



**Republic v HSO & another (Criminal Case 23(E023) of 2022)  
[2024] KEHC 1363 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE 23(E023) OF 2022  
TA ODERA, J  
JANUARY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**HSO ..... 1<sup>ST</sup> MINOR**

**SNG ..... 2<sup>ND</sup> MINOR**

**JUDGMENT**

HSO & SNG the minors herein (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> minor respectively) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 2.4.2022 at Maraba village, Nyamecheo Sub-location within Kenya Sub-County murdered ABJ .

1. The prosecution called 6 witnesses.
2. PW1 was SOC , the brother of the deceased. He testified that on 2.4.2022, he was sleeping at home in the same room with the deceased when at around 7.00 a.m., EK , their mother (Pw#), woke them up by calling the deceased and asked him to go tether their cows in the grazing field. The deceased did left the house. A few minutes later, SOC heard deceased while calling him crying and said “wamenipiga” After around 5 minutes, EK called SOC and told him to go check on deceased towards the river as she heard him say he had been assaulted. As was rushing towards the river, he met deceased on the way. Deceased’s clothes were wet and he informed him that HSO and SNG had assaulted him. PW1 saw HSO and SNG (accused) running away about a 150metres across the river. from where he was standing. PW1 said he knew the assailants of his brother as his. He was able to identify what they were wearing. PW1 gave them a chase but failed to reach them and so he went back to where deceased was. Deceased informed him that his said two 2 assailants had hit him on the forehead and middle of the head. He further said that deceased informed him that he had seen the 2 accused persons snatch a



phone from a child. When he (ABJ ) asked the 2 accused persons what they were doing, they turned on him and accused persons were running and he saw a young boy of about 7 years though he did not know the boy. PW1 was able to identify the minors in the dock and the clothes they wore on the said day. PW1 said that deceased had no visible injuries but after some time, his body started swelling . they proceeded to their home and upon arrival, deceased sat on the bed and told PW1 that the minors has beaten him severely and he expressed his fears that he was going to die. Pw1's 's friend Kevin Onduso escorted PW1 and deceased to the road there they hired a motor cycle and took deceased to Kenyena Hospital. By this time deceased was unconscious and upon arrival at the hospital, he was declared dead. PW3 followed them to hospital and PW1 informed her that ABJ had passed on. They proceeded to Kenyena Police Station and reported the matter.

3. On cross-examination, he stated that the deceased assaulted him using a rungu. He saw SNG with a rungu as he ran away. He testified that the river had not overflowed and was no possibility that ABJ fell into the river and hit his head against the stones because ABJ was categorical that the accused persons had assaulted him.
4. PW2 was P.C. Emuria Joseph attached to Etago Police Station. He testified that on 3.4.2022, around 12.00 p.m., SNG accompanied by his aunt reported to the station. SNG (the 2<sup>nd</sup> minor herein) PW2 that he and his friend fought with their friend. Their friend fell down and they both ran away. The aunt took him to the police station upon learning what had happened. P.C. Emuria interrogated SNG in the absence of his aunt. He later called the Kenyena Police Station and he was informed that the other boy called HSO had been arrested. He arrested and placed SNG in the cells who was later collected by the DCIO officers Kenyena Police Station. On cross-examination, he testified that there were other police officers present during the interrogation.
5. PW3 was EK , the mother of ABJ , the deceased herein and PW2. She testified that on 2.4.2022 at around 7.00 a.m., she was at home. After milking her cows, she called the deceased and told him to go tether the cows in the grazing field. ABJ did as he was told. After about 5 minutes, she heard ABJ scream and he came back and water was dripping from his clothes and he told her that he was feeling dizzy. He also told her that SNG and HSO had assaulted him on the head and she knew that ABJ was referring to the minors. PW1 took him to hospital and she followed them and learnt that deceased was pronounced dead upon arrival at Kenyena hospital. She identified the minors herein as SNG and HSO . She also stated that the accused persons were her nephews. On cross-examination, she testified that ABJ told her that he found SNG and HSO snatching a phone from a young boy and when he intervened, they assaulted him.
6. PW4 was P.C. Samuel Maranga attached to Kenyena Police Station. He testified that on 2.4.2022 at around 9.53 a.m., HSO reported to the police station and stated that he and his friend were fighting with deceased and deceased knocked him and he fell down. Further that members of the public witnessed the altercation and HSO and his friend decided to escape to the police station and report the matter for their own safety. AMBI as sister to HSO , went to the police station panting and stated that the members of the public were threatening to burn their house because her brother and another had killed some boy. PC Maranga accompanied by CPL Shikuku and PC KIBET and accompanied by AMBI went to the scene of the crime. Upon arrival, DCIO Kenyena also arrived at the scene He did not see the deceased since he had been taken away to hospital. He informed the DCIO that he had locked up the suspect in their office. The DCIO accompanied him to the police station and he showed him the suspect, who is the 1<sup>st</sup> minor herein.
7. On cross-examination, he testified that HSO informed him that they had fought with ABJ and he (ABJ ) fell down unconscious.



