



**Republic v Musiega (Criminal Case 7 of 2018)
[2023] KEHC 609 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 7 OF 2018
WM MUSYOKA, J
FEBRUARY 6, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MARTIN MUSIEGA ACCUSED

JUDGMENT

1. Martin Musiega is charged with murder, contrary to section 203, as read with section 204, of the [Penal Code](#), Cap 63, Laws of Kenya. Particulars of the offence allege that on the 23rd day of January 2018, at Shimalavandi area, Ichina village, Lurambi Division, within Kakamega County, he, jointly with others not before the court, murdered Brava Premji, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 14th February 2018. The hearing of the case for the prosecution commenced on 31st October 2019. 7 witnesses testified.
2. The first on the stand was Ainea Alex Chahenza, who testified as PW1. He stated that his wife had informed him, on 21st August 2018, that the deceased, who was his nephew, was in hospital at Kakamega. He travelled to Kakamega on 22nd August 2018, and found the deceased and the accused at the hospital. The doctor asked for a CT-scan, and he and the accused took the deceased for one. He left after that; he was later informed by the accused that the deceased had died. He rushed back to the hospital, to confirm the news. He saw the body. The accused asked him to escort him to the police station, which he did. The accused recorded a statement, after which they returned to the hospital with police officers. He recorded his statement at the police station on 24th January 2018. He stated that he had been told that the deceased had been assaulted at a matanga. The deceased told him that he had disagreed with some young men, but he did not mention any names. He said that he saw injuries on his face.
3. Wilson Siema Muchembi testified as PW2. He was the village elder, liguru, for the area. He testified that the accused and the deceased were his neighbours, and resided within his area of jurisdiction. He stated



that on 21st January 2018, he saw 3 police officers on a motorcycle going to the home of the accused, and he followed them. When he got to that home, he saw a child lying on a veranda, the deceased herein. The accused and another child, called John, were present. The police asked him to assist them put the deceased on the vehicle, but he refused, and they were assisted by the accused and John. He stated that he heard the deceased say that he had been assaulted by the accused, who was a brother of the father of the deceased. He stated that the deceased was not bleeding, and appeared to have had sustained internal injuries. He later heard that he died in hospital. During cross-examination, he stated that the deceased lived in the same compound with the accused, and with his grandparents. He said he was not present when the accused was assaulted, but when he visited the home, and found many people there, he was present when the deceased said that it was the accused who had beaten him. He said that he conveyed that information to the police, but again said that he did not. During re-examination, he stated that the deceased said, in his presence and that of the police, that it was the accused who had assaulted him.

4. Aggrey Nandwa Mbinwa testified as PW3. He was a villager elder. He stated that he knew the accused and the deceased, and that the accused was a son of Salome Musiega, while the deceased was Salome's grandson, and a nephew of the accused. On 22nd February 2018, Salome had come to his home and informed him that she wanted him to inform the Chief that the deceased had been taken to hospital. He conveyed that information to the Chief. He stated that Salome had previously informed him that the deceased was troublesome at the boma, for having vandalised a vehicle belonging to the accused. He later heard that the deceased had died, and he relayed that information to the Chief and his assistant. The Chief instructed him to visit the home, which he did. He was told by Salome that the deceased had come from a matanga. He said that no one told him who had injured the deceased. He said, during cross-examination, that he had previously been informed by Salome about the bad ways of the deceased, such as stealing maize and other things. He said that in his statement to the police he had mentioned those who had injured the deceased. He said that the deceased was with Willy Otunga, Tix and John, and at it was them who knew how he got injured. During cross-examination, he said that the deceased was among those who injured him.
5. Dr. Dickson Mchana Mwaludindi, followed as PW4. He was the pathologist who did an autopsy on the body of the deceased, on 2nd February 2018. He identified external injuries on the body, taking the form of disseminated contusions on the neck, both upper and lower limbs, left chest, entire back and skull. Internally, there was bleeding into the left chest muscles, and mild tiny clots on the surface of the lungs, and bruising of the left lung. There was also an injury to both kidneys. There were whip marks on the skin, with bleeding. He opined that cause of death was due to shock or circulatory collapse, secondary to widespread soft tissue injuries, following assault. He said the probable weapon was a solid whip or rope, as there were many random whip marks on the body.
6. Corporal Auma Josepher Okumu, service number 22xxxx, testified as PW5. She stated that the accused had previously reported at the Lurambi Administration Police Camp that his nephew had been stealing from him. She could not recall the name of the nephew. She stated that the accused telephoned her on 21st January 2018, to inform her that he had caught the person who had been stealing from his home. She got 2 police officers to accompany her to the home of the accused. The 2 were Administration Police Constables Alex Monari and Wilson Langat. They used 3 motorcycles. They found members of the public at the home. The accused took her into his house, where she found the deceased lying on the floor, with his hands tied with a rope, and he appeared as if he had been beaten, for he had swellings on the wrists. She said that she asked the accused why he had to assault the deceased, and then call the police, and he responded that he had gotten him at 11.00 PM the previous night. She said that the deceased was still alive, and was crying. When she asked the deceased who had assaulted him, he said "Martin aliniumiza bure." When he questioned the accused about the assault, he told her that he had just disciplined him, to get him to stop his habit of stealing. He said that he had made



