

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO.E007 OF 2023

REPUBLIC.....PROSECUTION

VERSUS

ALEX KAPELO OKWARE.....ACCUSED

JUDGMENT

1. Alex Kapelo Okware, the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on 31/12/23 at Mitambo “C” village Kiminini Sub-county within Trans-Nzoia County murdered Francis Wanyama alias Franco (the deceased).
3. The accused denied the charge and the prosecution has presented a total of four witnesses to support their case. The prosecution’s case is based on direct evidence and below is a summary of the evidence tendered.
4. Dr. Alex Barasa (**PW1**) the pathologist who conducted autopsy on the body of the deceased stated that he did so on 12/1/2024. He stated that he found the body in rigour mortis state, cold and stiff as it had been preserved for 2 weeks. He stated that the body was well preserved. That in the respiratory system, he found that the lungs appeared cyanosed and cardio-vascular system had mild cardiomegaly empty chambers which he associated with likely underlying condition. In the digestive system he observed moderate gastritis, punctured tina and

hyperaemic small and large bowel. That he also noted 500cc pus in the pelvic floor.

5. He concluded that from his findings the deceased died from septic shock from blunt force trauma secondary to assault. He tendered the Post Mortem report dated 12/1/24 as **PExhibit 1** and stated that he issued burial permit serial No.0459811.
6. Florence Khatuma Ngosi (**PW2**) stated that on 31/12/23 at around 8.30pm she was from the shops when she met her nephew, the deceased herein. She stated that the accused appeared from the front with a jerrican. That he began beating the jerrican threatening the deceased; **“leo nitakuwa”**. She stated that she asked the accused why he wanted to kill her nephew but instead he boxed him on the chest sending the deceased to the ground. That she assisted him to stand and that he attempted to run from the scene but the accused pursued him and knocked him down and began kicking him on the stomach. That the deceased cried in pain before going quiet.
7. She stated that the sister to the deceased later arrived and carried the deceased home. That the next day she went to work and she got back in the evening. She was informed that the deceased had been taken to hospital but that the doctors were on strike. She stated that the deceased was brought back home and got treated by a village doctor.
8. She recalled that during the material time there was moonlight and saw the accused coming from the opposite direction and threatened the deceased that he was going to kill him. She said that she tried to shield the deceased in vain and had a conversation with the accused who told her that the deceased

had stolen his beans from his store. She stated that the issue had been a source of disagreement between the accused and the deceased. She further stated that the accused appeared drunk and that he was a neighbour. She further added that she recognized the accused well from his voice as he was singing beating the jerrican as “**isukuti**”. She stated that the accused attacked the deceased with kicks and blows.

9. Angela Akonya (**PW3**), stated that on 31/12/23, she was home when she heard her uncle (the deceased) screaming from the road saying the accused was killing him. That she went outside to check and found that the noise was from the road next to their house. That on reaching the road, she found the accused on top of the deceased assaulting him. She said that she then saw the accused kicking the deceased once on the stomach and that she rescued him with one Rai. That they took him home and in the morning he was taken to Kitale County Hospital for treatment. That she heard the doctors were not in hospital that day and the deceased was not eating because when she gave him food he vomited. That the following day she made porridge for him but he vomited and at 3pm he died.
10. She stated that the accused was a neighbour and recognized him when he found him assaulting the deceased who was her uncle. She denied suggestions that the deceased used to be a sickly person.
11. Sgt Faith Kishoin (**PW4**) the investigating officer in the case testified that she was detailed to carry out the investigations of murder at Mitambo Area Kiminini by her boss on 4/1/24. That after investigations she established that the suspect fought with

the deceased in presence of several witnesses among them Brian, Angela and Florence who are all relatives of the deceased. She stated that the accused hit the deceased with blows and when the deceased tried running away he tripped him and continued with the assault.

