



**Republic v Chomba (Deceased) & 2 others (Criminal Case 17 of 2015)  
[2024] KEHC 14761 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 17 OF 2015  
RM MWONGO, J  
NOVEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ELIAS CHOMBA (DECEASED) ..... 1<sup>ST</sup> ACCUSED**

**PATRICK NJIRU MWAI ..... 2<sup>ND</sup> ACCUSED**

**PAUL WARUI ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

**Background**

1. The accused persons were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 12<sup>th</sup> September, 2015 at an unknown time at Komboini sub-location within Kirinyaga County, they jointly and unlawfully murdered John Musebiu.
2. The prosecution case was that the deceased, a boda boda rider, was at work on 9<sup>th</sup> September 2015 as usual, when the 2<sup>nd</sup> accused alleged that he had stolen Kshs.15,000/= . Fellow boda boda operators, numbering about twenty in number, took the deceased to Kangai - Marula and Kiangiciri junction. The 1<sup>st</sup> accused begun demanding the allegedly stolen money. Some people begun assaulting the deceased. The 1<sup>st</sup> accused allegedly used an electric wire to whip the deceased, who succumbed to injuries when taken to Embu level 5 Hospital.

**Prosecution Evidence**

3. PW1 Gerald Warui Gichira testified that the deceased was his cousin and the two accused person were villagers known to him. He confirmed that on 9<sup>th</sup> September 2015 he heard the brawl and upon



- responding, witnessed the deceased being whipped by the two accused person. A third who has since passed on, was also present. PW1 confirmed that he knew all the accused persons who were not strangers to him, and even tried to stop them from beating the Accused. They stopped immediately and he left.
4. When this witness begun to testify that he did not see any injuries on the deceased and that he did not see the beating, the prosecution asked that he be declared a hostile witness. This was granted, and he was then cross - examined. He confirmed that the two accused whipped he deceased.
  5. In cross-examination, PW1 said he was working at the Pool Table at Kangai when he heard commotion at between 9.00 and 10.00 am. He saw about 20 boda boda riders including the 1<sup>st</sup> and 2<sup>nd</sup> Accused whom he knew and recognized at the scene. He did not see the 3<sup>rd</sup> accused at the scene; he did not see any injuries or blood on the deceased. However, he confirmed he saw 1<sup>st</sup> Accused hitting the deceased and the 2<sup>nd</sup> accused holding the accused.
  6. PW2 Michael Gikunju Wachira testified that the deceased was his elder brother. On 9<sup>th</sup> September, 2015 he found the deceased being assaulted by Elias Chomba, now deceased, together with Patrick Njiru and Paul Warui. He confirmed that by the time he arrived, his brother was lying on his back with his legs raised. The 1<sup>st</sup> Accused was whipping the deceased with a “nyahunyo” on the legs; and the 2<sup>nd</sup> Accused was whipping the ceased with electric wires.
  7. The witness was candid that the Accused Elias Chomba who is now deceased, whipped the deceased while Patrick Njiru Mwai whipped him with an electric wire. He tried to stop them from beating the deceased, but they threatened to beat him too. Later, they stopped beating him.
  8. On 11<sup>th</sup> September, 2015 they took the deceased to Mwea hospital as he was complaining of stomach ache. He was x-rayed and returned home. He died on 12<sup>th</sup> September, 2015 at home.
  9. In cross-examination he said he found PW1 at the scene; and confirmed that 1<sup>st</sup> and 2<sup>nd</sup> accused beat the deceased with a whip and electric wires respectively.
  10. PW3 Patrick Njiru Warui testified that he was one of those who took the deceased to Mwea Mission Hospital. He confirmed that he knew all the accused person and that they were the ones who assaulted the deceased. In cross - examination he admitted that he was not at the scene when the incident occurred, but that he only took deceased to hospital.
  11. PW4 Lazaro Mumama Njiru, the uncle and neighbour of both accused persons, testified that the deceased had been dumped near the river by boda boda riders. He was crying in a lot of pain. He told PW4 that he had been beaten by boda boda operators and taken to the river area. He also told PW4 that he had been whipped on his buttocks. He met the deceased’s mother, and was involved in placing the deceased on a motor bike to take him to hospital. Further he was present when the post mortem was done. He did not see the beating occur.
  12. In cross-examination PW4 said he did not see signs of blood on the deceased. He said that the beating was by boda boda operators although the policeman writing his statement wrote that the beating was by mob justice.
  13. PW5 Julie Wanjira Njiru the mother of the deceased testified that the deceased was brought home by a motor bike. He was beaten on the buttocks and his clothes were stuck on his body with blood. He said that he been beaten by the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused. They accused him of having stolen from Paul Warui. He died the next day while being taken to the hospital.



