



**Republic v Beko (Criminal Case E004 of 2020)  
[2024] KEHC 6013 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E004 OF 2020**

**JN NJAGI, J**

**APRIL 12, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BEKO MOHAMMED BEKO ..... ACCUSED**

**JUDGMENT**

1. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 14<sup>th</sup> December 2020 at Manyatta Bulji location in Moyale Sub- County within Marsabit County he murdered Kumbe Woche (herein referred to as the deceased).
2. The prosecution called 5 witnesses in the case. At the close of the prosecution case the court found the prosecution to have established a prima facie case against the accused and placed him to his defence. The accused defended himself and called one witness.

**Prosecution Case**

3. A brother to the deceased, Shafa Woche PW1 testified that he is a boda boda operator in Moyale town at Ap stage. That on the material day he was on his way home on his motor cycle when he found the deceased and the accused. He picked the deceased and they headed towards their home at Bulji village. The deceased was riding the motor cycle at the time. They found the accused on the way, having passed by a different direction. He was riding his motor cycle. The accused ordered them to stop. They alighted from the motor cycle. The accused approached the deceased and started to hit him with fists. The deceased responded and the two started to fight. PW1 held the deceased. The accused drew backwards and picked a huge stone. He threw it at the deceased and hit him on the right side of the neck. The deceased fell down. The accused escaped and left his motor cycle there. Other people went there. The deceased died on the spot. PW1 took the body to the sub-county hospital mortuary.



4. Abdikadir Mohamed Woche, PW2, testified that he is a boda boda operator at AP stage in Moyale town. That on the material day at around 6 pm he was at his base when the deceased went there and said that he was looking for Beko, the accused. Somebody gave him the mobile phone number of the accused. He called the accused. The accused went to the base on his motorcycle. He asked the deceased what the problem was. The deceased jumped on him and head butted him. The two started to fight. They separated them. An administration Policeman went to the place. They all dispersed. After about 20 minutes he heard that the deceased had died. It was his evidence that the deceased's brother PW1 was there when the deceased and the accused fought. He said that the accused was a boda boda operator with them at the AP stage.
5. Dr. Dambe Bako PW3 of Moyale Sub-County Hospital testified that he performed a postmortem on the body of the deceased on the 14<sup>th</sup> December 2020 at 10 pm. That he found the body with a swelling on the right temporal area, an abrasion on the right lower lateral neck of approximately 2cm x 0.5 cm and 4cm x 0.5 cm. There was also an abrasion on the face and dry blood on the right nostril. He formed the opinion that the cause of death was due to severe head injury and bleeding in the brain.
6. PC Abdi Omar PW4 of Manyatta police patrol base testified that on the material day 8.30 pm he was at the base when the accused went running to the base. He was crying and bleeding from the nostrils. He said that he had been beaten by boda boda operators. He asked to be taken to hospital. Then a group of boda boda operators went to the base crying for the accused's blood. One of them called Shaba said that the accused had hit his brother with a stone. He, PC Omar, hid the accused in the office and called the OCS. The OCS sent a vehicle and policemen. They picked the accused and took him to Moyale police station.
7. The case was investigated by PC John Mumina PW5 of Moyale DCI Office. His evidence was that on the material day at 8.30 pm he received a report from a colleague that somebody had been killed and the body taken to Moyale sub county hospital. He filled a post mortem report and proceeded to the hospital. He found the body at the hospital mortuary. He took photographs of the body using his mobile phone. A doctor performed a post mortem on the body and completed the post mortem report. He took the body to Bulji manyatta and released it to relatives for burial. That on 25/1/2020 he took his phone to the scenes of crime office at Marsabit. A scenes of crime officer printed the photographs.
8. It was further evidence of PC Mumina PW5 that he met the accused on the following day at the DCI's office. That the accused had severe injuries. That he had been taken to hospital and returned to the police station. The accused was charged with the offence. During the hearing he produced the photographs in court as exhibits, P.Exh. 2(a) – (d). The doctor PW3 produced the post mortem report as exhibit, P.Exh.1.

### **Defence Case**

9. When placed to his defence, the accused stated in a sworn statement that he is a boda boda operator in Moyale town. That the deceased was also a boda boda operator. That on the evening of the material day he was at his house when a certain person phoned him and asked him to go to their base near the police station. He went there on his motor cycle. On getting to the place he found the deceased and his brother Shaba. The deceased asked him whether he is the person he had called over phone. He answered that he was the one. The deceased then slapped him. He fell down. The person kicked him. Fellow boda boda operators separated them. Policemen went to the place. The other boda boda operators disappeared. He rose up and ran to the police station. He started to make a report. A person went to the police station and reported that the person who had kicked him had died. He was put in the cells. He denied that he killed the deceased.



10. The accused's witness, Kadi Sargin DW2 told the court that he was a boda boda operator. That the accused was also a boda boda operator and they were operating from the same stage. That on the 14/12/20 at around 7 pm he was at AP Lines boda boda stage. The deceased went there in his tuk tuk motor vehicle while drunk. He asked them where the accused was. They did not answer him. He asked them for his mobile phone number but they did not give him. A brother to the deceased went there and gave the deceased the phone number for the accused. The deceased called the accused and told him to go to the stage. The accused went to the place on his motor cycle. Before the accused alighted from his motor cycle, the deceased hit him with a blow and kicked him. The accused fell down. The boda boda operators who were there tried to stop the deceased and his brother from beating the accused. Administration policemen were there. The deceased and his brother escaped. The policemen told the accused to report at the police station.

