



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Malala (Criminal Case E011 of 2021)
[2024] KEHC 16854 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 16854 (KLR)

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

DK KEMEL, J

MAY 17, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

WYCLIFFE MUKANDA MALALA ACCUSED

JUDGMENT

1. The accused herein Wycliffe Mukanda Malala has been charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the night of 23rd and 24th March, 2011 at Kibachenje village, Bumula Sub- County within Bungoma County, he murdered Christine Nekesa Malala.
2. The prosecution called eleven (11) 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 her 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 Mapesa 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 the right hand. He added that the accused was then relaxing at his house as if nothing had happened but who was later picked up by the police and taken in for questioning.
On cross-examination, he sated that he did not witness the incident and that he could not tell the person responsible for the death of the deceased.



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 that 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 the 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. Isaiah 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 into pieces. 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. No. 42672 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 examination 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. Vide a ruling dated 15th January, 2024, this court found that the prosecution had established a prima facie case against the accused and who was duly placed on his defence. Her tendered a sworn evidence.
15. Wycliffe Mukanda Malala (Dw1) testified that the deceased herein was his mother and that on the 23rd and 24th March, 2021 he went to the farm planting maize in company of Isaiah Osendo(Pw7), Christine Nekesa, Philip Malala (Pw8) and that later in the evening he retired to his house and that the following day he was apprehended by the clan elder and escorted to Mateka police post and later to Bumula police station from where he was charged with the offence herein. He denied committing the alleged offence and maintained that the witnesses told lies. He stated that one of his children namely Diana Malala (Pw6) confirmed that she had a grudge against him.

On cross-examination, he stated that Samuel Nyangweso Mapesa is an uncle while Philip Malala (Pw8) is a nephew while Julia Auma (Pw5) is his daughter while Isaiah Osendo (Pw7) is a cousin. He added that he had no differences with the deceased.

16. Learned counsel for the prosecution opted to rely on the evidence adduced while counsel for the defence filed submissions dated 3.4.2024.
17. I have given due consideration to the evidence presented by the prosecution and defence as well as submissions filed. It is not in dispute that the accused and some of the prosecution witnesses were together planting maize at the farm belonging to the deceased on the material date until 4.00 PM. The only issue for determination is whether the prosecution has proved its case against the accused beyond any reasonable doubt.
18. It is trite that the burden to prove all the ingredients of the offence herein falls on the prosecution in all cases save for a few statutory offences. The standard of proof in all criminal cases is that of proof



beyond reasonable doubt. Proof beyond reasonable doubt has been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. See *Miller v Minister of Pensions* [147] ALL ER 372. In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have to prove his innocence or justify his alibi. For a conviction to be secured, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused.

19. The ingredients that the prosecution is required to prove in a charge of murder are *inter alia*; that there was death of a human being; that it was unlawfully caused with malice aforethought either directly or indirectly by the accused.
20. As regards the fact of death, there is a post mortem report prepared and produced as an exhibit by Dr Elly Kiplimo Kosgei (PW11) who formed the opinion that the cause of death was cardio respiratory arrest due to collapsed right lung with fractured humerus and ruptured gall bladder due to a blunt object. This ingredient was proved by the prosecution beyond reasonable doubt.
21. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2015]eKLR that referred to the case of *Guzambizi Wesonga v Republic* [1948] 15 EACA where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example, in self defence or in defence of property.”
22. The deceased herein was found to have died of several injuries such as fractured right humerus, collapsed right lung as well as a ruptured gall bladder. The pathologist (PW11) formed the opinion that the cause of death was cardiorespiratory arrest due to collapsed right lung(pneumothorax) with fractured humerus and ruptured gall bladder which were as a result of a blunt object. It was upon the prosecution to prove that the accused assaulted the deceased and that he had the malice aforethought and therefore not excusable. Further, the prosecution was to avail evidence which placed the accused at the scene of crime as the assailant. The injuries as disclosed in the post mortem report and the evidence of the pathologist left no doubt that the perpetrator intended the injuries to lead to the death of the deceased. I find this ingredient was proved by the prosecution beyond any reasonable doubt.
23. As to the identity of the accused as the assailant, the accused in his defence evidence confirmed that he was present on the material date planting maize with some of the prosecution witnesses at the farm belonging to the deceased herein. The evidence of PW5, PW6, PW7 and PW8 placed the accused squarely at the scene of crime. The said witnesses were at the scene of the crime and witnessed the accused the deceased with a huge stick and that he also assaulted PW8 who had attempted to come to the rescue of the deceased. The evidence of the four witnesses was cogent and that the witnesses were not shaken at all even on cross-examination. The injuries inflicted on the deceased left no doubt that the accused really wanted to finish off the deceased. It is instructive that the accused upon assaulting the deceased left for his house nearby without a care in the world. It transpired from the evidence that the accused was incensed by the decision to distribute the family land among female children and further by a claim by the accused that the deceased had been a witch and had bewitched his children. I find this was the motive behind the killing of the deceased and hence the accused had the requisite malice aforethought. Accused’s own daughters (PW5 and PW6) were at the scene of crime and witnessed the same and further confirmed that the accused had been a violent person all along and whom they feared



and dreaded. The defence evidence did not shake that of the prosecution which is quite overwhelming against the accused. The incident took place in broad daylight and that the witnesses did not have any problem with the accused prior to the incident. I am thus satisfied that the accused was placed squarely at the scene of crime. He was later arrested within the vicinity of the crime and handed over to the police. I have no doubt that the accused is the one who killed the deceased. He had harboured a plan to eliminate her following her resolve to distribute the family land to her daughters whereas the accused had wanted to have it for himself. The accused also claimed that the deceased had been a witch. All these formed the malice aforethought on the part of the accused and who thus actualized the same on the material date. Had the accused resorted to other channels of redress such as engaging the clan elder (Mukasa), the deceased would be alive today. The deceased died a very painful death as she was abandoned in her house until the following morning. I find that the prosecution proved this ingredient beyond reasonable doubt.

24. The defence offered by the accused was full of mere denials save only to admit that he was present on the material date planting maize at the farm of the deceased. The incident took place in broad daylight and that two his daughters (PW5 and PW6) were present and who saw their father attacking the deceased. The said witnesses had no reason at all to frame up their father for the crime. Again, PW8 who had sought to assist the deceased was also hit by the accused forcing him to seek refuge inside a sugar plantation until the following day. I find the evidence by the accused did not shake that of the prosecution which is overwhelming against him.
25. In the result, it is my finding that the prosecution has proved its case against the accused herein Wycliffe Mukanda Malala beyond any reasonable doubt. I find him guilty as charged and convicted accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY, 2024

D.KEMEI

JUDGE

In the presence of :

Wycliffe Mukanda Accused

Wekesa for Wamalwa Simiu for Accused

Miss Kibet for Prosecution

Kizito Court Assistant

