



**Republic v Juma alias Kanumba & 2 others (Criminal Case
35 of 2013) [2024] KEHC 2788 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 35 OF 2013**

**A. ONG'INJO, J
MARCH 15, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

RASHID BAKARI JUMA ALIAS KANUMBA 1ST ACCUSED

YUSUF ABDULKADIR SOUD 2ND ACCUSED

ADAM MUSTAFA JUMA 3RD ACCUSED

JUDGMENT

Introduction

1. The accused persons Rashid Bakari Juma Alias Kanumba, Yusuf Abdulkadir Soud And Adam Mustafa Juma face a charge of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*.
2. Particulars of the offence are that Rashid Bakari Juma Alias Kanumba, Yusuf Abdulkadir Soud And Adam Mustafa Juma on the 6th day of February 2012 at Majengo area in Mombasa District within Mombasa County jointly before court murdered Mohamed Usi.
3. The prosecution called 8 witnesses to support its case that the accused persons committed the offence herein and they were placed on their defence.

Prosecution Case

4. PW1, Ali Mohamed Duwane Iten, said that on 6.2.2012 at about 6.00pm, he left home to go to work at Gongoni and that he was walking. He said that he passed three tuktuks near the fire station. That he saw the last tuktuk well and that it had about 7 people in it. PW1 said that he then heard one of the young men by the name Hassan Gutu tell one Abass to go and see the person who had stabbed Kanguni



- with a knife. That Abass was inside the tuktuk while Hassan was hanging on it while raising a slasher. That he told Abass that they were taking the person to KANU offices.
5. PW1 further informed court that he did not see the person that they were referring to. That he accompanied his sister to KANU offices in Majengo to find out who the person being carried in the tuktuk was. That on getting there, they saw the young men beating the deceased who was lying on the ground. That he saw the young men he had seen in the tuktuk and identified 7 of them although he did not know some of them. PW1 said that he identified Hassan Guti and Yusuf Cocker but he identified the others by appearance. He said that the young men picked stones and threw them on the deceased's face.
 6. PW1 said that his sister went and reported at Makupa Police Station. That PW1 went to report to work first then went to record his statement at Makupa Police Station on the same day. He said that while at KANU offices, he was able to identify the person who was being beaten. That his name was Mohamed Usi and that he worked at the slaughter in Limbe and lived in Kaloleni.
 7. PW2, Sultana Bwana Shosi, said that on 6.2.2012 at about 7.00 am, he was at home when someone by the name Mohammed Babadi went and informed him that his brother Mohamed Usi Kazi had been killed at Majengo area. That he went and reported at Makupa Police Station and they proceeded to the scene in the company of police officers. He said that the body was lying on the ground with cut injuries all over the body. That there were marks on the neck, ears, legs and generally all over. The injuries appeared to have been inflicted by a panga although there was no weapon at the scene. That the police removed the deceased's body to Makadara mortuary.
 8. PW3, Feisal Abdalla, testified that the deceased was his nephew and that on 6.02.2012 at about 5.00 am, he received a phone call and was informed that Mohamed Usi had been killed at KANU offices in Majengo. That he was informed the deceased was at his home when he was raided and taken away on a tuktuk and murdered at KANU offices. He said that he called his brothers and they proceeded to the said office where they found the deceased had been badly injured all over the body. That they called the police from Makupa Police Station who went and took photographs. That the body was removed to Coast General Hospital via Makupa Police Station. That post mortem examination was conducted and PW3 identified the same to the doctor, and that he was with Suleiman Eric. That he heard the people at the scene say that the deceased had been taken there by one Guti, Yusuf Koke and Abdalla Atomi who was said to be in Saudi Arabia. The deceased resided in Kaloleni with a certain lady who has since been murdered too.
 9. PW4, Joseph Mwangi Kinuthia, a tuk-tuk driver said that on 6.02.2012 at about 6.00am, he was driving along the road from Florida to fire. That on the right side, he saw some young men fighting and it was a group of about 7 young men who were beating another young man who was lying on the ground. That he saw one with a panga and rungu while the others had rungus. That PW4 reduced the speed of his tuktuk because of the crowd of people and that the young men who were beating the other went and blocked him by standing front. That they asked him to carry the man they had been beating and that one of them jumped on the tuktuk from the left side while other one jumped in from the right side while armed with a panga. They commanded PW4 to drive with the young man they had been beating on the passenger's seat. That three others sat at the back with the victim and the other two were guarding PW4 from both sides. That they commanded him to drive to the field at Mvita.
 10. PW4 said that they went to Mvita where he left them and went away. He said that they did not pay him and he turned and drove to Makupa Police Station where he reported the incident. He said that he led the police to Mvita where the men had alighted. That they found the young man lying on the



ground and was covered with a lessa. That the young man who had put the victim in the vehicle were not there. He said that he recorded his statement with the police.

