



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mapesa (Criminal Case E142 of 2021)
[2025] KEHC 12001 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E142 OF 2021**

**AC BETT, J
JULY 29, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

PROTUS LUSENO MAPESA ACCUSED

JUDGMENT

1. The Accused Protus Luseno Mapesa is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 21st day of August 2021 at Viande village in Ematiha Sub-location, Butso North location within Navakholo Sub-County of Kakamega County he murdered Elphas Amachapa.
2. The prosecution called six witnesses in a bid to prove its case. PW1 was Janet Mukhwana Amachapa, who is a widow of the deceased. She recalled that on 21.8.2021 at around 3.45 p.m., while at home, she heard some noise and went to the scene where she found her husband being assaulted by the Accused and Zacharia Ouya. She screamed and Moses her brother-in-law came whereby the assailants fled. They then escorted the deceased to walk home and the next day they took him to hospital at Bushiri after which they reported the matter. The deceased was treated as an outpatient and went back home but died that night. According to PW1, she saw the Accused who is a step-brother to the deceased husband beat the deceased with a metal bar.
3. When cross-examined, PW1 who had testified that there was a land dispute over their land said that both she and the Accused stay in the same land which is the subject of a succession case. She said that she saw the deceased being beaten about 100 metres away. She stated that she was aware that the deceased had been involved in a road accident and filed Kakamega CMCC. No. 306 of 2017 and that after the accident, he could not use his right hand. She denied the suggestion that she killed the deceased because of money and said that the compensation was paid to the first wife of the deceased who shared the cash with her.



4. PW2, Moses Juma Kanambo testified that on 21.8.2021 at about 4.00 p.m., he heard PW1 shouting that his brother was being killed. He rushed and found the Accused and Zakaria Ouya beating the deceased. Ouya was seated on the deceased's chest as the Accused hit him with a metal rod. They assisted the deceased walk home and took him to hospital the next day as they had no money for treatment. At the time, the deceased was complaining of pain on the stomach. They took him to hospital on 22.8.2021 and brought him back home but that night, the deceased passed on. PW2 stated that there had been a dispute over land in which the Accused who is his uncle did not want them to use a road near his land.
5. On cross-examination, PW2 said that on the day of the incident, he was alone at home as his wife had gone visiting and that the deceased who was a motorcycle repairer had been at home that day. He said he did not know the Accused as a businessman or a Club owner but as a farmer. He said that he saw the deceased bleeding on the stomach area. He also said that they had disputes with the Accused. When questioned by the court, it was noted that the Accused had difficulty with colours even though he had said that the deceased was wearing a white shirt on the day he was assaulted.
6. PW3 was a Consultant Pathologist, Dr. Dixon Mchana who conducted an autopsy on the body of the deceased on 26.8.2021. He produced the post mortem report which was marked P.Ex.2(i). He recounted how he performed the procedure after the body was identified to him by Richard Mapesa and Hezron Mapesa. Three days had lapsed after death. Externally, the nails, lips and tongue appeared bluish in colour. It had bruises on the left shoulder, left lower chest and left side of the abdomen with evidence of medical intervention. Internally, there were closed fracture of the left 5th and 6th ribs, contusion of the left lung, pus in the abdominal cavity and contusion of the 1st and 2nd parts of the small intestines. The kidney appeared very dark and the spleen had whitish material on the surface. PW3 said that he formed the opinion that the cause of death was severe infection in the abdominal cavity secondary to blunt force trauma following assault and he duly filed the post-mortem, filled burial permit No. 1913628 and signed the report. He stated that the presence of pus indicated that the injuries were aged between 48 and 72 hours.
7. Cross-examined, PW3 stated that infection of the abdominal cavity in a male is normally caused by perforated ulcers, infection, penetrating injury, or blunt injury. He said that he could not relate the pus to the accident which the deceased had in 2017.
8. PW4 was a village elder by name, Ibrahim Anyonji who testified that on 21.8.2021, at about 4.20 p.m., he was at his home when the Accused arrived and informed him that he had fought and injured the deceased.
9. He called the area Assistant Chief who directed him to have the deceased taken to hospital and he went to the deceased's home and found that indeed, he was injured after which he was taken to hospital. On the morning of 23.8.2021 he received a report that the deceased had died and on the advice of the Assistant Chief, accompanied the deceased's brother Juma and his wife to the police station where he made a report. Thereafter, the police came and collected the body from the homestead. PW4 who said that he knew the Accused as an Uncle to the deceased also stated that when the Accused reported the assault, he was carrying a metal rod and claimed to have differed with the deceased.
10. On cross-examination, PW4 denied witnessing a fight in which the deceased was beaten at the funeral of one Rose. He said that when he visited the deceased at his home he only saw marks on his belly. He did not see the deceased's first wife and was not aware that the deceased had separated from PW1. He said that he had previously give evidence against the Accused in a case involving the wife and the Accused and his mother. In re-examination, he stated that before the incident, the Accused had been



