



**Republic v Musa (Criminal Case 70 of 2018) [2026] KEHC 6124 (KLR) (7 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 70 OF 2018**

**S MBUNGI, J**

**MAY 7, 2026**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SUSY MAKONJO MUSA ..... ACCUSED**

**JUDGMENT**

1. The Accused person in this matter has been charged with the offence of murder, contrary to Section 204 of the Penal Code. The particulars of the charge are that the accused Susy Makonjo Musa on the night of 13th and 14th day of November, 2018 at Shiandiche sub-location, Silungai Location in Kakamega North Sub-County within Kakamega County murdered Bernard Shikuku Kawa.
2. At the hearing of the matter, the prosecution called a total of 6 witnesses and the post-mortem report was produced by consent of the parties on the 31st October, 2023 as prosecution exhibit 1.
3. PW1-PW6 were heard by Justice William Musyoka, Judge P.J Otieno recorded the consent on production of post-mortem report and gave a ruling on case to answer. I heard the defence .
4. PW1, who was at the time of giving evidence aged 10 years gave unsworn evidence. He testified to the fact that on the date of the incident, he had been sent by their deceased father to go to Senjeche and when they came back home they found their mother had blocked the door with a jembe.
5. He stated that when their father came home, he knocked on the door and when their mother opened the door she hit him with the jembe on the head. Thereafter, he recalled two people identified as Jack and Soita, who appeared from the sugarcane plantation. The two came to their house and started beating the deceased. He stated that Soita had a panga and Jack was armed with a fimbo. He said the incident happened in the house and he was able to see what had happening for the door was opened.
6. On cross-examination, PW1 reaffirmed that he saw his mother hit the deceased on the head with a jembe.



7. PW2 stated that he saw his mother (the accused herein) hide a jembe behind the door and that when their father came from work he saw his mother hit his father with the said jembe on the head. He also saw Soita and Jack emerge from the sugarcane plantation, and he saw them beating his deceased father with a panga. He also stated that their mother took them to a neighbour's house after the incident.
8. Upon cross-examination, PW2 maintained that it was his mother who had first attacked their father in the house and that he saw what was happening with the aid of light from a small lamp that was in the house.
9. PW3, PW4, PW5 AND PW6 just visited the scene after the incident, they found the body of the deceased lying in the compound near the door of the house and that he had visible injuries on the head and he also saw a jembe lying next to the deceased, which jembe was identified by PW2 as the weapon used by the accused to hit the deceased.
10. When placed on her defence, she gave a sworn statement and denied committing the offence and said that on the material day, she differed with her husband over uprooting of the flowers he had planted in the compound. The deceased could not take the explanation that it is his brother who uprooted his flowers. The deceased ordered her to pick her clothes and go with the young child and leave him with the two big children.
11. She sought the intervention of the deceased brother who also acted as the village elder. He was able to talk to him, they left the homestead together later at 7.00pm the deceased came home, he refused to eat and he appeared agitated. He did not talk to her. He asked him whether he had bought paraffin as he had promised, he did not answer. He requested for his phone so that he can use it as light to enable her serve him with food but he refused. She sensed danger, she decided to escape with her children to the sugarcane plantation and she sought refuge in her fellow church member house where she slept with her children. The following day she met with the village elder the brother to the deceased, he told her that her husband had died. He advised her not to go home for the villagers were very annoyed. She went to the AP camp and reported. She was told to stay there for her security. Later she was arrested and put in cells as a suspect for the murder.
12. On cross-examination, she told the court that PW1 and PW2 told her that they were told to say it was her who killed the deceased and if they don't they will be killed just as their father.