14. In cross-examination PW5 stated that the deceased's trouser was torn, his shirt was okay and he had no blood stains. The trouser had blood stains at the back and front. The deceased told her he was beaten by boda boda operators.
15. PW6 Dr.Karomo performed the Post-Mortem he formed the opinion that the cause of death was Cardiorespiratory arrest secondary to multiple injuries after assault. He produced the postmortem report as PExhibit 1. In cross-examination the doctor said that the bruises were mainly on the buttocks, lower limbs, upper limbs and trunk of the deceased. He also had pneumonia which was healing.
16. PW-7 Inspector Anselm Inyangala Mwashinga was the investigating officer who established that the deceased was assaulted by the accused persons. She visited the scene of crime and found the deceased lying on a bed at home. He was half naked. He had injuries on his back and buttocks.
17. She established that the 1<sup>st</sup> accused beat the deceased with an electric wire while the 2<sup>nd</sup> and 3<sup>rd</sup> accused held him to the ground. She confirmed the arrest of both accused after the matter was reported to the police.

### **Defence Case**

18. Accused 2 - Patrick Njiru Mwai testified that he lives in Kangai, Kirinyaga, and is 55 years old. On 9<sup>th</sup> September, 2015 at 9.00 am he went to the stage at Kangai and got a customer heading to Ngurumbani. They passed the junction at canal and found a large crowd of about 40 people on the road. He stopped and recognized the 1<sup>st</sup> accused (now deceased), PW2 and PW1. The three had a scuffle, PW1 told him that his cousin, the deceased, was being beaten by the crowd. He did not go into crowd and did not see the deceased. They refused to tell him the reason for beating him.
19. He shortly thereafter left the scene and went to Ngurumbani. He was informed that the deceased died on 12<sup>th</sup> September, 2015. He was arrested after one month. He said that he saw the 1<sup>st</sup> accused but did not see Paul Warui. The 3<sup>rd</sup> accused never said anything about Kshs 15,000/= being stolen from him.
20. Accused 3 - Paul Warui stated that he lives in Kangai, Kirinyaga. He said that he knows the 2<sup>nd</sup> accused as they went to school together. He didn't know the 1<sup>st</sup> accused. On 9<sup>th</sup> September, 2015 he woke up and went to his shamba. He stated that he did not go to the junction canal. He had no connection with the Kshs 15,000/= allegedly stolen. He was arrested one month after the incident. He found the other accused persons at the police station.
21. In cross-examination, he stated that he had no dispute with PW1 and PW2. He was arrested at 2pm and was not told the reason for the arrest.
22. The parties filed submissions as directed by the court.

### **Prosecution submissions**

23. The prosecution submits that Section 203 of the Penal Code places the burden on the Prosecution to prove that:1) The death of the deceased occurred; 2) The death was through unlawful acts or omission of the accused; and that 3) The accused person had malice aforethought.
24. The prosecution submits that the evidence tendered so far places the accused persons at the scene of the crime and the death of the deceased was due to the wrongful act of the accused persons. They invoke Section 206 of the Penal Code which stipulates that:

“Malice aforethought shall be deemed to be established by evidence proving;



- a) An Intention to cause the death or grievous harm.
- b) Knowledge that the act or omission causing death will probably cause death of or grievous harm to the same person,
- c) An intention to commit a felony.”

25. It was submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> accused, Patrick Njiru Mwi and Paul Warui were positively identified by Pw-1 Gerald Warui Gichira) PW-2 Michael Gikunju Wachira and PW-3 Patrick Njiru Warui as having been at the scene of Crime on the 11<sup>th</sup> September 2015.

### **Accused submissions**

#### **Proof of death**

26. The defence submissions were made under Three prongs as follow:

Proof of death

27. The defence submitted that there is no dispute on the deceased's death. This was confirmed by all the prosecution's witnesses. In particular by the evidence of PW6 Dr. Ndirangu Karomo, who carried out the postmortem (P. Exhibit-1) on the deceased's body. The doctor stated that the deceased died on 12<sup>th</sup> September, 2015 and certificate of death number 0028578 was issued.