11. PW5, Dr. Irene Muramba, a pathologist at Coast General Hospital testified that she received a request from Makupa Police Station to examine the body of Mohamed Usi Badi who had been stabbed by known men and dumped at Majengo on 6.02.2012. That the postmortem was conducted at Coast Provincial General Hospital on 6.02.2012 at about 12.15pm.
12. PW5 said that on external examination, the body revealed stab wounds on the face and scalp. There were two on the right side of the face about 2cm long. There was one cut over the nasal cage about 1cm long. There were two other deep cuts on left cheek extending to the bone of the cheek – the Maxilla. The upper incisors were broken and on the scalp, he had 2 cut wounds, one on the frontal area and the left parietal region extending to the deep scalp. That he had bruises on the back and the body was covered by dried blood stains.
13. PW5 testified that on internal examination of the head, he had hairline fracture frontal on the inner table about 5cm long, there was subdural hemorrhage over the cerebral hemisphere. There were signs of increased intracranial pressure. As a result of the examination, PW5 formed the opinion that the cause of death was severe head injury with multiple stab wounds leading to hemorrhage. He produced the Postmortem Report as exhibit 1.
14. PW6, Yusuf Mohammed Hassan, said that on 6.02.2012 at around 5.00am, he was at Kwa Mbuzi (place) in Kikowani when Hassan Guti and 2 other (pointing at the 1st, 2nd and 3rd accused persons in the dock) and others not in court went and asked for Mohammed Haji. That they asked PW6 where he was and PW6 told them that he did not know him. That they told him that Mohamed Haji had stabbed Kanguni with a knife. PW6 said that he knew who Mohamed Haji and Kanguni were. That they went to Mohammed Haji's mom where a certain young man by the name Mohammed Usi was sleeping. That they took Mohammed Usi who did not say anything and put him in a tuktuk and went away with him. That of the young men, some were carrying stones and others sticks. They injured him on the head, face and chest. That they did that for about 5 minutes before going away with him in a tuktuk. That PW6 boarded a tuktuk and followed them. That when they got to KANU offices and threw him out of the tuktuk.
15. PW6 said that he went to the deceased's uncle's place in Bondeni and informed him of what had happened. That he then went and reported at Makupa Police Station and later recorded his statement. That he told the police that he could identify one of the assailants by name and others by appearance. He said that he knew the 1st accused, Hassan Guti as he used to pass by his place of work while the 2nd and 3rd accused persons were known to him by appearance as they also used to pass by his place of work. PW6 said that he was not called by the police to go and identify the accused persons as he had travelled.
16. PW7, No. xxxx Corporal Antony Kinyanjui from DCI Mombasa, the Scenes of Crime Officer, Gazette No. 217 of January 2013. He said that he had a certificate which was prepared by Sergeant Oduor whom he had worked with from May 2011 to 15.12.2015 when he retired. That however, Sergeant Oduor died on 5.12.2018 and that he had a copy of the Burial Permit Serial No. xxxx which was dated 18.12.2018.
17. PW7 said that the certificate prepared by Sergeant Oduor was dated 18.05.2015. That it was handwritten by the said officer where he stated that on 6.2.2012 at about 11.00am he was at the Provincial Police Headquarter where he had been called by the duty officer at Makupa Police Station and requested to proceed to Coast General Hospital Mortuary. That on arrival, he was shown one male adult lying dead having been killed within Majengo village at the KANU offices. That Sergeant Oduor prepared a certificate that indicated he took the photographs, processed them under supervision and



no interference occurred in any way. That he signed the certificate and wrote his name. PW7 produced the certificate as ExP2 and photographs as ExP3(i) to (xi).

18. PW8, No. 64340 Corporal Jude Muthuri, said that on 6.2.2012 at about 7.15am, he was at Makupa Police Station when the former OCS by the name Pius Kilonzo called him to his office and showed him an entry in the occurrence book No. 11/6/2/2012 at 6.50am indicating that a report had been made by Joseph Mwangi, a rider of a tuktuk registration No. xxxx. That he reported that on the same date and about 6.00am, he had been carrying out his duties within Tononoka when he was approached by a group of about 7 people who were holding another man. That they boarded his tuktuk and that two of them sat at the front seat while the rest sat at the back with the man. That they directed the rider towards Majengo area. That he said that the men were armed with pangas and crude weapons. That the men started beating and inflicting injuries to the person they were holding. That the people proceeded to KANU offices in Majengo where they alighted. That they wanted the rider not to look back and the rider proceeded to the office and made a report to I.P. Kilonzo, the former OCS Makupa.
19. PW8 said that C.I.P. Moses Shikuku and other officers boarded the station vehicle together with the reportee who had been interviewed fully. That they proceeded to the scene where they found a group of people surrounding the victim who was covered with a piece of cloth. That they extensively examined his body and found he had stab wounds on the head, face and other injuries all over the body which was covered with blood. PW8 said that they did not recover any weapon at the scene. That the relatives of the deceased were enraged and wanted to take the body by force. That they talked to them and the duty officer called the scenes of crime officer. That they later collected the body and escorted it to Coast General Hospital Mortuary. That no photographs were taken at the scene which was tense and had been interfered with.
20. That they prepared for post mortem examination and the scenes of crime officers went to the mortuary and took photographs in his presence. That PW8 later learnt that the deceased was called Mohammed Usi Badi alias Bush. That Dr. Mulembe performed the postmortem examination and recorded her findings. PW8 said that I.P. Kilonzo proceeded with investigation and PW8 was a co-investigator. That during investigation, statements were recorded and names mentioned. That however, PW8 did not participate in the arrest of any of the accused persons.

