



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Malim & another (Criminal Case E009 of 2021)
[2025] KEHC 3064 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E009 OF 2021
JN ONYIEGO, J
MARCH 13, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

MAHAD MAHAMUD MALIM 1ST ACCUSED

ABDIRIZAK IDRIS 2ND ACCUSED

JUDGMENT

1. The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence being that on 22.06.2022 at Boji area within Madogo Location, Tana River County they murdered Fundi Kalonzo.
2. The prosecution called eight (8) witnesses in support of their case.
3. PW1, Hassan Dadhi Kolocho, a headman living in Madogo Adhele testified that on 21.11.2021 at about 8.00 p.m., he heard noise from the other side of the road where he was walking. Upon checking on what was happening, he found people fighting. Among those people was the 1st accused person who was bleeding from his forehead. He thus told the other young men to take the 1st accused person to the hospital but to the contrary, the fight continued.
4. He testified that in as much as he later learnt that a Kamba boy was stabbed, he did not know the root cause of the problem. It was his evidence that upon reaching home, he further heard more noise but did not bother to return. He was later requested to record a statement on the incident and further, identified the 1st accused person as having been the person he saw on the material night. On cross examination, he urged that he saw the persons well as it was 8.00 p.m. and there was light. He further reiterated that he did not witness the deceased being stabbed.



5. PW2, Musa Abdi Sirat, stated that on 21.11.2021 at 7.30 p.m., he saw people fighting while heading towards his father's house. That he saw two boys one whom was bleeding demanding for the two assailants in his father's house to get out. The two alleged assailants were ordered to come out and PW1 directed them to take the injured boy to the hospital. He stated that the two boys (assailants) agreed but the 1st accused person refused and so, they left only to hear some noise few minutes later.
6. That upon returning, he found one boy lying down while holding his stomach. That he called his brother and together they went to report to the chief who directed that the victim be taken to the hospital. He later learnt that the injured boy had died. He was then called to record a statement and identify the assailants.
7. It was his testimony that the accused persons were known to him as he was married to the aunt to the 1st accused person as 1st wife while the 2nd accused person was his cousin. He further testified that he identified the 1st accused person as there was enough light. He went further to state that, he identified him from his clothing and body structure as he knew he was the one who killed the deceased. On cross examination, he stated that he did not witness the stabbing but he suspected that the accused persons were responsible. Additionally, he claimed that his suspicion was supported by the fact that the accused persons ran away and also, the 1st accused person's refusal to be taken to the hospital.
8. PW3, Mary Katanu Mulama recalled that on the material day, at around 3.30 p.m., Rachael Mati, mother to the deceased asked her to accompany her to identify the body of the deceased to the doctor for post mortem at the Garissa general hospital. According to her, the deceased sustained injuries on the left side of the chest.
9. PW4, Ragow Machi Kone testified that on 24.11.2021, the OCS Madogo called and informed him of a murder incident. That the 1st accused person who is also his nephew was allegedly linked to the incident and therefore, he was requested to assist by giving information that could lead to the arrest of the 1st accused person. After one week, he heard that the 1st accused person was at a place called Korat and so, he informed the OCS and further, went for him. That together with other elders, they presented the 1st accused person to the police. On cross examination, he said that he was not aware of what the 1st accused person had allegedly committed but only assisted in arresting him.
10. PW5, No. 113594 PC Malik Mwaro Oduor, the investigating officer testified that on 02.12.2021 at around 20.30hrs, PW1 made a report at Madogo police station regarding boys who had quarreled and consequently fought thus leading to the death of one person. That the accused persons herein had fought some Kamba boys and there was a fatal injury sustained by the deceased. It was his evidence that he proceeded to the hospital where he saw the body of the deceased. Upon observation, he noted that the deceased had sustained a deep cut on the left side of the chest.
11. He commenced his investigations and on 21.11.2021, he managed to arrest the accused persons. He recorded witness statements which led to the conclusion that the accused persons and the deceased differed over phone ownership. He went further to state that PW1 attempted a reconciliation between the boys in vain. That Jackson saw Mahad stab the deceased with a knife and thereafter fled using the 2nd accused person's motorbike.
12. On 02.12.2021, he attended post mortem examination where he saw the stab wound on the chest of the deceased. Upon completing his investigations, he preferred the charge herein against them.
13. PW6, Jackson Murinyi Munywoki stated that on 21.11.2021, he was in the house when the deceased visited him. That the deceased requested him for some water to drink and therefore, they left for



Madogo to go purchase drinking water. Along the way, they met two boys and given that Muli was on his phone, the two boys aboard a motor cycle tried to knock them down.

