



**Republic v Walumoli & 2 others (Criminal Case E016 of 2021)
[2024] KEHC 3869 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E016 OF 2021**

DK KEMEL, J

APRIL 19, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

ANDREW MASINDE WALUMOLI 1ST ACCUSED

SAMUEL MUNGASA WANJALA ALIAS SAMMY CHEPKUBE 2ND ACCUSED

ZACHARIA MAKHAKARA 3RD ACCUSED

JUDGMENT

1. The accused persons herein were charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars were that on the 9th day of April, 2021 at Makunga Market of Bungoma North Sub- County within Bungoma County unlawfully murdered Jemiati Sirengo Mulaku alias Chemiati. They all denied the charges.
2. PW-1 Benson Simiyu Wanjala stated that On 9/4/2021 while on his way from Misikhu and on reaching Makunga trading centre at about 7.30 pm, he saw some people fighting and stopped his car about 10 metres away from them. He went to where the people were to find out what was happening and saw somebody lying on the ground being assaulted by the 1st and the 3rd accused person as well as a third person not before court. That the three people ran away upon seeing him. That he suggested to the injured person that he gets a neighbor who would assist him to his home. He staggered towards a shop and was assisted by one Charles. Thereafter he proceeded to his home and learnt the following day that the man had died. He stated that he knew the 1st and 3rd accused persons as artisans and had engaged them in various projects. That at the scene, the deceased informed him that he had been injured in the waist area. That the 3rd accused person was dressed in military boots. That there were security lights mounted in the area and he therefore recognized the accused persons.



On cross examination by Mr. Makali, learned counsel for the 1st accused, he stated that there is a police post within Makunga market but he did not lodge a report in the station. That his vehicle had a mechanical problem and had to be towed by a tractor. That the deceased used to take alcohol and that he saw three people fighting one person. That he did not see other people in the area apart from those fighting though the shops were still open but one Charles came to the scene. That he did not bother to check the clothes worn by the assailants. That he found the deceased already on the ground and that the assailants were kicking him. That the assailants fled from the scene before he could talk to them. He stated that he assisted the deceased stand up and saw a swelling on his groin area. That there was a bar nearby named 'Viva' and that he was not present when the deceased left the scene. Cross examined by Ms Lunani for the 2nd and 3rd accused, he stated that the accused persons fled the scene on seeing him approach.

3. Pw-2 Charles Simiyu Wekesa stated that he knew all the accused persons as they hail from Makunga area. That on 9/4/2021 while washing motorcycles at about 7.00-8.00 pm, he saw the deceased walking around and appearing a bit drunk. He tried to convince some motorcyclist to ferry him home but none accepted and that he entered a nearby bar. Later, he heard somebody crying near his residence. That he came out and found the deceased bleeding from the nose and mouth and that a crowd had gathered. He convinced a motorcycle operator to rush him to his home. The following morning, he learnt that the deceased had passed on.

Cross examined by Makali, he stated that the deceased was drunk and that is why the boda boda operators refused to ferry him home. That there were many people at the time. That it was dark and he didn't know how the deceased sustained injuries. That he did not see the 1st accused.

Cross examined by Lunani, he stated that he knew PW-1 but that he did not give him the report.

4. PW-3, Florence Nafula, the deceased's wife stated that on the day of incident, her husband took lunch and proceeded to the market while she went to church. At about 8.00 pm, she called him but she could not reach him on phone. At about 9.00 pm, the deceased arrived on a motorcycle with another person. That the deceased was assisted to the house where she saw a swelling on the neck and blood oozing from the mouth and nose. She stated that the deceased informed her he had been assaulted by Masinde, Zacharia and Sammy Chepkube to the point of death. That the deceased informed her that Zacharia had snatched his phone and when he protested, the accused persons assaulted him. That she gave him water and he started vomiting blood claiming Masinde had killed him. She stated that since it was raining heavily, she could not take him to hospital until the following morning at 6.00 am when the deceased again claimed Masinde, Zacharia and Sammy Chepkube had killed him and breathed his last. That upon his death, her brother in law went to lodge a report with the police who came and took the body to the mortuary. She stated that she had known the accused persons as they are neighbours.

Cross examined by Mr. Makali, she stated that she couldn't tell if the deceased had differences with the 1st accused. That the deceased went to the market after taking lunch but didn't know how the incident happened as she didn't meet the 1st accused on the day of the incident. She confirmed that the deceased used to take alcohol such as changaa. She confirmed the deceased named the three accused persons and that she recorded her statement with the police after the funeral. Cross examined by Ms Lunani, she stated that the deceased didn't have his mobile phone when he arrived home and that the same was not recovered. That she didn't know the 2nd accused person before. She stated that the deceased was not drunk when he arrived home.