#### **Analysis and Determination:-**

13. With this background from both the prosecution and the defence, it is now my singular duty to assess the evidence to establish whether the prosecution has discharged the burden of proof beyond reasonable doubt to warrant conviction of the accused.
14. The prosecution's mandate is to discharge this burden of proof of establishing that the accused person in this case committed the offence of murder beyond reasonable doubt. (See section 107(1), 108 and 109 of the *Evidence Act*). In such serious cases, the evidence must carry a high degree of probative weight.
15. Section 203 of the penal code defines murder as follows:

“ Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder”



16. In the case of Anthony Ndegwa Ngari v Republic (supra), the Court of Appeal identified the following crucial ingredients of the offence of murder as essential for a conviction: -

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order 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.”

17. It therefore follows that for a conviction to suffice, the prosecution ought to prove beyond reasonable doubt that the following:

- a. The death of the deceased,
- b. The death was unlawfully caused (actus rea)
- c. That in causing death of the deceased accused’s unlawfully acts were accompanied with malice aforethought. (mens rea)
- d. That additionally the accused was the person who committed the offence on the material day as against the deceased.

18. The death of Bernard Shikuku Kawa is not disputed. The post-mortem report states that the cause of death was severe head injury from blunt force trauma.

19. As to whether the cause of death was unlawful, It is a well-settled presumption in criminal law that, in the absence of justification, all homicides are presumed unlawful. This presumption stands unless the accused raises a credible explanation.

20. The post-mortem findings revealed extensive skull fractures and lacerations inconsistent with any lawful cause. The death was therefore caused unlawfully.

21. On whether the accused was the perpetrator, The eyewitness evidence is compelling. PW1 and PW2 said they saw the Accused hit the deceased on the head using a jembe and later Jack and Soita joined her and they saw them beat the deceased using panga and a fimbo (stick). They said they knew Jack and Soita they used to come to their home frequently, they could see what was happening in the house because the door was open and there was light from a small lamp.

22. The defence that the accused left the scene (homestead) after she sensed danger when the deceased arrived home and was uninvolved thus invoking the defence of alibi.

23. In the case of Republic v Sukha Singh s/o Wazer Singh & others (1939) 6 EACA 145 the Court of Appeal held thus:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he had been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped”.



24. The accused's defence, denying involvement and claiming to have left the homestead is unsupported by any credible counter-evidence. A bare denial, in face of cogent and unshaken evidence, cannot raise reasonable doubt. Taken together, the evidence excludes other plausible hypotheses of innocence and points irresistibly to the accused as the perpetrator. The Accused raised the defence of Alibi late in the day such that the prosecution did not have the chance to rebut.
25. As to whether the unlawful act of assault was actuated by malice aforethought, section 206 of the Penal Code defines it 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; or 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.”
26. The question is whether the accused in hitting the deceased on the head intended to cause death or knew that the manner and degree of assault will probably cause death.
27. Applying the above principles to this instant case, this court notes that the accused used a jembe stick, a blunt weapon, directed at the deceased's head, a delicate and vital part of the body. The force was sufficient to crush the skull of the deceased and indeed crushed the head.
28. The nature of the injuries and the part of the body targeted indicate that the accused intended either to cause death or grievous harm. The court therefore finds that malice aforethought is proved.

### **Conclusion**

29. Upon evaluating the evidence wholly, the court is satisfied that the prosecution has proved all the ingredients of the offence of murder beyond reasonable doubt; that the accused, Susy Makonjo Musa, unlawfully caused the death of Bernard Shikuku Kawa.
30. PW1 and PW2 the children of the accused were the eye witnesses each aged below 10 years at the time the offence was committed. They were two innocent to falsely testify against their mother. Their evidence was firm and corroborated each other.
31. Accordingly, the accused is found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and is hereby convicted accordingly.
32. The said Jack and Soita should be pursued and charged accordingly.
33. Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF MAY, 2026.**



**S.N MBUNGI**

**JUDGE**

In the presence of:-

CA: Angong'a/Velma

Ms. Kiu for the ODPP present online.

Ms. Wanyonyi for the Accused present online.

Ms Wanyonyi: I pray that a pre-sentence report be availed before delivery of the sentence.

Court: Sentencing and ruling on 13.7.2026.

