



**Republic v Suya (Criminal Case 42 of 2017)
[2023] KEHC 19361 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 42 OF 2017**

**A. ONG'INJO, J
JUNE 22, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ATHUMAN BAKARI SUYA ACCUSED

JUDGMENT

1. The accused person Athuman Bakari Suya is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 of the Laws of Kenya.
2. Particulars are that the accused person Athuman Bakari Suya on the 31st day of August 2017 at Vijiweni Village in Likoni Sub County within Mombasa County jointly with others murdered Joash Magige Sironga.

Prosecution Case

3. PW1, Samuel Maroa Sironga, stated that on 31.8.2017 at 10.00 am, he received a telephone call from his younger brother Joseph Maroa Sironga who was living at Likoni, Mombasa. That he was informed that his brother Joash Magige Sironga had been beaten and that he received the call in the presence of his wife and mother which he explained to them what had happened. PW1 testified that on 1.9.2017, he travelled with his brother-in-law Francis Wandwi to Mombasa and went to Coast General Hospital mortuary where PW1 identified the body of his deceased brother. He further stated that they attended the post-mortem on 5.9.2017 at Coast General Provincial Hospital where the doctor told them that the deceased had been hit on the skull which had a fracture. PW1 informed court that at the mortuary, he saw blood on the deceased's body but there were no visible injuries. That they went to Likoni Police Station where they were told that a report had been made and they were shown where the deceased's motorbike had been kept.



4. PW2, No. 235201 APC Moses Lemako, attached at Likoni Police Station stated that on 31.8.2017 at 7.00 am, he was in his home which was on the 1st Floor and that the building has 6 floors. He testified that he heard noise coming from outside the perimeter wall. That he checked outside and saw a crowd of people running around. That when the noise continued for 30 minutes, he decided to go outside through the main gate where he found a boda boda cyclist who was being beaten with stones and one of the people hurling stones was Athman Bakari who was well known to him. PW2 stated that Athman had a stone on his right hand and a heavy stick in his left hand. He identified the heavy stick in court which had 3 bent nails and marked MFI- 1. PW2 informed court that he shouted at the crowd and told them to stop beating the boda boda rider and that Athman Bakari (identified at the dock) told him that he could not leave the boda boda rider alive as he had killed his brother.
5. PW2 further informed court that he told the boda boda rider to go to the navy gate and he ran slowly towards the said gate where it would be safe for him as the gate is guarded. That the accused person and 5 others followed the boda boda rider towards the Mtongwe Navy gate and caught up with him 200 metres away. PW2 stated that he collected the motor cycle for the boda boda rider and pushed it towards the navy gate where he met the six men running towards his direction but he did not talk to them and continued walking towards the gate. According to PW2, he found the boda boda rider lying on the ground with an injury on his head and blood oozing out. That there were some stones on the ground next to him and the heavy piece of stick he has referred to. He testified that of the photographs he was given in court, photograph 1 showed the deceased lying on the ground with blood oozing from his head, photograph 2 showed the body of the deceased taken from a different angle and photograph 3 showed the heavy piece of stick which was blood stained and that the photographs are marked MFI 3 (a), (b) and (c).
6. PW2 informed court that when PW2 found the deceased lying on the ground, he called the OCS Inuka Police Station and explained to him what he had seen. That Chief Inspector Patrick Lumumba, the OCS Inuka Police Station went to the scene in less than an hour and collected the deceased's body. That on 2.10.2017 as he was walking along the ferry area, he saw Athman Bakari, the accused, and arrested him by explaining the reason for the arrest first. PW2 then called Inspector Nyarumba who works at the DCI office, Likoni. That he sent police officers to the ferry area and handed the accused person over to Inspector Nyaramba.
7. PW3, Dr. Fatma Kassim from Coast General Hospital stated that she had the postmortem report in respect to Joash Magige Sironga conducted by Dr. Zulal Hassan who was on study leave in Nairobi. She informed court that she had worked with him for 2 years and was conversant with his handwriting and signature and wished to produce it on his behalf.
8. PW3 testified that from the postmortem, the body of the deceased was identified by Samuel Maroa and Francis Kidaha. That the body was recovered at Mtongwe at 10.00 am, that the deceased died on 31.8.2017 at 8.00 am and that he was a boda boda rider. That the deceased was trying to assist a school girl who had been attacked by muggers and that the muggers turned on him and killed him. PW3 informed court that postmortem was done on 6.9.2017 at 2.00 pm and that the body was dressed in black trouser with blue underwear, brown jacket, purple sweater, a shirt and black belt all of which were soiled in blood. That he was a male African of apparent age of 44 years, with good nutrition and a height of 125 cm. That the body was embalmed and there were no postmortem changes. On general observations, the face had blood, it was cut on the right side of the head, and that there were several cuts on the back of the head.
9. PW3 further testified that on internal examination, there was a fracture on the head with swollen brain covered with blood but other parts of the body and organs were normal. PW3 stated that as a result of