5. PW-4 David Nyongesa stated that the deceased was his elder brother and that on 9/4/2021 at about 9.00 pm, he heard noises and on going out, he found out the noise was from his brother's house. He rushed there and found the deceased in the company of other people including their son Wafula.



The deceased was being assisted to get up while vomiting blood and who informed him that Zacharia Makhakara, Masinde and Sammy had snatched his phone. That he remained with the deceased until 6.00 am when his other brother David Kisembe arrived and that the deceased confirmed to him the names of his assailants. The deceased then passed on.

Cross examined by Mr. Makali, he testified that they could not take the deceased to hospital at the time as there was curfew in place. That it is his brother David who filed report with the police. That he had been with the deceased earlier on the day of incident and could not tell the places the deceased visited after that. That the deceased was vomiting blood and mentioning the accused's names. That the deceased mentioned that he had been to a certain bar.

Cross examined by Ms Lunani, he stated that the name Sammy Wanjala was mentioned by the deceased.

6. PW 5 Edwin Levy Sirengo stated that the deceased was his brother and that on 9/4/2021 at about 9.00 pm, he received a call from his brother Dominic Nyongesa that the deceased had been assaulted. That since there was curfew in place, he could not visit the deceased until the following day at about 6.00 am when Dominic called again telling him that the deceased had passed on. He rushed there and found the body had injuries on the face, chest and stomach.

Cross examined by Mr. Makali, he testified that he was alerted by his brother Dominic Nyongesa who also informed him of the names of the assailants. Cross examined by Ms Lunani, he stated that he recorded a statement with the police and that the names mentioned are not specific to certain individuals only.

7. PW-6, David Kisembe Sirengo stated that on 10/4/2021 at about 6.00 am, a young child called him asking him to follow him. He followed him to the deceased's home where he found him lying on a sofa set. He inquired as to what had happened and that the deceased claimed that he had been assaulted by Andrew Masinde, Zacharia Makhakara and Sammy Chepkube. That the deceased then passed on thereafter. That he thereafter reported the incident to the police and later recorded his statement.

Cross examined by Makali, he testified that he knew the 1st accused as they come from the same area and that he recorded his statement after the funeral but did not witness the incident. He confirmed that his witness statement to the police did not mention the assailant's names.

8. PW-7 Aggrey Wanjala Mkubwa stated that he runs viva wines and spirits pub at Makunga market. That on 9/4/2021 at about 7.30 pm, he was at the bar serving three customers Zacharia, Masinde and Sammy when he left them drinking to attend to something else. On coming back, he found the deceased at the door talking to the three customers whereupon he left the barmaid Irene Imbuga and went behind the bar. He heard noises from the bar and the barmaid asking the deceased to leave as he was drunk. On coming to the bar, the customers were gone as well as the deceased and his employee. There was a crowd outside the bar making noise and when the barmaid came back, she informed him that she had escorted the deceased and secured a motorcycle to ferry him home. He stated that he left the bar at about 9.00 pm and that he heard the following day that the deceased had passed on. He identified the three customers who had been in the bar the previous day as the accused persons herein.

On being cross examined by Mr. Makali, he testified that he found the deceased seated near the door but was not drinking as he appeared drunk. That he moved to the rear of the bar so he could not witness what happened in the bar but he could hear the deceased harassing customers. The noise was about twenty metres away from the pub. That it was already dark so he could not recognize any of the villagers. That the bar maid informed him that she had escorted the deceased to the boda boda stage. That he was not informed that the deceased had been assaulted and that he did not witness the deceased being assaulted.



Cross examined by Ms Lunani, he confirmed that he did not witness the accused persons exchange words with the deceased. When cross examined by Mr. Wamalwa, he stated that he found the accused persons with the deceased and left the bar. That he did not identify those who were making noise and did not know what had transpired.

9. PW-8, Edwin Barasa stated that on the said date, he was in the company of his friend Davis about 7.00 pm heading home on a motorcycle and at the door to Charles business, they found the deceased crying. Charles requested them to ferry the deceased home. That they assisted the deceased to climb onto the motorcycle and carried him home. That the deceased directed him to his house and that they handed him over to his wife. That the deceased claimed that he had sustained injuries and clutched onto his stomach. Later the following day, they learnt the deceased had died.

Cross examined by Mr. Makali, he stated that the villagers approached the place and that the deceased was lying down. That he did not see the 1st accused that day. On being cross examined by Ms Lunani, he stated that the 2nd accused is called Samuel.

