



REPUBLIC OF KENYA



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**Republic v Mosin (Criminal Case E008 of 2023)  
[2025] KEHC 5525 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE E008 OF 2023  
RB NGETICH, J  
APRIL 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MUSA CHEBOSKWONY MOSIN ..... ACCUSED**

**JUDGMENT**

1. The accused Musa Cheboskwony Mosin has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge were that the accused person on the 19<sup>th</sup> and 20<sup>th</sup> day of November, 2022 at Kaptombes Shopping Centre of Mochongoi ward in Marigat Sub-county within Baringo County murdered Jonathan Kiplagat Kipserich.
2. The accused person pleaded not guilty to the charge and the matter was set down for full trial where the prosecution summoned a total of 6 witnesses in support of the charge preferred against the accused.

**Prosecution Evidence.**

3. PW1 James Cheboi Sikuton testified that on 19<sup>th</sup> November, 2022 at 10:00 p.m. he was at Kaptombes Centre in the pool where Jonathan and Felix Mosin were playing as he was watching. He said they disagreed over Kshs.400= which was at the table near the pool table and they pulled each other outside and after about 3 to 5 minutes, he went outside and found Jonathan having fallen down and Felix also known as Musa had left. He said that he used mobile phone to see Jonathan and saw that he was bleeding from the head. He called Jonathan's brother Evans but he did not pick his call. He said that he went to his elder brother Gilbert who is his neighbor and explained to Gilbert. He was informed by Gilbert that Evans was sleeping in a neighbor's house. He went to wake Evans and Jonathan was taken to a hospital in Kabel by Evans and Gilbert. He said he did not see what Felix used to hit the deceased but he had a rungu placed in his trouser and which he used to walk around with.



4. PW2 Wilson Setanen testified that on the 19<sup>th</sup> November, 2022 at around 9.30:00 p.m., he was in his kiosk when he decided to return phones he was charging to people who were playing in the pool. He said as he entered the pool, he saw accused and Jonathan coming out and they by passed each other. After giving the phones to the owners in the pool, he stood a bit and then Cheboi said that there was somebody who had been hit outside. They went outside and found Jonathan bleeding from the ears and nose and Musa whom he said is accused herein was not at the scene.
5. PW3 Victor Kipkurui Tumeo testified that 19<sup>th</sup> November, 2022 at around 9:30 p.m., he was at the pool at Kaptombes centre where the late Jonathan and the accused were playing then they quarreled over money. He said the two went outside and shortly after, James went outside and found Jonathan lying down and Musa was not there. He said both were drunk and he confirmed that he did not see the money they were fighting for. He said James informed them that the deceased Jonathan had been injured and when he went outside he saw the deceased bleeding from the head. He said that they did not find the accused but only saw his caphat. He said the two left the pool together and that they never found anyone else outside.
6. PW4 Zedicay Toroitich testified that on the 19<sup>th</sup> November, 2022, he was at Kaptombes centre and at about 9:00 p.m., the accused and Jonathan arrived at the pool and played. That they quarreled over money they were using to play then struggled over money though he did not see it and pulled each other outside where they talked briefly and kept quiet. He said James went outside to check whether they had left but he came back and said one of them had been hit. They went outside and saw Jonathan had been hit and was bleeding from the head. He said that they send James to go and call his brother and he was then taken to hospital in Kabel. He said that Jonathan was playing with Musa who is the accused in the dock but they did not see the accused when they went outside.
7. PW5 No.239221 IP Willis Onyengo testified that on 25<sup>th</sup> December 2022, he was summoned by DCI Marigat CIP Atunga and on arrival at the office, he introduced Mzee Oroboi who is the father to the accused Musa Cheboskwony a suspect who was on the run for the murder of Jonathan Kiplagat Kipserech between 19<sup>th</sup> and 20<sup>th</sup> November, 2022. That the DCI informed him that Mzee Oroboi knew where the accused was and he was willing to escort him to the police station so that he could help them with investigations with regard to the murder. The DCI handed over to him the murder file which had preliminary investigations which included statements and postmortem report from Mochongoi police station. That the postmortem report indicated that the deceased had succumbed from severe head injuries with multiple depressed skull fracture secondary to blunt head trauma secondary to assault.
8. That on the 9<sup>th</sup> January 2023, he got a call from the accused's father informing him that he had found out where the accused was residing. That the accused was residing with her eldest daughter Grace Ruto who is also the sister to accused in Mogotio. He instructed Grace to take the accused to DCI Marigat to help them with the investigations. At 2:00 p.m., on the same day Grace Ruto arrived with the accused. He said that he interrogated the accused where he recorded his statement and asked him if he was willing to make confession in regard to murder case but he declined. He released the accused on free bond pending forwarding of the file to ODPP for perusal and advice.
9. On recommendation of the ODPP the accused was charged with murder. On the 2<sup>nd</sup> May, 2023, he summoned the accused through her eldest sister Grace Ruto and on arrival, he arrested the accused and placed him in custody and brought him to court on 3<sup>rd</sup> May, 2023. He confirmed that he recorded the accused's statement who disclosed the events of that day. He said the accused informed him that on 19<sup>th</sup> November, 2022 while they were playing pool in Kaptombes area, the deceased Jonathan Kiplagat put his hand inside his pocket and took away Ksh.600=. When the accused asked the deceased to return



the money, he refused and they moved outside the pool where a scuffle ensued between the accused and the deceased.

