



REPUBLIC OF KENYA



**Republic v Ahmed alias Munga Hisham Azar & another (Criminal Case E010 of 2024) [2025] KEHC 7305 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E010 OF 2024  
WM KAGENDO., J  
MAY 23, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ALI MOHAMED AHMED ALIAS MUNGA HISHAM AZAR ..... 1<sup>ST</sup> ACCUSED**

**ABUBAKAR ATHMAN ALI ALIAS ABU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The 3 accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence as per the information filed in court on 11th July 2024 being that; on 4th day of May 2024 at Saragoi Area Mwembe Tayari Location, Mvita Sub County, within Mombasa County jointly with others not before Court murdered John Gitahiga Muhihu. They all pleaded not guilty, and the prosecution side called a total of 16 witnesses.

**The Prosecution case**

2. PW 1, Benson Mutuku Mwauliko, testified that he was a bodaboda operator. That at around 9 am on 4th May 2024, he was at the stage and he got a passenger who told him that he wanted to go to Central Police Station to collect his property. They picked the item then went to Saragoi area where customer told him to wait as they tried to get change for a Kshs 1,000/ note. As he waited, one of the men who was in a group drinking outside a wines and spirits shop, went and asked him whom he was waiting for. The witness told him he was waiting for a client. That the person suddenly attacked him and hit his head with a metal rod and he injured his eye as he was wearing a helmet.



3. The witness told the court that he could not see well after his left eye was injured. He managed to escape, and he took off with his motor bike. He went and informed his colleagues who decided that they should return to the scene of the assault. At the scene, they found three girls in a tuktuk who were drinking. His colleagues asked the three girls who had assaulted him, and the girls said that they did not want to be asked questions. His team insisted and one of the girls telephoned Munga,A1.
4. According to the witness A1 arrived and he was armed with a panga. He then whistled and a group of 20 people emerged from the graveyard. They were all armed with pangas and slashers. The witness said he decided to escape as his eye was still troubling him. That as they ran, one of them was overpowered and was hit with a stone and he fell down. That Munga's group caught up with the person who had tripped and cut him with a panga. The witness ran away and got into a tuktuk and went around to the other side of Saragoi.
5. According to PW 1 he saw the attackers damage their motor bikes with pangas. They reported the matter, and the police officers came and the girls who had called Munga were arrested.
6. When cross examined, he stated that he had told the truth he was a bodaboda rider of motorcycle registration number KMFK 383Z. He knew Munga who was wearing shorts and a t-shirt on the day of the incident. He reported to the police that Munga assaulted him. The witness told the court that he saw Munga hit the deceased with a Panga.
7. He further told the court that he could see the three people who were arrested by the Police in court. The witness stated that he saw Munga cut the deceased with a panga.
8. PW 2, Richard Kabuthi, testified he operated a bodaboda in Mvita. He parks at Ferry stage, and they had an association called the Mvita Bodaboda Association. He was the head of security and if someone had a problem, they attended to it by sending 3 to 4 people to inquire. That PW 1 as a member of their association at their stage. He recalled on the day of the incident he got a client to take to Kongowea. That at around 10 am, he got a call from Kyalo Katana who told him that one of their members had been assaulted at Saragoi. He proceeded there and when he got to the scene of the incident, he saw about 30 people who were armed. He testified that he talked to Munga but when he saw the armed men, he decided to run away. That as he ran, he fell and Munga got a hold of him and grabbed his shirt. He noticed Munga had a panga and pleaded with him to spare him as he did not know what was going on. He decided to put up some resistance and fight back and was rescued by his friend Ayub and they managed to run away.
9. That he saw Munga A1, throwing a stone at the deceased while he was across the road. That at that point the deceased was still alive and he saw the him raise his hand. That one of the young men cut the deceased's hand. Then Munga hit the deceased with a big rock crashing a stone against the deceased and blood started oozing out.
10. PW2 testified then went to the police and told them that the person who killed the deceased was Munga and this Munga was found with blood stains when he was arrested. That Munga had removed his shirt and placed it on his shoulders.
11. When cross examined, he stated that he was told that his colleague had been beaten by a customer. The police did not arrest the bodaboda customer. He was telephoned by Kyalo to be informed of the same. The deceased was lying on the other side while the bodaboda rider was on the other side. The young men had tried to run but they were unsuccessful. He sustained an injury to his leg.
12. He added that he saw Benson there and he had a bad injury. That Ayub took the panga which Munga had (PMFI 1) and he knew Munga before that date as he was a toute. He also recognized another guy