On being cross examined by HP Wamalwa, he stated that they found the deceased outside Charles' business premises and appeared injured but they did not see any blood. That the deceased did not claim to having been attacked.

10. PW-9 David Wekesa stated that he had been with PW-8 on 9/4/2021 and had just left a certain hotel within Makunga market and that PW-8 had been riding the motorcycle when they saw somebody lying down and screaming near Charles's business premise. That Charles requested them to carry him home as the man was bleeding from the nose and could not walk or stand. That they carried him home and handed him to his wife. That the man claimed that he had been assaulted by Masinde, Sammy and Zacharia.

On being cross examined by Mr. Makali, he stated that they were attracted by the screams by the deceased. That the deceased led them to his house while mentioning the accused's' names.

Cross examined by Ms Lunani, he stated that he did not see the 1st accused person though he knew him and had been seeing the 2nd accused who hails from another part of the village. Cross examined by HP Wamalwa, he stated that he had never known the deceased but had seen him in the village. That the deceased kept on mentioning the three names. That Charles told them that the deceased had been assaulted and was bleeding profusely at the time.

11. PW-10 Benard Wafula Chemiat stated that he was with his mother at home at about 9.00 pm on 9/4/2021 when a motorcycle entered their home. That he went out and saw his father being held on a motorcycle. That they assisted the deceased to the house and who claimed that he had been assaulted by Zacharia, Masinde and Sammy. That he noted injuries on the face, nose and shoulders. That the deceased was given water but vomited. That he stayed up to 1.00 am when he went to bed. The following day at about 5.00 am, he went to check on him but who passed on before he could be taken to hospital. He stated that he had known the persons named.

Cross examined by Mr. Murunga, he stated that he had never known the good Samaritans before. That he did not witness the incident. Cross examined by Ms Lunani, he stated that the name Sammy is a common name. Upon Cross examination by Mr. Wamalwa, he stated that he did not engage in a conversation with the Samaritan and that he knew the three accused persons.

12. PW-11 Dr. Reuben Nyongesa Kere from Kimilili subcounty hospital performed a post mortem exercise on the deceased's body on 13/4/2021 at Lugulu Mission Hospital and from his analysis, the deceased died of severe hemorrhage due to blunt physical injury. He produced into evidence the post mortem report.



Cross examined by Mr. Murunga, he stated that there was no physical injury in the abdomen save the chest, forehead and arms. On being cross examined by Mr. Wamalwa, he stated that the cause of the perforation was the blunt object.

13. PW-12, No. 88038 PC Shadrack Marangu, the investigating officer stated that they were alerted on 11/4/2021 by DCI Paul Nyamai of a report of death made at Webuye police station. He stated that the incident had occurred on 9/4/2021 and that the deceased passed away on 10/4/2021 and the body preserved at Lugulu Mission Hospital. He added that the post mortem was conducted on 13/4/2021.

Cross examined by Mr. Murunga, he testified that the report had been booked on 10/4/2021 at Webuye Police Station by one David Kitembe, the deceased's brother. That he visited the scene on 11/4/2021 and interviewed witnesses including the proprietor of Viva wines but the bar maid had disappeared and could not be traced. That he established that the incident occurred between 6-8.00 pm. On being cross examined by Ms Lunani, he stated that the report was made by David Kitembe who was not an eye witness. That he did visit the scene and established the assault took place outside the bar near the road. On cross examination by Mr. HP Wamalwa, he stated that the assault took place outside the bar while the confrontation began inside the bar and the assault outside the bar. That he hadn't recorded a statement from the barmaid as she had relocated to another place.

14. By a ruling of this court dated 3.5.2023, the accused persons were found to have a case to answer and were thus put on their defence.

15. The 1st accused person testified as DW-1 and his evidence was that on the said date, he had gone to cultivate sugarcane up to about 5.00 pm after which he went to Makunga market to pay the day's wages to those who had worked for him. That he entered Viva wines and spirits where he had some drinks. That later at about 8.00 pm, as he was paying the bill, the deceased arrived demanding drinks. That the co-accused were also at the bar at the time but seated in different positions. That the deceased quarreled the bartender who pushed him outside without any intervention from any of the co-accused. That the bar tender pushed the deceased outside as he was troublesome. That the bar tender later came and served him a take-away drink. He denied seeing the deceased outside the bar.

On cross examination by Ms. Kibet, the Prosecution counsel, he stated he knew the deceased so well. That he was the first to enter the bar though there were other patrons. That he was not angered by the deceased's conduct who was drunk. That he met the co-accused who had left earlier and were not followed by anyone else.

