



**Republic v Semeiyan alias Dodo & 2 others (Criminal Case E011 of 2021)  
[2025] KEHC 16139 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL CASE E011 OF 2021  
CW MEOLI, J  
NOVEMBER 6, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SAMUEL SIMEL SEMEIYAN ALIAS DODO ..... 1<sup>ST</sup> ACCUSED**

**BENJAMIN REMPEIYAN SEMEIYAN ALIAS KADONG ..... 2<sup>ND</sup> ACCUSED**

**BENJAMIN ROINET NTARYA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Samuel Simel Semeiyan alias Dodo, Benjamin Rempeiyan Semeiyan alias Kadong and Benjamin Roinet Ntarya, (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons, respectively) are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence stating that on 18<sup>th</sup> June, 2020 at Nkarusha village, Kiserian Location, Kajiado North Sub-County, Kajiado County they jointly murdered David Nyongesa Wakhungu alias Korombia.
2. The Accused denied the charges and the case proceeded to full hearing with the prosecution calling 12 witnesses. The prosecution case was that the County Government of Kajiado had prior to the material period purchased a parcel of land at Nkarusha for the construction of a school, and eventually digging of the foundation began on 17<sup>th</sup> June, 2020. Among those engaged to work in the construction project were the Accused persons who resided at Nkarusha village, David Nyongesa Wakhungu alias Korombia (hereafter the deceased), Goko Kariuki (PW3) and Joseph Munyua Njoroge (PW4), all working under the supervision of Francis Muya Kinuthia (PW2) who was in charge of the site. In addition, the deceased performed caretaker duties as an employee of Biko Amunga, the apparent vendor of the piece of land in question where, an elevated water tank supported by metal beams had been previously erected, and still stood at the material time.



3. On 18<sup>th</sup> June, 2020 the workers on the site complained that the digging of the foundation trenches was being hindered by the presence of the said water tank, as a result of which PW2 directed that the tank be removed. However, the deceased strongly objected to the removal, triggering a confrontation with the enraged workers including the three accused persons, that degenerated to the hurling of insults, the deceased challenging the workers to a fight.
4. According PW2 – PW4, in the ensuing melee the 1<sup>st</sup> Accused struck the deceased on the back with a stick, felling him while each of the 2<sup>nd</sup> and 3<sup>rd</sup> Accused used their jembes to strike the deceased on the face, occasioning serious injuries and profuse bleeding. Good Samaritans, Patrick Mugo Kiriba (PW8) and Mary Teitei Barnoti (PW6) rushed him to Kajiado County Referral Hospital where he died on the same date.
5. PW12 was the investigating officer Cpl. Teresia Thirikwa who, with other officers, namely, Cpl. Kilonzo and PC Francis, visited the scene of crime and commenced the search for the three Accused persons, named as suspects and who were said to have gone underground. They were eventually traced and arrested. With the consent of the defence, PW12 produced as Exh. 1 the postmortem report prepared after the examination conducted on the body of the deceased on 26<sup>th</sup> June, 2020 by Dr. Johansen Oduor.
6. At the close of the prosecution case, the Accused persons were placed on their defence. On his part, the 1<sup>st</sup> Accused testified that on 18<sup>th</sup> June 2020 he was working at the school construction site and was instructed, along with two others, to help bring down the elevated water tank that was supported by metal beams. His role was to go up onto the elevated platform to secure the tank to a rope for safe lowering. However, the deceased resisted the removal of the tank, leading to a commotion between him and other workers. He stated that by the time he descended from the elevated tank platform, the deceased had already been attacked by several of the workers and was injured. He claimed that during the fracas he had remained atop tank platform and denied assaulting the deceased. He was arrested a year later.
7. The 2<sup>nd</sup> Accused testified that on the morning of 18<sup>th</sup> June 2020, he was involved in digging the foundation trenches at the construction site, and was directed by the foreman to assist in removing the water tank. He too climbed the ladder to the elevated platform alongside the 1<sup>st</sup> Accused. That an altercation erupted after the deceased objected to the removal of the tank, and was injured when attacked by the workers using their tools. The 2<sup>nd</sup> Accused denied participating in the assault and stated he was arrested about a year later in Juja while grazing cattle. During cross-examination, he admitted being at the site during the day and acknowledged that the deceased was struck during the incident. He denied fleeing after the incident to avoid arrest.
8. The 3<sup>rd</sup> Accused testified that he was a herder and casual labourer residing at Nkarusha. Stating that he was present at the construction site on 18<sup>th</sup> June 2020, he said that at about 11:00am, three persons, including the 1<sup>st</sup> and 2<sup>nd</sup> Accused, who were relatives of one Sholoi, the (previous) landowner, scaled up the platform to remove the tank as instructed by the foreman. And that the deceased who appeared intoxicated, objected to the removal of the tank, insisting that his employer be consulted.
9. In the ensuing fracas the deceased was attacked with tools by the workers. He too denied having fled the area after the incident, stating that he surrendered to DCI Kiserian after officers came looking for him a year later. During cross-examination, he confirmed that the persons attempting to remove the tank were related to the landowner. He said he was busy working and did not see the assailants who attacked the deceased.



