



**Republic v Karakacha & another (Criminal Case E022 of 2022)  
[2025] KEHC 532 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E022 OF 2022  
AC BETT, J  
JANUARY 24, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHRISROPHER KARAKACHA ..... 1<sup>ST</sup> ACCUSED**

**EDWIN OSCAR WASADIA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Christopher Karakacha and Edwin Oscar Wasadia, the Accused persons herein, are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the offence are that Christopher Karakacha and Edwin Oscar Wasadia on the 20<sup>th</sup> day of May 2022 at Bushiri Market, Butso North Location in Navakholo Sub-County within Kakamega County jointly murdered Dickson Aruba.
2. Both Accused persons pleaded not guilty to the charges against them and as a result, the case proceeded to hearing.
3. The prosecution availed a total of six witnesses in support of their case. Each of the Accused person on the other hand presented their defence through sworn statements and did not call any witnesses.

**Prosecution's case**

4. The prosecution called Philip Onyango (PW1) who gave his sworn evidence and stated that on the material night, he was at a club called Nekoye at Bushiri market. He stated that he was behind the counter when the waiter called him and told him that there was a fight outside. He stated that he went outside and found two people namely Oscar and Toffer fighting. He stated that he managed to separate them, and they left. He advanced that shortly after that incident, the waiter again called him and told him that he was being called by one Dickson Aruba (the deceased). He testified that he went outside



- where he met the deceased who told him that he had been beaten by Oscar. He stated that he proposed to take the deceased to the hospital, but the deceased declined, and he asked one Rodgers to take the deceased home in a car and went back to the club. He further stated that the deceased claimed that he was hit with a stone on the head by Oscar and Toffer. He stated that he knew Oscar who is the 2<sup>nd</sup> Accused herein and that he did not know Toffer then. He stated that on the evening of the day of the incident, he saw the two Accused persons at Nekoye and he affirmed that they were the two people who were creating disturbance. He stated that when the deceased told him that he had been beaten, the two accused persons were not around.
5. In cross-examination by Counsel for the 1<sup>st</sup> Accused, PW1 stated that he did not know the 1<sup>st</sup> Accused person whom he first saw him at the police station. He averred that when the Accused persons were brewing trouble outside the bar, the deceased was also outside the bar. He stated that when the deceased went to him to report that he had been beaten, he told him that he was beaten by Oscar. In further cross-examination by Counsel for the 2<sup>nd</sup> Accused, he stated that the incident happened at 10:00 p.m. He stated that he did not witness the fight nor the deceased getting injured.
  6. In re-examination, he stated that Toffer is the 2<sup>nd</sup> Accused person. He said that he saw the 2<sup>nd</sup> Accused person at the bar but did not know his name is Toffer.
  7. Anthony Mtungu Malinji testified in court as PW2 and stated that on the night of the incident at around 9:00 p.m., he was at Bushiri market going home. He recounted that he met the deceased who was walking by the roadside. He stated that the deceased approached him and told him that he was injured by some boy. He explained that he went back to the club with the deceased where they met PW1. He testified that he asked PW1 what had happened and PW1 identified the accused persons as the people who had been brooding trouble. He suggested that the deceased should go to hospital, but the deceased refused and opted to go home. PW2 said that they parted ways and that on 22<sup>nd</sup> May 2022 he received a phone call from one James Andega who told him that the deceased had been found dead in his house. He stated that he visited the scene and that the next day he recorded his statement at the police station. He averred that it is PW1 who told him that it could have been the Accused persons who injured the deceased.
  8. In cross-examination by the 1<sup>st</sup> Accused person's advocate, he stated that the name that was given to him by PW1 was that of the 2<sup>nd</sup> Accused and that PW1 did not know the name of the 1<sup>st</sup> Accused. He averred that when he met the deceased, the deceased told him that he was beaten by two boda boda guys but he did not give him any names. He stated that he did not witness the incident hence he could not say who injured the deceased. In cross-examination by advocate for the 2<sup>nd</sup> Accused, he stated that when he met the deceased, the deceased was weak but not drunk although he had said in his written statement that the deceased appeared drunk. He stated that the deceased did not give him the names of the people he claimed had assaulted him.
  9. In re-examination, he reiterated that the deceased did not give him any names and averred that PW1 did not witness the fight.
  10. Dennis Simbayun Wanjofu testified as PW3 .He recalled that on 22<sup>nd</sup> May 2022, he was at Bushiri market when he received a phone call that one of their tenants had been found dead in his house. He testified that he went to the scene and informed the police who went and picked up the body and took it to the mortuary. He stated that on his way back after writing his statement, he met the 1<sup>st</sup> Accused, his father and brother on a motorcycle and that they arrested the 1<sup>st</sup> Accused and took him to the police station.



