



**Republic v Malala (Criminal Case E011 of 2021)
[2024] KEHC 82 (KLR) (15 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 82 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E011 OF 2021**

DK KEMEL, J

JANUARY 15, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

WYCLIFFE MUKANDA MALALA ACCUSED

RULING

1. The accused herein Wycliffe Mukanda Malala has been charged with an offence of murder contrary to section 203 of the *Penal Code*. The particulars are that on the night of 23rd and 24th March, 2011 at Kibachenje village, Bumula Sub- Location within Bungoma County, murdered Christine Nekesa Malala.
2. The accused denied the charge. The prosecution called three witnesses in support of its case.
3. Caroline Nakhungu Malala (PWI) testified that she was away when the incident happened and only rushed to the scene and found the deceased who is his mother lying in the sitting room with injuries on the right hand and right side of the head. She confirmed that the accused is her elder brother.

On cross examination, she denied that their uncle Samuel Maresa Nyangweso had inherited the deceased upon the demise of her husband. She denied knowledge of any land disputes involving the family.
4. Cornel Okonyo Okumu (PW2) testified that he was alerted of the incident and that he rushed and found the body of the deceased lying on the floor of her house and that she had injuries on right hand. He added that the accused was then relaxing at his house as if nothing had happened but he was later picked up by the police and taken in for questioning.
5. Denis Osendo Okonyo (PW3) testified that upon receipt of the report of the incident, he rushed to the scene and found the deceased already injured. He stated that the deceased was rushed to hospital



- for treatment while the accused was flushed out from his house and escorted to the police station. On cross examination, he stated that he did not witness the incident and that the accused did not flee from the scene as he was found sleeping in his house nearby.
6. Moses Wabwire, Opasa (PW4) testified that he was alerted by PW3 of the incident and he rushed there and joined other villagers in escorting the accused to the police station. On cross examination, he confirmed that he did not witness the incident and that his task was to assist in the apprehension of the accused.
 7. Julia Auma Malala (PW5) testified that the accused who is her father ran amok and damaged a solar battery as well as assaulting a young boy aged 13 years and again stormed the house of the deceased and assaulted her. She rushed there and found her already injured with a broken hand and that she later passed on. On cross examination, she stated that the deceased had threatened to sub divide the family land to her daughters which angered the accused who was the only son in the family. She also stated that she did not witness the accused assaulting the deceased inside her house. She also added that the villagers did not intervene as the accused was known for being hostile and wild.
 8. Diana Malala (PW6) testified that the accused is her father while deceased was her grandmother. She stated that she heard screams from the house of the deceased and that she rushed there and found the accused assaulting the deceased with a huge stick which she identified in court (MFI 3). She together with her sister and a visitor Samuel Nyongesa attempted to prevent the accused from further harming the deceased. She added that the deceased later passed on and that the accused had been assaulting the deceased in the past. On cross examination, she stated that she witnessed the accused assaulting the deceased. She also stated that the deceased's house had one solar lantern in her bedroom. She added that she had not loved her father in the past due to his bad behavior of assaulting and chasing people.
 9. Isiah Osendo Wanjala (PW7) testified that he was in the company of the accused herein on the material date and that while at the home of the deceased an altercation took place between the accused and deceased over the use of the family land in Mumias. They intervened and that the accused went away only to return back and allege that the deceased was a witch who had been bewitching his children. He stated that the accused then snatched a huge stick and assaulted the deceased while she was inside her bedroom. He added that the deceased's grandchild Philip attempted to intervene but he too was hit by the accused using the same weapon. He intervened and escorted accused to his house. He finally added that he visited the deceased the following morning and found her in critical condition. On cross examination, he stated that he saw the accused assaulting the deceased and that he intervened in separating them.
 10. Philip Malala (PW8) a form one student at Bokoli Secondary school testified that he used to live with the deceased who was his grandmother. He recalled that on the material date, he was with the deceased and another relative who had visited her when the accused arrived and then picked a quarrel with the deceased and thereafter hit her on the hand with a stick which broke. He stated that he tried to intervene but the accused assaulted him on the face and knee and that he ran away from the scene. He identified the stick. He added that he sought refuge inside a sugarcane plantation where he spent the night there. He testified that he returned the following morning only to find the deceased had passed on. He added that the deceased had raised him from childhood. On cross examination, he stated that the incident took place on the verandah and that the solar lamp was in the sitting room. He also confirmed that he witnessed the incident. He finally maintained that he was not with Isaiah and that he was speaking the truth even though he used to lie before.
 11. Sergeant Harisson Mugumo (PW9) testified that he is the investigating officer in the matter. He recalled on 24.3.2021 at 8.40 am he received a report of murder from the OCS whom he accompanied together



with other officers to the scene of crime. He testified that the accused had already been apprehended by irate members of public who handed him over to Mateka police post. He stated that they found the body of the deceased which had physical injuries. He recovered the murder weapon namely, a huge stick (Exhibit 3), a broken solar lamp (exhibit 2) , One blood stained skirt belonging to the deceased (Exhibit 4), one Yellow green stripped bloodstained shirt belonging to one Isaiah Wanjala (Exhibit 5) and a green blue blood stained dress belonging to the deceased (Exhibit 6). He testified that he organized for post mortem examination of the body and that he later charged the accused with the offence. He added that he established the motive of the murder was a family land dispute.