10. Moses Litei (DW1), a defence witness, testified that he was a resident of Oloiren and a pastoralist and that on 18<sup>th</sup> June 2020 while near the school construction site, he heard a commotion. Upon inquiry, he learned that the deceased, had resisted the removal of a water tank and while allegedly armed with a knife or panga, had threatened the site workers; that the Accused had been instructed to bring down the tank, which the deceased opposed, resulting in his assault.
11. During cross-examination he confirmed that the three accused persons, two of whom are brothers hailed from his home area, and that by the time of his arrival at the site, the assault had already occurred although the Accused persons were at the site.
12. Only the defence filed submissions, the prosecution opting to rely on the evidence adduced. In his submissions dated 17<sup>th</sup> June 2025, counsel for the Accused dismissed the testimony of PW1 as hearsay and described PW2's evidence as unreliable and malicious. Whereas the testimony of PW4 and PW5 revealed that, there was no intention to murder. Asserting that no witness was able to clearly identify the deceased's assailants, counsel cited the case of Republic -vs- Okwara (Criminal Case E015 of 2023) [2024] KEHC 1360(KLR).
13. Stating that the prosecution evidence as a whole was contradictory, counsel relied on the Court of Appeal decision in Richard Munene -vs- Republic [2018] eKLR (Criminal Appeal No. 74 of 2016) where the court held that whereas fundamental and substantial inconsistencies and contradictions in the prosecution evidence may go to discredit the credibility of a witness, not every trifling inconsistency and contradiction is fatal to the prosecution case. Counsel reiterating the requisite standard of proof in criminal cases therefore urged the court to acquit the Accused.

### **Analysis and Determination**

14. The definition of murder is found in Section 203 of the Penal Code which states that "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder". Similarly, malice aforethought is defined in Section 206 of the Penal Code in the following terms:

"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."
15. As always, the onus was upon the prosecution to prove beyond reasonable doubt the ingredients of the offence, namely, the fact and cause of the death of the deceased person, and that it is the accused persons whose actions or omissions led to the deceased's death, and, that the accused's actions were accompanied by malice aforethought , as held in Roba Galma Wario vs. Republic [2015] eKLR. The



undisputed circumstances of the incident are that the accused persons were working with the deceased and others at the construction site on the material date.

16. The fact of death of the deceased and the cause thereof are not in dispute. Following his assault at the construction site, the deceased sustained severe head injuries, principally, a skull fracture, as documented in the post mortem form produced as Exh 1. He succumbed to his injuries on the same date. The issue falling for determination is whether the Accused persons with malice aforethought jointly assaulted the deceased thereby occasioning him fatal injuries. Of relevance to the joint charge herein are the provisions of Sections 20 and 21 of the Penal Code. Section 20 provides in Subsection (1) that:

- “(1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-
- a. every person who actually does the act or makes the omission which constitutes the offence;
  - b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - c. every person who aids or abets another person in committing the offence;
  - d. any person who counsels or procures any other person to commit the offence;
- and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

17. Regarding common intent Section 21 provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

18. In this case the common intention, or mens rea to be proved is an intention to cause death or knowledge that the act or omission would cause death as stated in the definition of malice aforethought in Section 206 of the Penal Code. In the case of *Stephen Ariga & Another -Vs- Republic* [2018] eKLR the Court of Appeal considered the definition of common intent in Section 21 of the Penal Code before stating that:

“What common intention implies was set out by the predecessor of the Court in *Wanjiru d/ o Wamerio versus Republic* 22 EACA 521 as follows: -

“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.