11. In cross-examination by the 1<sup>st</sup> Accused's counsel, PW3 averred that he was not privy to what happened on the night of the incident. He testified that there was a reported scuffle between the 2<sup>nd</sup> Accused person and PW1. He further stated that he did not know who hurt the deceased. PW3 was cross-examined by the advocate for the 2<sup>nd</sup> Accused person and he maintained that he received the news of the death of the deceased while he was at the market and that he did not know what killed the deceased.
12. Rogers Wakhisi testified as PW4 and recounted that on the material night, he was driving from work on his way home when he saw two people known to him standing by the road. He testified that the two people were PW1 and the deceased and that PW1 waved him down. He stated that the deceased was holding his head with one hand and an egg on the other hand. He testified that the deceased boarded his car, and he dropped him off about 100 meters away at a junction to Lukuwe and Ingotse. He averred that he received news of the deceased's death after two days.
13. In cross-examination, he averred that he met the deceased at about 8-9 p.m. He posited that the deceased only told him that he was injured on the eye.
14. Dr. Dickson Mchana, a Consultant Pathologist based at Kakamega County Referral Hospital, testified as PW5 and gave his evidence and stated that he had an autopsy report on the deceased, which was dated 26<sup>th</sup> May 2022 at Kakamega County General Hospital mortuary. He averred that the body of the deceased was identified by Nahashon Mashumbo and Benson Akhulia. He testified that on examination of the body, he observed that there was bubbling through the mouth, and the skin was peeling off with mosaic pattern. He averred that the nails and tongue appeared bluish in colour and that there were defence injuries on both elbows. He stated that there was no evidence of medical treatment or prior ill health. He asserted that upon internal examination, he observed that there was blood clot in the chest overlying the breast borne. He stated that the stomach was empty with an alcoholic smell and that there was extensive bleeding in the head under the skin involving the left side of the face and the left scalp. He averred that there was no fracture of the skull but there was bleeding under the brain coverings involving the hind brain and the left part of the fore brain. He further testified that the brain had mild swelling meaning that the deceased did not take long before death. He stated that he formed an opinion that the death was due to closed head injury secondary to blunt force trauma following assault. He stated that he filled in a burial permit number 1912639. PW5 produced the post-mortem report which was marked P.Exh. 1.
15. In cross-examination, PW5 stated that the blood clot on the chest was due to landing. He asserted that the head had two levels of bleeding which he considered to have been occasioned by a blunt trauma. He averred that even though there was alcohol smell, the body was embalmed, and they could not ascertain the level of concentration of alcohol in the body. He reiterated that he had no doubt from the extensive injuries, that the deceased had been assaulted since the injuries were inconsistent with a fall.
16. PW6 NO. 2299111 PC. Benjamin Kosgei, who was the Investigations Officer in the matter, testified and stated that he received a report from Bushiri market in Navakholo that somebody had been found dead in his house. He averred that he visited the scene of crime in the company of his colleagues. He stated that when they arrived, they found the body of the deceased lying face up with the left hand holding the left face. PW6 asserted that they removed the body which was already decomposing and took it to the mortuary. He averred that when they were conducting investigations the next day, they were told that the deceased had been spotted at Nekoye while drinking. He testified that when they spoke to the workers at Nekoye, they were informed that two boys had been to the bar and caused a brawl by beating the bar attendant called Grace and that they also assaulted the deceased. He testified that they were further informed that two boys ran away when they were confronted by the proprietor of the bar called Phillip (PW1) and that they started pelting the bar with stones. He stated that the



deceased decided to leave but was assaulted by the same boys and he went back to the bar and reported to PW1 that the same boys had assaulted him. He further stated that PW1 offered to take the deceased to hospital, but the deceased insisted on going back home and he was escorted there by PW4. He testified that he did attend the post mortem which confirmed that the death was caused by assault. He averred that members of the public managed to arrest the 1<sup>st</sup> Accused on 23<sup>rd</sup> May 2022 while the 2<sup>nd</sup> Accused was arrested on 11<sup>th</sup> June 2022 in Busia.