8. PW5 Dr. Manda Evans, a medical officer at Nyaribari Masaba working as a medical Superintendent at Kesosu Sub-County Referral Hospital. He testified that he held a degree in Medicine and Surgery from Kampala International University 2017. He had 4 years' work experience. He produced a post-mortem report for ABJ. He conducted the post-mortem on 4.4.2022 at Gucha Sub-County Referral Hospital. The body was identified to him by Albert Kombo Ndambo And Elijah Kombo Matundai. The findings were as follows: -Blood stains and soil in the clothing Body was stiff No cut wound Laceration on the left dorsal part of the foot No fractures Swelling of the lungs Almost half litre of water in the stomach Intracerebral subdural haematoma

Opinion:

The cause of death was hypoxia (lack of oxygen to the brain tissue) This was: -Secondary to drowning in water. Intracerebral haematoma was secondary to severe head injury.

9. DR. Manda signed the post-mortem on the same day and produced it as exhibit 1. On cross-examination, he testified that he was a qualified pathologist and a medical officer. He could not tell if the drowning was forced or accidental. The haematoma was caused by an external cut wound on the head. On re-examination, he testified that he was a medical officer and qualified to perform post-mortem. He clarified that the intracerebral haematoma was caused by severe head injury.
10. PW6 was SGT. Alfred Ruto attached to DCI Kenya on general investigations. He identified himself as the investigating officer. He testified that a report of murder was reported by Joel Nyangao and SOC and booked. The particulars were that on 2.4.2022, their deceased brother ABJ was seriously assaulted earlier that day by two known persons, HSO and SNG who were his relatives. The deceased succumbed to his injuries while undergoing treatment at Kenya District Hospital. He commenced investigations. He found the deceased on a stretcher and blood oozing from his nose and mouth. He recorded witness statements. He visited the scene. On the same day, the 1<sup>st</sup> minor presented himself at Mariba Police Post where he reported that he and 2<sup>nd</sup> minor had assaulted someone but was not aware that the victim had succumbed to his injuries. He arrested him and took him to Kenya Police Station. On 3.4.2022, 2<sup>nd</sup> minor presented himself to Etago Police Station and reported that they had murdered somebody the previous day, since he was aware that ABJ had succumbed to his injuries. He picked up the said suspect. A post-mortem was conducted on the deceased's body and a report prepared (Exhibit 1). He established that the injuries were caused by the accused persons. The accused persons were robbing a friend of the deceased of his phone. When the deceased tried to assist his friend, the minors turned to him and assaulted him and threw him in Nyangorora River. In his dying declaration, the deceased told SOC, his brother, that he had been attacked by the minors herein whom he mentioned by name and indeed Pw1 saw the minors running away from the scene. He was not able to establish the name of the friend who was robbed of their phone. The deceased did not name the said boy. He recovered the t-shirt the deceased wore at the time of the attack, from his brother, SOC. They did not record a confession from the suspects. The t-shirt marked as MFI-1 was produced as Exhibit 2 (blue t-shirt marked Yokohama). On cross-examination, he testified that he was not the one who booked the report. He stated that the report was booked as assault and not murder. He was accompanied by IP MURATHE who was the deputy OCS Kenya and CPL. Nicholas Gikondi. He interrogated the minors herein in the absence of their parents and/or guardians. He however was not aware that they were minors until their ages were assessed by the doctor. He said the statement under inquiry was recorded by IP Mogabe Nyawacha and that person who was robbed of the phone was a key witness as he witnessed the assault herein. He admitted that he did not draw the sketch map as there was no clear crime scene and that photographs were also not taken. On re-examination, he testified that the assault was an explanation for the murder that had been reported and that the dying declaration was verbal.



