



**Republic v Malalu (Criminal Case E003 of 2024)
[2025] KEHC 13338 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E003 OF 2024
WM KAGENDO., J
SEPTEMBER 25, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ALLAN MALALU ACCUSED

JUDGMENT

Introduction

1. The accused person herein Allan Michael Malalu is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the charge are that the on the 5th February, 2024 at Calvary in Vikwatani area, Kisauni Sub-County, within Mombasa County, jointly with others not before court murdered Daniel Kipkemboi Kangogo.
2. At inception, this case was heard by Ong’ijo J. who heard one (1) prosecution witness. Directions under Section 200(3) of the Criminal Procedure Code were taken, and the accused opted to proceed from where the former trial judge had reached. This court took over the case and heard six (6) more prosecution witnesses as well as the defence case.

Prosecution case

3. It is the prosecution’s case that with intent, the accused person in the company of others not before court, murdered the deceased person herein. The prosecution called a total of seven (7) witnesses.
4. Upon considering the evidence adduced by the said prosecution witnesses, the court in its Ruling dated 27th February, 2025 held that a prima facie case had been established, and placed the accused in his defense.



Defence case

5. The 1st accused gave his sworn evidence as DW1, at which point the defense closed its case and parties were directed to file their written submissions.

Written submissions

6. As at the time of making of this determination, only the accused person had complied by his written submissions dated 18th July, 2025 on record.
7. Summarily, it was argued that even though the prosecution proved both the death and the cause of death of the deceased, they failed to establish that it is the accused person caused the said death, with malice aforethought beyond reasonable doubt.
8. To impeach the prosecution witness testimonies, the accused argued that PW5, PW6 and PW7, who all are police officers, and were purportedly on official duty on the material day when they drove past a crowd of people beating up the deceased, left gaps in the case by failing to interrogate other key witnesses present at the scene of crime.
9. Further, the testimonies of PW5 and PW7 was that the crowd was on average of 20 – 30 people (who all ran away), and the post-mortem report indicated several injuries inflicted by mob justice, which could not entirely be attributed to the accused person, who denies injuring the deceased.
10. He relied on the authorities in Malindi Court of Appeal Criminal case No.s 87 & 89 of 2022 (consolidated) Gohu Ndungi Dzimba & Samson Kambi Yaa vs Republic, Machakos High Court Criminal Case No. 33 of 2012 Republic vs James Kioko Malungu.

The Law

11. The accused persons is facing a charge of murder contrary to Section 203 of the Penal Code, which section provides that:

Any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.

12. On the definition of malice aforethought, Section 206 of the Penal Code as follows:

‘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.



13. Therefore, the elements that must be proved by the prosecution in a charge of murder are mens rea, that is, the guilty mind, and actus reus, that is, the guilty act that causes the death. The standard of proof required is that of beyond reasonable doubt. In the case of Joseph Kimani Njau v Republic [2014] eKLR, the Court of Appeal stated that-

“In all criminal trials, both the actus reus and the men’s rea are required for the offence charged; they must be proved by the prosecution beyond a reasonable doubt. The trial court is obliged to ensure that before any conviction is entered, both actus reus and mens rea have been proven to the required standard.

14. In Anthony Ndegwa Ngari v Republic [2014] eKLR, the Court of Appeal identified that three crucial ingredients of the offence of murder that must be proved for a conviction to be entered are as follows: -

For the offence of murder, there are three elements that the prosecution must prove beyond a reasonable doubt to secure a conviction. They are

- a. the death of the deceased and the cause of that death
- b. that the accused committed the unlawful act which caused the death of the deceased and
- c. that the accused had the malice aforethought.

15. This notwithstanding, it is trite that malice aforethought does not necessarily denote motive, and that the former may be inferred from the circumstances of the case. According to the Court of Appeal in Robert Onchiri Ogeto v Republic [2004] KLR 19 –

“The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive – see Karukenya & 4 Others v Republic [1987] KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased.”

16. Consequently, I will consider these elements of the offence to determine whether the prosecution has proved the charge against the accused persons beyond a reasonable doubt.

Analysis and Determination

17. Proof of the deceased person’s death and the cause of that death?

18. In the instant case, the death of the deceased and the cause thereof was undisputed. The same was proved beyond reasonable doubt by the production of the post-mortem report as Prosecution exhibit 1. PW4: Dr. G. Lubola, a consultant pathologist testified that the deceased persons succumbed because of severe traumatic cervical spine injury due to high force blunt trauma to the neck.

19. Proof that the deceased’s death was because of an unlawful act or omission and whether that unlawful act or omission was by the accused person herein?