#### **Whether accused persons unlawful act or omission caused the death of the deceased**

28. On this issue it was submitted that the post-mortem report produced as P. Exhibit-1 by Dr. Ndirangu Karoma indicates under Internal appearance -respiratory system - that the deceased had pneumonia adhesions prior to death. That from the prosecutions witnesses the deceased died 2 days after the alleged assault. The post-mortem report suggests that the cause of death was cardia respiratory arrest, multiple organs failure, caused by peritonitis inflammation of abdominal cavity.
29. The defence submitted that the deceased did not die of the alleged assault but of pneumonia which is lung inflammation caused by bacteria or viral infection in which the air sacs fill with pus and may become solid. This they submits emerged during the cross-examination of Dr. Ndirangu Karomo by Mr.Ngigi-Advocate on 25/11/2019.

#### **Whether the accused caused the deceased's death**

30. On this issue the defence submits that none of the prosecution's witnesses actually saw the accused persons kill the deceased. They urge the court to note the following:
- a. The prosecution's evidence did not establish the doctrine of common intention to harm and/or kill the deceased.
  - b. That no evidence was led to show that the 3 accused persons had malice afterthought.
  - c. That it is difficult in the case of mob justice such as in this case to pinpoint that a blow or assault by a particular person in the group led to the victim's death.
  - d. That all the prosecution's witnesses stated the 3rd accused person was not at the scene of the crime at the material time.



## **Issues for Determination**

31. The issues arising for determination by the court are as follows:
1. Whether the accused persons caused the death of the deceased.
  2. If so, whether the accused had malice aforethought.

## **Analysis and Determination**

32. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person:- The death of the deceased occurred.- That the accused persons committed the unlawful act which caused the death of the deceased and- The accused persons had malice aforethought in so doing.
33. Having considered the testimonies of the seven (7) prosecution witnesses and the two accused persons, the question is whether the evidence tendered proves the prosecution case beyond reasonable doubt against the accused persons.

## **The death of the deceased occurred**

34. This issue is not contested. PW6 Dr. Ndirangu Karomo, who carried out the postmortem on the deceased's body certified the death. He formed the opinion that the cause of death was Cardiorespiratory arrest secondary to multiple injuries after assault. The postmortem report was produced as PEx1.

## **That the accused persons committed the unlawful act which caused the death of the deceased**

35. It was submitted by the prosecution that the evidence tendered so far places the accused persons at the scene of the crime, and that the death of the deceased was due to the wrongful act of the accused persons.
36. PW1 & PW2 saw the 1<sup>st</sup> and 2<sup>nd</sup> Accused assaulting the deceased using a whip and electric wire. None of them said the 3<sup>rd</sup> Accused at the scene. They are the only eye witnesses that testified. In the case of Republic v David Makali Mutiso & another [2017] eKLR it was stated:

“Section 213 of the Penal Code does define acts and various circumstances which death can be inferred and accused held responsible to include where:

- (a) He inflicts bodily injury on another person and as a consequence of the injury the deceased undergoes treatment which causes his death.
  - (b) The accused inflicts injury on another which would not have caused death if the deceased fails to get proper medication and he dies as a result.
  - (c) He, by any act, hastens the death of the deceased.
  - (d) His acts or omission of the person killed or of other persons.”
37. PW3, carried the deceased to hospital from the scene after the incident. PW4 also arrived at the scene after the incident. He helped place the deceased on a motor bike. PW5 confirmed that he was told the deceased was beaten up by boda boda riders. The deceased told him his assailants included 1<sup>st</sup> and 2<sup>nd</sup> accused.



