



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Masavu (Criminal Case 16 of 2019)
[2025] KEHC 9447 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 16 OF 2019**

**TM MATHEKA, J
APRIL 30, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALEX KYALO MASAVU ACCUSED

JUDGMENT

1. Alex Kyalo Masavu is charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars are that on 3rd June 2019 at Kyale village Kisekini sub location, Kilungu sub county within Makueni county he murdered Onesmus Kiendi Kivuva.
2. The plea was read to him on 3/7/2019. He pleaded not guilty. He was represented by Mr. Judah Kioko advocate.
3. The prosecution called 11 witnesses. The accused was put on his defence and gave a sworn statement of defence.
4. The case for the prosecution was that on the night of 3/4/June 2019 at 1:00 am PW6 Angelica Munece Masavu was sleeping. She heard someone walking outside her home. She phoned her son Bonface Mutiso. Bonface phoned the accused. She also phoned Benjamin Mumina PW3 her nephew. She testified that when she came out of her house she found them – Bonface, Benjamin, accused and the deceased Onesmus. Her testimony was that they asked the said Onesmus what he was doing in her homestead at that time of night. He told them that he was following up on his sim card that was in the custody of Bonface. They told him to leave and come the next day but he said he would not leave until he was given his sim card. It was then that Onesmus began to assault her son Bonface with a stick. Benjamin insisted on Onesmus leaving and coming back the next day. She said Benjamin left with the deceased and she went inside to sleep. That just before she entered her house to sleep the accused also left for his house in the opposite direction as Benjamin and Onesmus. She learnt about the death



- of Onesmus on Monday from Benjamin – that he was found in a trench. She next went there. She said that she, Bonface and Benjamin and the accused were arrested. They remained in custody for two weeks – they were released and accused remained in custody. She said she did not see the accused assault Onesmus, but she did see him hold the deceased on the material night.
5. On cross examination she said the accused was her 4th son, she also knew deceased for long as he was a neighbour, that it was the first time he came to her home at night, that the trench where he was found was so deep that even a person standing inside, his head would still be inside the trench. She said deceased had left with Benjamin Mumina, that the deceased was drunk, he had a glass soda bottle and a stick. Her theory was that deceased walked through the bush and accidentally fell into the trench.
 6. Benjamin Mumina Kimanthi was PW3. He testified that Alex Kyalo was his cousin. He said deceased was his neighbour. That on the night of 3/6/2019 at 2:00am he did receive a call from PW6 Angelica Masavu his aunt, to go to her place as there was a stranger in the homestead. On arrival, he found Kyalo Masavu (accused) Mutisya Masavu (brother to accused) the PW6, and Kiendi Kivuva, deceased. It is then he witnessed the accused hit the said Kiendi Kivuva on the back of the head twice. He restrained the accused and told Kiendi to leave and Kiendi left.
 7. After one day – he heard his dogs barking and when he followed the dog it led him to a hole he would not see properly and because it was night he went to sleep. The following day – was market day – he harvested his vegetables at 2:00 am and proceeded to market at 6:00am. On the way he checked the hole and saw that there was a person. He would not identify the person and he woke up his brother, one Simon. The hole was 30 feet deep. On checking they saw it was Kiendi – he phoned PW1 – Benjamin Kivuva, the brother to the person in the hole and told him. Later police came and arrested him, PW6, the accused and his brother. He testified that the hole was 3 meters away from a nearby footpath. He said he did not know why accused hit the deceased.
 8. On cross examination he said the incident was on a Sunday and he saw the body on a Tuesday. He said when deceased was hit by accused he did not fall. That he was drunk – that he left just before he (PW3) left. He said accused hit him with a club (rungu). He said he did not see Kiendi with a torch and there were no lights.
 9. PW1 Benedict Kivuva told the court that on 4/6/2019 at 6:30 am he received a call from Benjamin, PW3 that he had seen the body of his brother Kiendi lying in a trench near the river. PW1 called one Nthiani, another neighbour and they went to the scene about one kilometer away - on the way he met the mother of PW3 (Christina) who told him that his brother Kiendi had been killed by Kyalo, his mother and his brother. He knew these people as they were neighbours.
 10. They went to Kilome police station. Police came and retrieved the body. He attended the postmortem together with PW2 Simeon Mutua Kikuva. He saw an injury on the forehead, scratches on the chest – he said three suspects were arrested and only one the accused who he described as a renowned thief was in the dock.
 11. On cross examination he said the deceased could not have been injured by a stone because there were no stones at the trench.
 12. PW4 Sabina Mbinya Mutava was sleeping in her home about 50 metres from home of accused the night of 2/3/6/2019 when she heard screams of thief! She identified the voice of Alex Kyalo. She came out of the house – and heard PW6 – mother of Kyalo telling him not to hit him with a metal. She said she heard the hitting but did not see it. She also heard someone say – put on some light and escort me – and heard accused say – go the way you came. She heard people walking. She heard the voice of Kyalo and Benjamin as they passed by her house. There was no moonlight.