17. In cross-examination, he stated that he was not present at the scene to witness the incident and that he did not recover any exhibits from the scene. He testified that they tracked the 2<sup>nd</sup> Accused using his phone and the 2<sup>nd</sup> Accused's father also assisted them to trace him to Busia.
18. The prosecution closed their case, and the accused persons were placed on defence.

### **Defence case**

19. The 1<sup>st</sup> accused gave his sworn statement and testified as DW1 where he stated that on the material date, he was at home weeding maize from around 4.00 p.m. and at around 7.00 p.m., he averred that he was in the house with his mother watching news. He denied going to the bar and drinking alcohol that night. He stated that he did not know the deceased and still does not know him. He further averred that he did not know any of the witnesses except for PW1 and that he knew PW1 since he used to shop at the Matoi Bus stage. He testified that he was arrested at home while weeding flowers with his father in their compound. He averred that it is the police who recorded his statement and that he did not know what he was signing since he is illiterate. He denied knowing the 2<sup>nd</sup> Accused person. He testified that he came to know of the 2<sup>nd</sup> Accused when their cases were consolidated. It was his testimony that the policeman who arrested him informed him that he had received information that two boda boda riders had committed the offence and that he needed his help with the investigations. He averred that when he denied knowing the two boda boda guys who had committed the offence, the policeman told him that if he did not tell him who committed the offence, he would arrest him.
20. In cross-examination, he stated that he did not record the police statement and that he was assaulted and forced to sign the statement by the police. He reiterated that on the material night, he was watching news at home with his father and that his mother and brother were in the kitchen. He stated that he did not do boda boda business since he was a casual labourer who loaded sugarcane on tractors and did weeding. He reiterated that he did not know the 2<sup>nd</sup> Accused at all despite them being from the same area. He averred that he knew PW1 since he used to do the work of a bouncer. He also stated that he used to stay at the stage with boda boda riders and that is how he came to know PW1. He averred that what PW1 told the court was a lie.
21. In re-examination, the DW1 testified that he was not friends with PW1. He stated that he never used to stay with boda boda riders and that he does not know all the residents of Matoi. He averred that he did not disclose that he was assaulted by the police since he was threatened with more assault if he disclosed the issue of the assault.
22. The 2<sup>nd</sup> Accused gave his sworn statement and testified as DW2 where he averred that he did not know the 1<sup>st</sup> Accused and that he first saw him in court. He stated that on the day of the incident he was in Busia. He denied knowing any of the witnesses or the deceased. He further stated that he signed the statement in the police station without knowing the contents of the statement. He averred that he was not forced to sign the statement, but he was just directed to sign the document. He stated that he was arrested in his brother's home in Busia, but he was not told the reason for the arrest until he reached the police station. He further testified that he came to know of Nekoye bar after his arrest.



23. In cross-examination, he stated that the 1<sup>st</sup> Accused is from a village near his village and that he had seen him only once when he was young. He averred that in 2022 he was in Busia at his brother's place and that he could avail his brother as a witness. He reiterated that he did not know of Nekoye bar and that he came to hear of it when the witnesses were mentioning it in their testimonies. He denied being at Nekoye bar on the day of the incident and claimed that it could be a case of mistaken identity.
24. In re-examination, he stated that he had seen the 1<sup>st</sup> Accused when he was young. He averred that he could avail his brother as a witness although he did not know where his brother worked at that time.
25. The defence closed their case.