involved in three other cases in which he was charged with assault and he testified as a village elder but the Accused was his friend.

11. The Chief, Matikha Location testified as PW5. He confirmed that on 21.8.2021, PW4 called him on phone and informed him that one Protus Luseno fought and injured the deceased whereby he directed the said witness to visit the injured and advise him to go to hospital. According to him, on 23.8.2021, PW4 called him to inform him that the injured person had died. He visited the home and found the body lying on the bed. He called the police who came and collected the body which he had noted had bruises on the abdomen. PW5 said that he knew the Accused.
12. During cross-examination, PW5 said that PW4 told him that the Accused had reported to him that he had fought with the deceased who got injured.
13. The last witness was No. 229111, P.C. Benjamin Kosgei who was the investigating officer. He said that on 23.8.2021, he was on duty when he received a report on someone who had died. He visited the scene alongside his colleagues where he found the body which had injuries on the left side of the abdomen and the left side of the chest lying on the bed. He took photographs at the scene which he produced as P.Ex. 2 (a), (b), (c) and (d). thereafter, he recorded statements from the witnesses and on 26.8.2021, attended the autopsy examination where he took a photograph which he produced as P.Ex 3. He further testified that on 27.8.2021, the Accused presented himself at Natia Police Station while expressing fears for his life having been identified as a murder suspect. In the course of recording the Accused's statement, PW6 stated that he discovered that there existed a land dispute between the deceased and the Accused and that the Accused and the deceased were relatives who lived about 200 metres apart.
14. In response to cross-examination regarding the investigation report, PW6 stated that there was a report made by the Accused at 0540 hours vide OB. No. 02/22/8/2021 concerning malicious damage to property which showed that the Accused was also injured. The second entry was OB. No. 02/23/8/2021 at 0655 hours being the report of death whereby it was stated that the deceased died in the company of his wife. During re-examination, PW6 stated that the earlier report was to the effect that the deceased had damaged property being super drum and window glass in the Accused's Club on 21.8.2021 at 4.30 p.m. and despite the allegation of assault, the Accused had no medical report. PW6 stated further that the second report was by a village elder and the brother to the deceased by name Juma and states that the deceased told the two that he had been assaulted by the Accused.
15. Upon being placed on his defence, the Accused gave a sworn statement. He stated that on 21.8.2021 at about 4 p.m., as he was going back home from a funeral he had attended, he saw the deceased hitting his windows and water drum with a rungu. On approaching the deceased in an effort to establish the problem, the deceased turned and attacked him on his left side of the head and on the shoulders. The Accused said that as the deceased tried to attack him again, he caught hold of the rungu and while trying to pull it, the deceased stuck to the rungu and the ensuing struggle ended up with the rungu and some pliers that the deceased had falling on his hands. The Accused said that he then went to the village elder where he explained what had transpired to him and showed him the injury. He requested the village elder to go and witness the damage to his place but the village elder declined since the Accused had no independent eye witness. The Accused narrated that he went back by himself only to be surprised that neither the deceased nor the damaged property was there. He slept and went and made a report in the police station the next day. He then went to Ematitia for treatment but was informed that they do not treat people on weekends. So, he went to Hum Medical Clinic for treatment. The Accused produced the medical report from the said clinic as D.Ex.1. He then went home but on 23.8.2021 while he was in his house, members of the public accompanied by PW3 descended on him and started pulling down the trees to take to the house of the deceased who had by then passed on. According to the Accused,



