



REPUBLIC OF KENYA



**Republic v Luchenje (Criminal Case 25 of 2020)
[2023] KEHC 20599 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 25 OF 2020
WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SILAS LIGARE LUCHENJE ACCUSED

JUDGMENT

1. 6 witnesses testified in this matter. 2 of them testified to have had witnessed the assault on the deceased, Josephat Murwa Shibure. PW1, Athanas Shiamala Vitinyu, was at his home, when he had someone at the road saying that Silas was killing him by beating him. He rushed to the scene and saw the accused rushing from where the deceased was lying. The deceased informed him that the accused had hit him with a rungu, and stepped on him with boots. He had blood on his forehead, and complained of pain on the abdomen. PW2, Linus Mushira Shikhure, he had cries from children, and he stepped out to investigate. He found the accused and the deceased. The deceased was on the ground, and the accused was standing near him. When PW2 asked the accused what had happened, the accused fled the scene. He identified the deceased for post-mortem purposes. PW3, Dr. Dixon Mchana Mwaludindi, was the pathologist who conducted autopsy on the body of the deceased. His opinion was that death was caused by toxic shock, secondary to ruptured small intestines, following assault. He explained that the small intestines had been cut into 2, which released waste into the abdomen, which caused infection. He stated that the cut was caused by blunt trauma.
2. PW4, Joshua Isanya, a minor, rushed to the scene after he heard screams. He found the deceased on the ground, and the accused stepping or stumping on him with his feet. The accused also cut the deceased with a panga. PW4 screamed, and when PW1 emerged, the accused fled into a sugarcane farm. PW5, a minor, was with PW4. He saw the accused on top of the deceased, stepping on him. The accused fled into a farm when PW1 emerged. He said he saw the accused hit the deceased with a metal rod on the shoulders, and stump on his stomach with his feet. PW6, No. 94681 Police Constable James Taje, was the investigating officer.



3. I put the accused on his defence. He denied assaulting the deceased, and being anywhere near the scene.
4. Mr, Mulama, Advocate for the accused, filed written submissions, and cited authorities: *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR (Visram, Koome & Odek, JJA), *Woolmington vs. DPP* [1935] AC (Viscount Sankey, Lord Hewart, Lord Atkin, Lord Tomlim & Lord Wright), *Karani and 3 others vs. Republic* [1991] KLR 622 (Gachuhi, Cockar JJA, & Omolo AJ), *Roba Galma Wario vs. Republic* [2015] eKLR (Kihara Kariuki (P), Githinji & J. Mohammed, JJA), *Nzuki vs. Republic* [1993] KLR 171 (Gicheru, Cockar & Muli, JJA) and *Republic vs. Lawrence Mukaria & another* [2014] eKLR (Lesiit, J), among others. I have read through the written submissions and noted the arguments made.
5. 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, it was with malice aforethought.
6. On whether the deceased died, I have the evidence of PW1 and PW4. They said that the deceased died 2 or so days after the assault. PW3 identified the body for post mortem purposes. PW6 conducted autopsy on the body of the deceased, and produced the post-mortem report. The cause of death was said to be toxic shock, secondary to ruptured bowel loop, following assault. The small intestines cut into 2 spewing waste into the abdomen. The cut was caused by blunt trauma. The cause of death was linked to the accused, by PW4 and PW5, who testified to have been present, when the accused stumped or stomped on the deceased, on his stomach, with his boots. The accused denied killing the deceased. There was eyewitness evidence. PW4 and PW5 saw it happen, and the cause of death, according to PW6, the cut or rupture of the small intestines, was caused by a blunt trauma, consistent with the testimonies of PW4 and PW5, that the deceased was stepped or stomped on the stomach, with boots, by the accused, and PW1 testified that he complained of abdominal pains.
7. The remaining issue for determination is whether the accused acted with malice aforethought.
8. 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.”
9. 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.



10. The rapture or the splitting of the small intestines that the deceased sustained, was a grave injury, and was caused by being stomped or stumped or trampled upon with boots on the stomach, and could only have been caused by a person who had an intention to kill him, or to cause him grievous harm, or was indifferent that by so acting he could cause his death or cause him grievous harm, all of which are elements of malice aforethought.
11. In view of everything stated above, I do hereby, find the accused herein, Silas Ligare Luchenje, guilty of the offence of the murder of Josephat Murwa Shibure, 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. Sentencing shall, thereafter, be conducted by my successors at Kakamega.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

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

Mr. Mulama, advocate for the accused person.