### **Submissions**

11. Counsel for the accused submitted that the case against the accused was not proved beyond reasonable doubt. It was submitted that the evidence adduced by the prosecution that the accused committed the offence is doubtful. That it is doubtful whether the accused was at the scene of the offence. That the prosecution was in the case trying to shift the burden of proof on the accused.
12. It was submitted that the prosecution was relying on circumstantial evidence but the parameters for relying on circumstantial evidence were not met. Therefore, that the prosecution had failed to prove the charge against the accused and the accused should be acquitted.
13. The prosecution did not tender any submissions in the case.

### **Analysis and Determination**

14. This being a criminal case, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller vs. 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.”
15. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
16. 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.”



17. 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 vs 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. There is no doubt as regards the death and cause of death of the deceased. The death was confirmed by the evidence of the Dr. Dambe, PW3, who carried out a postmortem on the body and reached a conclusion that the cause of death was due to severe head injury and bleeding into the brain. I have no reason to doubt the doctor's finding on the cause of death. The elements of the death and cause of death of the deceased were therefore proved.
19. The next issue for determination is whether it is the accused person who caused the death of the deceased.
20. The evidence of the deceased's brother PW1 was that he picked the deceased at a place where he was with the accused. That he and the deceased rode towards their home but they found the accused ahead. That the accused started to fight with the deceased. That in the course of the fight the accused picked a huge stone and threw it on the deceased and hit him on the right side of the neck. That the deceased died on the spot.
21. Abdikadir Mohamed PW2 however stated that the accused and the deceased fought at their boda boda stage. That policemen appeared and the accused, the deceased and other boda boda operators who were there dispersed.
22. It is worth of note that the deceased's brother PW1 did not mention what he found the deceased and the accused doing when he said that he found the deceased and his brother together. He did not mention that the deceased and the accused fought at the boda boda stage, which evidence was adduced by Abdikadir PW2 and the accused's witness, Kadir Sargin DW2. It is then evident that the accused and the deceased fought at the boda boda stage. I believe the evidence of Abdikadir PW2 that policemen appeared in the course of the fight and everybody disappeared, including the deceased and the accused. There is no truth in the defence of the accused that he remained around when policemen appeared and he immediately went to report to the police.



23. It is evident that the deceased was seriously injured which resulted to his death. Though the accused admitted in cross-examination that there was a scuffle between him and the deceased at the boda boda shed, he did not say that the deceased received any injuries during the scuffle. Abdikadir PW2 was at the boda boda stage when the deceased and the accused fought. He did not see the deceased receiving such injuries that could have led to his death. The accused's witness DW2 was also at the boda boda stage and he did not see the deceased receiving such injuries. It is then clear that the injuries that led to the death of the deceased were not received at the boda boda stage but elsewhere.
24. The deceased's brother PW1 testified that after he picked the deceased they found the accused way laying them ahead. That the accused and the deceased started to fight in the cause of which the accused picked a stone and hauled it on the deceased. He was hit on the neck. The deceased died on the spot.
25. I have no reason to doubt that it is the accused who killed the deceased by hitting him with a stone. The brother to the deceased PW1 witnessed the accused hitting the deceased with the stone. Nobody else was involved in a fight with the deceased. It is therefore only the deceased who could have caused his death. The accused was also injured in the cause of the fight and he was taken to hospital. There is no truth in the accused's denials that he is not the one who killed the deceased. The prosecution did prove that the accused committed the unlawful act that caused the death of the deceased.
26. The last issue is whether the accused caused the death of the deceased with malice aforethought.
27. Malice aforethought is defined in Section 206 of the Penal Code in the following terms:
- (a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - (b) Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
  - (c) An intent to commit a felony.
  - (d) An intention to facilitate the escape from custody of a person who has committed a felony.
28. The evidence adduced in this case is that the accused and the deceased were fighting when the deceased hit the deceased with a stone thereby causing his death. The death was thereby not intentional but is something that happened at the spur of the moment. Malice aforethought was thereby not proved against the accused. Without proof of malice aforethought, there is no murder.
29. In the case of *Roba Galma Wario vs Republic* [2015] eKLR, it was held that;
- “For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
30. The same was held in *Nzuki vs. Republic* (1993) KLR 171, where the Court in substituting a charge of murder with manslaughter stated that:
- In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”



31. The accused in this case did kill the deceased by an unlawful act. Section 202(1) of the *Penal Code* provides as follows:
- (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
32. Section 205 of the same provides as follows:
- Punishment of manslaughter
- Any person who commits the felony of manslaughter is liable to imprisonment for life.
33. Section 179 of the *Criminal Procedure Code* provides that:
- 179.
- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
34. The offence of manslaughter is a minor offence to the offence of murder. The accused may therefore be convicted of the offence of manslaughter where facts proved reduce the offence from that of murder to that of manslaughter.
35. I find the offence committed in this case to be manslaughter and thereby reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder and convict him for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Nyenyire for accused

Mr. Otieno for Republic

Court Assistant – Jarso

