



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Esitaka alias Musizi & 3 others (Criminal Case
2 of 2020) [2026] KEHC 3980 (KLR) (19 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 2 OF 2020
S MBUNGI, J
MARCH 19, 2026**

BETWEEN

REPUBLIC PROSECUTOR

AND

JULIUS MZEE ESITAKA ALIAS MUSIZI 1ST ACCUSED

JOSEPHAT OCHIENG MABOSS 2ND ACCUSED

STEPHEN ODHIAMBO BARAZA 3RD ACCUSED

JEREMIAH ATEKO MULANDO 4TH ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on the night of 6th January 2020, at Murram Village, Shirere Sub-location, Kakamega Central Sub-County, they jointly murdered Harrison Adaka. They all pleaded not guilty.
2. PW1 and PW2 evidence was heard by Judge W Musyoka , Evidence of PW3 and PW4 was heard by Justice S Chirchir, I heard the defence.
3. The prosecution case, taken as a whole, was that on the material night, a fight broke out between the deceased and the 2nd accused.
4. PW1, Andrew Nyanga Azizi, testified that he witnessed the deceased and the 2nd accused struggling on the ground, with the 2nd accused armed with a short sword. He intervened and disarmed him. He further stated that the 1st accused arrived armed with a slasher and he saw him hit the deceased with the back side of the slasher. The 1st accused issued threats to kill both him and the deceased, while the 3rd and 4th accused also appeared at the scene, prompting him to flee. He did not see the 3rd and 4th accused hit the deceased.



5. PW2, Dismus Ndusi Wenu corroborated that there was a fight and found both the deceased and the 2nd accused injured at the scene, with the accused persons present.
6. PW2 further testified that he saw the first accused kick the deceased when he was lying on the ground.
7. PW3, Dr. Dixon Muchana confirmed that the cause of death was multiple injuries due to mixed force trauma following assault.
8. PW4, Cpl Clement Kiprono testified that police found both the deceased and the 2nd accused injured at the scene and that Nyumba Kumi members assisted in taking them to hospital.
9. The defence of the 1st, 3rd and 4th accused persons was that they were Nyumba Kumi personnel responding to a fight, and that they did not participate in the assault.

Issues for Determination

10. The court determines:
 - i. Whether the death of the deceased occurred and its cause;
 - ii. Whether the death was unlawful;
 - iii. Whether the accused persons caused or participated in the death;
 - iv. Whether malice aforethought was proved.

Analysis and Determination

11. The fact and cause of death are not in dispute. The post-mortem confirms that the deceased died from multiple injuries resulting from assault.
12. The evidence clearly establishes that the death resulted from an unlawful act, namely a violent confrontation.
13. The central issue is whether the accused persons acted with malice aforethought, as required under Section 206 of the *Penal Code*.
14. The court finds that the evidence points to a spontaneous fight, initially between the deceased and the 2nd accused. The other accused persons appear to have arrived thereafter. PW1 said he saw the 1st accused hit the deceased with the backside of a slasher. PW2 also said that he saw the first accused kick the deceased when he was lying on the ground.
15. Further, the evidence reveals:
 - a. No prior grudge or motive was established;
 - b. The incident occurred suddenly at night;
 - c. The deceased and the 2nd accused were already engaged in a violent struggle;
16. In *Republic v Ekai*, the High Court held that where death results from a spontaneous fight without evidence of prior intent, malice aforethought is not established, and the offence is reduced to manslaughter. The court emphasized that absence of motive and premeditation weakens the prosecution's case on murder.
17. Similarly, in *Republic v Mbula*, the court held that failure to prove *mens rea* (malice aforethought) leads to substitution of the charge to manslaughter, even where the accused caused death.



18. In *Republic v Mwangangi*, the court reiterated that where death occurs in the course of a fight, and intention to kill is not proved, the proper conviction is manslaughter.
19. Further, the principle in *Nzuki v Republic* remains authoritative: malice aforethought cannot be inferred merely from the act of assault; it must be proved through clear intention to kill or cause grievous harm.
20. Applying these principles, this court finds that:
 - a. The prosecution proved *actus reus* (unlawful act causing death);
 - b. However, it failed to prove *mens rea* for murder;
 - c. The circumstances disclose a fight and possible mob assault, not a premeditated killing.

Conclusion

21. The prosecution has failed to prove the offence of murder beyond reasonable doubt, particularly on the element of malice aforethought.
22. However, the evidence establishes that the accused persons participated in an unlawful act of assault that caused the death of the deceased.
23. Under Section 179(2) of the *Criminal Procedure Code*, the court substitutes the charge of murder with the lesser offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.
24. The 1st and 2nd accused persons Julius Mzee Esitaka- Alias Musizi and Josephat Ochieng Maboss. I hereby found guilty for offence of manslaughter, and they are convicted accordingly. 3rd and 4th Accused persons are acquitted for lack of evidence. The 2nd Accused absconded the trial proceedings in absentia, therefore his none participation was self induced.
25. The matter shall proceed to mitigation and sentencing.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH, 2026.

S. N. MBUNGI

JUDGE

In the presence of:-

CA: Velma/Zilda.

Ms. Kiu for the ODPP present online.

Mr. Otsyeno for the Accused persons present online.

The Accused person present.

