



**Republic v Mateche & another (Criminal Case 29 of 2016)  
[2024] KEHC 5547 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 29 OF 2016**

**PJO OTIENO, J**

**MAY 6, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SAMUEL MATECHE ..... 1<sup>ST</sup> ACCUSED**

**SILAS MATECHE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons stand charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 13<sup>th</sup> day of May, 2016 at Kituyi village, Ikoli sub location, Chesero location in Kakamega North Division within Kakamega County the accused persons jointly murdered Alex Mateche. The two pleaded not guilty to the charge hence the prosecution was confronted with the duty to discharge the burden of proof under Section 107(1) of the *Evidence Act*. The prosecution paraded and led evidence from five witnesses.
2. PW1 was Wilberforce Chitai who testified that on 13/5/2016 at about 9AM he was at Ikoli market when police officers went to his brother Joseph Mateche’s shop and interrogated him why him and his sons had plotted to kill the deceased. The police said the deceased had reported a threat against his life. Joseph Mateche promised the police that he would take his sons to the police station the following day and the police officers went away.
3. While still at the shop, the deceased wife one Princes came and informed Joseph Mateche that Silas Mateche and Chitai Mateche, sons to Joseph and brothers to the deceased, had tied up the deceased on a tree and they were beating him up. After delivering the message she took a boda boda and returned home while the witness also took another boda boda and headed to the home of the deceased. At the home, he found many people with Silas and Chitai were indeed beating the deceased with a bicycle steel fox and a steel tape while he was tied on a tree.



4. With the help of Sunday Imbito, Ben Shikube, Francis Shikube, Amos Tshwaya and Eric Lubonga they untied the deceased who was breathing from a distance, placed him on a bicycle and took him to Manyatta Private Clinic. The deceased was bleeding from the head, nostrils, left hand, left knee and right knee. The deceased died the next day at 5PM. They then reported the incident with the police. He discounted the position by Joseph Mateche that the deceased hit a door which led to his death. The police then visited the scene of the attack and collected the weapons used to kill the deceased and further took photos of the deceased at the clinic. The body was then taken to Webuye Hospital Mortuary and Joseph Mateche and his wife were later arrested. He stated that Silas Mateche was the 1<sup>st</sup> accused in the dock while Chitai was the 2<sup>nd</sup> accused in the dock. He also identified the steel fox and the steel tape and further stated that he did not know why the accused persons were beating the deceased.
5. On cross examination he indicated that the deceased had two wives one princess and Eunice and that the deceased's mother did not like the 2<sup>nd</sup> wife Eunice and wanted the 1<sup>st</sup> wife Princess to return to the homestead which they shared with the deceased. He also detailed that he saw the accused persons beating up the deceased while standing about 10 steps from them and that the accused persons ran away as his team approached. With the leave of the court his statement was marked "DMFI.1".
6. PW2, Joyce Mateche testified that he was the mother to the deceased and the accused persons and that on 13/5/2016 at 7PM the deceased was fighting with his wife, Princess, in their house and she screamed drawing the attention of the accused persons who came to the scene and they took the deceased to hospital where he died. The prosecutor considered the witness to have retracted her statement, stood her down but was never recalled. Her evidence was thus not tested by cross-examination and to that extent the court considered it to have no probative value.
7. PW3, John Imbotu Mutayi testified that the deceased was his nephew by virtue of being a son to his brother and that on 14/5/2016 at 6AM he was at home when he received a call from a boda boda rider by the name of Wilberforce informing him that the deceased had been taken to Manyatta Clinic the previous night and he headed to the clinic where he found that the deceased had died. He then reported the incident at the Kabras Police Station and with the help of the police the deceased's body was taken from the clinic to Webuye Hospital Mortuary. He claimed not to know what led to the death of the deceased but added that when he went to the Accused's boma they were holding in maize plantation. The defence chose not to cross-examine him.
8. PW4, No 77979 PC Sudi Koyabe testified that he was the investigating officer formerly attached at Kabras Police Station and that on 14/5/2016 in the company of the OCS CI Odera they headed to the scene of murder where he interrogated witnesses and discovered that the deceased's body had been taken to Manyatta Clinic. From the scene the team recovered two forks and a curtain which he produced as PEXH 1, PEXH 2 and PEXH 3 respectively. The team then headed to the clinic and took the body to Webuye Mortuary. He stated that a witness by the name of princess stated that she saw the accused persons beating the deceased. The Prosecutor however closed its case without calling the said Princess. In cross-examination, the witness said he made a decision to charge based on the statement of Princess.
9. PW5 No 236777, was IP Caleb Onyango of Kabras Police Station who testified that he picked up the matter from the initial investigating officer that is, PW4 and was called purely to produce the autopsy report. He produced the autopsy report prepared by Dr. Were of Webuye Sub County Hospital which indicated that the deceased died due to severe cardiopulmonary collapse secondary to severe head injury following assault. He also produced two metal rods recovered at the scene and which were believed to have been used to commit the offence. The defence Counsel opted not to cross-examine the witness.