Defence Case

21. The 2nd accused, Yusuf Abdulkadir Soud gave sworn statement that on 6th February 2012, he was on a safari to Malaba. That he left Mombasa on 4.2.2012 to go to Kampala and when he arrived in Malaba, he received a phone call and got information from Swabir that there was a murder in the village and that his name was mentioned as a suspect. That the accused told him that he was in Malaba and that he decided to come back to Mombasa and travelled in a truck of his colleague who was also a driver. The accused informed court that he arrived in Mombasa on 7.2.2012 at around 6.00 am and met his sister who told him that there were people who went to their plot and alleged that he was involved in the murder. That the accused told his sister that he returned so that they could not be anxious. That he stayed at home for 2 days and the people he was told had gone to look for him did not show up. That after about 3 months, an offer for international drivers in Saudi Arabia arose and he went for the interview and succeeded. That he processed his documents and went to Saudi Arabia. That he stayed in Saudi Arabia for 2 years and 8 months and on return to Kenya on annual leave,

Analysis and Determination

22. In consideration of the evidence of 8 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder



as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

23. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’

24. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

Death of the deceased

25. There is no dispute as to the death of the deceased Mohamed Usi.

Death was caused by an unlawful act or omission

26. A group of 7 men went asking for Mohamed Haji and when they told them that they did not know where he was, they went to Mohamed Haji’s house, forcefully removed the deceased and started beating him up while armed with pangas, rungas and stones. That the men commandeered PW4’s tuktuk and used it to carry the deceased to a field near KANU offices in Mvita. PW4 went and reported the matter to the police and led the police to the scene where the deceased had been killed.

27. PW5, the pathologist who conducted the postmortem observed that the body has stab wounds on the face and scalp, that there were bruises on the back, and on internal examination, she observed that there was hairline fracture frontal on the inner table about 5cm long, there was subdural hemorrhage over the cerebral hemisphere. She then formed the opinion that the cause of death was severe head injury with multiple stab wounds leading to hemorrhage.

28. The injuries were not self-inflicted and they were not accidental. It is no doubt therefore that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

29. PW4 whose tuktuk was commandeered by the 7 assailants and used to carry the deceased to the field near KANU offices near Mvita said that he was not able to identify those who forced him to carry the deceased in his tuktuk because they jumped on his tuktuk on both sides after blocking his way and put the deceased in the passenger seat and commandeered him to drive. Since they were armed, he was not in a position to identify them. When he led the police back to the scene, they did not find the assailants.

30. PW6 said that Hassan Guti and 2 other (pointing at the 1st, 2nd and 3rd accused persons in the dock) and others not in court went and asked for Mohammed Haji. When he told them that he did not know where Mohamed Haji was, they went to the house of Mohamed Haji’s mother where they found the deceased herein, Mohamed Usi and forcefully removed him from the house and started to beat him.



- PW6 said that he was able to identify Hassan Gutu as well as the 2nd and 3rd accused persons among the assailants as the 1st accused was known to him by name while the 2nd and 3rd accused were known to him by appearance.
31. PW6 however said that he did not lead the police to arrest the accused persons. Neither was he called to attend an identification parade to identify that the accused persons who were charged herein were among the 7 young men who committed the offence of murder. He identified the accused persons in the dock and it would be difficult to establish whether he truly identified them at the scene.
32. In *Gabriel Kamau Njoroge v Republic* (1987) eKLR the Court of Appeal held:
“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade...”
33. In consideration of the above principle and as a matter of law, dock identification is worthless and no conviction can be based on it alone.
34. PW8, Cpl Muthuri was instructed by the OCS to investigate the murder. He did not however visit the scene and the officers who visited the scene did not find the assailants at the scene. PW8 did not arrest the suspects and he did not testify as to who arrested the suspects. It therefore remains unclear as to how the accused persons were identified, arrested and charged.
35. The issue of identification of the assailants not having been established clearly, this court finds that participation or involvement of the accused in the offence has not been proved.

Malice aforethought

36. Section 206 of the *Penal Code* defines malice aforethought as follows: -
“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.
37. On the element of malice aforethought in respect to Section 206 of the *Penal Code*, the court held as follows in the case of *Isaac Kimathi Kanuachobi v R* (2013) eKLR: -
“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed



in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

38. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

39. Although the manner in which the deceased was murdered shows malice on the part of the perpetrators, the prosecution has not clearly established who the said perpetrators were.

40. In conclusion, this court find that the prosecution has failed to prove its case beyond reasonable doubt. The accused person is found not guilty and is acquitted of murder pursuant to Section 322(1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 15TH DAY OF MARCH 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the State

Ms. Mbaka Advocate H/B for Ms. Musyoki Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