### **Submissions**

26. The prosecution filed their written submissions while the defence counsel opted not to file written submissions.
27. The prosecution filed their written submissions dated 26<sup>th</sup> November 2024 where the state counsel submitted that the definition of murder under Section 203 of the Penal Code carries the ingredients of the offence and that the ingredients must be proved beyond reasonable doubt for an accused person to be convicted.
28. The prosecution submitted that the first ingredient they needed to prove is that Dickson Aruba (the deceased) died. The state counsel asserted that a post mortem report was produced in respect of the body of Dickson Aruba. The prosecution averred that the body of the deceased was identified as being that of Dickson Aruba by two people who are Nahashon Mashongo and Benson Akhulia. They submitted that the identification of the body and the subsequent issuance of a burial permit in respect to that body confirmed that Dickson Aruba (the deceased) died.
29. State counsel averred that the second limb is to prove that the death of the deceased was caused by an unlawful act. The prosecution relied on the case of Republic Vs Boniface Isawa Makodi [2016] eKLR where the court gave a definition of an unlawful act. Prosecution further submitted that the doctor (PW5) conducted the post mortem and formed an opinion that the cause of death was a closed head injury secondary to blunt trauma following assault. The prosecution asserted that the death of the deceased was therefore not from natural causes or from an action excusable by law but from an assault which is an unlawful act as defined in law.
30. Prosecution submitted that the third element to prove is whether the accused persons were the perpetrators of the unlawful act that culminated in the death of the deceased. They averred that there is no direct evidence by the prosecution that the accused persons herein committed the offence they are charged with. They further advanced that there is no direct evidence by the prosecution on this matter since the prosecution did not present an eyewitness to the assault. Prosecution submitted that they rely on circumstantial evidence to link the accused persons to the offence they have been charged with. They relied on the case of Abanga alias Onyango Vs Republic Cr. A no 32 of 1990 (ur) where the court outlined the tests to be satisfied when a case rests entirely on circumstantial evidence.
31. The Prosecution counsel submitted that the chain of events that transpired on the material date, coupled with the dying declaration of the deceased, irresistibly points to the accused persons as the people who assaulted the deceased. They relied on Section 33 of the [Evidence Act](#) on dying declarations. The prosecution further relied on the case of Charles Njogu Vs Republic [2019] eKLR and the case of Moses Wanjala Ngaira Vs Republic [2019] eKLR where the courts held that the prosecution is supposed to show that the deceased could not have been mistaken in the identification of the Accused while in the heat of facing imminent danger. They argued that the assault of the deceased herein



happened simultaneously at the time when the Accused persons had caused commotion at the bar and that the deceased could therefore not have been mistaken when he said that it was the boys that had caused chaos at the bar who assaulted him.

32. The prosecution also relied on the case of *Musili Vs Republic* [1991] eKLR where the Court of Appeal held that the suspicious circumstances and actions of an accused person could corroborate the dying declaration of the deceased. Prosecution submitted that this analogy applies in this case since the deceased left the bar and headed to the direction where the Accused persons were seen throwing stones and he went back shortly thereafter and stated that he had been assaulted by the boys that were causing commotion at the bar. They further averred that the injuries occasioned on the deceased were consistent with being hit by stones. They posited that the deceased could not have been mistaken as to who assaulted him since the events happened simultaneously and in a short span. State counsel advanced that the dying declaration was well corroborated by the sequence of events.
33. The prosecution submitted that the last limb is to prove that the accused persons had malice aforethought when they committed the crime. They relied on the case of *David Wekesa Vs Republic* [2021] eKLR where the court held that malice could be imputed from the type of weapon used, the manner in which it was used, the part of the body it was used on, the nature of the injuries inflicted and the conduct of the accused before, during and after the incident. The prosecution asserted that the accused persons were throwing stones towards the bar targeting to hit people and that the deceased suffered depressed injuries to the head which were consistent with being hit by stones. They averred that the part of the body that was targeted was the head and that this was intended to cause grievous harm to the deceased.
34. The prosecution finally submitted that they have proved their case beyond reasonable doubt and prayed that the accused persons be convicted as charged. There were no submissions filed on behalf of the Accused persons.