- the postmortem examination, Dr. Zulala Hassan was of the opinion that the cause of death was severe traumatic head injury due to assault with sharp object. PW3 produced the postmortem report as ExP1.
10. PW4, No. 64603 CPL Richard Limo attached to CID Likoni at the time stated that on 31.8.2017, he was assigned the duty of investigating the murder which had been committed in Mtongwe near the navy camp. He stated that it was in the morning at 8.30 am when they got a report and proceeded to the scene where they found the body of the deceased and it looked like he had been injured using a blunt object. A piece of wood recovered near the body was produced as ExP2 as it was suspected to have been used to inflict the injuries. That the scenes of crime officers took photographs and later the body was taken to Coast General Hospital Mortuary where postmortem was done after relatives identified the body. PW4 stated that the postmortem report, the photographs and the wood in the photograph were all in court. According to the testimony of PW4, he looked for witnesses and recorded their statements.
 11. According to the statements recorded by PW4, the deceased was a boda boda rider and that on the morning of 31.8.2017 at around 7.00 am and while on duty, he saw two young men attack two school girls who had been sent home for school fees and the deceased and his colleagues apprehended the two young men and beat them up and it is members of the public who rescued them and took them to hospital. That the friends of the two young men surrendered the deceased herein and beat him up and he died. That an officer who lived nearby tried to help but the mob overpowered him and beat the boda boda rider until he died and then they escaped. That the police officer who tried to rescue the deceased identified the accused herein among the assailants and on 2.10.2017, he met him at the ferry and arrested him and took him to Likoni Police Station where he was charged.
 12. PW5, PC Collins Bumile went to the scene where the Mtongwe school girls were attacked and found that those who attacked them were taken to Mrima Dispensary and on arrival, they had been referred to Likoni District hospital and they proceeded to Likoni District Hospital and found the two young men whom they took to Inuka Police Station. That while they were still at the hospital, they found that one of the boda boda rider who had rescued the girls had been attacked and killed. PW5 said he did not arrest the accused person.
 13. PW6, PC Justus Wafula from Inuka Police Station was with PW5 PC Collins Bumile when the OCS instructed them to proceed to a scene near Mtongwe Navy quarters where two people who had attacked two school girls were beaten by members of the public. He reiterated what PW5 had said in his evidence. PW6 said that he did not know the accused person.
 14. PW7, the Scenes of Crime Officer CPL Anthony Kinyanjui processed photographs taken at the scene of the murder of the deceased. He produced the photographs ExP3 and the letter requesting him to process the photographs and the certificate of the photographs.
 15. PW8, Abdalla Saidi of DCI Likoni produced a rungu on behalf of CPL Limo who was the initial investigating officer and had been transferred.

Defence Case

16. The Accused gave a sworn statement and said that he was a matatu conductor. He said he was not involved in the murder of the deceased and that the testimony of PW2 is not true as he was not at the scene. He said that when he was arrested, no investigations were conducted and he was just brought to court. That he did not know the deceased and he did not kill him. The accused person said in cross examination that on 31.8.2017, he left his home at 8.00 am to go to Mombasa town to take Methadone which is an alternative drug for drug addicts. He said that he did not know the deceased and he does not know where and how he was killed. He said that PW2 knew him because he was a drug addict and



he used to collect Kshs. 2000 from him. He said he did not escape after the offence was committed as he works in Likoni and the offence was committed in Mtongwe.

