



**Republic v Makuku (Criminal Case E002 of 2021)  
[2026] KEHC 633 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE E002 OF 2021  
JN KAMAU, J  
JANUARY 28, 2026**

**BETWEEN**

**REPUBLIC ..... ACCUSED**

**AND**

**ERIC MAKUKU ..... ACCUSED**

**JUDGMENT**

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-  
  
“On the 26<sup>th</sup> day of April 2021 in Hobunaka Village, Ebusudi Sub-Location within Luanda Sub-county murdered Zablon Masinde.”
2. The Prosecution’s case was heard on diverse dates between 18<sup>th</sup> July 2022 and 27<sup>th</sup> September 2023 when it closed its case. On 31<sup>st</sup> October 2023, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. The defence case was heard on 1<sup>st</sup> April 2025.
3. This matter was partly heard by P.J Otieno J. He took the evidence of Mary Saisi (hereinafter referred to as “PW 1”), Ann Anyanda (hereinafter referred to as “PW 2”) and Sara Muhonja Omukangu (hereinafter referred to as “PW 3”).
4. This court became seized of this matter on 28<sup>th</sup> March 2023 on which day the Accused person and the Prosecution indicated that this court could proceed with the matter from where it had reached. This court, therefore, took the evidence of Samuel Akombo (hereinafter referred to as “PW 4”), Getry Andisi (hereinafter referred to as “PW 5”), Dr Dickson Mchana (hereinafter referred to as “PW 6”), No 237821 Chief Inspector Margaret Muthui (hereinafter referred to as “PW 7”) and that of the Accused person.



5. The Prosecution's Written Submissions were dated and filed on 6<sup>th</sup> May 2025 while those of the Accused person were dated 8<sup>th</sup> October 2025 and filed on 9<sup>th</sup> October 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

6. The issues that were put before this court for consideration were as follows:-
- a. Whether or not Zablon Masinde (hereinafter referred to as the "deceased") died?
  - b. If so, was his death caused by an unlawful action(s) and/or omissions?
  - c. If so, who caused the unlawful action(s) and/or omissions?
  - d. Was there malice aforethought in the causation of the deceased's death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

#### **I. Proof Of Death Of The Deceased**

8. The Accused person submitted that the deceased's death had been proved by Prosecution's identifying witnesses. On its part, the Prosecution submitted that there was no dispute as to whether the deceased died.
9. As both the Prosecution and Defence witnesses alluded to the deceased's death, it was not necessary to seek further proof. This court found and held that the deceased's death was proved without an iota of doubt.

#### **II. Proof Of Cause Of The Deceased's Death**

10. The cause of the deceased's death was a pertinent issue. Both the Accused person and the Prosecution submitted that the cause of the deceased's death was proven by the production of a Post-mortem Report dated 30<sup>th</sup> April 2021 as an exhibit in this case by PW 6. After conducting the post-mortem examination, he formed an opinion that the cause of the deceased's death was septic shock secondary to jejunal perforation following blunt abdominal trauma (assault).
11. It was, therefore, clear from PW 6's evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was, therefore, crucial to establish how the deceased sustained the injuries that caused his death.

#### **III. Identification Of Perpetrator(s) Of Deceased's Death**

12. The Accused person did not deny having been with the deceased on the material date of 26<sup>th</sup> April 2021 and fighting him. He, however, argued that the injuries he inflicted on him were not sufficient to have caused his death.
13. He submitted that it was trite law that the burden of proof shall lay on the prosecution to prove that it was an accused person who murdered a deceased and that the proof had to be beyond reasonable doubt. He added that the Prosecution had to prove all the elements of murder so as to secure a conviction.
14. To buttress his point, he placed reliance on the case of Republic vs Andrew Muecha Omwenga (eKLR citation not given) where it was held that for an accused person to be convicted of murder, it had to be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission.