12. She stated that the accused was arrested on 25/1/24 within Kakamega County where he had gone into hiding because the boda boda operators were looking for him. She said that he was arrested after a tip off.

13. She stated that she was not aware if the house of the accused was burnt down by angry villagers.

14. When placed on his defence, the accused recalled that on 31/12/23 he was at a local bar at Mitambo with his brother named Paul and a lady called Anne. He stated that his brother complained of hunger and Anne volunteered to go and cook for them from her house. That he was carrying a 20 litre jerrican and that after eating they went back and were playing isukuti using the jerrican as a drum. That when they reached the compound of the deceased which was next to a pathway, he found the deceased and **PW1**. That he was drunk at the time and fell on the deceased and the deceased held him by the shirt. He stated that he asked for forgiveness saying;

“Pole bro ni ulevi”.

That Mama Pengo (**PW1**) told the deceased to leave him alone and removed his hand from his shirt and they proceeded to the bar. He stated that the deceased followed him there and tried to strangle him. That he tried to free himself by kicking him. That they wrestled and the deceased went on top of him before people

came and separated them. He stated that he suffered an injury on the head. That the sisters to the deceased took him home and they continued drinking.

15. According to him, the deceased was not injured. He stated that he went home at around 2am and slept. That the following day at around 4pm he went back for a drink. That a brother to the deceased held him and told him something had happened at the home of deceased and that he needed to go and see for himself. That he was told that he had stolen beans but he denied. That the brother told him he had killed his brother but he also denied. That the mother to the deceased went and told them to leave him and he was left free and went home.
16. He stated that when he reached home, he heard that the deceased's brother was planning for a revenge. That he feared for his life because boda boda guys were dangerous and he ran to his sister in Kakamega. That he later learnt that his house together with his parents' houses had been razed down.
17. He stated that he was later arrested and brought back to Kiminini. He stated that he had no grudge with the deceased. That they both married from the same family. He stated that he did not know that he had injured him and thought that the deceased may have died from other causes.
18. He conceded under cross-examination that Angela **(PW3)** was among the people who separated them during the fracas between him and the deceased. He stated that he learnt that his life was in danger and took off but did not go to the police. He conceded that there were many police stations between Kiminini and Kakamega but did not report to any or even go to the chief.

He stated that he did not have the mobile phone number of the chief or the village elder.

19. This court has set out both the prosecution's case as well as the defence. As observed above the accused is charged with the offence of murder contrary to section 203 of the Penal Code. For a case of murder to stand under that section three essential elements must be proved beyond reasonable doubt. The same are:

- (i) **Fact of death and the cause.**
- (ii) **That the unlawful act was committed or linked with the accused (actus reus).**
- (iii) **Mens rea or malice aforethought.**

20. (i) **Fact of death and its cause.**

The fact of death in this case is not disputed. The accused person in his written submissions through counsel concedes that going by the doctor's **(PW1)** evidence and Post Mortem report **(Pexhibit 1)** the deceased died from septic shock secondary from punctured sigmoid colon from blunt force trauma secondary to assault. The doctor also said he issued a Burial Permit serial number 0459811 in respect to the body of the deceased. The element of death and its cause is therefore well established and proved beyond any doubt.

21. (ii) **Actus reus.**

This element was also clearly established by the prosecution through the evidence of **PW2** and **PW3** both of whom witnessed the accused assaulting the deceased. The two witnessed the accused boxing and kicking the deceased. The accused partly

admitted that there was altercation between him and the deceased and even though he denies knowledge of injuries he inflicted to the deceased, it is obvious from the evidence tendered that he did so. The injuries caused by the kicks he subjected the deceased into are consistent with the injuries the doctor (**PW1**) observed during Post Mortem examination. The doctor noted that there was 500cc pus on the floor of the pelvic of the deceased and moderate gastritis, punctured tina and hypereamic small and large bowel. The punctured colon was a clear indication of blunt force trauma caused by kicks witnessed by **PW1** and **PW2**. The element of actus reus is well established and proved beyond any reasonable doubt. It is the accused who caused those fatal injuries.