- at the time, he and the deceased had a cordial relationship as the deceased used to work for him and he had no reason to kill him. He said that when he pushed the Accused, he did not intend to harm him.
16. On cross-examination, the Accused said that a succession cause has been pending since 1998. He reiterated that the deceased was drunk when he found him smashing the windows. He said that the deceased assaulted him as he approached to ask why he was destroying his property and that when the deceased fell, he took away the rungu as he went to report at the village elder. When asked where his treatment book was, he said that it was in the house when it was burnt down and so it was destroyed.
 17. At the end of the trial, the State submitted that the prosecution had proved its case by proving the vital elements of murder. It submitted that it had been established that the deceased died in a death resulting from an unlawful act and that evidence was led to prove that the Accused was seen by two witnesses assaulting the deceased with a metal rod. Reliance was placed on the case of Reuben Taabu Anjanoni v Republic [1980] KLR 59 and Karani v. Republic [2010] 1 KLR 73 as the prosecution argued that malice aforethought had been proven since the Accused was seen assaulting the deceased who suffered multiple injuries that led to his death.
 18. The Prosecution discredited the defence that was tendered by the Accused who created the impression that he pushed the deceased in self-defence because the deceased had attacked him first and cited the case of Palmer v. Republic [1971] AC 814 and Republic v. Mainnes 55 Cr. Appeal 551. The Prosecution submitted that if the court shall be persuaded that the Accused acted in self defence, then the force applied by the defence was not proportional to the attack in view of the severity of the injuries that the deceased suffered. The prosecution averred the Accused's line of defence must fail.
 19. Under Section 203 of the Penal Code, any person who with malice aforethought, causes the death of another person through an unlawful act or omission is guilty of murder. For the offence of murder to be proved therefore, the prosecution must establish the following elements beyond reasonable doubt:-
 - (a) That the person named is deceased.
 - (b) That the death was as a result of an unlawful act or omission.
 - (c) That the Accused person is responsible for the unlawful act that led to the death.
 - (d) That the unlawful act resulting in death was actuated by malice aforethought.

(a) The death of the deceased

20. It is common ground that the person named Elphas Amachapa Mukamano died. An autopsy was conducted on his body by Dr. Dixon Mchana, PW3 who duly filled a post-mortem report dated 26.8.2021 which was the day of the autopsy and issued a Burial Permit. It is trite knowledge that an autopsy is only conducted on a dead body and a burial permit issued for burial of a deceased person.
 - (b) That the death was the result of an unlawful act or omission
21. In determining the cause of death, courts normally rely on the post-mortem report. In this case, the Pathologist examined the body of the deceased and having established that the deceased had multiple bruises, a closed fracture of the 5th and 6th ribs, as well as contusion to the first and second parts of the small intestine, formed the opinion that the cause of death was severe infection in the abdominal cavity secondary to blunt force following assault. In Republic v. Nicholas Kipkemei [2024] KEHC 2388 (KLR), Nyakundi J. elucidated the common features of unlawful acts in murder cases and stated thus:-

