



**Republic v Khalitsa (Criminal Case 49 of 2016)
[2023] KEHC 18316 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 49 OF 2016
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

EUGENE MAKOTSI KHALITSA ACCUSED

JUDGMENT

1. 7 witnesses testified in this matter. PW1, PW2 and PW5 claimed to have had witnessed the assault on the deceased. PW1, Shadrack Ndevwa Litsalia, was at school with the deceased and the accused, on October 4, 2016. He saw the accused kick the deceased on the waist, and the deceased told him that he was injured on the waist. PW2, Cornelius Mmbo, was a fellow pupil of the accused and the deceased. He saw the accused kick the deceased, and ran away. The accused and the deceased then began to fight, and the deceased was injured on the forehead. The accused then picked a stick and hit the deceased behind the head with it. PW3, Phanice Shatsila Myani, was the deputy headteacher of the school attended by the accused and the deceased. A report was made to her of a fight between the accused and the deceased, and she was informed that the accused hit the deceased at the back of the neck with a stick. PW4, Masheti Nasichi, was the father of the deceased. He was called to the school, and was informed that the deceased had been assaulted by the accused, and he was asked to take him to hospital, which he did.
2. PW5, Margaret Khimayi Masheti, was the mother of the deceased. She was informed by one of her daughters that the deceased had been assaulted at school by the accused, and the deceased confirmed the same to her. She gave him money to buy medicine. Shortly, thereafter, she got information that the accused and the deceased were fighting. She rushed to the scene, and separated them, and took the deceased home. She later took the deceased to hospital, but his condition worsened. PW6/PW8, Dr Dickson Mchana Mwaludindi, testified twice, he was the pathologist who conducted autopsy on the body of the deceased. He noted a swelling at the back of the head, but there was no fracture on the head or neck. There was frothing into the airways, bleeding into the brain cavity that was pushing the brain



downwards towards the spine, and a blood clot on the area where there was swelling at the back of the head. He formed the opinion that the cause of death was due to blunt force trauma. PW7, Maurice Otunga Chibeyia, was the assistant Chief for the area. He arrested the accused.

3. I put the accused on his defence. He conceded that he was at school with the deceased. The deceased wanted to fight him, he, the accused, evaded him by going away, but the deceased followed him. Teachers were called, and they beat him, the accused. He said he and the deceased did not fight, but had a scuffle. He said the deceased died 3 days later, as he was sickly. He denied going to the home of the deceased that day. He denied hitting the deceased, nor beating him.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
5. On whether the deceased died, I have the evidence of both PW4 and PW5, the parents of the deceased, who confirmed that he died. The accused also testified as to the death. PW6/PW8 conducted a post-mortem on the body of the deceased, and the injuries noted were consistent with the assault described by PW2, a hit or blow at the back of the head with a stick. The cause of death was due to a blunt force trauma. The cause of death was linked to the accused, by PW2, who testified to seeing the assault, which caused the death, happen. The accused denied hitting the deceased, saying that they did not fight, but only had a scuffle. However, he was seen kicking the deceased by PW1 and PW2. He was seen, by PW2, hitting the deceased with a stick at the back of his head. PW5 also saw him fight the deceased. The fatal injury was that inflicted at the back of the head, and the assault leading to it was witnessed by PW2. I find that there is evidence, beyond reasonable doubt, that the injury that caused the death, was inflicted by the accused.
6. The only contentious issue is whether the act by the accused was with malice aforethought.
7. 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.”

8. Under section 206, malice aforethought is to be inferred where there is 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 lawful custody of a person and in the process a death is caused.
9. The accused in his defence merely denied the assault, yet there were persons who testified that they saw him assault the deceased, and inflict the injury in question. By hitting the deceased on the head with a stick, it can be inferred that the accused had an intention to inflict grievous harm on the deceased; or he knew or he was indifferent that the act of hitting him on the head, with the implement he used could cause death, as it did. All these are elements of malice aforethought.
10. In view of everything stated above, I do hereby, find the accused herein, Eugene Makotsi Khalitsa, guilty of the offence of the murder of Felix Mulima Masheti, contrary to section 203 of the *Penal Code*, as read with section 204 thereof, and I convict him accordingly, under section 322 of the *Criminal Procedure Code*, cap, 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
.....2ndDAY OF.....JUNE..... 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

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

Mr. Otsyeno, Advocate for the accused person.

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