16. DW-2 Samuel Mungasia Wanjala stated that on 9/4/21 at about 6.30 pm, he was at Viva wines and spirits bar and found the bar owner and the bar tender before the deceased arrived heavily drunk. That the deceased ordered for alcohol and since he was speaking in a loud voice, the owner asked the bar tender to eject him outside. That the bar tender ejected him and came saying the deceased had boarded a motorcycle. That on his coming out, he did not find the deceased and that boarded the 1st accused's motorcycle.

Cross examined by Ms Kibet, the prosecutor, he stated that the deceased who appeared too drunk found him at the bar and harassed the bartender. He denied knowing what happened to the deceased.

17. DW-3 Zakaria Wambani Makhakara stated that on the fateful day, the deceased entered the bar he was in at about 8.00pm and harassed the bar tender who ejected him. That by the time he left, the bar tender had not come back to the bar. That he later boarded a motorcycle belonging to the 1st accused. He denied seeing the deceased after he had been ejected by the barmaid.



Cross examined by the prosecutor, he stated that the deceased was too drunk at the bar. He confirmed that he had no grudge with PW-1. That the deceased was pushed out by the bartender and that each of his co-accused was seated separately and that they left the bar after the deceased had been ejected.

18. At the close of the defence case, parties filed their final written submissions. The same have been considered.

Analysis and determination.

19. This being a charge of murder contrary to section 203 as read with section 204 of the penal Code, the following ingredients should be proved by the prosecution beyond reasonable doubt;

- 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. the accused had harboured malice aforethought

20. the above ingredients were buttressed by the court in Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR where the elements of the offence of murder were listed by M. Odero, J as follows:

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- 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 persons, and lastly;
- 4) Proof that said unlawful act or omission was committed with malice aforethought.

21. The above summary establishes beyond doubt that there was death. The witness account in court establishes that the deceased indeed died and the cause of death was established by PW-11 Dr. Reuben Nyongesa Kere as severe hemorrhage due to multiple duodenum/ileum perforations due to blunt physical injury. In my view, these injuries relate with the injuries sustained by the deceased as narrated by PW-1 who found him still lying on the ground, PW-3, PW-4 PW-8 and PW-9 who all testified that the deceased complained of pain in the abdomen area as a result of the assault.

22. The 2nd ingredient is that the cause of death was the accused's unlawful act. *The constitution* of Kenya 2010 under Article 26(3) prohibits killing and guarantees every citizen's right to life which enacts;

A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.

23. The above therefore means that one is prohibited from taking another's life unless within the limits permitted by *the constitution*.

24. In the instant case, witnesses pointed that the deceased died as a result of being assaulted by the accused now before court. From the evidence on record, there is no justification whatsoever for assaulting the deceased. Indeed, the accused persons in their defence evidence did not show that the deceased assaulted them in any way. In fact, there was no evidence of a fight or confrontation between the deceased and



the accused persons. It is clear that the death was caused by an external force which caused rupture of internal organs.

25. In Joseph Kimani Njau vs. Republic [2014] eKLR the Court of Appeal stated that:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

26. In the instant case and upon evaluating the evidence, I do find that the motive for the killing/assault by the three accused persons was the deceased's conduct at the bar which is said to have been harassment of patrons who included the accused persons herein. The motive can be established from the testimony of PW-1 who witnessed the assault on the deceased as well as well as PW-7 who despite not witnessing the assault stated that on coming out of the bar, he found a crowd had formed outside his bar.

27. It is worth noting that the other relevant witness could have been the bartender identified as Irene Imbuga who is said to have informed PW-7 that he had escorted the deceased and already secured a motorcycle to take him home. The witness is said by the Investigating Officer to have relocated to another town and had not been traced at the time of hearing this matter. It is also evident that it is the said Irene who was attending to the accused persons as well as the deceased on the fateful day.

28. I must also point out that as correctly submitted by the 3rd accused person that there is no rule requiring the prosecution to call such number of witnesses, the failure by the prosecution to call and avail the said Irene to testify is not fatal to the prosecution's case as there is ample evidence showing that the deceased was fatally assaulted by the accused persons herein.

29. On this issue, I am guided by the sentiments expressed in Mwangi vs. R, [1984] KLR 595 by the Court of Appeal that:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

30. I thus find no prejudice occasioned by the failure to call the said bartender as a witness. In any event, the explanation that she had vanished is plausible and further that the other prosecution witnesses were quite sufficient in their testimonies.