13. She said her mother came out and asked Kyalo who was beaten and Kyalo responded – Onesmus Kiendi.
14. On Tuesday – the mother of Benjamin told them that the person who was beaten had been thrown into the hole and died. She added that when the hitting was going on – she heard someone say there had been thief in the home two days earlier. On cross examination she said accused was his cousin that their home was about 60 metres away and she heard the sound of hitting. She said she knew accused’s voice having grown up with him. She said it was dark – that she did not see anything, but she knew that Alex and Benjamin escorted the person who was hit – yet in her statement she said she saw two torches of Benjamin and Alex escorting the person who was hit – On cross examination she insisted that she did not hear any other voice other than Kyalo – she said it is only Kyalo and Benjamin who passed by their house and her mother spoke to them.
15. PW5 Simon Mutunga Kimanthi saw the body of Kiendi as he passed by the trench when his dogs barked persistently. He informed his brother who rang the brother of Kiendi.
16. PW7 the mother to Regina Mueni Kakui PW4 told the court that on the night of 3/6/2019 she is the one who heard screams and people walking on the road and woke up her daughter. Then she heard Kyalo shout ‘thief’, then the voice of Benjamin say “don’t hit him on the head”, then she heard Alex say that a person who left his home for another’s at that hour was either a thief or a witch. She did not see them but only heard Kyalo tell someone to leave and go home. She did not hear the name of the person.
17. On Tuesday morning she saw one Tina – who told her that Kiendi had died. That he had fallen into a trench. She PW7 was later called to record statement.
On cross examination she said she did not see Kyalo and deceased on the material day.
18. PW8 was Dr. Pauline Loko Kingoo who performed the postmortem on the deceased. She produced the Post morte report which showed the following. A left parietal region cut wound 2m in length, 1cm in width – 2cm deep i.e. (2x1x2) cm involving the skin A 2cmx2cmx2cm cut wound on the parietal – occipital junction involving the skin. A 2cmx2cmx2cm cut wound on the parietal region involving the skin A bruise 6x6 cm on upper right back. A bruise 4x5 cm on the mid – right back region Respiratory system: A soft tissue injury and bruise measuring 13/6cm on the upper left chest region. A blood clot of the same size in 13x6cm. A bruise (soft-tissue injury and blood clot measuring 6x4cm on the lower left chest region. Cardio-vascular system No abnormality detected. Respiratory Broken ribs at the costo-chondry junction left chest cavity – 1st, 2nd, 3rd, 4th and 5th ribs broken Right chest – 5th and 6th ribs broken – left lung – A 6x5 cm parenchymal lung injury on the left upper lobe.
Head
A cut- wound left parietal region 2x1x2 cm A 2x2x2 cut wound on the parietal- occipal junction A 2x2x2 cut wound on the parietal region Nervous system A 4x5 cm left frontal parenchymal bleed A 3x4 cm left parietal parenchymal bleed A 2x2 right temporal lobe parenchymal bleed A 6x6 cm occipital subdural bleed. Spinal column Normal – No abnormality detected.
19. Cause of death: traumatic head injury leading to intra parenchymal bleeding and respiratory compromise following traumatic chest injury.
20. She said the injuries were caused by both sharp and blunt objects. She was of the view that the injuries were inflicted by someone because of the place where the injuries were found.
21. PW9 was No. 88289 PC Miruka Onyango, received the report of the discovery of the body on 4/6/2019. He visited the scene. He learnt of the phone call that Benjamin received from Angelica on 2/6/2019 about the stranger in the home – that Benjamin told her that Kyalo was armed with a