10. While outside the accused pulled a nut bolted rungu which was on the deceased's waist and hit the deceased on the head leaving the deceased bleeding on the ground and threw away the nut bolted rungu before running away to their homestead. That at the homestead the accused informed 2 of his younger brothers Paul and Kiplagat that he had hit the deceased with a nut bolted rungu. That the brothers advised him to stay at home but he refused saying the deceased's family may come to attack him. The accused then left home and that night he slept in the forest till morning and trekked for about a week to a distant place in Mogotio. He confirmed that the accused signed the statement. That
11. PW6 Dr. Felix Masongo Nyasani performed postmortem examination on the body of Jonathan Kipserech Kiplagat on 22<sup>nd</sup> November, 2022 at 10:40 a.m. at Nyahururu County Referral Hospital. Upon examination, he formed opinion that the cause of death was severe head injury multiple depressed skull fracture on the left side secondary to blunt head trauma secondary to assault. That the manner of death was homicide. He produced the postmortem report dated 22<sup>nd</sup> November, 2022 as exhibit before court.
12. Upon close of prosecution case, by ruling delivered on the 10<sup>th</sup> July, 2024, the court found that prima facie case had been established against the accused person and he was placed on his defence in accordance with Section 306(2) of the *Criminal Procedure Code*.

#### **Accused's Defence Case.**

13. The accused Musa Mosin Cheboskwony gave sworn statement. He said that he is now 18 years old having been born on the 10<sup>th</sup> June, 2006. He said that he understands the charges against him. He testified that between the 19<sup>th</sup> and 20<sup>th</sup> November, 2022, he went to the centre after arriving from herding cattle in the forest and that the deceased found him at the centre and requested the accused to buy for him tea. He said that he bought him tea and 2 chapatis then he went to the pool. While in the pool, the deceased who was drunk went there and took his money. The accused requested him to return the money but he strangled him. He said he took his rungu and hit him with the rungu and left. He said he was defending himself and that he hit the deceased once and he did not intend to kill him.

#### **Accused's Submissions**

14. The accused submits that from evidence adduced, the following are issues for determination by court:-
  - i. Whether the accused person has malice aforethought.
  - ii. Whether the defense of self-defense is sufficient.
  - iii. Whether the accused person had malice aforethought
15. The appellant submits that post mortem report confirm that the deceased died and on what caused the death, PW6 upon examining the deceased's body found that the deceased had died as a result of blunt force trauma causing severe head injury, secondary to assault (homicide) and the evidence is corroborated by evidence of PW1, PW3 and PW4 and further in his defence, the accused DW1 also alluded to hitting the deceased on the head in self defence.
16. Defence counsel submits that the accused did not possess malice aforethought defined under Section 206 of the *Penal Code* as intention to kill. Further, that That PW2 testified that when he was entering the pool, he met the deceased and the accused holding hands while leaving the establishment which shows the level of friendship that the two had.



17. The defence counsel relied on the case *Nzuki vs. Republic* (19930 KLR 171 and *Mugoma and Another vs. Republic* (2003) JELR 1003636 (CA) and *Joseph Kimani Njau vs. Republic* (2014) JELR 100689(CA) while submitting that there was no evidence of malice aforethought. That an unfortunate fight occurred between two friends who had been playing pool together; as evidenced by the witnesses, they came to the pool together to play against each other.
18. On Whether the defence of self-defence is sufficient, they submit that it is indeed unfortunate that JONATHAN lost his life but, the accused person only used the weapon from the deceased's waist when he was strangling him so as to save his life and relied on the case of *Republic vs. Chepkwony* (Criminal Case Number 18 of 2018) (2022) KEHC 1277 (KLR) 26 MAY 2022 where the accused fatally stabbed her husband during a violent altercation where he was assaulting her. The court acknowledged that she acted in self-defense and stated that she was not obligated to wait until she was harmed before defending herself.
19. Further in the case of *Republic vs. Truphena Aswani* (2021) eKLR, the accused killed her husband who had attacked her with a machete. The court found that she had acted in self-defense as the deceased was armed and posed imminent threat to her life and in the case of *Republic vs. Joseph Kamande Mau & 3 Others* (2005): the accused persons were involved in a fatal altercation during a reburial ceremony. The court held that they acted in a heat of provocation, leading to a loss of self-control and the death resulted from self-defense.
20. Counsel submitted that the alleged weapon used was a nut bolted rungu that was in the possession of the deceased and DW1 testified that during the scuffle and as the deceased was strangling him, he felt a weapon on his waist, took it and hit him with it in an attempt to save his own life and he stated that he did not see where he had hit the deceased as it was dark; and submit that the accused acted in self-defense and did not intent to take the life of the deceased.
21. In conclusion, the defence counsel submits that prosecution failed to discharge the burden of proof to the required standard of proof beyond reasonable doubt. And urged this court to acquit the accused under Section 215 of the *Criminal Procedure Code*.

