that PW4 and PW5 testified that the Deceased left the house of the Accused without any injuries on his body. It is his contention that the woman who PW5 testified spent the night with the deceased by the name Alice might have inflicted the injuries that led to the death of the deceased which woman the investigating officer chose not to take a statement from thus raising doubts as to whether Accused person really caused the death of his own son.

### **Analysis and Determination**

18. Because the offence of murder is committed when a person out of malice aforethought, causes death of another person by an unlawful act or omission it behoves the prosecution to prove to the satisfaction of the Court all the ingredients of the offence contained in section 203 of the Penal Code.
19. Accordingly, therefore, the Court in trying a murder case must always concern itself with the questions whether; the named victim is indeed dead; if the death of the deceased was caused by unlawful acts or omission by the Accused and whether the Accused was actuated with malice aforethought in causing the death of the deceased.

### **Whether Boniface Bulemi is deceased?**

20. The evidence of PW3, 4 & 5 together with the post mortem report dated 19/6/2018 and produced by Dr. Dixon Mchana, PW2, confirms that Boniface Bulemi is dead. That question is thus answered in the affirmative because even the defence witness confirmed that the deceased was dead.

### **Whether cause of death was by unlawful acts or omission by the Accused?**

21. According to the post mortem report, the deceased died due to circulatory collapse secondary to mixed force trauma following assault. Assault upon another without consent is ipso facto unlawful, even in civil litigation.



22. While the Accused only admitted threatening the deceased to extract a confession, it was the testimony of PW2 that the deceased had a cut wound on the inner side of the left leg, brain was severely swollen and there were some small blood clots on the surface of the heart. He formed the opinion that the deceased died due to shock secondary to mixed force trauma following assault.
23. PW4, wife to the Accused and step mother to the deceased, gave evidence that she heard people talking outside and when she went out she found the deceased beating the Accused on the buttocks with a herding stick. PW5 stated that he heard a commotion outside went out and helped PW4 separate the Accused and the deceased. Thereafter the deceased left for his house and his body was discovered the next day.
24. PW4 and PW5 were not present when the beating started and when PW4 came out, she found the Accused caning the deceased. PW4 stated that the Accused used a rod used to herd cattle to cane the deceased. PW4 claimed not to have seen any visible injuries on the deceased but also stated that the Accused had worn a shirt, a sweater and a trouser and since it was 7PM, it would have been hard or impossible for her to see the injuries.
25. PW4, PW5 and the Accused all claimed that the deceased was a trouble-some child who had the reputation of a thief. Was that the reason to assault the Accused? Is that assault capable of justification as lawful? The answer to that question is a resounding 'NO'. It is not open for anybody to punish another even on allegation of a criminal act. Only the Court has the mandate to determine whether or not one is guilty and to proscribe a punishment. However, even the Court has no mandate to administer corporal punishment which is proscribed by *the Constitution* as cruel and degrading treatment. To the extent that the Accused constituted himself into an illegal adjudicator and executor of its determination, the Court finds that he acted unlawfully and the commissions were thus unjustifiable. His actions pass for nothing else but unlawful.
26. The Court finds the evidence of the Accused untruthful because his defence that he was expressing disgruntlement at the constant troubles caused by his son is unjustifiable and wholly unlawful. It does not controvert but assists the Prosecution's case of an assault upon the deceased leading to his death.
27. There is no doubt in the mind of the Court that the deceased died due to the injuries inflicted on his body by the Accused out of unlawful act of omission by the Accused.

#### **Whether the accused was actuated with malice afore thought in causing the death of the deceased**

28. To understand the principle of malice aforethought, the Court takes guidance of the Court of Appeal decision in the case of *Nzuki v Republic* [1993] KLR 171 where the court observed as follows: -

“...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. The mere fact that the Accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”
29. The uncontroverted evidence by PW4 & 5 is that the Accused did assault the deceased with a rod. The Court has adjudged such unlawful. The only question is whether by his act of assault he knew or appreciated that his actions risked the death or grievous harm to the deceased.



30. From the evidence there is no proof that any other person got into contact with the deceased after being assaulted by the Accused. The Court finds that all the injuries established on the body of the deceased and attributed to his death were inflicted by the Accused. In the Court's assessment, the injuries were so extensive and grave that the only intention by the perpetrator must have been at least grievous harm. On that finding the Court determines that the Accused was accentuated by malice aforethought.
31. Accordingly, the Court determines that all the ingredients of the offence of murder have been established and the accused is thus guilty of the offence of murder contrary to Section 203 as read with 204 of the Penal Code and is convicted accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of: -

Mr. Isiakho for Mukavale for the Accused

Ms. Chala for the Prosecution

Court Assistant: Polycap