### **Analysis**

35. It is well settled that the burden of proof in criminal cases lies on the prosecution to prove the guilt of the Accused person(s) beyond reasonable doubt. This principle was enunciated in the case of *Moses Nato Raphael v Republic* [2015] eKLR where the Court of Appeal cited with authority the case of *Woolmington v. DPP* (1935) A. C 462 and stated that that:

“The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time-honored English case of *Woolmington v DPP* (1935) AC 462 where the Court stated: ‘Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’”



36. The Court of Appeal further expressed itself on the evidentiary threshold in criminal cases in the case of *Nyanjui v Republic* [2023] eKLR where the court cited the case of Lord Denning in *Miller vs Ministry of Pensions* [1947] 2 All ER 372 and stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

37. For the offence of murder to be proven against the Accused persons herein, there are vital elements that the prosecution needs to prove to the required standard to warrant the conviction of the accused persons. Section 203 Of the Penal Code provides: “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” Courts have interpreted this section as containing the necessary elements to be proven in a murder case. The court in the case of *Republic v Kipkemei* [2024] eKLR expressed itself as follows on the elements necessary to prove the offence of murder:-

“What followed was for the prosecution to prove the elements of the offence beyond reasonable doubt which comprise the following:

- i. Death of a human being.
- ii. Unlawful causation of that death.
- iii. The said unlawful causation having been done with malice aforethought.
- iv. The participation of the accused in causing the said death.”

38. I have carefully considered the testimony of the witnesses, the defence of the Accused persons, the submissions of the prosecution and the authorities they relied on, and all relevant legal provisions. The main issue for determination herein is whether the prosecution has proved all the elements of murder against the Accused persons beyond reasonable doubt.

#### **Whether the prosecution has proven the death of the deceased**

39. The general practice adopted by courts in ascertaining the death and cause of death of a deceased person is usually by medical evidence which is through a post-mortem report.

40. The Court of Appeal in *Ndungu vs. Republic* [1985] eKLR pronounced itself on the issue as follows:-

“Where a body is available and the body has been examined, a post mortem must be produced, the trial Court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post mortem examination is cross-examined.”



41. Additionally, the court in the case of Republic v Boniface Isawa Makodi (supra) which the prosecution cited in their submissions held that:-

“The prosecution must prove by evidence that a human being identified as Raphael Cheserek is dead. One critical source to prove death is by way of medical evidence. This case incidentally was unique in the sense that the prosecution for reasons not stated did not avail evidence of the deceased known as relatives to positively identify the deceased body. The court had to contend with circumstantial evidence of PW1, PW2, PW3 and PW5 who were all formal witnesses by virtue of their role as public officers and a business man respectively.”

42. In the instant case, a post mortem report was availed and the Pathologist testified as PW5. He testified that the body of the deceased was identified by Nahashon Mashongo and Benson Akhulia. It was PW5’s testimony that the deceased had defence injuries on both elbows, a blood clot in the chest overlying the breast borne, extensive bleeding in the head under the skin involving the left side of the face and the left scalp, bleeding under the brain coverings involving the hind brain and the left part of the fore brain and a mild swelling on the brain. He stated that he formed an opinion that the deceased’s death was due to closed head injury secondary to blunt force trauma following assault. He further stated that the extensive injuries that the deceased suffered were consistent with assault and not a fall.

43. It is therefore clear that the body of the deceased was positively identified, a burial permit issued, and the cause of death established through the autopsy as reflected in the post mortem report. Based on the foregoing, I find that the prosecution has proven the death of the accused beyond reasonable doubt.

#### **Whether the death of the deceased was caused by an unlawful act**

44. The court in Gusambizi Wesonga v Republic [1948] 15 EACA 65 held as follows on the unlawful cause of death of a deceased:-

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

45. The court in the case of Republic v Kipkemei (Supra) assessed the common features of unlawful acts in murder cases and held that:-

“The elements of unlawful Acts in homicide cases have these common features;

1. A deliberated act which is unlawful (e.g. an assault)
2. The act is a dangerous act in that it is, from an objective standpoint, one which as sober, reasonable and responsible person of the perpetrator’s age and gender, would inevitably realize in an act which is likely to cause the deceased some physically harm, albeit no serious harm, and
3. The unlawful, dangerous act cause death (even though death or harm or any kind is not intended).”