### **Analysis And Determination.**

22. Section 203 of the *Penal Code* defined the offence of murder as hereunder:-

” Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
23. From the above definition, the ingredients for the offence of murder are as hereunder:-
  - i. Proof of death
  - ii. Whether the accused person inflicted the injuries that caused the deceased death.
  - iii. Whether the prosecution has established that at the time of the incident the accused actions were actuated by malice aforethought.

### **Proof of death.**

24. The fact that the deceased died is not disputed. PW6 testified he conducted the postmortem examination of the deceased on 22<sup>nd</sup> November, 2022 and in his findings the deceased died as a result of blunt force trauma causing severe head injury, secondary to assault. The postmortem report was produced in court and which confirmed that indeed the deceased died 20<sup>th</sup> November, 2022.



### **Whether the accused person inflicted the injuries that caused the deceased death.**

25. From the evidence tendered before court, it is clear that none of the prosecution witnesses saw or witnessed the accused kill the deceased. Thus, there was no direct evidence linking the accused to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’ Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities by this court. Suffice to mention *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which this court held as follows: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.” And in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus: “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 upon. 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 remain with the prosecution. It is a burden which never shift to the party accused.”

26. The circumstantial evidence linking the accused to the incident is that of PW1, PW2, and PW3 who said that they were at Kaptombes Centre where the accused and the deceased were also there playing pool. They all confirmed that the two disagreed over some money where they then dragged themselves outside only for the deceased to be found lying outside the pool bleeding from the head.
27. The investigations officer PW5 testified that the accused during the recording of the statement under inquiry admitted that he disagreed with the accused over Kshs.600= which the accused took from him and refused to return. That the accused admitted that he hit the deceased with a bolt nutted rungu on the head and fled from the scene where he went home and informed his two brothers and later disappeared to his eldest sister’s home in Mogotio.
28. The accused in his defense stated that on the fateful evening, he was with the deceased where he bought the deceased tea and 2 chapatis. That the deceased while drunk took his money and upon requesting



him to return the money, he strangled him: He said that he took a rungu which the deceased had and hit the deceased in self defence then ran away.

29. The evidence of the prosecution witnesses PW1, PW2, PW3, PW4 and PW5 all linked the accused to the murder of the deceased. The accused admitted to hitting the deceased with a rungu after a disagreement. All this confirmed that the accused indeed caused the death of the deceased.

**Whether the prosecution has established that at the time of the incident the accused actions were actuated by malice aforethought.**

30. Malice aforethought is provided for under Section 206 of the *Penal Code*. It may be established by way of evidence when any of the following circumstances exist:

- “(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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
- (c) An intention to commit a felony; and
- (d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.”

31. In the case of *Nzuki V Rep* 1993 KLR 171 the learned Judges of Appeal set out the principles of determining whether intention to commit murder is proved as follows:

- “1. Malice aforethought is a term of art and is either an express intention to kill or implied where by a voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as the result.
- 2. Before an act can be murder, it must be aimed at someone and must be an act committed with one of the following intentions
  - (a) To cause death;
  - (b) Cause grievous bodily harm; and
  - (c) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately.
- 3. Without an intention of one of these three types, the mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.

32. In the cited case of *Nzuki*, supra, the Court of Appeal held that even though the appellant’s conduct was done with the knowledge that the action is likely or highly likely to cause death or grievous harm, that in itself is not enough if there is no evidence to establish that the accused had formed an intention to cause death or to cause grievous harm, or knew his conduct may cause serious harm or death but committed the act deliberately any way.



33. The deceased's only defence is that he was provoked by the deceased. From the evidence of PW1 the deceased and the accused were still playing pool when suddenly they disagreed over some money which was placed on the pool table and according to him, it was Ksh.400= . He said the two pulled each other outside and he went outside to check only to find that the deceased was lying outside with an injury on the head and the accused was nowhere to be seen.
34. From the foregoing there is no doubt that the deceased caused the death of the deceased, there is however no evidence to prove his act was premeditated. It is evident that after playing pool together, they disagreed over money and they dragged each other outside and shortly after, the deceased was found death. In view of the fact that the killing of the deceased was not intentional, I find that the prosecution have proved the offence of manslaughter against the Accused. I hereby find accused guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* and I convict him accordingly.

#### **Final Orders**

35. Accused is convicted of the offence of manslaughter contrary to Section 202 as red with Section 205 of the penal code
36. Right of appeal 14 days.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**RACHEL NGETICH**

**JUDGE**