10. The evidence of PW5 marked the close of the prosecution case and after the court ruled that a *prima facie* case had been established against the accused persons, the two were thus placed on their defence. Both elected to give sworn evidence.
11. The 1<sup>st</sup> Accused, Samwel Mateche testified as DW1 and in his sworn evidence he stated that the deceased was his younger brother and that on 13/5/2016 he returned home between 6-7PM from his boda boda business and found his mother wailing outside the deceased's house because the deceased had locked himself in the house with his wife Princess. He claimed that in the company of the 2<sup>nd</sup> accused they approached the house and found the deceased alone lying on the ground while bleeding from the head and legs. They took him to hospital and left him there being attended to and the next day when they went to visit him at the hospital they learnt that he had died. The police took his body to the mortuary and his uncle informed him to go tell the police what happened and while at the station he was arrested.
12. On cross examination he stated that he did not see the deceased's wife that evening and that the deceased and his wife would fight and had fought three days prior to the incident. He also stated at the time of the incident only him, his mother, the 2<sup>nd</sup> accused and children were present in the homestead.
13. The 2<sup>nd</sup> accused, Silas Mateche, testified as DW2 and stated that on 13/5/2016, he returned home from his boda boda business at about 4PM and when it got to 6:50 PM his son Vincent called him to help DW1 separate a fight between the deceased and his wife. When he got to the deceased's house he only found the deceased who was lying on the ground and was bleeding from the head, nose and legs. They took him to hospital where he was admitted and he died the next day. The body was taken to the mortuary and when he went to the hospital to record his statement he was arrested.
14. On cross examination he stated that when he went to the deceased house, he found DW1 outside the house and they entered together and found the deceased on the ground while their mother was nearby.
15. The defence closed their case and parties proceeded to file their respective submissions which the court has studied and commends both Counsel for the industry.
16. It is the submission by the prosecution that it has proved the offence of murder against the accused to the requisite standards in that the death of the deceased was proven by the post mortem report.
17. On whether the death of the deceased was occasioned by an unlawful act it is submitted that according to the post mortem report, the deceased's cause of death was severe cardiopulmonary collapse secondary to severe injury following assault. On whether it was the accused persons who inflicted the injuries on the deceased they submit that PW1 testified that upon learning that the accused persons were beating the deceased he proceeded to the scene and upon his arrival the accused persons stopped beating the deceased and he was assisted to untie the deceased after which they took the deceased to hospital.
18. The prosecution submits that the incident leading to the death of the deceased can be proved by the evidence of a single witness provided the conditions are favorable. Reliance was placed on the case of *Robert Onchiri Ogeto v Republic* (2004) eKLR. It is further argued that the evidence of PW1 on identification was consistent and coherent, the incident happened during the day and that PW1's case was a case of recognition rather than identification.
19. On the last element of malice aforethought, the prosecution argues that the injuries suffered by the deceased which included a deep cut on the skull, bleeding from the right ear and nostrils, bruises and fracture of the right patella bone demonstrate malice aforethought on the part of the accused persons. The prosecution contends that malice aforethought can be inferred from the weapon used being steel



- rod and the fact that the accused persons fled the scene leaving the deceased at the mercy of other people to assist him.
20. It is the submission by the defence that the evidence of the prosecution witnesses suggests that there was a heated dispute involving assault of the deceased by one Princess and there is a possibility that the deceased received fatal injuries from his wife princess. They further question why the prosecution did not subject the exhibits to forensic examination in order to prove that the accused persons at any time handled the exhibits.
  21. The offence of murder is created and defined in section 203 of the *Penal Code* to be committed when any person who of malice aforethought, causes death of another person by an unlawful act or omission. The prosecutor needs to prove, beyond reasonable doubt that the deceased named, is indeed death and the death was caused by the unlawful acts or omission of the Accused while propelled by malice aforethought.
  22. It thus behoves every court trying any person for murder to demand that the prosecution proves the three ingredients of murder to the requisite standards in criminal trial. Therefore, for the prosecution to sustain a conviction, all the ingredients contained in section 203 of the penal code ought to be proved beyond reasonable doubt.
  23. There is no contention that Alex Mateche is deceased. The death is confirmed by all witnesses including the two Accused as well as the autopsy report dated 17/5/2016. All say that the deceased died on 14/5/2016 at 6AM at Kambiri Clinic.
  24. The issue in dispute and which the court must resolve is whether the death was as a result of unlawful acts of the Accused and if in so conducting themselves the two were propelled by malice aforethought.
  25. That the Accused persons and the deceased are blood brothers is common ground. Of the five prosecution witnesses, the testimony of PW1 was the most direct on the events that led to the death of the deceased. It was his evidence that the deceased's wife informed the deceased's father that the accused persons were beating up the deceased. She did so in the presence of PW1 who then took a motor bike and headed to the scene where he found the deceased had been tied to a tree while the accused persons were beating him up with a rod. The accused persons fled and in the company of others they untied the deceased and took him to hospital since he was breathing from a distance. His testimony was very coherent and he did not mince his recount of what happened on the material day. Because no other witness was present to corroborate that evidence, the court must still determine if that evidence alone suffices.
  26. In this matter the evidence of PW1 is corroborated by the autopsy report which capture injuries on the parts of the body talked of by PW1.
  27. The Court of Appeal in *Robert Onchiri Ogeto v Republic* [2004] eKLR has given evidence on the position when it held on the evidence of a single witness and said: -