46. It goes without saying that assault is an unlawful act which is legally recognized as a crime under Section 250 of the Penal Code. Since it has been established that the cause of death of the deceased was assault, and no evidence has been tendered to justify the assault, I find that the prosecution has proven this element beyond reasonable doubt.



## **Whether the prosecution has proven the participation of the Accused persons in causing the death of the deceased**

47. From the testimony of the prosecution witnesses, it is evident that the prosecution did not present any eyewitnesses in this case. The prosecution submitted that they rely on the dying declaration of the deceased to PW1 and circumstantial evidence to place the two Accused persons at the scene of crime.
48. PW1 testified that there was a scuffle at the bar where he worked, and he was called by the waitress to calm the situation. He averred that he found the two Accused persons fighting and he managed to separate them. He recalled that some moments later, he was also called by the waitress who informed him that the deceased person was calling him. It was his testimony that the deceased person informed him that he was beaten by one Oscar, who is the 2<sup>nd</sup> Accused person. He further testified that the deceased informed him that the two Accused persons had hit him on the head with a stone. On cross-examination, PW1 stated that the deceased only mentioned the name of the 2<sup>nd</sup> Accused as the person who assaulted him.
49. On the other hand, PW2 testified and averred that he met the deceased who was walking by the roadside and the deceased approached him and told him that he had been injured by some boy. He stated that he went back to the club with the deceased where they met PW1. It was his testimony that it was PW1 who suggested that the deceased could have been injured by the 2 Accused persons herein. On cross-examination, he stated that the deceased told him that he had been beaten by two boda boda guys, but the deceased did not give him any names.
50. PW4 also recounted to having met the deceased on the day of the incident. He testified that while he was dropping the deceased home, the deceased only mentioned that he was injured on the eye and did not mention any names to him.
51. PW6 testified that during the investigations, they questioned the workers at Nekoye bar and they were informed that two boys had been to the bar and caused a brawl by beating the bar attendant called Grace and also assaulted the deceased. He testified that they were further informed that the two boys ran away when they were confronted by the proprietor of the bar called Phillip (PW1) and that they started pelting the bar with stones. He stated that the deceased decided to leave but was assaulted by the same boys and he went back to the bar and reported to PW1 that the same boys had assaulted him.
52. On weighing the prosecution's evidence, I note a series of inconsistencies in the testimonies of the witnesses. PW1 at first claims that the deceased only mentioned the 2<sup>nd</sup> Accused's name but he again states that the deceased mentioned the two accused persons as having hit him with a stone on his head. In cross-examination, he affirmed that the deceased only mentioned the 2<sup>nd</sup> Accused as the person who injured him. The question that arises is whether the deceased person mentioned both the Accused persons or only mentioned the 2<sup>nd</sup> Accused as the person who injured him.
53. PW2 on the other hand claims that it is PW1 who suggested that it is the 2 accused persons who injured the deceased. He stated that the deceased did not mention any names, but told him that he was accosted by a boy. On cross-examination, he claimed that the deceased stated that he was injured by two boda boda guys. The question that arises from PW2's testimony is whether it was the deceased or PW1 who identified the Accused persons as the perpetrators of the assault. Another question that arises is whether the deceased was injured by a boy or by two boda boda guys.
54. PW6 brings a whole different narrative from that of the rest of the witnesses. He testified that during investigations, he was informed that the Accused persons assaulted a bar attendant called Grace. It is important to note that PW1 also worked at the same bar but he did not raise the issue of the bar