20. There was sufficient evidence by the testimonies of PW5: No. 238099 I.P Joseph Nyasini, PW6: No. 87153 Sgt. Serengo Aggrey, and PW7: No. 113146 PC. Samuel Mweni, who all were eyewitnesses, testified that while enroute from an official duty Kisauni Head Quarters, on reaching Calvary area



in Kikwatani they met a crowd of people who requested them to stop and help the situation as the deceased person was being assaulted. This was corroborated by the postmortem reports, which declared the death of the deceased while undergoing treatment was a result of severe traumatic cervical spine injury due to high force blunt trauma to the neck. There was no evidence that the deceased persons death was self-inflicted or caused by any legally justifiable reason.

21. By dint of Article 26 of *the Constitution*, all homicides are deemed unlawful unless authorized by law. The injuries inflicted on the deceased person left no doubt that the same would cause their death. The assailant had no legal right or excuse to deprive the deceased person of his right to life. Accordingly, I find and hold that the prosecution proved this ingredient beyond any reasonable doubt, that an unlawful act caused the death of the deceased person.
22. On whether the prosecution proved beyond reasonable doubt that it was the accused who unlawfully killed the deceased person, the accused person raised his defence that he did not beat the deceased at any point but in fact had come to the deceased person's rescue, where he allegedly disarmed one of his assailants for which reason he did not flee the scene.
23. However, corroborative testimonies of the eyewitnesses, herein PW5, PW6 and PW7 give a totally different picture.
24. PW5; No. 238099 I.P Joseph Nyasini, and the Deputy OCS, Kiambeni Police Station testified that on 5th February, 2024 at around 1600hrs after attending a meeting at their Sub-County Head Quarters in Kisauni, in the company of his colleagues (PW6 and PW7) while driving back to the station they passed by Calvary area in Kikwatani where a crowd of people were gathered. Beside the crowd was a person who was being assaulted, and some of the bystanders stopped the police vehicle and asked them to help the person being assaulted as he was not a thief. They alighted the vehicle and found the accused assaulting the victim (deceased) with a plank of wood which had nails fixed on it, which was produced in court and marked as PMFI-2. They arrested the accused person and took the victim to Coast PGH- Kikwatani branch. The following day (6th February, 2025), the victim's family members (PW2) arrived at the station and reported that the victim had been transported to Coast PGH-Main but he had succumbed to the injuries, at which point the accused was charged.
25. The testimony of PW5, was corroborated by PW6: No. 87153 Sgt. Serengo Aggrey who testified that he saw the accused hit the deceased on the head with a plank of wood which had nails affixed. In his cross-examination by the accused person's counsel, he confirmed that there were other people near the victim, but none was armed. PW7: No. 113146 PC. Samuel Mweni confirmed witnessing the accused hitting the deceased with the plank of wood which nails and was thereby disarmed by PW6 and arrested by PW5.
26. It is worth mentioning that the accused readily acknowledged during cross-examination that he was indeed found at the scene, wielding the subject weapon, and he had no alibi to corroborate his narrative that he was only present in the scene as Good Samaritan in aid of the victim.
27. I have carefully considered the evidence of the prosecution and weighed the same against the defence of the accused. I am of the considered view that the prosecution has proved that the deceased died of the unlawful act of the accused.
28. As to whether the accused person had malice aforethought, this court hereinabove has elaborated that the same is a mental component that can be deduced from the circumstances surrounding the death. Section 206(a) of the Penal Code stipulates that malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. Simply put the prosecution is obligated to prove that as at the time the accused inflicted the injuries on the deceased, he formed the



necessary intention to either cause death or grievous harm on the deceased. This can be inferred by considering factors like the type of weapon used, the parts of the body attacked, the number of times the weapon was used on the victim, and the assailant's behavior before, during, and after the attack.

29. Accordingly, the eyewitness evidence of PW5, PW6, PW7 attest to witnessing the assault on the deceased. However, it can be inferred from what was used as the murder weapon; a plank of wood affixed with nails, and given the presumed force used on such a sensitive part of the body being the head, neck and upper limbs, it can safely be inferred that death was the desired outcome. Further, as evidenced by PW4; the consultant pathologist and the postmortem report, specifically on the deceased's internal appearance the head had hematoma on the scalp muscles at occipital frontal parietal region, fracture of the spinal column C3-C5 (neck) which concluded that severe traumatic cervical spine injury was the cause of death. The injuries caused by a blunt object pointed to an intention that death of the deceased was the desired outcome.
30. Having carefully evaluated the entire evidence I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the ingredients of the offence of murder earlier identified hereinabove, which irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference.
31. In the result, it is my finding that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and is convicted accordingly. It is hereby ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025.

W. K. MICHENI

JUDGE

In the Presence of;

For the Accused.... Mr Egunza hb for Ms Munyori.....

For the Respondent.....Sirimamr

Court Assistant.....Ms Bebor.....

Signed by/for:

HON. LADY JUSTICE WENDY MICHENI