38. PW2 testified that he tried to stop the accused persons from beating the deceased but they threatened to beat him too. Later, they stopped beating him. On 11<sup>th</sup> September, 2015 they took him to Mwea Hospital as he was complaining of stomach ache. He was x-rayed and returned home. He died on 12<sup>th</sup> September, 2015 at home.
39. PW7 was the investigating officer who established that the deceased was assaulted by the accused persons. She visited the scene of crime and found the deceased lying on a bed at home. He was half naked. He had injuries on his back and buttocks.
40. The accused persons submit that the deceased did not die of the alleged assault, but of pneumonia which is lung inflammation caused by bacteria or viral infection in which the air sacs fill with pus and may become solid.
41. During the cross-examination of Dr. Ndirangu Karomo by Mr. Ngigi he stated that the deceased had pneumonia but it was resolving or healing. However, the accused had fluid accumulation that had been caused by a perforated duodenum occasioned by assault. The main cause of death was cardiorespiratory arrest secondary to multiple injuries after assault.
42. There is no doubt that the unlawful acts of assault by the accused persons caused cardiorespiratory arrest and subsequent the death of the deceased.
43. In their defence the accused persons denied assaulting the deceased person or being at the scene of the crime. Accused 2 however placed himself at the scene when he testified that on the material day, he passed the junction at canal and found a large crowd of about 40 people on the road. He stopped and recognized the 1<sup>st</sup> accused (now deceased), PW2 and PW1. The three had a scuffle, and PW1 told him that his cousin, the deceased, was being beaten by the crowd. He said he did not go into crowd and did not see the deceased.
44. Accused 3- testified that he spent his day on the farm and did not go to the scene of the accident. Further, he denied any connection with the Kshs 15,000/= allegedly stolen. He relies on the defence of alibi to impeach the prosecution's evidence.
45. The factors to be taken into account when considering the defence were stated in the case of *Erick Otieno Meda v Republic* [2019] eKLR where the court of appeal set down the following parameters to be considered when the defence is raised thus;
  - a. . An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
  - b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
  - c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
  - d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.
46. As earlier noted, there were two eye witnesses, PW1 and PW2. PW1- on cross-examination stated that he did not see the 3<sup>rd</sup> accused person at the scene of the crime. Similarly, PW2- testified that he did not see the 3<sup>rd</sup> accused at the scene of the crime. PW7- on cross-examination stated that he could not remember any witness stating that they saw Accused 3 at the scene. Both PW1 and PW2 saw Accused 1 and 2 beating the deceased.



47. Thus, the alibi evidence of the 3<sup>rd</sup> accused person has been corroborated by the above four prosecution witnesses and I so find.

### **That the accused had malice aforethought**

48. The accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Republic v DKK & another [2019] eKLR, it was held that

“For the prosecution to establish its case against the accused, it must prove that they committed the offence ‘with malice aforethought. Section 206 of the Penal Code sets out what the prosecution needs to place before the court for ‘malice aforethought’ to be established:

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.” (Emphasis added).

50. Thus, malice aforethought may be demonstrated by evidence that: there was an intention to do grievous harm whether the person is actually killed or not; that there was knowledge that the act will probably cause death or grievous harm to the victim; that there was an intent to commit a felony.

52. There is no doubt that PW1 and PW2 clearly saw Accused 1 and 2 beating the deceased. The beatings caused or were intended to cause him grievous harm. Accused 1 and 2 must therefore be found to have had malice aforethought as described by the case of R v DKK (supra). PW1 said he did not see any members of the public beating the accused. PW2 testified that he tried to stop the accused persons from beating the deceased, and they threatened to beat him up too.

### **Conclusions and Disposition**

53. From all the evidence above, it is clear that Accused 1 and 2 had a common intention to cause grievous bodily harm on the deceased. They had accused the deceased of being a thief and proceeded to punish him by whipping him with an electric wire and whip.

54. Ultimately, the prosecution evidence was able to place the 1<sup>st</sup> accused (now deceased) and the 2<sup>nd</sup> accused at the scene of the crime. However no single witness who saw the 3<sup>rd</sup> accused person at the scene.

55. Accordingly, the prosecution’s case against the 2<sup>nd</sup> accused succeeds the 1<sup>st</sup> accused having died the charges against him have abated. The 2<sup>nd</sup> Accused is convicted with the offence of murder.



56. The 3<sup>rd</sup> Accused was not seen at the scene and is hereby acquitted. He is to be set at liberty forthwith unless otherwise lawfully held.
57. The mitigation for the 2<sup>nd</sup> accused shall be heard on a date to be fixed.
58. Orders accordingly.

**DATED AT KERUGOYA THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mamba for the State
2. Munene holding brief for Ngigi for Accused
3. Accused 2 - Present in Court
4. Accused 3 - Present in Court
5. Court Assistant, Murage