31. The other ingredient to be established is that there was malice aforethought which is defined under section 206 of the Code to mean.

“206. 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;
 - a. 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;
 - a. an intent to commit a felony;
 - a. 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.”

32. In the instant case, malice can be inferred from the circumstances of the case. PW-1 testified that he found the accused persons assaulting the deceased by the roadside before they all ran away leaving the deceased on the ground. It was his testimony that the deceased were kicking the deceased who was then lying on the ground.
33. The individuals who picked him from the scene testified that the deceased had blood oozing from his mouth and nose and that he was clutching onto his stomach being the position of the injuries inflicted on him.
34. The vitality of establishing malice afore thought was stated by the court in *Tubere S/O Ochen v Republic* [1945] EACA 63 where the court outlined the circumstances imputing malice thus:
- (a) The nature of the weapon used against the deceased to inflict injuries.
 - (b) The part of the body targeted by the attacker whether vulnerable or not.
 - (c) The manner in which the lethal weapon was used. Whether in furtherance to cause grievous harm the assailant used the weapon repeatedly.
 - (d) The conduct of the accused before, during and after the attack of the deceased.
35. The evidence presented before this court plainly shows that the accused persons either intended to cause the deceased’s death or cause him grievous harm. The injuries inflicted on him were serious as further indicated by the fact that one of the accused persons was wearing military boots. This piece of evidence resonates with that of the doctor on the nature of the injuries sustained and the cause of death stated in the preceding paragraphs.
36. The last element to be established is that of whether it is indeed the accused persons who caused the deceased’s death. The evidence presented before court shows that the accused persons herein were at the bar drinking. The owner of the bar indeed testified that he had seen them in the bar before he retreated to the back of the bar and was only attracted back to the bar by noise outside his bar. From this, there is no doubt the accused were with the deceased at the bar. He also testified that on coming back, the bar maid Irene informed him that she had escorted the deceased and secured a motorcycle to carry him home.
37. This evidence taken together with that of PW-1 establishes beyond doubt that the accused person are the people who injured the deceased. Additional evidence can be gathered from the testimony of



the samaritans who ferried him home, the deceased's son and wife who all testified that the deceased informed them that it was the accused persons herein who had assaulted him.

38. From the above summary, I find that it is the accused persons herein were identified as the perpetrators.
39. I have also considered the defence tendered by the accused persons herein. All the accused persons admitted sighting the deceased at the bar and that the bartender pushed him outside as he was troublesome. They all concurred that the deceased was troublesome and that the bar tender ejected him. They denied fatally assaulting the deceased.
40. It is a cardinal principle of the law the burden of proof in a criminal trial rests upon the prosecution and does not shift to the accused unless under the circumstances prescribed by law. In the instant case, the prosecution shouldered the burden of establishing beyond reasonable doubt that indeed it was the accused persons who inflicted the fatal injuries herein. They were identified by Pw1 who found them assaulting him and that the deceased was already on the ground and that on seeing him approach, they ran away. The said witness had known them before as they use to work for him on some of his projects.
41. I have analyzed the accused's defence in light of the prosecution's case and it is my finding that the defence herein is a mere denial in that indeed, the deceased sat in a bar with the accused taking drinks and there is no evidence that the deceased came into contact with another person besides the accused persons at the bar. The accused persons herein did not by way of evidence exculpate themselves from the scene of crime and it is only logical that they are the ones who fatally assaulted the deceased. They were found at the scene of crime by Pw1 who saw them attacking the deceased who was then lying down. Nothing emerged from the defence or prosecution evidence that there was an altercation or confrontation between the deceased and accused persons took place. Further, there is no evidence that the deceased had interfered with the accused persons once they were on their way home from the bar. Hence, the killing of the deceased was out of malice. Even if the deceased had been a nuisance at the bar, he did not deserve to die.
42. Taken wholly, I find the prosecution proved its case beyond reasonable doubt. Consequently, I find the three accused persons herein Andrew Masinde Walumoli, Samuel Mungasa Alias Chepkube and Zachariah Makhakara guilty of the charge of murder and are each convicted accordingly.

Dated and delivered at Bungoma this 19TH day of APRIL 2024

D.KEMEI

JUDGE

In the presence of :

Andrew Masinde 1st Accused

Samuel Mangase 2nd Accused

Zacharia Makhakara 3rd Accused

Miss Wanyama for Masengeli for 1st Accused

Miss Lunani for 2nd Accused

HP Wamalwa for 3rd Accused

Wekesa for Wamalwa Simiyu (watching brief)

Miss Kibet for Prosecution

Kizito Court Assistant



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