previous reports of theft of a car battery, and assorted household goods. She informed her superiors, who linked her up with the local head of the regular police, who sent Inspector of Police Ogada, PW7, who came to the scene with other officers in a vehicle, and they picked the deceased and took him to the Kakamega General Hospital. She was in the party that took the deceased to the hospital, where she was instructed to remain behind with the deceased, and she remained with him and the accused, until he was discharged on 21st January 2018. She handed the deceased over to PW7, who left with him for Kakamega Central Police Station, and she was given permission to leave. On 31st January 2018, PW7 informed her of the demise of the deceased. During cross-examination, she stated that she had not gone to the house of the accused to effect an arrest, but to respond to a distress call. She had been informed by the accused, that he had caught the person who had been stealing from him, and she had gone there to assist him arrest the person. She said that the deceased was inside the sitting room in the house of the accused, and his hands and feet were bound. She could not recall the state of his clothes. She was in the company of her police colleagues, when the deceased told her that the accused had badly injured him for nothing. She said that the deceased could not walk unsupported. She said that she did not record in her statement about what the deceased had told her on how he got his injuries, but she had informed the investigating officer, PW7, about it. She testified that she mentioned it to PW7 and Inspector Musonik. She expressed surprise that that bit of information was not in her statement. She said that the ropes were untied at the home of the accused, but could not tell who took the ropes. She said that the accused told her that he was disciplining the deceased, as he was tired of his stealing from him.

7. Police Sergeant David Sugut, service number 6xxxx, testified as PW6. He was on duty at the Kakamega Police Station on 24th January 2018, when 2 persons came to the station at midnight to report a death that had occurred at the Kakamega County Hospital. The reportees were the accused and his wife, who informed him that the deceased had been a victim of mob justice on 21st January 2018. He died at the hospital, where he had been for 2 days. He informed his superiors, and thereafter rushed to the hospital to confirm the report. He found that the body had been moved to the mortuary. On 25th January 2018, the accused came to the station to report that he had been threatened by members of the public, that they would destroy his property. The police locked him up in the cells for his own safety, and he was also treated as a suspect, pending further investigations. He said that he was not an investigating officer, but a duty officer to whom the report of the death was made, and who had arrested the accused after he came to report of the threats to his property. He said that he assisted with the investigations, for he visited the scene to see if he could get witnesses, and to also see the property of the accused, which needed to be secured.
8. PW7 was Inspector Otieno Ogada, service number 23xxxx. He testified that on 23rd January 2018, he was informed by Administration of Police Corporal Jasper Okumu, about a theft suspect who had been arrested by members of the public at Similarandu area, Ichina village, and was about to be lynched by a mob. He and his driver rushed to the scene. At the scene, he found the deceased lying at a corner at the house of the deceased. He asked the accused to explain to him what had transpired, and the accused told him about how the deceased had been stealing in the neighbourhood. He said that they had arrested him on 20th January 2018, but the police had not come for him despite several phone calls. He said that he rescued him from a mob, which was baying for his blood, and which had already injured him, and he took him to his house, and locked him in there, awaiting police collection or intervention. He testified that the police collected the deceased, and because of his injuries, they did not lock him in the cells, instead they took him to hospital. On 24th January 2018, it was reported to him by the duty officer, PW6, that the deceased had succumbed to his injuries. When the report of that death reached the village, villagers turned violent and wanted to harm the accused and destroy his property. The accused made a report of the matter to the police, and he, PW7, rushed to the scene, where he and