Accused Submissions

17. The accused person's advocate has submitted that PW2 confirmed that he was 200 meters away from the incident where the deceased was beaten to death and he did not see the accused person kill the victim and all that he saw was that there were many people throwing stones and that he found the body and the heavy stick at the scene.
18. It is further submitted that the evidence of the doctor in the postmortem report as to the weapon inflicting the injuries differs from the evidence of PW2, PW4 and PW5's which was to the effect that a log was used to inflict injuries on the deceased.
19. Further submissions were made that PW2 was out to frame the accused that they knew each other and that PW2 used to collect money from the accused every evening as he was a drug addict.
20. The defence contended that the prosecution had not proved the ingredients of the offence of murder as the accused was not at the scene and not even circumstantial evidence placed him at the scene of the crime. The court was urged to acquit the accused person.

Analysis and Determination

21. In consideration of the evidence of 8 prosecution witnesses and in consideration of the accused person's sworn statement and submissions, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
22. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
23. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
 - i. That the deceased died;
 - ii. That the death was caused by an unlawful act or omission;
 - iii. That there was malice aforethought; and
 - iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

Death of the deceased

24. The fact of death of the deceased is not in doubt. PW1 the brother of the deceased identified the body for purposes of postmortem, PW2 witnessed a mob of about six people beating the deceased with stones and damaging his motor cycle and he found him lying on the ground with an injury on the head which was oozing blood.



25. The cause of death was established as severe traumatic head injury due to assault with sharp object as per the postmortem report prepared by Dr. Zulala Hassan and produce by Dr. Fatma Kassim, PW3.

Whether death was caused by an unlawful act or omission on the part of the accused

26. Dr. Zulal Hassan observed that the face of the deceased had blood, it was cut on the right side of the head, and that there were several cuts on the back of the head. He further found on internal examination that there was a fracture on the head with swollen brain covered with blood. These injuries were not self-inflicted neither were they accidental. PW2 saw the accused with others not before court beating the deceased. The injuries were therefore caused by an unlawful act on the part of the perpetrators.

Malice aforethought

27. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

28. On the element of malice aforethought in respect to Section 206 of the [Penal Code](#), the court held as follows in the case of [Isaac Kimathi Kanuachobi v R](#) (Nyeri) Criminal Appeal No. 96 of 2007 (UR): -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

29. When PW2 found a mob beating the deceased at 7.00 am, he shouted at the crowd and told them to stop beating the boda boda rider and that the accused person Athman Bakari who was known to him responded that he could not leave the boda boda rider alive as he had killed his brother. That he told the boda boda rider to run towards the Kenya Navy gate which was guarded as it would be safe for him but the accused and 5 other followed the deceased and killed him before he got to the Kenya Navy gate. PW2 said that he had collected the deceased’s motor bike and was pushing it towards the Kenya Navy gate when he met the six men running towards his direction away from the Kenya Navy gate.



30. The accused confirmed that he knew PW2 as a police officer and alleged that PW2 used to collect Kshs. 2000 from him because he was a drug addict. PW2 was cross examined by the accused person's advocate but the issue of Kshs. 2000 and drug addiction was never raised. PW2 said and the accused confirmed that he used to see him severally at the ferry stage. PW2 and the accused were therefore known to each other. The accused did not deny that his brother was one of the two young men who attacked pupils from Moi Forces Academy Mtongwe on the material morning and they were intercepted by boda boda riders and beaten. The Accused categorically told PW2 that he could not leave the boda boda rider alive. He was bent on eliminating him and used a heavy piece of stick with 3 bent nails and stones to inflict injuries on the deceased. He did not heed when PW2 shouted they should leave the deceased alone. They followed him and were not restrained by the fact that they were approaching a security installation for the Kenya Navy.
31. This court finds that malice aforethought has been proved beyond reasonable doubt on the part of the accused person.
32. In conclusion, this court find that the prosecution has proved all the ingredients of the offence of murder contrary to Section 203 as read with Section 204 of the *penal code* and the accused person is found guilty and convicted accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 22ND DAY OF JUNE 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Muyala Advocate for the Accused present

Accused present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Ngiri: I seek for copy of judgment. I pray for another date to confirm if accused has past records.

Mr. Muyala Advocate: I apply for copies of proceedings and judgment.

Order: Certified copies of proceedings and judgment to be supplied to the defence and prosecution.

Accused person in custody at Shimo la Tewa G.K. Prison.

Mention on 10.7.2023 for Records, Mitigation, Victim Impact Statement and Sentence/presentence report.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

PARA 22. 6.2023

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