- rungu and was hitting Kiendi with it – he arrested the suspects and placed them in cells just before he proceeded on transfer – that one PC Murunga carried out the rest of the investigations.
22. On cross examination he said he visited the scene but did not measure the trench but estimated it was about 10 feet deep – that the cliff was a gully dug by river water he said he did not see any stones at the scene. He said he did not recover the rungu.
 23. PW10 No. 83125 PC Daniel Mwirigi – said he took over from PC Muruka vide OB No. 10/04/06/2019 and took over the suspects.
 24. His investigations revealed that the deceased had a love affair with the mother of accused – Angelica Masavu – which her sons abhorred. That on the material night deceased proceeded to Angelica’s compound without her prior knowledge and when she heard footsteps she thought it was thieves. She rang her sons – they arrived – Bonface and Alex, who identified the deceased – a neighbour and prominent businessman at Kilome. He found that the two boys had clashed with deceased over their mother’s infidelity and had warned him from coming to their mother’s homestead.
 25. It is then that Alex Kyalo hit the deceased with a metal headed club and Benjamin witnessed this.
 26. He said he then charged the accused –

On cross examination he said the gully was a long drop – that he did not witness any sharp edges on its sides. He said he did not know whether any photos of the scene were taken – that the cliff was near a footpath and a new person passing nearby could fall into the cliff. He said the area had no lighting and it was dark when the deceased left home of the accused.
 27. PW11 No. 79063 CPL Derrick Cherotich, Scenes of Crime Officer, gazette No. 407/18/1/2010 produced photos on behalf of Sgt Peter Kiilu who had left the jurisdiction and with whom they had worked before he left. He took several views of the body in the gully and out of the gully. He identified some loose ending of roots and some stones or soil at the bottom of the home.
 28. When put on his defence the accused told the court that on 3/6/2019 he was at home sleeping at 2:00am. He heard two people speaking in loud voices and ongoing out he found two people who he described as walevi wawili – Benjamin Kimathi and Onesmus Kiendi – they had torches he asked what they wanted and they told him that they were just passing through going home. They left. This was on Sunday. On Tuesday – Benjamin went to his home to say that he had seen a person in the hole - accused rang his mother – he said there was a footpath passing near his home – he denied that he injured the deceased; he said it was Benjamin who left with the deceased. He denied any involvement.
 29. On cross examination he said Benjamin was his cousin their fathers were brothers, he said he could not say whether his mother knew the deceased well and could not speak to the alleged love affair. He said he did not hear the words allegedly heard by Sabina –to the effect that “Kyalo usimchape”. He said that Benjamin lied when he said the accused fought the deceased. He denied that his brother Bonface came to the scene where the incident was. He said he was the one who rang him. He confirmed that when he recorded his statement he did not mention his brother. He said Sabina’s home was about 600 meters away. The defence closed its case.
 30. The counsel for the accused told the court that he filed his submissions – and on 19/6/2024 he told the court he would file his submissions within three days. Judgment was set for 25/10/2024 but unfortunately due to pressure of work and the court being indisposed – the judgment was not ready. However, a search on CTS, and within the file did not bring up any submissions. The State had already stated that it would not be filing any submissions.