“20. The elements of unlawful Acts in homicide cases have this 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 realise 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). See Archbold 19-112 and DPP Vs Newbury (1977) AC 500”
22. Considering the evidence adduced by the prosecution that the deceased was assaulted and bearing in mind the Pathologist's opinion, it is evident that the assault on the deceased was unlawful. There was no evidence that the act that resulted in the injuries found on the deceased's body were excusable or justified as to fall under the exceptions laid out in the case of *Guzambisi s/o Wesonga v. Republic* [1948] 15 EACA 65 where it was held that:-
- “ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- (c) That the Accused person is responsible for the unlawful act that resulted in the death
23. PW1 and PW2 testified that on 21.8.2021 at about 3.45 to 4.00 p.m. they witnessed the Accused and one Zacharia Ouya beating the deceased. PW1 said that she saw the Accused poke the deceased with a metal bar and the deceased was bleeding. PW2 stated that the deceased was bleeding from his stomach.
24. The issue for determination is whether the injures inflicted on 21.8.2021 are the ones that led to the septic peritonitis. It is the duty of the prosecution to prove, beyond reasonable doubt that the Accused person is guilty of the offence he is charged with. The burden of proof rests on the prosecution and where there is doubt, the Accused person shall benefit from the doubt. In *Moses Nato Raphael v. Republic* [2015] KECA 787 (KLR), the Court of Appeal cited with approval the case of *Woolmington v. DPP* [1935] AC 462 and stated that:-
- “ 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.”
25. The evidentiary burden of proof was further discussed by the Court of Appeal in *Tony Njuguna Njanyui v. Republic* [2023] KECA 1122 (KLR) in citing Lord Denning in *Miller v. Ministry of Pensions* [1947] 2 ALL ER 372 where what amounts to reasonable doubt was considered:-
- “ 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 with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

26. In the instant case, there is no dispute that the deceased suffered multiple injuries. However, the pathologist Dr. Mchana, did not identify any of the injuries to be the direct cause of death. On cross-examination, the Pathologist attributed the cause of death to an infective inflammatory process resulting from injury to the abdomen. He said such inflammation of the abdomen can be from perforated ulcers, infection, penetrating injury, blunt injury or a traffic accident. In the present case, he said the infection was due to blunt abdominal trauma arising from assault. He further said that the presence of pus indicates that the age of the injuries are over 48 hours as it takes 48 to 72 hours for the pus to form in the body around an injured area.
27. The court has to weigh his evidence vis-à-vis the evidence of the eye witnesses so as to determine the cause of death. Evidence adduced by a professional who is specialized in a certain field is covered by Section 48 of the Evidence Act which provides as follows:-

- “(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.
- (2) Such persons are called experts.”

28. PW3, who is Consultant Pathologist is considered an expert in his field as he is specially trained to apply his medical knowledge to inter alia; examine dead bodies during an autopsy and to identify the cause and manner of death by closely examining the entire body. In the case of *Mercy Kwamboka Lazarus v. Republic* [2022] KEHC 17193 (KLR), W.A. Okwany J. cited the case of *Mutonyi v. Republic* [1982] KLR 203 at 210 where the Court of Appeal held:-

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters.

In *Cross on Evidence* 5th edition at page 446, the following passage from the judgement of President Cooper in *Davie versus Edinburgh magistrates* (1933) SC 34,40, as scenting the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.”

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.



2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”
29. Dr. Mchana, PW3 personally examined the deceased. His evidence that the cause of death was due to septic peritonitis resulting from blunt trauma following assault corroborates the prosecution’s evidence that the Accused assaulted the deceased on the abdomen. However, his clarification that it takes 48 hours for the pus to form seem to suggest that the injury that led to the infection was not the one that was inflicted by the Accused since according to PW1, PW2 and even the Accused himself, the incident occurred on 21.8.2021 at about 3.45 p.m. and the deceased passed on in the wee hours of the morning on 23.8.2021 at about 5.00 a.m. which is only 38 hours after the injury.
 30. In light of the Pathologist’s evidence, the court must carefully consider and weigh all the evidence adduced in order to determine whether or not the Accused really caused the death of the deceased.
 31. The eye witnesses testified that they saw the Accused and another person assault the deceased, who was lying on the ground, on the abdomen using a metal. PW4, whose evidence was corroborated by PW5 testified that on the material date, the Accused reported to him at about 4.20 p.m. that he had fought with the deceased and injured him. The Accused in his defence, stated that he found the deceased damaging his property and when he tried to dissuade him, the deceased attacked him and in the ensuing struggle, he pushed the deceased, who was armed with a rungu and pliers and the deceased fell down. Although the Accused did not admit that he assaulted the deceased, I find that his evidence is largely collaborative of the eye witnesses evidence whose recollection of the incident was solid and consistent in material respects. The narration of the incident left no doubt in the mind of the court that the Accused did assault the deceased on his abdomen.
 32. The prosecution’s case was further bolstered by the evidence of PW6, P.C. Benjamin Kosgei who visited, processed the scene and took photographs of the scene and the body which he produced as P.Ex 2 (a), (b), (c) and (d). I have examined the photographs and P.Ex 2 (c) which is a frontal shot of the body of the deceased with his abdomen exposed clearly showing a wound on the abdomen which looks slightly swollen. The injury confirms the evidence of the eye witnesses and is consistent with the Pathologist’s report that there was a penetrating injury to the abdomen that led to the formation of pus as a result of infection.
 33. In the face of the overwhelming evidence by the prosecution and in absence of any suggestion that the deceased had an abdominal injury prior to the assault, having carefully scrutinized all the evidence, I find that based on the totality of the same, the prosecution was able to prove that the Accused was the one responsible for the injury that ultimately led to the death of the deceased.
 - (d) That the unlawful act resulting in death was actuated by malice aforethought
 34. The case of Tubere s/o Ochen v. Republic [1945]12 EACA 63 set out the guidelines to be followed by the courts in determining whether mens rea is existent in a murder case when it held that:-

