



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Madero (Criminal Case E002 of 2022)  
[2025] KEHC 10052 (KLR) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10052 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL CASE E002 OF 2022**

**JN NJAGI, J  
JULY 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**YUSUF DUBE MADERO ..... RESPONDENT**

**JUDGMENT**

1. The accused, Yusuf Dube Madero, 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 15<sup>th</sup> January, 2022 at about 0200 hours at Mwanje village of Konemansa location, Tarasa Division, Tana Delta sub county within Tana River County, he murdered Abdallah Jaro Saidi (herein referred to as the deceased).
2. The accused pleaded not guilty to the charge. The prosecution called 6 witnesses in the case at the close of which the court found the accused with a case to answer and placed him to his defence. The accused defended himself and did not call any witness.
3. The case for the prosecution is that deceased and two of the prosecution witnesses, Musa Godana Dube PW1 and Galgalo Twalib PW2 together with the accused were engaged in fishing activities at Mwanja village in Tarasaa Division. They were at night time sleeping in a make shift shelter near where they were fishing.
4. That on the material night at 2 am the four of them were sleeping in the shelter when Musa PW1 and Galgalo PW2 woke up to the screams of the deceased. They saw the accused cutting up the deceased with a panga outside the shelter. They ran away and reported to the village headman, PW4. The accused was arrested by members of the public and taken to the home of PW4. The incident was reported to the police. PC Nyondo PW5 of Idzowe police post and other policemen went and re-arrested the accused and visited the scene. They found the body of the deceased at the scene. PW5 noted that it had stab wounds. They took it away. The father to the deceased PW3 received the report on the death



- and travelled to Mwanja where he found the body of the deceased. He accompanied PW5 to Malindi Hospital mortuary where a doctor conducted a post mortem on the body and the same was released to relatives for burial.
5. The case was investigated by police officers from Tarasaa police station and was later taken over by DCI Tana Delta sub county. The officer from that office who investigated the case went on transfer and PC Akunga PW6 of DCI Tana Delta sub county took over the case. The accused was charged with the offence. During the hearing of the case in court, PC Akunga PW6, with the consent of counsel for the accused, PW6 produced the Post Mortem report in court as exhibit, P.Exh.1. The same indicated that the deceased had cuts to the right knee and left knee; deep cuts to the right wrist exposing the underlying bone; a single cut to the neck above the adam apple transecting the trachea exposing the neck muscle and 4 deep cuts to the head exposing underlying brain tissue. The pathologist opined that the cause of death was severe head injury secondary to blunt head trauma with use of an object with sharp, edges inflicting the deep cuts.
  6. When placed to his defence the accused stated in a sworn statement that before his arrest he was living at Mokowe, Lamu where he was working as a porter. He stated that at the material time he was working at Mwanja village where he was carrying goods at the stage. That on the material day, he went to work and worked until 3:30 pm when he returned to his home. He woke up at 6:30 pm and went to a neighbour's video kiosk where he stayed up to 7:30 pm when he left for his house.
  7. It was his testimony that on the following morning he woke up and prepared to go to work. He met with the village elder together with villagers as he left his house. The arrested and told him that he had killed a person at the river which is about 12 hours walk from Mwanja. He stated that he did not know the deceased as he was new in that area and was not with him on that fateful day. He said that he did not kill him. He denied the evidence that he was a fisherman in the area.

### Submissions

8. The defence filed submissions but the prosecution did not file any.
9. Counsel for the accused submitted that the elements of the offence of murder as set out in the case of *Anthony Ndegwa Ngari v Republic* (2014) eKLR that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice afterthought.
10. On whether the accused person committed the unlawful act which caused the death of the deceased, counsel submitted that the prosecution witnesses stated that the incident occurred at night and as such, it was not clear what kind of lighting they were using to identify the accused person. That this raises a lot of questions as to whether the person identified as the perpetrator was actually the accused person. In addition, that the investigating officer did not produce the murder weapon. She submitted that some of the prosecution witnesses relied on hearsay evidence.
11. It was submitted that the accused person in his defence stated that did not know the deceased and that he was not at the scene of the alleged offence. It was submitted that none of the prosecution witnesses testified that there was any animosity or misunderstanding between the accused person and the deceased and that no evidence was adduced to show that the accused person knew or had the intention of causing the death of the deceased.



## Analysis and determination

12. This being a criminal trial, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

13. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Section 203 of the *Penal Code* defines murder in the following terms:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

14. The prosecution in order to sustain a conviction for the offence of murder must prove the ingredients of the offence which were stated in the case of *Republic v Isaac Mathenge Maina* [2018] eKLR to be as follows:

The ingredients of the offence of murder were discussed in the case of *Republic v Mohammed Dadi Kokane & 7 others* [2014] eKLR as follows:

“The offence of murder is defined as follows by section 203 of the penal code:

“any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

1. The fact of the death of the deceased.
  2. The cause of such death.
  3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly
  4. Proof that said unlawful act or omission was committed with malice aforethought.”
18. It is the duty of this court to interrogate the respective ingredients of the offence of murder and determine whether the offence of murder was proved against the accused person.
19. A post mortem report was produced that showed that the deceased died as a result of severe head injury secondary to blunt head trauma with use of an object with sharp edges inflicting deep cuts. The medical report was not challenged by the defence. I therefore find that the deceased died as a result of severe head injury as a result of deep cut wound injuries on the head. The death and cause of death of the deceased was therefore proved.