- who had raitas but whom he could not recognize in court as he was wearing a Muslim hat and hence, he could see the shape of his head. The witness recalled participating in an identification parade.
13. PW 3 David Waimea Miah, testified that PW1 had informed them that he had been assaulted at Saragoi and they immediately mobilized a group of boda bodes and went there. He stated that they were attacked by a group of 50 men. He stated that he ran for his life. When cross examined, he stated that they had been attacked by a group of around 30 men and they all had weapons. He stated that he saw them hit John to the point of his death.
  14. PW 4 Geoffrey Kangethe Njuge, testified that he met Juma who told him that he had been assaulted at Saragoi. That together with other bodaboda riders they went to Saragoi and there they found their fellow bodaboda riders engaged in a confrontation. He said that he ran away to safety when things got worse.
  15. PW 5 Ayub Mbugua Muninu, told the court that Juma told him that he had been assaulted at Saragoi and together with others they went to see what had happened. That when they arrived Munga and the team attacked them That they ran away but his brother fell and was cut and later overpowered.
  16. PW 6 John Safari gave testimony in respect to the CCTV footage; he told the court that in the footage you could see a group of young men gathering and then there was a lot of chaos and running. When cross-examined the witness admitted that the CCTV footage was duplicate and that he did not know who made the flash disk.
  17. PW 7 Kazungu Charo Mweni, told the court that he sold bread at Mwembe Tayari. He recalled on 4th May 2024 he was at the shop at around 11 am while taking a break when he saw 5 bodaboda riders come from the right side of the shop each having a pillion passenger. They stopped next to wines and spirits. One of them had an injury on the left eye. The one with the injury asked the witness about the whereabouts of the person who injured him. There were three girls. The girls hesitated and one of the riders hit one, that Hishan A2, was at the scene and he took off hurriedly. That shortly thereafter he returned with Munga and others, who were armed. That Munga's team attacked the riders and chaos broke out. That he saw one of the riders being cut and he telephoned the area chief. He later assisted in the arrest and identification of the culprits.
  18. PW 8 Mary Katana testified that there was a confrontation between bodaboda riders who told her to call the 1st Accused person. That a fight ensued thereafter and they went to look for safety at a nearby hotel. She told the court that when she told the 1st Accused about what the bodaboda person had done, he was very furious. She stated that she had not seen the 2nd Accused person at the scene. She reiterated that a group of bodaboda riders gathered with weapons and people started running in different directions. She did not see the 1st Accused again after reporting to him that she had been assaulted.
  19. She stated that she did not witness the alleged incident. When cross examined, she testified that she did not see the 2nd and 3rd accused persons at the scene of crime and she does not know him. She also did not see who killed the deceased person as she went into hiding.
  20. PW 9 Chief Mohamed Masifwa Musa testified that he was called by PW7 and informed that an incident had happened at Saragoi where someone had been killed. He arrived at the scene, but the incident had already happened. He testified that he started looking for suspects. He pointed out the accused persons as the people he had identified on CCTV. When cross examined, he stated that he was not at the scene of crime. He also could not explain particulars of the alleged habitual allegations against the accused persons. He admitted that he did not see the accused persons kill the deceased.



21. PW 10 Ashraf Ali Badi testified that he is the village elder Saragoi. He testified that he received a call from PW7 that there was an incident at Saragoi. That they were able to arrest young men after the incident who had perpetrated the incident. When he got to the scene of the incident, he found a group of young men and the deceased on the ground.
22. PW11 Dr. Michael Clifton, testified that the cause of death was because of Haemorrhagic shock secondary to severe traumatic head chest and abdominal injury secondary to multiple blunt and sharp trauma. He produced the postmortem report as per.
23. PW 12 NO.74398 PC Henry Rotich, testified that he arrived at the scene of crime after the incident. Together with inspector Muli they arrested the 1st Accused person. When cross examined he stated that he did not see nor arrest the 2nd and 3rd Person.
24. PW 13 NO 240460 Joseph Ngatia he testified that he conducted the Identification parade in respect to the 3rd Accused person. During cross examination he testified that he did not have any photographic evidence that he indeed had followed the procedure as per the Police force standing orders. He also testified that he did not ask for the description of the suspect from the witness and that the description had been made to the investigating officer.
25. PW14 NO. 237588 Geoffrey Cheruiyot, testified that he conducted the Identification parade in respect to the 1st Accused person. According to the witness the witnesses to the offence correctly identified the 1st Accused. He told court that the identification parade was conducted as per the rules of identification parades and in respect of the accused rights.
26. PW15 NO 107576 Halima Ibrahim Dika, testified that she arrived at the scene of crime after the fact and found the deceased person on the ground. There was a group of people and PW 1 informed them that the person who had killed the deceased was drinking nearby with 3 ladies in a tuktuk where they found the ladies.
27. PW16 68830 CPL Sospeter Njiru testified that he arrived at the scene of crime with PW15 after the fact. He testified that they carried out investigations and recorded witness statements. During cross examination he testified that he had seen the 3rd Accused person on the CCTV footage cutting the deceased with a panga.