31. The issue then is – has the State proved the charge against the accused person beyond a reasonable doubt to warrant the conviction of the accused person.
32. The ingredients for the offence of murder are settled – the death of a person, through the unlawful acts or omission of the suspect with malice aforethought.
33. It is not disputed that the deceased, Onesmus Kiendi died. His body was found in a gully within walking distance from the home of the accused and his own home.
34. The accused person denies any involvement or contact with the deceased on the material night – which is within his rights and this court must proceed on the basis that the accused is innocent until proven guilty – and that the onus to prove the charges against the accused remains with the prosecution – see *Bhatt v Republic* and other related cases.
35. Did the accused kill the deceased? The theory by the prosecution through the Investigating Officer is that the mother of the accused had an ongoing love affair with the deceased – something the accused and his brothers did not approve. This theory is that on this night – there was no prior notice – the deceased arrived and the PW6 – fearing it was a stranger rang her son, Bonface Mutisya (who did not testify) Bonface rang the accused (something which the accused denies) when they arrived they found it was the deceased – Benjamin, their cousin had also been rang by their mother – he is the one who witnessed Alex hit the deceased with a stick/rungu on the head. Benjamin stated that the accused hit deceased at the back of the head twice. Thereafter, deceased left.
36. The accused person was placed at the scene by none other than his own mother. PW6 she told the court that when she phoned her son Bonface, he phoned the accused. Her version was that it was the deceased who started to assault her sons with a stick – because he was demanding his sim card from her other son Bonface – and it was Benjamin who was persuading him to leave and come the next day.
37. Sabina and her mother heard the voices of the accused, his mother and Benjamin restraining the accused from beating someone. Benjamin who was at the scene having been called by the mother to the accused person confirmed that it was the accused who hit the deceased on the back of the head twice.
38. It is also clear that the deceased was told to leave the home. PW6 stated that Benjamin left with the deceased – Benjamin told the court he told the deceased to leave Sabina and her mother heard the person who was in the home being told to leave the way he had come. She heard Benjamin and the accused pass by their house.
39. Clearly there was the incident on the material night and the evidence before me is that there was an altercation between the sons of PW6 – that is Bonface and Alex – the accused and the deceased. The altercation was because they wanted to know what the deceased was doing in their mother’s homestead at 2:00am. The accused was not satisfied with the explanation given and he assaulted the deceased on the head with a stick – the stick was not recovered. The deceased sustained injury – but still left for his home.
40. It was a dark night – and from the evidence on record – he had to pass by the gully because the path goes by there. He was drunk and according to the postmortem report he had sustained a serious head injury – 6 x 6 cm occipital subdural bleed among others. I found out that this injury is a serious injury where blood collects between the skull and the surface of the brain – and cause of death included traumatic head injury.
41. It is my understanding that the head injury sustained from the assault led to the instability of the deceased leading to his fall into the gully. This is because every witness told the court that there were no stones in the gully – but sand, soft soil – which could not have caused the serious head injury. The



fall could have resulted in the other body injuries – taking into consideration the depth of the gulley. Evidently, the head injury caused by the accused person led to the fall that resulted in the death of the deceased-

42. Did the accused intend to kill the deceased?
43. What emerges from the evidence is that the accused and his brother were upset by the deceased visit to their mother’s home at night. There were no grudges between the accused and Benjamin who is his first cousin to justify the accused’s defence that Benjamin had when he said that the accused actually hit the deceased on the head twice-
44. I did consider the defence by the accused – it was mere denials. His position was that he is the one who heard Benjamin and the deceased making noise. He found them they were passing by drunk. He confirmed that his brother rang him; he did not say why his brother rang him. He avoided anything to do with the fact that his mother was present at the scene – and that she is the one who rang his brother, who then rang him. He said in one breath that his brother was present, and in another that he was not present where he was on 3/6/2019. I must state here that I consider the accused’s defence – not with a view that he should prove his innocence – but with the view as to whether it is believable to ring hollow.
45. Having said that, I find that the prosecution established that the accused person hit the deceased at the back of his head – an injury that led to his fall into the gulley –to further injuries and eventual death.
46. I find therefor that the prosecution has established the unlawful killing of the deceased by the accused without malice aforethought and find the accused guilty of manslaughter c/s 202 as read with s. 205 of the Penal code and convict him accordingly under s. 322(1) of the CPC

DATED, SIGNED AND DELIVERED, VIRTUALLY ON 30TH APRIL 2025

MUMBUA T MATHEKA

JUDGE

Accused: Present

Mr. Chris Court Assistants Mr. Kazungu for State Counsel for the Accused Kioko

Bond suspended upon Conviction Accused Remanded in Custody

M. on the 22nd May for the pre-sentence report. PACS be informed.