his team met a hostile crowd, which stoned their vehicle. One side was holding the accused responsible for the death, while the other was blaming the community at large. He said that when he first visited the scene, he found the deceased in the house of the accused, and he had a swollen head, with bruises on the head. During cross-examination, he stated that the deceased did not talk to him and his officers as his mouth was swollen. He said that other police officers had arrived earlier, it was probable that he had spoken to them. He said that the report that he got was about mob injustice.

9. I ruled, on 17th September 2021, that the accused person had a case to answer, and I put him on his defence. The defence hearing happened on 23rd February 2022. He testified that on 23rd January 2018 he was at the Kakamega County Referral Hospital, where he had taken his child, and that that child died on 24th January 2018, and he made a report of the death to the police. He denied inflicting injuries on the deceased on 20th January 2018. He said that a neighbour had informed him on 20th January 2018, that the deceased had been caught entering someone's house, and that he was beaten. His mother, who was also the grandmother of the deceased, instructed him to go there and rescue him, which he did. He said that it happened at the house of Otunga, who he said was deceased. He went there and found the deceased being beaten by neighbours, whose names he could not recall. They told him that the deceased had stolen a padlock from Lurambi. He then took him, with assistance of neighbours, and took him to his house. He telephoned police officers to make a report of the matter, but the calls were not picked. He called a caretaker of one of his houses, who came and helped him move the deceased to a room in his house, where he locked him up. The next morning, he was able to reach the police on telephone, and an Administration Police officer came to his house. He said that the deceased could not walk or talk then, and he thought that he was pretending. He stated that he and the police officer left some of their colleagues with the deceased, and went to one of the places where the deceased had said he had hidden the stolen items. A vehicle then came from Kakamega Police Station, and the deceased was taken to hospital. He accompanied the deceased to hospital. At one point, the deceased was stable, and he was taken to Kakamega Police Station, but he was later said to be unstable, and he was returned to the hospital, where he died. He reported the death to the police, and was advised to get in touch with the officer handling the matter. When he went to the police station, he was promptly arrested, and locked up, but was released in the morning. He stated that later that morning the Officer Commanding Station called him to tell him that the Chief had advised that the people would harm him, and that he should seek safety at the police station. He proceeded to the police station, where he was locked up. He stated that he had informed the police that he had found the deceased being beaten, and he produced his statement to the police as an exhibit, to support his case. During cross-examination, he stated the deceased was alright the previous night, could walk and talk, but next morning he could not walk or talk. He asserted that he had been beaten, and that he only went to rescue him. He said that his home was just 6 kilometres from the hospital. He said that he locked him up in his house. He stated that his wife, mother and children were present, but he said he would not call them as witnesses. He said that he was hurt by the deceased, on his finger, he informed the police, but he did not obtain a P3 form. In re-examination, he stated that none of the witnesses who testified said that they saw him assault the deceased, and because of that there was no need for him to lead evidence to counter what they had told the court.
10. At the close of the oral hearings, the accused, through his Advocate, Mr. K'Ombwayo, filed written submissions, dated 3rd May 2022. He submitted, citing *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR (Visram, Koome & Otieno-Odek, JJA), that there were 3 elements to the offence of murder that the State is required to establish, that is that the death of the deceased occurred, the responsibility of the accused in the causation of death, and malice aforethought. On the death, he submitted that that was not in dispute. On the role of the accused in the causation, he submitted that the record by the pathologist pointed to the deceased being assaulted, leading to his death, and the question was as



to who had assaulted him. He argued that the State was claiming that it was the accused who did it, but there was no positive evidence, as no one saw the accused assault him, and the only evidence was the alleged dying declaration by the deceased made to PW5. It is submitted that the burden was on the State to establish guilt on the part of the accused, and that the State had not established the same due to various inconsistencies and gaps in the evidence. Submissions have also been made on malice aforethought.