### **Analysis**

28. The court evaluated the evidence of the 16 witnesses and was satisfied that the prosecution had adduced sufficient evidence as required under section 306 of the *Criminal Procedure Code*. The court then explained the rights to the accused persons, and they tendered evidence under section 307 of the CPC.

### **The Defence Case**

29. DW 1 Ali Mohamed Ahmed Alias Munga, the 1st Accused told the court that he was at home when police officers came to his house and arrested him on allegation of him having committed a crime. He recalled that he had been drinking the previous night and that he had not been at the scene of the incident.
30. DW 2 Abubakar Athman Ali Alias Abu, denied the offence and challenge the identification . The 3rd Accused person told the court that he was at home when he was arrested by the police. In his defence he stated that he had not been at the scene of the accident and none of the prosecution witnesses had identified him by his face through the CCTV camera. According to the 3rd Accused when he was arrested, he was wearing a short and a sweater which were taken and produced in court as evidence



of what he was wearing when the incident happened yet from the CCTV footage shown there was nobody wearing what he is claimed to have worn.

### **The Law**

31. Considering the testimonies of both the prosecution and defence it was now upon this Honourable Court to determine whether or not the offence of Murder had been proved beyond reasonable doubt.
32. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused persons herein face the charge of murder contrary to section 203 as read together with 204 of the *Penal Code*. It is upon the prosecution to prove beyond reasonable doubt, that the accused murdered the deceased.
33. Section 203 of the *Penal Code* provides the elements of the offence as follows: -
  - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
  - “For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

### **Analysis and Determination**

#### **The death and cause of the death.**

34. The death is not disputed. Further the postmortem form Pext 3 filed by PW 11 Dr. Michael Clifton dated 8th July 2016 shows that the death was as a result of Haemorrhagic shock secondary to severe traumatic head chest and abdominal injury secondary to multiple blunt and sharp trauma. The particular injuries were: fracture of the ribs bilateral with massive hemothorax and lacerated lungs and multiple skull injuries and fractures with skull fracture- commuted skull fracture and massive epidural and subdural hematoma (massive brain injury) and a lacerated liver with massive hemoperitoneum traumatic abdominal hematomas.

Proof that accused persons committed the unlawful act which caused the death of the deceased.
35. From the evidence, it emerged that PW1, Benson Mutuku, was the genesis of this unfortunate incident. When he was attacked by A1 earlier this fateful day, he went and mobilized the other bodaboda riders and then went on what they call a security mission.
36. The group comprised of the security team of the Mvita Bodaboda association and other riders who were not in the security team. Even though they say they were on a peaceful mission, the evidence shows that one of them did rough up PW8 Mary Katana.
37. This was confirmed by PW7 Kazungu Charo Mueni - the key witness.
38. I call him key because, he was not only an eyewitness, but he was independent and not aligned to the either, the team of the bodaboda riders who were supporting PW1, and neither was he pro the team comprising the accused persons which was described as Munga's group.
39. PW7 testified that when the bodaboda team arrived he saw Hisham, accused 2, walk away hurriedly and then return with Munga, Accused 1 and the others. That is when chaos broke out. He narrated how



- the stones were thrown and those who were armed. PW7 positively identified the 3 accused persons who were known to him. He also identified them on the CCTV and assisted in their arrest.
40. His evidence was supported by the area Chief, who also though not present at the scene, was able to pick them out from the CCTV footage.
  41. The defence raised the issue of the custody of the CCTV footage but the same was admitted without any objection.
  42. Further it is not the only evidence. We have the eyewitness accounts and the identification parades.
  43. PW1 told the court that he identified the accused persons as the people who attacked the deceased with pangas and other crude weapons.
  44. It also emerged that A1, Munga was well known to most of the witnesses. PW1 testified that he knew A1 and he saw him attack the deceased. Pw2 also testified that he knew Munga, A1. That he saw Munga pick and crash the stone against the deceased. PW2 also testified that he saw Ayub, PW 5 take the panga PEXT1 that A1 had. Both PW1 and PW2 Identified A2 And The Narrated How He Cut The Deceased. PW2 also said that he saw A3 cut the deceased on the leg, and he identified in the ID parade.
  45. PW3, likewise, positively identified Munga, A1. He said he saw Munga hit the deceased, and he (PW3) went back to rescue. The deceased who was his brother. He managed to lift the deceased but A1 turned upon him and fractured his (PW3) arm. Consequently, he was overpowered and his elder brother, PW5, advised him to take off.
  46. PW4 also identified A1 and A3.
  47. PW5 testified that he saw Munga cut Rasta on the head, and he also saw A3 stab the deceased on the chest and A2 cut the deceased on the leg. PW5 added that he is the one who retrieved the panga (PEXT1) from Richard who had grabbed it from A1, and he collected the chain link, PEXT 2, from the wines and spirits. He narrated how he saw the deceased pick a stone and smash it against the head of the deceased.
  48. He identified A2 in the CCTV and A3 in the ID parade.
  49. As earlier stated, there was no objection to the production of the CCTV footage which was supplied to the defence well in advance.  
  