15. He contended that it was clear from the evidence of PW 1 and PW 2 that a fight ensued between him and the deceased but whether the said fight caused the death of the deceased was not been proved beyond reasonable doubt. He argued that there were contradictions as to the actual weapon used as PW 1 and PW 2 who were the eye witnesses, mentioned a rungu and a panga, yet a panga was not adduced in court. He added that the said witnesses also confirmed that he (sic) had no cuts from the panga.
16. He further submitted that although the eye witnesses testified of a rungu as the murder weapon, what was used to beat the deceased was a broken jembe stick. He added that it was the Area Chief who arrested him and not the Investigating Officer but that the Area Chief was not called to give evidence. He was emphatic that this element of murder on whether he committed the unlawful act of causing the deceased's death was not proven beyond reasonable doubt.
17. On its part, the Prosecution placed reliance on the case of R vs Joseph Chege Njora[2007]eKLR where it was held that killing of a person could only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose.
18. It asserted that the deceased suffered a closed fracture of the 2<sup>nd</sup> – 6<sup>th</sup> right ribs, broken left side 2<sup>nd</sup> – 5<sup>th</sup> ribs, lung contusion on either side, injury to the blood vessels, perforation of the small bowel and swelling of the stomach lining of the abdominal cavity. It added that his spleen also had a lot of blood. It argued that it was, therefore, clear that the deceased suffered injuries to the vulnerable part of his body and that he succumbed to the injuries which were as a result of the assault perpetrated by the Accused person. It was emphatic that the unlawfulness of the death of the deceased was not disputed.
19. It submitted that it was clear from the evidence of the Prosecution's witnesses that it was the Accused person who inflicted the injuries on the deceased which led to his death. It averred that the Accused person was properly identified by PW 1 and PW 2, who knew him well as they saw him assault the deceased and stepped on his back and stomach. It contended that PW 3 testified that the deceased informed her that the Accused person had assaulted her by stating, "Erick ameniua leo" before he succumbed to the injuries.
20. It was its contention that it relied on direct evidence of PW 1 and PW 2 and the dying declaration made to PW 3 and hence, it proved its case beyond reasonable doubt and established a prima facie case against the Accused person whereafter he was put on his defence. It pointed out that the Accused person's defence was not tangible and did not dislodge its case and he was, therefore, guilty as charged. It urged this court to convict and sentence him accordingly.
21. The Accused person testified that on the material date of 26<sup>th</sup> April 2021, he had come home from Equity Bank to book a scholarship for his daughter who had performed well when he heard the deceased, who was on the road coming to the direction of his house, insulting him and his family. He testified that he had reported the deceased to his siblings and to the Assistant Chief for the insults which began from the year 2020 but that the deceased told him that there was nothing he could do as his children were teachers and lawyers.
22. He said that he got out of the house because the deceased was disturbing his children who were reading and that he asked him why he was following him while the matter was with the Assistant Chief. He told this court that the deceased looked like he was in a fighting mode and was drunk. He added that the deceased started fighting him but because he was drunk, he overpowered him and pushed him to the ground.
23. He said that neighbours came to the scene and PW 4 ferried him on a motor bike. It was his evidence that after four(4) days, he heard that the deceased had died. He averred that a mob came to his



- compound to attack him but he jumped over the fence and fled. His evidence was that the deceased who had two (2) boulders tried to hit him with them but he overpowered him and hit him first. He denied having being armed with a rungu and/or a panga at the material time.
24. Notably, PW 1 who was the deceased's granddaughter testified that on the material date of 26<sup>th</sup> April 2021, she was by the road side with PW 2 who was her younger sister when she saw the deceased passing by and on approaching the gate of the Accused person, the Accused person attacked him, held him by the collar and dragged him to his compound. She further stated that the Accused person ordered the deceased to lie down like a student and sent his son, Havi, to get him a cane. However, the said Havi came with a rungu which the Accused person used to assault the deceased.
  25. It was her further testimony that the Accused person asked the said Havi to bring a panga which the Accused person used to hit the deceased's thighs, legs and hand. She further stated that the Accused person stepped on the deceased's stomach and back and that she saw blood ooze from the deceased's mouth and nose.
  26. Her evidence was corroborated by PW 2 who was also the deceased's granddaughter to the effect that the Accused person directed the said Havi to bring a stick and also ordered the deceased to lie down like a student. She explained how the Accused person beat the deceased on his ribs, stomach and hands with a rungu that the said Havi brought.
  27. PW 3 was the deceased's wife. She stated that she was informed by one Geoffrey Amakobe that the Accused person had killed her husband and she rushed to the scene. She said that members of the public informed her that the deceased had been rushed to Kima Mission Hospital. She went to the said hospital but found that the deceased had been referred to Coptic Hospital. She said that she went to Coptic Hospital where she found the deceased who informed her that the Accused person had killed him that day ("Eric ameniua leo") before he died.
  28. PW 4 was the one who rushed the deceased to Kima Mission Hospital where they were referred to Coptic Hospital. PW 7 was the Investigating Officer. Her evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6. She recovered the murder weapon, a broken jembe handle.
  29. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 and PW 2 saw the Accused person beat the deceased on the material date. They were also able to see him bleeding from his head, nose, mouth and eyes. They also saw the crude weapons the Accused person was using in beating the deceased at the material time. The deceased told PW 3 that it was the Accused person who had killed him.
  30. Notably, PW 1, PW 2 and PW 4 all placed the Accused person at the scene of crime. They all saw him armed with a rungu and a panga. The incident happened during daytime when there was sufficient light that was favourable for the positive identification of the Accused person. PW 1, PW 2, PW 4 and the Accused person were all neighbours and knew each other. This could not have been a case of mistaken identity. Identification was by way of recognition. This court was thus persuaded to find and hold that the Accused person was positively identified by PW 1 and PW 2 as aforesaid.
  31. The Accused person did not demonstrate that there was any motive for PW 1, PW 2, PW 3 and PW 4 to have colluded to frame him as the person who unlawfully caused the deceased's death on that material date.
  32. His assertions that the rungu or the panga was not produced as evidence and that the Prosecution witnesses' evidence was full of inconsistencies and that the Prosecution failed to call some crucial witnesses raising doubts as to who actually killed the deceased were therefore rendered moot.



33. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the evidence of the Accused person to have been watertight enough to have weakened the inference of guilt on his part. The witnesses that the Prosecution availed were sufficient to have proven its case. It was not necessary for the Prosecution to have adduced the panga as failure to produce a murder weapon was not a fatal omission in a Prosecution's case.
34. Consequently, it was this court's finding that the Accused person's defence was a mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 5, PW 6 and PW 7.

#### **IV. Malice Aforethought**

35. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.
36. The Accused person submitted that he acted in self defence and that if the deceased died out of the injuries inflicted by him, then it had not been proven that he had any intention of killing the deceased. He contended that all the elements to secure a conviction for murder had not been adequately proven herein hence urged the court to acquit him under Section 215 of the Criminal Procedure Code.
37. The Prosecution invoked Section 206 of the Criminal Procedure Code and placed reliance on the case of *Nzuki vs Republic* (1993) KLR 171 where it was held that the inferences drawn from a person with malice aforethought included intention to cause harm, intention to cause grievous bodily harm, where the accused knows that there is a risk that death or grievous harm will ensue from his actions and commits them without lawful excuse and an intention to commit a felony.
38. It asserted that the Accused person assaulted and caused grievous harm on the deceased and that he was determined to injure him as the said injuries occasioned his death. It was its case that the actions of the Accused person were propelled by extreme malice aforethought. In this regard, it relied on the case of *Republic vs Hancock and Shankard* (1985) 3 WLR 1014 where it was held that the probability of an injury arising from an act done was important because if the likelihood that the injury would result was high, the probability of that result could be seen as overwhelming evidence of the existence of the intent to injure.
39. It further submitted that the court in the case of *Republic vs Tubere s/o Ochen* [1954] 12 EACA 63 held that an inference of malice aforethought could be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. It pointed out that the attack on the deceased's chest was an attack on his life. It was emphatic that it had proved all the ingredients of the offence of murder to warrant this court to find that the Accused person was guilty as charged.
40. This court had due regard to the case of *Morris Aluoch vs Republic* [1997] eKLR which cited the case of *Rex vs Tubere s/o Ochen* (Supra) where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
41. As was stated hereinabove, PW 1 and PW 2 saw the Accused person assault the deceased with a rungu and a panga. They saw him step on the deceased's stomach and back and further saw blood ooze from the deceased's mouth and nose. From PW 7's investigations, PW 1, PW 2, PW 3 and PW 4 connected the Accused person to the deceased's death. The thorough beating he meted on the deceased could only have been intended to kill him for the insults.



42. The serious injuries that PW 1, PW 2 and PW 3 alluded to were captured in the Post-mortem Report by PW 6. Upon conducting the postmortem examination, he observed that the deceased suffered a closed fracture of the 2<sup>nd</sup> – 6<sup>th</sup> right ribs, broken left side 2<sup>nd</sup> – 5<sup>th</sup> ribs, lung contusion on either side, injury to the blood vessels, perforation of the small bowel and the stomach lining of the abdominal cavity was swollen. He added that the spleen had a lot of blood. The extensive injuries all over the deceased's body and the fact that he did not die immediately were evidence that he suffered greatly before he died.
43. The beatings the deceased suffered at his hands were not only unlawful but they could not be said to have been bereft of malice aforethought on his part. It was clear that he acted with intention to cause the deceased harm which led to his death. It was immaterial that the deceased used to insult him as the Accused person had alleged.
44. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the Accused person had asserted. What it observed, however, was that the Accused person took the law into his hands. If he wanted to stop the deceased from insulting him and his family, he ought to have sought assistance through the proper legal channels.
45. Having analysed the evidence that was adduced by both the Prosecution and the Accused person and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, was proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the Accused person herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
  - a. Proof of the deceased's death'
  - b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
  - c. Proof of malice aforethought in the unlawful actions and/or omissions.

### **Disposition**

46. For the foregoing reasons, the upshot of this court's decision was that the Accused person herein be and is hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
47. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 28<sup>TH</sup> DAY OF JANUARY 2026.**

**J. KAMAU.**

**JUDGE.**