11. The elements of the offence of murder, as set out in section 203 of the *Penal Code*, are the fact of death, the cause of the death, the role of the accused person in the cause of the death, and the fact that the death is caused by the accused with malice aforethought.
12. From the material before me there is proof that the deceased in fact died. All the prosecution witnesses testified to the fact of his death. The pathologist, PW4, conducted a post mortem on his body, after it was identified by relatives. The cause of death is also not in dispute, it was said to be due to shock or circulatory collapse caused by widespread soft tissue injuries following assault. The contention is on who caused the death, for the issue of malice aforethought rides on proof of the third element.
13. So, who was responsible for the death of the deceased? The case presented by the State is ambivalent. One strand of it blames the accused. It emerges from the testimonies of PW2 and PW5. Both testified that the deceased had told them that it was the accused who had assaulted him. PW2 testified as follows on that point:

“I had heard the deceased saying that he was beaten by his uncle, Martin Musiega...Brian said in my presence that the accused beat him and injured him. It was said in the presence of other people...I told the police Brian himself spoke and said Martin was the one who beat him.”

PW5 on the other hand said:

“The deceased was still alive, he was crying. I asked him who beat him. He said in Kiswahili, “Martin aliniumiza bure.” ... I asked Martin why he had done so. He told me that he had just disciplined him. For him to stop the habit of stealing...He said that Martin had injured him for nothing, and had injured him very badly.”

14. The other strand came from PW1, PW6 and PW7, and it was to the effect that the deceased was injured by persons other than the accused. There are 2 sub-strands to this strand. The first is that by PW1, that the deceased was hurt at a matanga, by individuals that he met there, and disagreed with. He said that the deceased told him that, when he went to visit and tend to him while in hospital. He testified:

“When I went to hospital I had been told he had been assaulted at a matanga by some people. When I asked he told me he had disagreed with other young men at a matanga. He did not mention names...The deceased did not tell me who assaulted him.”

15. PW6 arrested the accused and PW7 is the investigating officer, their case is that the deceased was a victim of mob injustice, and he suffered his injuries in the hands of a mob that cornered him after he had committed a theft. This position tallies with the defence offered by the accused person. Both PW6 and PW7 testified on information from the accused and undisclosed sources. PW6 testified as follows:

“I found the accused person, Martin Musiega, and his wife, who told me that they were taking care of Bravin Prinja, who had been “mob-injusticed” on 21/1/2018. He had succumbed to death at County Hospital.”



PW7 testified:

“...I received phone call from one AP Corporal Jasper Okumu. That there was one suspect of theft arrested by members of the public ... and were about to lynch him... At the scene, one Bravin Prinja lay in a corner of a house belonging to the accused, Musiega Martin. I asked the owner of the house what had transpired, and he informed us that ... he rescued him from the wrath of the mob having arrested him...the deceased was injured, he rescued him and locked him in his house awaiting police collection or intervention. We collected the deceased, and due to fact that that he was injured we could not put him in the cells, so we took him to Kakamega District Hospital.”