14. That the two boys confronted Muli while the other one followed closely as they intended to take the phone away from Muli. He stated that one of the boys picked a mathenge stick and out of fear, they ran away and ended up in a certain lady's house. While there, they heard PW1 call them out and so, they came out of the said house. PW1 asked them of what had ensued and so they told him that the said boys wanted to rob them. He further asked them whether they were ready to ensure that accused one was treated which request they agreed to but the 1st accused person instead stated that he was not ready to be treated but blood be shed.
15. It was his testimony that as they stood out there, the son to his landlord called the two but after a short while, the 1st accused person went back and stabbed the deceased on the chest. The two boys thus fled the scene using the 2nd accused person's motor cycle. That despite Muli being rushed to the hospital, he succumbed to his injuries. On cross examination, he stated that he was with Muli when they were attacked. On re-examination, he said that the incident took place at 7.00pm and therefore, there was enough light at the scene.
16. Pw7, No. 2387794 CIP Izaack Ahmed testified that he conducted the identification parade wherein the two accused persons were positively identified. It was his case that the ID parade was conducted where there was enough light, eight members participated and they were of similar weight, physical appearance and colour. He thus invited the 1st accused person to stand in a place of his choice which number he chose as number 4 and the suspect was positively identified by being touched on the back.
17. That he asked the accused person whether he was satisfied to which he stated that he had no objection but he failed to sign the documents as the officer did not ask him to. He conceded that this was his first ID parade to conduct and therefore, he was not privy to the ideal requirements of a standard procedure of conducting an ID parade. He also conducted ID parade on the 2nd accused person and similarly, messed the process as none of the witnesses signed the parade forms. On cross examination, he stated that the suspects did not sign the forms and further, he filled one form for the two accused persons.
18. Pw8, Dr. Asif Abdi Mohamed testified on behalf of his colleague Rage who was on study leave. He said that the post mortem was conducted on 02.12.2021 and even though he previously met Rage, he did not know his signature. Of importance to note is the fact that Mr. Bosire for the accused persons raised no objection to the same. He continued that rigor mortis had set on the body and externally, the body had a 3 cm penetrating wound on the left chest which was the possible cause of death. On cross examination, he stated that the cause of death was due to loss of blood.
19. The prosecution closed its case and via a ruling delivered on 22.11.2024, the court found that the prosecution had established a prima facie case against the accused persons warranting them to be placed on their defence.
20. DW1, Mahad Mohamud testified that he did not kill the deceased noting that he was a stranger to him. He contended that on the day in question, he was riding a bike together with the 2nd accused person as they were heading to a shop when some boys stopped them. That one Justus, a witness herein attacked him using fists and so they thought that they were robbers. One Hassan intervened and separated them and thereafter ordered them to leave. It was his case that he sustained injuries on his forehead but after the fracas, he went home.
21. DW2, Abdirizak Idris testified that he did not kill the deceased and neither did he see him being stabbed. It was his evidence that on 21.11.2021, he was together with the 1st accused person when they were attacked by some two boys. That in the process of fighting, the 1st accused person sustained injuries.