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it is shown that conditions favouring a correct identification were difficult – see *Marube & another v Republic* [1986] KLR 356. Further, the Court, has to bear in mind that it is possible for a witness to be honest, but to be mistaken – *Kiarie v Republic* (supra). In this case, Onkoba was subjected to intense cross-examination but his evidence was not shaken and it remained consistent all through. He knew the appellant before. In fact the evidence of Onkoba, Migiro and the evidence of PC Misiko show that the appellant, Onkoba and



Migiro come from the same neighborhood. Migiro also knew the appellant before. Onkoba said that deceased was stabbed at about 6 pm and that there was sunlight. Similarly, Migiro testified that it was not yet dark when the appellant attacked him.”

28. According to PW1 the event happened during the day at about 9AM and he was therefore able to have a clear view of what happened. Even though the accused persons have created a narrative that the deceased was attacked by his wife Princess and that there is a possibility that it as a result of the injuries inflicted by the wife that the deceased died, the court does not buy that narrative. The first reason is that PW1 was consistent and coherent on the events that took place on the material day. Secondly, if the deceased and the wife were locked in the house fighting and when the accused persons opened the door the wife was missing, how and to where did the wife escape to since PW2 was standing outside their house. The court takes the view that this is a case where a mother is afraid to lose her three sons and therefore opts to save two, that is the Accused persons. The evidence by the two Accused and the attempt by the mother, PW2, are not credible nor capable of belief.
29. The court is thus satisfied that the prosecution proved beyond reasonable doubt that it was the Accused persons who tied the deceased on a tree and assaulted him thus inflicting the grievous injuries leading to his death.
30. On the last elements of malice aforethought, section 206 of the *Penal Code* leads the court to infer malice aforethought on the Accused where there is proved: -
  - “(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 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;
  - (c) An intent to commit a felony;
  - (d) ...”
31. With the evidence of physical assault upon the deceased by his two brothers, the Accused persons, with the use of metal rode there is no other inferable intention than the intension to do grievous harm or death. When the head is targeted as the object of assault, the intention becomes more planned and well executed.
32. To this Court section 206 of the *Penal Code* is an application of the law that it is difficult to prove intention by direct evidence. On many occasions surrounding circumstances may be the only material to discern the intention of an offender the court is thus guided by the decision of the Court of Appeal in *Bonaya Tutuu Ipu and another v Republic* (2015) eKLR where it was observed: -

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, Criminal Application No 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, it any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere*



*S/O Ochen* (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick....”.

33. According to PW1 the accused persons beat the deceased with a rod and when PW4 headed to the scene he recovered two forks that were used to attack the deceased. The deceased was tied to a tree helpless and at the mercy of the two accused persons whom he considered family and even after beating up the deceased, the accused persons abandoned the deceased tied up to the tree. The injuries inflicted on the deceased according to the post mortem report were a deep cut wound to the skull with underlying skull fracture, bleeding from the right ear and nostrils, generalized bruises and fracture of the right patella bone. The injuries inflicted, the weapon used, the part of the body attacked and the actions of the accused persons after beating the deceased all point to a desire and intention to grievously harm if not kill him outrightly. The court thus infers malice aforethought on the part of the Accused persons and determine that all the ingredients of the offence of murder have been proved beyond reasonable doubt.
34. Accordingly, the court finds the Accused persons guilty for the offence of murder as charged and convict them accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF MAY, 2024.**

**PATRICK J O OTIENO**

**JUDGE**

In the presence of:

Mr. Momanyi for the Accused

Ms. Chala for the Prosecution

Court Assistant: Polycap