16. As indicated above, the line taken by PW6 and PW7 tallies with the defence by the accused. He testified that the deceased had been cornered on the night of 20th January 2018, as a theft suspect, and was subjected to a beating by a mob. Neighbours alerted him of the incident, and he went to the scene, at Otunga's home, and witnessed the beating, and pleaded with the mob to leave him to him, and to release him to him. He said he was accompanied by his mother, who was the grandmother of the deceased, and the persons beating the deceased were neighbours, whose names he did not know.
17. If the court were to rely entirely on the testimony of the investigating officer, the conclusion would be that this is a case that ought not have been brought to court. PW7 was the investigating officer, yet in his own testimony, he did not implicate the accused at all with the death of the deceased. One would wonder why PW7 charged the accused with the death in the first place, if in his own testimony he could not lead evidence that points to his guilt. An Administration Police officer, who was at the scene at the house of the accused, that is PW5, gave clear testimony that the accused had previously reported a theft incident to her, then on 21st January 2018, the accused telephoned her and informed her that he had caught the thief, and she rushed to his house in the company of other officers, and found the deceased lying there badly injured. The deceased informed her that it was the accused who had assaulted him, and the accused conceded that he was the one who had done so, but his intention was just to discipline him. The testimony of PW5 was corroborated by PW2, a liguru or local headman. PW5 testified that she conveyed that information to PW7, when he came later. Indeed, PW7 conceded that PW5 called him to the scene, but she, PW5, did not tell him about the statement by the deceased that it was the accused who had beaten him. PW7 testified that the deceased did not tell him anything. Indeed, he did not talk to him at all. I find this curious, given that the deceased was still conscious, and talking. He even talked to PW1, when he allegedly talked about he having been assaulted at a matanga. The evidence on record indicates that his condition improved after sometime in hospital, and he was discharged, and taken to the police station, where the condition took a turn for the worse, and he had to be taken back to hospital, where he died. There was opportunity for PW7 to talk to him.
18. What is surprising is that PW7 presented witnesses in court who gave 3 versions of how the deceased met his death. One version was that he was beaten at a matanga, the second was that he was injured by a mob that was accusing him of theft, and the third was that it was the accused who beat him up. PW7, from his testimony, appeared to believe that the deceased was beaten by a mob, and the accused only saved him, so why charge him with the murder if he did not believe that he killed him? So, why present witnesses who would tell tales about the deceased being assaulted at a matanga? It does not add up. No witness was called to testify on what might have happened at the matanga, to shed light on where the matanga was, who was present, and who might have assaulted the deceased there? No witnesses were presented to adduce evidence on what allegedly happened at the home of Otunga, where the mob beating allegedly happened, although the names of some of those who were allegedly present were mentioned by PW3, who, himself, was not at that scene.



19. The testimony by PW7 points to 3 things. One, that he either conducted no investigations, and was happy to go along with the report that the accused gave at the police station, which was inconsistent with that he gave to PW5, another police officer. There were far too many loose ends that he needed to tie up in order to have coherence in the matter. He told the court nothing about the matanga that PW1 talked about. Did he investigate whether or not the deceased might have been injured at the alleged matanga? Did he rule out the matanga theory? If he did conduct investigations relating to that matanga, why did he not testify on his findings? That would have been critical, given that one of the witnesses, that he presented in court, testified that the deceased had informed him that it was at the matanga that he got his injuries. Secondly, the allegation about the mob beating. Other than the word from the accused, did he conduct any independent investigations to establish whether or not there was such an incident? It was alleged to have had happened at the home of Otunga, did he take a statement from the said Otunga? That was critical, as the case by or for the defence is that that was how the deceased met his fate. The mother of the accused was said to be present at Otunga's, did he take a statement from her? If he did, why did he not call her as a witness on the events at the home of Otunga? PW3, a village elder or liguru, mentioned Willy Otunga, Tix and John, as among the persons who knew how the deceased got injured. PW7 presented PW3 as a witness in court, did he make a follow-up on PW3's allegation concerning those individuals? Did he take statements from them? If he did, why did he not present them in court as witnesses, to confirm whether or not the deceased was subjected to a beating by members of the public?
20. Two, that PW7 presented a case that was intended to exonerate the accused person, primarily for the reasons that I have stated above. Fundamentally, the police officer, to whom the accused reported that he had arrested the deceased, that is PW5, and to whom the deceased had stated that it was the accused who had assaulted him badly, and to whom the accused had conceded that he did so to discipline the deceased, said that she conveyed to PW7 information about what the deceased had informed her, but when PW7 testified, he feigned ignorance of that, and merely said that the deceased might have conveyed that information to PW5, and the other officers, who were at the scene earlier, but the deceased never talked to him about it, neither did PW5 convey the same to him.
21. This is what PW5 told the court:
- “The police officers who came to the scene were from police station. I told them what the deceased told me. I told IP Ogada and IP Musonik.”
- PW7 testified:
- “When I first visited the scene, the deceased was at the accused person's house. It is an AP policewoman based at Lurambi who called me. The deceased appeared injured. He had a swollen head, bruises on the face...There were officers who had arrived at the scene prior to us. Maybe they might have talked to him before his condition worsened. I do not recall any of my officers telling me whether they talked to the deceased. There were several calls, but AP Corporal Jasper Okumu called me. I think she got information from the accused and from her commander.”
22. Of the 2 versions recited, in paragraph 21 foregoing, I believe that by PW5. Her testimony is fairly straightforward and detailed. She was very clear on what the accused told her, making her and her colleagues repair to his house, where they found the deceased, inside the house of the accused, injured, and bound with ropes on his arms and legs, he informed her that the accused had assaulted her, whereupon the accused conceded that he beat him as a disciplinary measure. She was the one who called PW7 to the scene. He came, and took over. I doubt that PW5 would have omitted to update