On cross examination, he stated that he visited the scene and recovered the exhibits. He stated that no P3 form was issued to one of the witnesses namely, Isaiah Wanjala as he did not file a complaint of assault. He added that the incident took place inside the deceased's bedroom.

12. No. 110694 PC. Analine Jelagat (PW10) testified that she was at Mateka Police Post on 24.3.2021 at 8.30 am when members of public presented the accused whom they claimed had killed his mother. She rearrested him and booked him in the cells.
13. Dr. Elly Kiplimo Kosgei (PWII) testified that he conducted a post – mortem on the body of the deceased on 26.3.2021 and established bruises on the lower limbs (shin) , a fracture of right humerus distal bone. He also noted a collapsed right lung as well as a ruptured gall bladder. He formed the opinion that the cause of death was cardiorespiratory arrest due to collapsed right lung. (Pneumothorax) with fractured humerus and ruptured gall bladder. He also formed the view that the injuries were due to blunt trauma by a blunt object. He produced the post mortem report as exhibit one.
14. Thereafter, the prosecution closed its case. Learned counsels opted to rely on the evidence so far tendered at this stage of the proceedings.
15. I have given due consideration to the evidence presented by the prosecution at this stage of the proceedings. The only issue for determination is whether the prosecution has established a prima facie case against the accused to warrant him to be placed on his own defence.
16. It is trite law that prior to placing an accused person to his her defence the prosecution is required to have established a prima facie case against such accused person. It is a well established law that a prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence could convict the accused if no evidence or explanation was fronted by the defence. See *Ramanlal T Bhatt v Republic* (1957) EA 332.
17. The prosecution in order to sustain a conviction as in the present case must prove all the ingredients of the offence of murder which are inter alia, that there was death; that the death was caused unlawfully; that there was malice afore thought and that the accused directly or indirectly participated in the commission of the alleged crime.
18. As to the fact of death, the evidence of the pathologist (PWII) is sufficient in that he confirmed having conducted a post mortem on the body of the deceased and noted the injuries sustained. He formed the opinion that the cause of death was cardio respiratory arrest due to collapsed right lung with fractured humerus and ruptured gall bladder. He also formed the view that the injuries must have been inflicted by a blunt object.
19. As to the unlawful nature of the death , it is trite that all homicides are unlawful unless authorized by law. The deceased had lived a normal life without any problems at her home and hence her death was unlawfully caused. She did not contribute to her death in any way.



20. As to the issue of malice aforethought it transpired from the evidence that the deceased had lived a quiet life with her grandson and that she used to have differences with the accused over the sharing of family land in Mumias in which the accused wanted it for himself while the deceased wanted the same shared among both male and female children. It is that acrimony which bred the intention to cause death of the deceased. There was therefore malice afore thought established by the prosecution.
21. As regards the identity of the perpetrator , the evidence of PW5, PW6, PW7 and PW8 placed the accused herein at the scene of crime. The said witnesses stated that they were at the home of the deceased and saw the accused herein assaulting the deceased.
22. In view of the foregoing, I find that in the absence of any explanation to the contrary from the defence, the prosecution's evidence does establish the three ingredients of the offence of murder. The evidence of the four witnesses placed the accused at the scene of crime and that he had an opportunity to harm the deceased and that there was reason to believe he did so in. In arriving at the above conclusive, I do recognize that at this stage, the standard of proof is not one of beyond reasonable doubt as is required for a fully pledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder as well as the accused's participation therein. Having established that there was an altercation between accused and deceased leading to the assault of the deceased, the accused must now offer an explanation as to how the deceased met her death.
23. In the result, it is my finding that the prosecution has established a *prima facie* case against the accused herein, Wycliffe Mukanda Malala. I find that he has a case to answer and is now called upon to elect to conduct his defence in line with the provisions of section 306 (2) of the [Criminal Procedure Code](#).

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JANUARY, 2024

D KEMEI

JUDGE

In the presence:-

Wycliff Mukanda Malala Accused

Shikhu for Wamalwa Simiyu For Accused

Miss Kibet for prosecution

Kizito Court Assistant