22. (iii) **Mens rea.**

The accused in his written submissions has gone to great lengths to absorb himself from guilt. He submits that he did not intend to kill and that is why no weapon was used and that his conduct before and after the incident depicts him as a person who did not intend to kill. He relies on **Nzuki -vs- Republic (1193)KLR** where an accused picked the deceased from a bar and stabbed him. That there was no exchange of words and the court found him guilty of manslaughter because of absence of malice aforethought.

23. In this case however, as the prosecution has rightly submitted, the accused kicked the deceased in the lower abdominal region and that though the deceased may have had underlying condition that contributed to moderate gastritis, the accused kicked him in the abdomen more than once.

24. I further find that from the evidence of PW1, that when the deceased tried to flee from the accused after being boxed on the chest to the ground, the accused pursued him and tripped him as the deceased was running away. That act of pursuing a person running away from an assault, in my view indicates that there was malice. There was the evidence that there was a grudge regarding stolen beans. That may have contributed to the motive but what is more glaring from the prosecution's case is that the accused was heard beating the jerrican threatening the accused. He stated "**leo nitakuwa!**" He was therefore heard and seen literally beating drums of war. He followed up the threat with an attack on the deceased and even after **PW1** had rescued him from the initial blow to the chest that sent him sprawling to the ground, and after managing to escape, the accused pursued him and caught up with him. That act in my view clearly establishes motive.

25. The defence have raised the defence of intoxication under section 13 of the Penal Code. Section 13 of the Penal Code provides as follows;

(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—(a) the state of intoxication was

***caused without his consent by the malicious or negligent act of another person; or
(b)the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission....”***

Flowing from the above the defence of intoxication is available only on the following conditions;

- (i) When state of intoxication was caused without his consent or malice or through negligent act of another person.***
- (ii) When the person charged was by reason of intoxication insane, temporarily or otherwise at the time of committing the offence.***

26. The burden of establishing or proving the above conditions is on the accused person. The accused person has not given the details on the amount or type of alcohol taken. He did not raise the issue of drunkardness in his defence. The evidence given shows that he voluntarily went out to drink. In the case **Gilbert Kiptoo Sang -vs- Republic (2024)KECA 807**, cited by Mugun for State, the Court of Appeal had this to say;

“Our reading of section 13 is that intoxication is not a defence per se. However where the accused person’s state of mind is in question due to his or her level of intoxication, a court seized of the matter must establish whether the intoxication was involuntary or whether by reason of intoxication the accused suffered from insanity whether temporary or otherwise as to disprove him or her of the ability to form an intention to commit the offence. As per section 13(2) of the Penal Code, intoxication shall be

defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing....”.

The prosecution submits that the accused got drunk on his own accord and failed to demonstrate that the condition he was in during the incident made him insane.

27. This court finds that the defence of intoxication is not available to the accused to negate the element of mens rea for the following reasons;

- (i) He did not specify the amount and type of alcohol taken.***
- (ii) The fact that he pursued the deceased who was not drunk and caught up with him shows that he was not in a state that he did not know what he was doing.***
- (iii) His conduct after the incident also shows that he harboured ill intentions and was out to run away. He ran into hiding in Kakamega County. He did not bother to report to any police station or even the local administration. That in my assessment indicates that his intention was to run away after knowing that what he had done was wrong and there were consequences. He cannot take refuge in alcohol.***

28. This court on the overall finds that the prosecution has proved its case against the accused beyond any reasonable doubt. He is hereby found guilty as charged and he is convicted of murder accordingly.

**DELIVERED, DATED and SIGNED at KITALE this30th .
..... day ofOCTOBER....., 2025.**

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Auta for the accused

Alex Kapelo Okware -the accused person

Mugun for the State

Duke/Chemosop- Court assistants