The photographs as well as the certificates under section 78A and 106B of the *evidence act* were produced.
  50. That evidence was further supported by the independent evidence of PW7. He identified the 3 accused persons in the CCTV. He also testified that they are well known to him as the come from the village where he is a village elder and he knew the accused persons very well. He is the one who called the chief, PW9 to report that there was some chaos.
  51. The chief was able to identify the accused persons in the CCTV footage, and he helped in the arrest of A2 who they found hiding under a bed. Subsequently he led the police to recover 2A's clothes PEXT 9 and 10. These are the clothes that A2 was captured wearing on the CCTV footage on the material date. He was in the company of PW 10 the other village elder.
  52. PW13 produced the ID parade in which Athman Abubakar ALI, A3 was positively identified by both Pw5 and Pw2 whilst PW14 produced the ID parade in respect to Ali Momammed alias Mungawhere PW5, PW3, PW2 AND PW4 positively identified him.



53. From all this, the court is satisfied that the identification of the 3 accused persons at the scene was proper. In particular, A1 was seen not only cutting the deceased but also throwing and smashing the stone against the head of the deceased

### **Common intention**

54. The 3 accused persons are charged jointly with the offence of killing the deceased. This brings into perspective the provisions of Section 20 as read together with Section 21 of the Penal Code. Section 21 of the Code provides the features of criminal responsibility as follows:

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

55. The other overriding elements of a common intention concerns characteristics of it being formed at the very onset or during the commission of the offence. It may also arise spontaneously on the spur of the moment. According to Section 10 of the Evidence Act, anything said, done or written by any of the persons deemed to have a common intention, in reference to their common intention is relevant evidence of such intention. What is required of the prosecution is evidence tending to show that the individual accused persons were in fact part of the conspirators in a gang of two or more, sharing a common intention, purposed to commit a particular offence. *Rex v Mikaeri Kyeyuniu* [1941] 8 EACA 84
56. In this case, there is evidence of multiple blunt and sharp traumas to the head, chest and abdominal parts of the deceased’s body. We have evidence that the accused persons pursued the deceased and hit him repeatedly until he died.
57. The post mortem report shows the death was from multiple injuries. So clearly, the 3 had a common intention to cause the death of the deceased.

### **Malice Aforethought**

58. Section 206 of the Penal Code provided 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.”

59. In order to find a conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In *Black’s Law dictionary*, 10th Edition malice aforethought is defined as: The



requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

60. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under section 202 *Penal Code* which is punishable under section 205 *Penal Code* by a term of imprisonment extending up to life.
61. The malice aforethought may be proved by direct evidence or inferred from the circumstances, in most cases we rely on circumstantial evidence.
62. In “*Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*”, the Court of Appeal cited the case of “*Rex v Tubere S/O Ochen [1945] 12 EACA 63*” with approval where it was in stated as follows: -

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case, we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late”.
63. In *Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR*, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence.
64. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan [1928] Cr. App. R 21*: - “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
65. As noted above, the three accused persons inflicted multiple injuries which caused the death of the deceased. This is seen especially seen in the conduct of Munga who even cut and injured PW3 and PW4 who tried to rescue the deceased. PW7 also testified that he heard Munga (A1) tell the group “Maliza hawa.” (finish these ones) after which he was seen cut the deceased with a panga on the leg and also, he smashed the stone on the head of the deceased severally. A3 was also seen stabbing the deceased and A2 cut him. They all had the common intention to cause his death.
66. Accordingly, I find that the 3 Ingredients of murder being the cause of an unlawful death, the identification and the malice aforethought were proved, and I do not hesitate to convict the 3 accused persons for the offence of murder contrary to section 203 as read with 204 of the penal code.
67. It Is So Ordered Acordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 15<sup>TH</sup>,DAY OF MAY 2025**

**HON. LADY JUSTICE W. K. MICHENI JUDGE**



In the presence of: -

The 3 accused persons and their advocates Mr. Khamisi Salim for A1MR Odhiambo for A2, and MS Kuria for A3 .

MR Ngiri for the prosecution Bebora court assistant

**HON. LADY JUSTICE W. K. MICHENI JUDGE**

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

**THE JUDICIARY OF KENYA.**