PW7 on all what had transpired prior to his arriving at the scene. To my mind, PW5 told the truth, and PW7 was economical with the truth.

23. Three, the deceased person, from the multiple testimonies, appears to have been a petty thief, who was a nuisance to the community. Other than PW2 and PW5, the State witnesses appeared to treat his death as a case of good riddance. PW1 took a position that was designed to protect, in my words, the “good” or “upright” member of the family as against the “bad apple.” PW3, a local public official, took a neutral or disinterested position, apparently for the same reasons. The regular police, through PW6 and PW7, were happy to treat the death as caused through mob injustice, and that a bad element in society had been gotten rid of, hence the non-existent investigations conducted into the matter. It is unfortunate, that the deceased was treated in this manner. He got no justice. He might have been the scum of the earth, in the eyes of these witnesses, but he was human, and he was entitled to be treated with human dignity, and to all the other safeguards guaranteed to him under the *Constitution* of Kenya. PW7, as a police officer, and an agent of the State, was supposed to be the guardian of those rights, yet it was through him that they were trampled upon, given the casualness with which he treated the investigation that fell into his hands, upon being entrusted upon him.
24. Further to the above, I am persuaded that the State had no appetite to conduct proper investigations, in order to get to the bottom of the matter, and give justice to the victim. Indeed, I wonder why these proceedings were initiated in the first place, for the investigating officer did not even believe in them, going by his testimony. It would appear that the accused was prosecuted only because of the circumstances of his arrest. He was not arrested because investigations were conducted, which pointed, according to the investigators, to his culpability for the murder. The police were not looking for him. Instead, it was he, the accused, who sought police protection, according to PW6 and PW7, after the public became hostile to him, upon suspicion that he was the killer. He was arrested and put in the cells for his own protection, and not because he was a suspect for murder, hence no proper investigations were ever conducted into the murder. It would appear that the prosecution was mounted for the sole purpose of justifying his detention for his safety.
25. I am satisfied that the statement that the deceased made to PW5 amounted to a dying declaration. Am aware that there was a statement, allegedly made to PW1, that the deceased was injured at a matanga. Whereas the dying declaration made to PW5 was corroborated by PW2, and PW7 conceded that there was a possibility that it could have been made, the statement allegedly made to PW1 was not corroborated by any of the witnesses. I note that the accused alleged that he had arrested or rescued the deceased on the night of 20th January 2018, one would wonder, if indeed, the deceased was a theft suspect, why the accused did not find it necessary to take him to the police straightaway, instead of first taking him to his house, and then call the police. Secondly, it would appear that the deceased was very badly injured. If he was injured by a mob, and being a nephew of the accused, why did the accused not find it necessary to take him to hospital? The deceased was only taken to hospital upon police intervention, which proved to be too late. The accused, in his defence, presented himself as the good Samaritan, who looked out for the good of the deceased, by rescuing him from a mob, taking him to hospital and nursing him there, and reporting the matter of his being injured and his subsequent death to the police. Yet, that is not the correct picture. He did not take the deceased to hospital on his own initiative, he was in hospital courtesy of the police. The accused only reported the matter of the deceased being injured when he realised that he was badly hurt, and when he needed a story to exonerate himself from those injuries, by creating the narrative that the deceased was a victim of mob injustice.
26. The deceased was placed by PW2, PW5 and PW7 in the house of the accused, very badly injured. The stories about the matanga and the mob injustice are not supported by any independent or concrete evidence. There is no evidence that the deceased was injured elsewhere, and, was, thereafter transported