20. The next issue is whether the deceased met his death as a result of an unlawful act on the part of the accused person. Musa PW1 and Twalib PW2 told the court that they saw the accused cutting the deceased with a panga.
21. It was the evidence of Musa PW1 that they were asleep in a make shift shelter when he heard some noise. He then saw the accused cutting the deceased with a panga all over the body. He shouted “you’re killing him, you’re killing him”. The deceased was also screaming. That Galgalo woke up after which they ran away and reported to the headman Haji Dube who later called the chief. They later went to the scene in the company of the chief, the headman and other people. That they met with the accused at Mwanja as they were going to the scene.
22. It was the evidence of the witness that the shelter where they were sleeping in was made of sticks and had no walls. He stated that there was moonlight. However, that he did not know why the accused cut up the deceased. He testified that the deceased was a fisherman and that at night he would sleep with them at the shelter.
23. PW 2 Galgalo Twalib Galgalo told the court that he knew the accused since they used to fish together in ziwa. They lived near the ziwa and had a shelter where they slept. That the shelter was made of posts and the roof was covered on top and on one side. That on the material day, he heard Musa shouting ‘Baba don’t kill’. That he rushed out of the house and went round the shelter where he saw the accused cutting up the deceased all over with a panga. That together with PW1 they went to the headman at Mwanja village and informed him.
24. The witness testified that the deceased was a fisherman who stayed in another camp and he would occasionally come to fish at their ziwa. That for about a week he would sleep at their place and in the morning, he would go fishing. Further, that the accused did not have any conflict with the deceased.
25. There is no dispute that the incident in which the deceased received fatal injuries took place at night. The question then is whether Musa PW1 and Twalib PW2 identified the accused as the person who inflicted the fatal injuries on the deceased.
26. The law on evidence of identification is that the evidence should be examined carefully for the court to satisfy itself that the circumstances of identification were favourable and free from the possibility of error. This fact was the holding of the Court of Appeal in the case of *Cleopas O. Wamunga v Republic*, Criminal Appeal No. 20 of 1989 where the court stated that:

“..... evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification....”

27. In *Kariuki Njiru & 7 others v Republic* it was held that:

The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R. v Turnbull*[1976]63 Cr. App. R.132). Among the factors the court is required to consider is



whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.

28. In addition, even where identification is by recognition at night, the evidence must be absolutely watertight to justify a conviction, see *Nzaro v Republic* (1991) KAR 212.
29. In the case of *Tumusiime Isaac v Uganda* [2009] UGCA, the Court of Appeal of Uganda set out the factors which the trial court should consider in deciding whether the conditions under which the identification was made were conducive for positive identification to include; the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused.
30. In the case of *John Mwangi Kamau v Republic* (2014) eKLR the Court of Appeal stated the following on the issue:

“Time and time again this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of *R v Turnbull and others* (1976) 3 All ER 549, an English case, Lord Widgery CJ had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

31. Musa PW1 told the court that there was moonlight when the incident occurred. He however did not tell the court how far he was from the accused when he saw him cutting the deceased. He did not tell the court the position of the moon and its brightness when he claims to have identified the accused as the person he saw cutting the deceased. He did not adduce evidence on the other factors such the length of time he observed the accused cutting the deceased. Without such evidence, it cannot be said that his identification of the accused was free from the possibility of error.
32. Twalib PW2 on the other hand told the court that it was dark when the incident occurred. He did not tell the court how he identified the accused in the darkness.
33. It is clear that the two witnesses, PW1 and PW2 gave contradictory evidence as to the condition of lighting when they claim to have identified the accused as the person who cut the deceased, with one saying that there was moonlight and the other stating that it was dark. The question then is as to which of them is the court going to believe as to be telling the truth? The conclusion can only be that the



witnesses did not identify the assailant as the accused. Their purported identification of the accused cannot be said to be free from the possibility of error. It was therefore not proved that the accused is the one who caused the death of the accused.

34. The third ingredient for the offence of murder is proof that the death was occasioned with malice aforethought. The same is defined in section 206 of the *Penal Code* as follows:

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.

35. In view of my finding that there was no evidence that the accused is the one who killed the deceased, the issue of malice aforethought does not arise.

36. The upshot is that the prosecution has failed to prove beyond reasonable doubt the offence of murder against the accused person. I find the accused not guilty of the offence charged and acquit him under the provisions of section 306 of the *Criminal Procedure Code*.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 8<sup>TH</sup> DAY OF JULY 2025**

**J.N. NJAGI**

**JUDGE**

In the presence of:

Ms Mwanja for Accused

Miss Mkongo for Republic

Accused - present virtually at G.K. Prison Malindi

Court Assistant - Ndonge