- attendant being assaulted by the Accused persons. PW6 also testified that he was informed that after the Accused persons were confronted, they started pelting the bar with stones. This also did not come out from the testimony of PW1 who was present during the alleged scuffle. The bar attendant, who would have helped to corroborate PW1's evidence was not called as a witness.
55. The court in *MTG v Republic* [2022] eKLR while addressing contradictions in evidence rendered itself as follows: "Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from."
56. The Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* defined contradictions as follows: -
- "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."
57. This court is left to determine whether the inconsistencies noted in the testimonies of PW1, PW2 and PW6 are fatal to the prosecution's case. The contradictions noted in these testimonies relate to the identification of the Accused persons as the perpetrators of the murder which is a material issue in question herein. PW2's testimony raises a question on whether it was the deceased who identified the perpetrators, or the identification was mere speculation by PW1. PW1's testimony also raises doubts as to whether the deceased mentioned the names of the two Accused persons or the name of one accused person. The testimony of PW6 all together tells a different story from that of PW1 and PW2.
58. I find that these inconsistencies go to the core of the prosecution's case since the prosecution purported to rely on the dying declaration of the deceased that identified the Accused persons as the perpetrators. This court cannot rely on the dying declaration alleged by the prosecution since there are major inconsistencies as to whether the dying declaration was actually made by the deceased or if it was PW1's speculative conclusion that led to the identification of the Accused persons.
59. The Prosecution also submitted that they relied on circumstantial evidence to tie the two Accused persons to the scene of crime. It is the prosecution's case that since the two Accused persons were spotted causing a scuffle outside the bar, they also assaulted the deceased who left the bar a few moments after the two Accused persons left.



60. Courts have time and again expressed their cautious approach to circumstantial evidence. The court in *Ng'ang'a v Republic* (2024) eKLR held as follows: -
- “However, it is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must satisfy itself that the circumstantial evidence points irresistibly to the accused as the perpetrator of the crime and that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.”
61. Similarly, the Court in the case of *Joan Chebichii Sawe v Republic* [2003] eKLR expressed itself thus: -
- “As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused”
62. The prosecution herein seeks to tie the guilt of the Accused persons to their actions preceding the incident of assault against the deceased. In their submissions, they argue that the Accused persons were throwing stones towards the bar where the deceased was and that when he got out, he was caught up in the stone throwing and ended up injured. It is however of essence to note that this narrative did not come out in any of the witness testimonies except PW6 who was reporting what he was informed by the witnesses. The narrative pushed by PW1, who alleges to have met the Accused persons before the incident, is that the Accused persons were fighting and causing a scuffle at the bar. PW1 did not mention the stone throwing incident anywhere in his testimony in court.
63. Even in the assumption that the narrative the prosecution is trying to push is true and that the Accused persons assaulted the deceased while they were throwing stones at the bar, the pathologist's evidence was that the deceased had defence injuries on his elbows. This evidence, which was cogent and uncontested, pointed to an apparent struggle that the deceased encountered during the incident. The prosecution's narrative is therefore inconsistent with the evidence of the pathologist since if it is true that the deceased was hit by a stone when the Accused persons pelted the bar with stones, why would the deceased have defence injuries that pointed to an apparent struggle with his assailant?
64. I find that the circumstances surrounding the death of the deceased was clouded with a multitude of possibilities for the prosecution to single out the sole possibility of the Accused persons having assaulted the deceased without concrete evidence to that effect. The evidence as a whole does not unerringly point to the guilt of the Accused.
65. Based on the foregoing, I find that the prosecution has failed to prove the participation of the Accused persons in causing the death of the deceased to the required standard.



## **Whether the Prosecution has proven that the death of the deceased was caused with malice aforethought**

66. Malice aforethought has been defined under Section 206 of the Penal Code 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;
- 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.”

67. The Court of Appeal in the case of Carilus Omondi Mboga & another v Republic [2019] eKLR cited with authority the case of Republic Vs Tubere S/O Ochen [1945] 12 EACA 63 when determining the elements to be considered in order to prove existence of malice aforethought and stated that:-

“The court acknowledged that in determining whether malice aforethought has been proved the following elements should be considered: the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”

68. Since the prosecution has failed to prove that it is the Accused persons who actually caused the death of the deceased, it is rather impossible to prove the element of malice aforethought. The conduct of the Accused persons is an important ingredient in determining whether the Accused persons had any malice aforethought. Since it has not been sufficiently proven that the Accused persons are the perpetrators of this crime, the element of malice aforethought also fails.

69. I find that the prosecution has also failed to prove this element beyond reasonable doubt against the Accused persons.

### **Determination**

70. Based on the aforesaid, I find that the prosecution has not sufficiently proven its case against the Accused persons, and I acquit them accordingly. The Accused persons shall henceforth be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JANUARY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution



Ms. Wanyonyi for the Accused persons

Court Assistant: Polycap