19. The Court further observed that:-

“The ingredients of common intention were enunciated in Eunice Musenya Ndui -Vs- Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

1. There must be two or more persons;
2. The persons must form a common intention;
3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
4. An offence must be committed in the process;
5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose”

20. The Penal Code defines the actus rea or causing death in Section 213 as follows:

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases-

- a. If he inflicts bodily injury on another person, in consequence of which that other person undergoes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
- b. if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
- c. ....;
- d. ....;
- e. ....”

21. PW 2, 3 and 4 were the eyewitnesses called by the prosecution. The total sum of their evidence was that the Accused, the deceased and other workers on the construction site were busy digging the foundation trench when it was resolved and authorised by PW2 that a water tank pre-existing on the site, which was obstructing the digging, be removed. To which the deceased took great objection, resulting in an altercation with the workers and especially the accused persons, which degenerated into name-calling and a fight. In the ensuing fight, the 1<sup>st</sup> Accused using a stick hit the deceased on the back and he fell. Both the 2<sup>nd</sup> and 3<sup>rd</sup> Accused using their jembes struck the deceased in the face or head, as a result of which he bled profusely and was escorted to Kajiado County Referral Hospital by PW8 and PW6. He died on the same date.

22. The eyewitness accounts were consistent and none of the witnesses was shaken during cross-examination. While not disputing their presence at the site at the time, and the occurrence of the incident, the accused persons by their defences denied assaulting, the deceased each stating to have been busy performing tasks related to their work. While the 1<sup>st</sup> and 2<sup>nd</sup> Accused claimed to have been aloft



the platform where the elevated tank stood trying to prepare to lower it, the 3<sup>rd</sup> Accused stated that he was busy on the ground working.

23. However, from the evidence of the eyewitnesses, it appears that the removal of the tank had not commenced by the time what they described as a fight erupted between the Accused and the deceased. Equally, the Accused persons did not during cross-examination of these witnesses put their version of events to them. This incident occurred in daytime and the Accused were well known to the witnesses. While it is possible that several workers were involved in the initial altercation with the deceased, if indeed other workers, and not the Accused persons assaulted the deceased, one wonders why the witnesses would lay the blame only on the Accused only. In the court's view the prosecution evidence displaced the denials by the Accused, further rendered incredible by the fact that all three of them subsequently went underground and were arrested a year later.
24. The court having reviewed the accounts of the eyewitnesses noted that PW3 stated during cross-examination that the "fight" occurred after the deceased insulted the Accused, apparently mocking them for having sold the land and challenging them to a fight. While PW2 described the Accused's actions as rash. Of course, the workers on the site were unhappy that the deceased's conduct interfered with their day's work from which they hoped to earn their day's wages as happens in such sites and may have verbally challenged the deceased's actions. From the evidence, however, it was the three Accused on the face of it, who took matters in their own hands, verbal interventions having failed to move the deceased, their manifest intention being to forcefully and unlawfully subdue the deceased to facilitate the removal of the tank so that their work of digging the foundation trench could proceed.
25. That said, there is no evidence that such unlawful intention existed at the start of the argument with the deceased, rather that it developed in the course of events as the deceased who was the vendor's caretaker, stood his ground and challenging his opponents to a fight. Without doubt, the Accused persons brutally attacked the deceased using objects in their hands, namely a stick and jembes in the execution of an unlawful intention. Thereby occasioning him fatal injuries. However, in the court's considered view, the proven circumstances of the case appear more consistent with the offence of manslaughter. In the result, the court finds the Accused guilty of the lesser offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and will proceed to convict them.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2025**

**C.MEOLI**

**JUDGE**

In the presence of:

For the State: Miss Halima h/b for Mr Kilunda

For the Accused: Mr. Sifuna h/b for Mr. Mbuthia for the Accused

Accused 1, 2 and 3: Present

C/A: Lepatei