to the house of the accused, where PW2, PW5 and PW7 found him. He urgently needed medical care, but the accused did not take him to any medical facility, he called the police instead. These circumstances placed a burden on the accused to explain how the deceased ended up injured in his house, and why he could not take him for medical care. That is what the police needed to investigate, which, apparently, the did not. The explanation given, by the accused in his defence statement, does not adequately explain it. Instead, it lends credence to the testimonies of PW2 and PW5, that he, the accused, was the one who fatally injured the deceased. I, therefore, strongly suspect that the accused had a role or hand in the causation of the death of the deceased.

27. Did he have malice aforethought? Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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;
- (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) 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.”

28. Under section 206, malice aforethought is to be inferred where an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from custody of a person and in the process a death is caused.
29. There is no direct evidence on the accused assaulting the deceased, but the evidence by the pathologist points to assault with either a solid whip or rope. He said that there were very many random whip marks on the body, and he could not identify the number. He clarified that it was the number of whip marks that were many, and not the number of the persons who were assaulting the deceased. It means that the deceased was assaulted very many times, for probably a considerable length of time, with the same weapon, probably by the same person. There was testimony by PW5, that the deceased was bound with ropes on his arms and legs, making it possible for the sort of sustained assault evident from the post-mortem, because he was defenceless.
30. PW5 said that the accused told him that he was only disciplining the deceased, meaning that he did not intend to cause his death, that is if the court goes by the version that it was he who hurt him. One may take that to mean that there was no direct intention to cause death. However, under section 206, an intent to cause grievous harm, such as that which would result from a sustained assault, like that inflicted on the deceased herein, would amount to malice aforethought should death occur, as in this case. It would also be the case that where the person committing the assault knows that inflicting such injury could cause death or he is indifferent as to whether death would result, would also amount to malice aforethought. An intent to commit any felony, including grievous harm, would also found



malice aforethought. The accused herein was said, by PW5, to have said that he intended to discipline the deceased when he beat him. The injuries sustained would suggest an intent to cause grievous harm, or knowledge that the nature of the assault on the deceased could cause grievous harm, or an intent to commit a felony, all of which point to the accused having malice aforethought, if the injuries in question were inflicted by him. There was motive, the deceased was a notorious petty thief, who needed to be dealt with.

31. Standard of proof in criminal cases is beyond reasonable doubt. In a case where 3 versions of what befell the deceased are presented by the prosecution, it cannot be said that the prosecution has established, beyond reasonable doubt, that the accused was responsible for the death of the deceased. It leaves the court in a zone where it presupposes that the accused could have caused the death, or that the death was caused by a mob beating after the deceased was caught in an act of stealing or after a disagreement at a funeral dirge or vigil. Of course, of the 3 versions I believe the one presented by PW5, which, unfortunately, and regrettably, is not adequate to sustain a conviction, in view of the other 2 versions. PW7, the investigating officer, did not believe in his own case, and he did not try to disprove the version he did not believe in, and he did not conduct concrete investigations on the one that he believed in. Presenting 3 conflicting versions on how the deceased met his death fundamentally and fatally undermined the prosecution's case.
32. In the end, for the reasons given in paragraph 31 above, I do not find the accused herein guilty of the offence of murder, of Brava Premji, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I acquit him accordingly. He shall be freed from remand custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF FEBRUARY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. K'Ombwayo, Advocate for the accused person.

