



**State v Murunga (Criminal Case E033 of 2023)
[2025] KEHC 12615 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E033 OF 2023
A MABEYA, J
SEPTEMBER 17, 2025**

BETWEEN

STATE PROSECUTION

AND

DAVID APOLLO MURUNGA ACCUSED

JUDGMENT

1. The Accused is charged with the offense of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence as per the Information dated 20/12/2023 are that, on the 8/12/2023 at around 10:00hrs at Kalusi village in Chiga sub-location Kolwa East location in Kisumu East sub-county, the accused murdered Bavian Omondi Odhiambo.
2. The accused denied the offence and the prosecution paraded 10 witnesses at the trial to prove its case.
3. Pw2, Lenox Ochieng, a cousin to the deceased testified that on the 5/12/2023, the accused contracted him and the deceased to carry out some weeding work for pay which work they did the following day, a Wednesday and on Friday though they did not finish.
4. That on the fateful Friday, the accused refused to pay them and instead assaulted both him and the deceased. That the accused assaulted the deceased on the head and at the back of the head. He then threw Pw2 a deep ditch. When Pw2 came out of the ditch, he found the deceased lying down and naked. That he carried the unconscious deceased and placed him in a shade nearby, fetched a jerrycan of cold water which he poured over the deceased as he thought he had fainted. The deceased was bleeding from the mouth. He went home and informed his uncle Eric, about what had happened so they proceeded back to the scene with his uncle.
5. In cross-examination Pw2 reiterated that he saw the accused assault the deceased with sticks.



6. Pw9, Beatrice Adhiambo Oyoo was on the material day passing near the scene. He saw people surrounding Pw2 who was seated and a body nearby. She inquired from Pw2 whether he had informed his family of what had happened and he answered in the negative. She went to the home of Pw2 and informed Pw4 of the incident. She denied being a spouse to the accused.
7. Pw4, Eric Akumu Nyakwaka testified that on the material day, the accused's wife came to his home and informed him that the accused had beaten one of the children and as such she asked him to go and take the child to hospital. That on their way to the scene, they met Pw2 who informed them that the accused had beaten and killed the deceased, a fact that he confirmed at the scene. He then proceeded to Kalusi Centre where he met Pw3 with whom they arrested the accused after spotting him in a hotel and returned with the accused to the scene.
8. Pw3, Collins Otieno Odhiambo, the deceased's brother testified that on the material day while at Kalusi Centre, he heard people saying that one of his brothers had been killed. He then Pw3 and they got into a hotel where they saw the accused whom they arrested and escorted to the scene.
9. Mary Akoth Omolo (Pw5), the deceased's mother testified that on the material day at about 12pm-1pm she received a call from Pw3 who asked her to proceed to where he was. That, in the company of her co-wife, she proceeded to the scene where they found the Assistant Chief and other members of the public including Pw2.
10. That she identified the deceased's body at the scene and later prior to the postmortem. That she saw the accused for the first time at the scene.
11. Pw6, Marcelus Aucha, the area Assistant Chief testified that on the material day at about 11:30hours, he received a call from one of his residents who informed him that there was a boy lying next to a fence. That he proceeded to the scene where he found Pw2. On interrogation, Pw2 revealed to him what had transpired and even described how the accused was dressed. He then called one of his village elders, Fredrick Oyaro who managed to trace the accused at a hotel in the trading canter, arrested him and brought him to the scene.
12. Pw7, Michael Ochieng, a boda boda rider at Chiga testified that on the material day, he was at Kalusi when the village elder one Fredrick asked him to carry him. They proceeded to a hotel where a person was pointed out and arrested and they took him to the scene. That at the scene, they found the Assistant Chief Pw6 and saw a dead child. When cross-examined, he admitted that he did not know the accused before that day and that the accused was pointed out by his wife.
13. Pw8, Hezron Ogutu, testified that he resides in Kisii but had bought two plots in Chiga. That on the 8/12/2023, he received a call from his neighbour one Cliff Onyango who informed him that someone had been killed on his plot. That he had asked the accused to plant some vegetables on a small portion of his land but the accused tilled the whole land.
14. Pw1, Dr. Ombok Lucy, a medical officer at JOOTRH testified that she carried out the post-mortem on the deceased and produced the post-mortem report dated 19/12/2023. That on examination, the body had lacerations in the face, left arm, a cut wound on the forearm and at the back of the head measuring 4cm. That she formed the opinion that the cause of death was sub-dural hematoma as a result of a blunt force trauma secondary to an assault.
15. In cross-examination, she told the Court that the deceased was confirmed dead prior to her undertaking the post-mortem and that the deceased could have been assaulted using a blunt object.
16. Pw10, No. 96736 Corporal Lukas Masore was the investigating officer. He testified that on 8/12/2023, he received communication of a murder incident at Chiga. He mobilized officers from Kasagam Police



