



**Republic v Lubakha alias Charles Malala (Criminal Case E006 of 2023)  
[2023] KEHC 25880 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E006 OF 2023  
WM MUSYOKA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHARLES WANZALA LUBAKHA ALIAS CHARLES MALALA ..... ACCUSED**

**JUDGMENT**

1. The accused herein, Charles Wanzala Lubakha alias Charles Malala, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, the particulars being that on the night of 29<sup>th</sup> and 30<sup>th</sup> December 2022, at Segero B village, Segero Sub-Location, Nambale Township, Nambale Sub-County, within Busia County, he, jointly with another not before court, murdered James Ouma Etyang.
2. 6 witnesses testified for the Republic.
3. PW1, Ann Maututu Etyang, witnessed as a crowd of people came to her home with the deceased, baying for the blood of a motorcyclist, that the deceased was shielding. The said person and his motorcycle, together with the deceased, and a few others, entered the house, and locked out the crowd. That crowd knocked down the door, demanding for the motorcyclist, so that they could kill him. The deceased, who was the husband of PW1, and the owner of the house, stepped out to plead with the people in the crowd. Whereupon the accused hit the deceased on the head with a rungu, and the deceased fell down. While on the ground, the deceased was stabbed by a James Kabaka, with a knife, on the back. The crowd dispersed, and the deceased was rushed to hospital, where he died. PW2, Stephen Etyang Inyasi, was among the persons who were inside the house, when the crowd pushed the door down, and the deceased stepped out to plead with the people. PW2 did not witness what exactly happened, but he saw the deceased fall, and heard him say that he was being killed for nothing. The crowd dispersed, and PW2 went home. He said that he did not see the accused. PW3, Francis Wafula, was also part of the group that was locked inside the house. The door was broken down, using



- knives. The deceased stepped outside the house. He was hit on the head by the accused, and stabbed by Kabaka. He stated that the deceased asked why the accused and Kabaka attacked him. The deceased allegedly mentioned their names. PW3 was among those who took him to hospital, where he died. He asserted that he saw the deceased being hit with a rungu, and stabbed with a knife. He said he was just behind the deceased, when the attack happened. He said he saw both the accused and Kabaka. He said that he also saw PW1 outside. He asserted that he saw the accused hit the deceased with a rungu, and Kabaka stab him with a knife.
4. PW4, Goret Adipo, was a sister of the deceased. She was among those at the home of the deceased. She pleaded with the deceased to open the door, and to release the suspect to the crowd, but the crowd knocked down the door. She said that the accused hit the deceased on the head with a fimbo, and the deceased fell to the ground. Then Kabaka stabbed him with a knife, on the back, and pulled out the knife. She asserted that the deceased did not mention the names of his assailants, and that he only wondered why he was being killed at his home. She was informed by those who had taken him to hospital that he had died. PW5, Lawrence Otati Osike, was the motorcyclist that was being secured at the house of the deceased. He did not witness the killing, as he was then hidden in a bedroom within the house. He only heard screams from the outside, and voices urging that someone be taken to hospital. PW6, No. 8935 Police Constable David Koech, was the investigating officer.
  5. I found the accused to have a case to answer, and I put him on his defence, in a ruling that I delivered on 28<sup>th</sup> July 2023. The defence hearing happened on 9<sup>th</sup> October 2023, before me.
  6. The accused testified as DW1. He was the lone defence witness. He denied killing the deceased, saying that he did not know how he met his death. He said that the police knew the killer, James Kabaka. He denied working together with Kabaka. He said that he did not go to the home of the deceased on the material night. Then again he said that he was at the scene, but arrived and found that James Kabaka had already done the deed, and had left. He said that it was after the police arrived at the scene that he heard that it was Kabaka who had injured the deceased.
  7. Mr. Okutta, for the accused, submitted orally, while the Republic, through Ms. Chepkonga, submitted in writing.
  8. 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, it was with malice aforethought.
  9. On whether the deceased died, I have the evidence of PW1, PW3 and PW4. PW1 and PW3 were among those who took the deceased to hospital, where he died. PW4 was a sister of the deceased, she was not present when he died in hospital, but she was informed of the death. No doctor or pathologist testified, but the post-mortem report was produced as evidence by the investigating officer, PW6, on 31<sup>st</sup> May 2023. According to the post-mortem report, dated 30<sup>th</sup> December 2022, signed by Dr. Dancan Nabuya, the cause of death was respiratory failure, secondary to right lung collapse, or acute respiratory failure.
  10. Was the injury inflicted by the accused the cause of the death? From the evidence, the deceased was attacked by the accused and another. The accused was said to have hit him on the head with a rungu or fimbo; while the other stabbed him at the back with a knife. The post-mortem report, on the external appearance, identifies 2 injuries, one at the back and the other on the head. The back injury is said to be a deep laceration on the back, about 8 centimetres long. The head injury is a laceration at the occipital region, about 3 centimetres, which was not very deep. Curiously, the column on the internal appearance of the body identifies only one injury, at the respiratory system, being right lung collapse with haemothorax. All the other organs or parts of the body, including the head, are indicated as intact. The conclusion is that it was the injury to the lungs that caused the death.