- He proceeded that Hassan separated them and thereafter, he left for home only to be later arrested for claims that together with the 1st accused person, they killed the deceased herein.
22. Parties filed their respective submissions with the prosecution urging that the court must discern the elements of malice aforethought and self defence. Prosecution made reference to the case of Anthony Ndegwa Ngari vs Republic, [2014] eKLR, to express the position that it has a duty to prove the following elements in the offence of murder: that death occurred; that the accused person caused the said death and; that he caused the death unlawfully and intentionally. On the first element, it was argued that the prosecution indeed had proved that the death of the deceased did not happen naturally and further, PW6 testified how the deceased was attacked, bled all the way to the hospital and died. On malice aforethought, it was urged that there was evidence of a brawl or struggle but the attack was after the fight. That the level of injuries being severe, pointed towards the fact that the accused persons had intent to kill.
 23. The defence on the other hand submitted that prosecution's case was not proved to the required standard as only PW6 testified to have allegedly witnessed the 1st accused person stab the deceased. That the said evidence was not corroborated despite there being many people at the time when the incident allegedly happened. Reliance was drawn from the case of Igbine vs The state (1997) 9 NWLR (Pt.519) 01 where the court held that corroborative evidence must come from an independent source and serve to strengthen the primary evidence, without being a mere repetition. In the same breadth, the defence faulted the investigating officer for failing to carry out investigations that could have helped this court reach a logical conclusion. To that end, this court was urged to dismiss the charges herein and set the accused person free.
 24. I have duly considered the evidence presented by both prosecution and defence. It is trite law that the burden to prove all the ingredients of the offence herein fall squarely on the prosecution in all cases save for a few statutory offences. The standard of proof in all criminal cases is that of beyond any reasonable doubt. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. [See Miller vs Minister of Pensions [1947] ALL ER 372].
 25. The ingredients that the prosecution is required to prove in a charge of murder therefore are: that there was death; that the death was caused by the accused unlawfully while possessed of malice aforethought;
 26. As regards the fact of death, there is an autopsy report produced as Pex 1 by Dr. Asif (PW8) on behalf of Dr. Rage. The doctor formed the opinion that the cause of death was severe bleeding from penetrating wound. This ingredient of the offence was duly proved by the prosecution.
 27. 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. This position was succinctly espoused in the case of Republic vs Boniface Isawa Makodi [2016] eKLR which made reference to the case of Guzambizi Wesonga vs Republic [1948] 15 EACA 65 where the court 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.”
 28. The deceased herein was found to have died from severe bleeding from penetrating wound. It was upon the prosecution to prove that the accused persons assaulted the deceased and that they had malice aforethought. Further, the prosecution was under a duty to adduce evidence which placed the accused persons at the scene of crime as the assailant. The injuries as disclosed in the autopsy report and the



evidence of the pathologist left no doubt that the perpetrator intended the injuries to lead to the death of the deceased. Indeed, the injuries noted on the autopsy report could not give the deceased any fighting chance of survival. The homicide was thus unlawful and not authorized by law. This ingredient was also proved by the prosecution beyond any reasonable doubt.

29. As to the identity of the assailants, the evidence before this court clearly show that indeed the accused persons were at the scene of crime as they also conceded to the fact that they fought with the deceased and PW6. The accused persons argued that they did not kill the deceased in as much as they fought. To them, they thought that the said boys were robbers but even after fighting, they left for home. PW6 on the other hand testified that the 1st accused person was responsible for stabbing the deceased after which the duo fled the scene aboard the 2nd accused person's motor cycle.
30. Indeed, the evidence of PW6, a direct witness was corroborated with the evidence of the PW8 who conducted post mortem on the body of the deceased. Of importance to note is the fact that despite the incident happening at night, it was not denied that there was sufficient light at that time to enable positive identification.
31. Besides, it is clear from the evidence tendered that even after PW1 had talked to the boys and had separated them, the accused persons returned to where PW6 and the deceased were and accused 1 stabbed the deceased. Pw2 confirmed that while at his home he saw some people fighting while running towards his father's house. That one of those boys was bleeding as the other two boys sought refuge in his father's house.
32. He stated that he witnessed the boys inside the house being ordered to get out which they did and agreed to take the injured boy (accused 1) to hospital. He identified the accused persons as those boys whom he saw running after the boys who sought refuge in his father's house. He identified the accused as his relatives whom he knew very well. From his testimony coupled with that of pw1 and pw6 the eye witness, I have no doubt that the evidence is well corroborated that it was the accused who acted in a concerted effort in assaulting the deceased thus causing him grievous harm leading to his death.
33. On the question of malice aforethought, the same is discernable from the nature of the injuries occasioned. It was said clearly that PW1 had cooled and separated the boys but due to a second thought of returning to PW1 to stab him and in fact on the chest, in my view signified malice aforethought. It was reasonably expected that by stabbing the chest which is a critical part of the body harbouring the heart, it was highly likely to cause grievous harm.
34. In the case of Joseph Kimani Njau v R (2014) eKLR, the Court of Appeal held as follows with regards to what constitutes malice a forethought:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) 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....”(Emphasis added)



35. Similarly, in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, Eastern Court of Appeal observed:

“In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”

36. It is manifestly clear that the 2nd accused person acted in a concerted effort with accused one in attacking the deceased. The fact that the two accused persons went back a second time to where the deceased was is a manifestation of their intention to cause grievous harm which eventually led to the death of the deceased. Accused one was all along at the scene and clearly saw what ensued but still chose to play along. In my view, he was keen to enable the 1st accused person escape using his motor cycle.

37. In conclusion, it is my finding that the prosecution has proved its case against the accused persons beyond reasonable doubt. Accordingly, I am inclined to find them guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and are therefore convicted.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE