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or



dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

35. The elements of mens rea or malice aforethought were later codified in Section 206 of the Penal Code which provides that:-

“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;

SUBPARA (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.”

36. Malice aforethought is deemed to be established where evidence shows that the Accused acted in a manner that intended to cause the death or grievous harm of the victim. In determining whether there was malice aforethought, the court must consider the circumstances of the attack, the weapon(s) used, the part of the body targeted, the severity of the injuries inflicted and the conduct of the Accused before, during and after the attack. See *Bonaya Tutu Ipu v. Republic* [2015] eKLR.
37. The prosecution’s evidence pointed to the existence of latent hostilities between the Accused and the deceased’s family arising from an unresolved succession dispute. The hostilities had resulted in several incidences of assault involving the Accused, the deceased, the deceased’s wife and his mother. Clearly, the two families were at odds.
38. In his defence, the Accused denied the offence. He said that he did not assault the deceased but found the deceased damaging his property. Contrary to the prosecution’s evidence, he said that he was in good terms with the deceased who even used to work for him. The Accused did not make reference to Zakaria Ouya who was said to have been his partner in the attack on the deceased. The Accused was not able to explain how the deceased sustained the injuries that he did if he only punched him to the ground during a confrontation over the deceased’s destruction of his property. According to the Accused, the deceased hit him on the head and injured him. However, the evidence by PW4 was that the Accused reported to him that he had fought and injured the deceased. According to PW6, the Accused reported a case of malicious damage to property and assault vide OB. No. 02/22/8/2021 at 0540 hours. The Accused said that he sought treatment on 22.8.2021 from public hospitals in vain and ended up in a private hospital called Hum Medical Clinic. The Accused, whose house was burnt by angry villages after the deceased had passed on could not produce the original treatment notes but produced a report from the clinic showing that indeed he had been treated for soft tissue injuries arising from assault.
39. Due to the existing grudges between the families, I am alive to the fact that any slight issue could result in a confrontation between the Accused and any member of the deceased family. There is a real possibility in view of the Accused’s version of the events that the Accused found the deceased damaging his property and in a confrontation, assaulted the deceased. The subsequent action of the Accused in



going to report to the village elder do not depict the actions of one who was intent on assaulting the deceased or who was reckless over the possible consequences of the assault. The report that the Accused lodged with the police on 22.8.2021 lends credence to his version as to how he ended up assaulting the deceased. All in all, the surrounding circumstances of the incident cannot lead to the inference that the Accused's actions were actuated by malice aforethought.

42. Based on the foregoing, I find that the prosecution fell short of proving the charge of murder against the Accused but were able to prove, beyond reasonable doubt, that the Accused did unlawfully cause the death of the deceased. The Accused is hence convicted for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Ms. Khateshi holding brief for Mr. Manyoni for the Accused

Court Assistant: Polycap