11. The cause of death was due to the back injury, which went into the lungs, leading to their collapse. That injury was said to have been inflicted by James Kabaka. It would appear that the head injury was superficial, for it was visible only externally, and not internally. From the conclusion, it did not cause the death, and there is no suggestion that it contributed to it. That being the case, it cannot be said that the accused caused the death of the deceased or contributed to it. The fatal blow was inflicted by another.
12. Could it be that the accused and that other were acting in concert or were in a joint enterprise? It would appear so. The crowd that had converged at the home of the deceased, was baying for the blood of a person that the deceased and others were securing, that is PW5. They wanted to lynch that person, who they suspected was a thief. They had an intention to kill that person, or to cause him grievous harm, or to commit some felony with respect to him. They pulled down the door to the house of the deceased, where the person was, with an intent to lay their hands on him, so as to execute their mission, of lynching him. That of itself was an unlawful act, of malicious damage to property. After the door was damaged, the deceased emerged, instead PW5, and they directed their anger at him. Their intent was common, to kill or cause grievous harm or to commit a felony. Grievous harm was caused, which later led to the death of the deceased. There was malice aforethought. It matters not that the person killed was not the one that they intended to kill. It too matters not that the fatal blow was struck by a person other than the accused, so long as the accused was of the same mind as the person who inflicted the fatal injury. It would appear that the intention to kill PW5 was abandoned, once the deceased was gravely injured, for the crowd, that had been baying for the blood of PW5, dispersed shortly after the deceased was felled by the blow to his head, and was stabbed thereafter. See *Rasiklal Jamnadas Davda vs. Republic* [1965] EA 201 (Newbold Ag VP, Crabbe & Spry, JJA). Consequently, the accused is as guilty of the offence of murder as the person who struck the fatal blow.
13. The concepts of joint offenders and common intention are relevant, and the principles around them apply here. See section 21 of the Penal Code and section 10 of the *Evidence Act*, Cap 80, Laws of Kenya. 2 or more persons formed a common intention, to commit an act together, which amounted to an offence, and an offence was actually committed. See *Masau and another vs. The Republic* [1979] KLR 54 (1976 – 80) 1 KLR 1560 (Trevelyan & Hancox, JJ). The convergence at the home of the deceased, by the crowd, who included the accused and Kabaka, had a common intention, to kill or harm PW5. PW5 was not killed, but the deceased, who was shielding PW5, from his would be attackers, was. The killing of the deceased occurred in the execution of the common purpose, the killing of PW5, but the fact that the person killed was the deceased, who was protecting PW5, and not PW5 himself, did not absolve them of the crime, and it meant that all involved, including the accused herein, were liable. The acts that caused the death were preceded by another unlawful act, the breaking down of the door to the house of the deceased, which was an act of malicious damage to property. See *Rex vs. Omari s/o Kindamba and another* (1942) 9 EACA 77 (Sir Joseph Sheridan CJ, Sir Norman Whitley CJ & Sir Henry Webb CJ) *Lekishon ole Sang'are alias Lakamondo ole Sang'are and others vs. Reginam* (1956) 23 EACA 626 (Sir Ronald Sinclair VP, Briggs & Bacon, JJA). The common intention may have been formed at the very beginning. See *Rasiklal Jamnadas Davda vs. Republic* [1965] EA 201 (Newbold Ag VP, Crabbe & Spry, JJA). It may also have been spontaneous. See *Joseph Wangangu and another vs. Republic* [1977] KLR 223 [1976 – 80] 1 KLR 692 (Trevelyan & Todd, JJ) and *Mohamed and three others vs. Republic* [2005] 1 KLR 722 (Osiero, J). Contrast with *Njogu vs. Republic* [2007] KLR 123 (Bosire, Onyango-Otieno & Deverell, JJA). In this case, the common intention appears to have been spontaneous. The accused, and the other individuals in that crowd, that was baying for the blood of PW5, and which maliciously damaged the door to the house of the deceased, were brought together by the common and unlawful purpose of killing PW5, or causing him harm. The accused was placed



at the scene at the same time with the person not before the court, Kabaka, and others. See Republic vs. Nyambura and four others [2001] KLR 355 (Etyang, J).

14. In his defence, the accused initially denied being at the scene, but later said that he in fact went to the scene, but got there after the deed had been done. Should I believe him? I doubt. There is evidence of 3 witnesses who were at the scene when it happened, that is PW1, PW3 and PW4. All 3 placed the accused person at the scene at the time of the assaults. All 3 were emphatic that they saw the accused hit the deceased first, and then Kabaka hit him next. I am satisfied that the accused was not only at the scene at the time of the assaults, he was in fact the first person to hit the deceased. The evidence on his presence, at the material time, and his complicity, is overwhelming.
15. Accordingly, I find the accused person herein, Charles Wanzala Lubakha alias Charles Malala, guilty of the offence of the murder of James Ouma Etyang, contrary to section 203 of the Penal Code, as read with section 204 thereof, and I, accordingly, convict him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya. For the purpose of sentencing, the Busia County Director of Probation and Aftercare Services shall compile a pre-sentence report, and file it herein, within 14 days. The accused person has a right to make a statement in mitigation, before sentence, and an opportunity shall be availed to him, for that purpose, once the pre-sentence report is placed on record. He shall be sentenced thereafter. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 27<sup>TH</sup> DAY OF NOVEMBER 2023**

**WM MUSYOKA**

**JUDGE**

Advocates

Mr. Mayaba and Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Okutta, Advocate for the accused person.