- Station and proceeded to the scene. They documented the scene and took photographs as the body had already been removed.
17. He interviewed witnesses including Pw2 who informed him that the deceased had been hit with a piece of wood that had broken into 2 which he collected and produced as PExh 2. He produced a copy of the deceased's Birth Certificate as PExh 3, 5, photographs of the crime scene as PExh 4 (a), (b), (c), (d) and (e) and their certificate as PExh 5.
 18. In cross-examination, he told the Court that they did not dust the sticks for fingerprints and that this was not occasioned by the fact that the sticks may have had fingerprints of other persons other than the accused.
 19. When placed on his defence, the accused testified that, prior to the case, he was a security man at Chiga. That on the material day at about midday, he was at a shop where he had gone to buy food when he was arrested by 3 people who beat him and took him to where he guarded.
 20. That at the scene, his captors started beating him and he lost one a tooth. That he saw someone in the land he guarded but did not recognize him though he knew he was a student. That later on the Chief called the police who arrested him though he was never told why he was being arrested.
 21. That he was working on the said land, slashing the place and that the sticks he is alleged to have used to kill the deceased were those he had slashed. That he first saw Pw2 in Court and that Pw9 was the one who pointed him out at the shop though she was not known to him.
 22. In cross-examination, he told the Court that Pw2's home was not near where he was working, that he worked at Wycliffe's compound. That Wycliffe and Hezron were not the same person and that their homes were 30 meters apart. That Pw9 did not identify him to the persons who arrested him. In re-examination, he reiterated that he had no relationship with Pw9.
 23. I have considered the evidence on record. The accused is charged with an offence of murder. The onus was on the prosecution to prove the offence beyond reasonable doubt. The ingredients for murder that must be proved by the prosecution to that standard are: -
 - a. the fact of death;
 - b. the cause of death;
 - c. that the death was caused by the wrongful act or omission of the accused; and
 - d. that that act or omission was with malice aforethought.
 24. I have examined the evidence by the prosecution witnesses. There's no doubt about the deceased's death. The same is confirmed by the testimonies of all the prosecution witnesses. Pw2 told the Court how he was with the deceased on the material day when they went to demand to be paid for the alleged work they had done. That the deceased was assaulted and he carried him to a shade nearby while unconscious.
 25. Pw3, Pw4, Pw5, Pw6, Pw7 and Pw9 testified of seeing the deceased's body at the scene where it was recovered. Pw5, the deceased's mother testified that she identified the deceased's body to the doctor for post-mortem.
 26. Accordingly, I am satisfied that the prosecution proved this element to the required standard.
 27. The second element is the cause of death. Pw1, Dr. Ombok Lucy, a medical officer from JOOTRH produced a post-mortem report that she carried out on the deceased. She told the Court that post-



mortem was carried out on 19.12.2023. Externally, the body had lacerations on the face and left arm and that there was a cut wound on the forehead and at the back of the head measuring 4cm. Internally, the head had a skull fracture with increased intracranial pressure and massive bleeding. The other systems were normal.

28. She formed the opinion that the cause of death was sub dural hematoma as a result of a blunt force trauma secondary to an assault. The report was produced as PExh1. I am satisfied that the cause of death was due to sub dural hematoma or internal bleeding in the skull as a result of a blunt force trauma secondary to an assault.
29. The third element is whether, the cause of death was as a result of the wrongful act or omission on the part of the accused. Pw2 was an eye witness. He testified that the accused had contracted him and the deceased to weed the land in which the accused was working on. They did and that on the material day, when they asked for their pay, the accused descended upon them with a whip and started assaulting them.
30. That he saw the accused attack the deceased hitting both of them on the head and specifically hit the deceased on the back of the head and kicked him on the chest. The injuries he attributed to the assault were consistent with Pw1's testimony on the results of the post-mortem. The cause of death was attributed to severe head injury due to blunt force trauma secondary to assault.
31. Pw2 identified the accused as the assailant and described how the accused was dressed on the material day. The accused was known to him.
32. The accused denied committing the offence and stated that, on the material day at about mid-day, he was arrested whilst buying food at a nearby shop. However, he admitted that at about 8am of that day, he was around the scene of crime. However, he admitted that he was working on the farm of Pw8.
33. The Court has considered the prosecution evidence and the accused's defence. It is clear that Pw2 knew the accused. He testified of he and the deceased being assaulted by the accused. He testified of a very deep pit that he was thrown to by the accused. The accused admitted to working on the land where the incident occurred. He admitted being at the scene at the time the incident allegedly occurred. There was nothing to show why Pw2 would frame the accused of the murder of the deceased.
34. In this regard, it is the Court's view that the accused's defence failed to displace the evidence of the prosecution as to how the deceased met his death. It was the assault of the accused that caused the death. The same was caused by the boys demanding to be paid for the work they had allegedly done.
35. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the death of the deceased.
36. Finally, was there malice aforethought on the part of the accused? Section 206 of the Penal Code defines malice aforethought 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.”

37. In *Joseph Kimani Njau v R* (2014) eKLR, the Court of Appeal held as follows: -

“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.

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 intention were aimed at a potential victim other than the one succumbed ...”

38. In the present case, Pw2 testified that the accused attacked both him and the deceased hitting them on the head and specifically hit the deceased on the back of the head and kicking him on the chest. He used a piece of wood PExh2. The postmortem report produced by Pw1 revealed that the cause of death was severe head injury due to a blunt force trauma secondary to assault.
39. Pw1 also noted that head had a skull fracture with increased intracranial pressure and massive bleeding. The accused must have intended to cause the deceased grievous harm by using a dangerous weapon on the head of a child aged only 15 years. He knew that assaulting the boy on the head he would cause either his death or grievous harm.
40. In the circumstances, I am satisfied beyond reasonable doubt that malice aforethought on the part of the accused was proved.
41. Accordingly, the Court finds that all the ingredients of the offence were proved by the prosecution beyond any reasonable doubt. The Court therefore finds the accused guilty of the murder of the deceased and convicts him accordingly.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