11. The court found that the minors had a case to answer on 4.7.2023.
12. The Defence case was taken on 2.11.2023. The 1<sup>st</sup> minor herein namely H.S. O testified as DW1, he said that he was 15 years old. He told this court that ABJ Bikindo the deceased herein was his cousin. On 2.4.2022, he was passing near the river in Rienya Yema in the company of the 2<sup>nd</sup> minor, (with whom he has been charged with herein) who had a phone belonging to one Edwin. They met deceased claimed that the phone belonged to him and he demanded it. Deceased then started a fight and they defended themselves. Deceased fell into the river and called out his brother SOC . He heard SOC calling him from behind him but he was not chasing them. He went to the shop and then went home. Deceased's mother cried that HSO and SNG had killed ABJ , her son. The public threatened to lynch them and he took refuge at the police post where he was arrested. He sought for forgiveness from this court saying he did not beat the deceased deliberately. He also asked for forgiveness from the deceased's parents. On cross-examination, he testified that he and the deceased did not differ before his death. He said deceased had no reason to lie against them about the stolen phone.
13. S.N.G the 2<sup>nd</sup> minor herein testified as DW2. He told this court that he was 16/17 years old. He said deceased and H.S.O were his cousins. On 2.4.2022, he and HSO were heading to the river when they met one Edwin. Edwin had a phone which he gave them but later demanded to have the phone Deceased arrived and demanded that they return the phone to Edwin. They differed with deceased and he pushed him and he fell into the river but he had no intention of hurting him. ABJ thereafter stood up and called SOC , his brother. They left and he saw SOC following them from behind. They went towards their homes and they heard ABJ 's mother scream that SNG and HSO had killed her son. He went to the home of his aunt one Pamela Grace for safety since he feared for his life. He did not inform his aunt of what had transpired. His aunt was called and informed of the incident and she took him to Etago Police Station where he spent one night and then he was moved to Kenyena Police Station where he recorded a statement in the absence of counsel, parents or any adult. He asked for forgiveness from Court. Further that he had talked to the family of the deceased and said he was sorry. On cross-examination, he testified that he confessed to the police that he had killed the deceased. He confirmed that they took Edwin's phone before the deceased followed them. He said that they did not kill the deceased before he fell into the river. He said he was unaware of the deceased's dying declaration to SOC . He admitted that they caused deceased to fall inside the water.

## **Submissions**

### **Prosecution's submissions**

14. Mr. Ochengo for the State submitted that the defence case cemented the prosecution's case. The minors confirmed assaulting the deceased leading to his demise. They confirmed attacking the deceased who was trying to prevent them from stealing a phone from a passerby. He submitted that if a person dies in the process of committing a crime, malice aforethought is presumed. He submitted that they had proved the ingredients of murder beyond reasonable doubt and urged the Court to find as much.

### **The Accused Persons' submissions**

15. Mr. Magara for the Accused Persons submitted that the accused persons were 15 and 16 years old respectively. The Accused Persons admitted coming into contact with the deceased and that there was an altercation, and in the process the deceased got hurt and died. The only eye-witness was a 7-year old boy who was not called to testify. He submitted that the deceased died in the cause of committing an offence but this was not proved. He insisted that this was a case of an accidental death- the deceased fell into the river accidentally as the riverbed was slippery. He submitted that intention was not proved.



He submitted that it was unfortunate that the deceased died from the actions of the deceased and he urged the Court to reduce the charge from murder to manslaughter.

16. In rejoinder, Mr. Ochengo for the State submitted that the age of criminal culpability is 12 years and the minors were well over that age. He submitted that the defence admitted to an altercation with the deceased but cleverly concealed the cause. The deceased gave a dying declaration on why he was attacked which was not challenged. He submitted that there was no need to call the 7- year old boy and indeed, the defence could have called him as their witness if they so wished.

### **Determination**

17. I have considered the case and the submissions in this case.

18. Sections 203 and 204 of the Penal Code provide as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

19. The Court of Appeal in *Mwangi v Republic* (Criminal Appeal 1 of 2015) [2023] KECA 246 (KLR) (3 March 2023) (Judgment) condensed the ingredients of murder to:

1. The fact of death;
2. The fact that the death was caused by the actions of the appellant; and
3. That the appellant had malice aforethought.

20. From the evidence on record, it is not in doubt that ABJ Died on the material day.

21. The second issue is whether the death was caused by the actions of the minor herein. The minor herein do not deny meeting deceased on the material day and fighting with him. They deny that they assaulted him and said they acted in self defence and the deceased slid and fell into the river due to the said fight.

22. PW1 stated that the deceased made a dying declaration that it was the accused persons who had assaulted him on the head. The deceased also told him that the minors had beaten him severally and that he feared that was going to die. PW2 also supported the dying declaration which she said deceased also made to her and implicated the minors herein as his assailants.

23. Section 33[a] of the *Evidence Act*, Cap 80 provides as follows:

33. Statements by deceased person, e.t.c., when.

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

- (a) relating to cause of death

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under



expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question.

24. The Court of Appeal defined what a dying declaration is in the case of *Mwangi v Republic* (Criminal Appeal 1 of 2015) [2023] KECA 246 (KLR) (3 March 2023) (Judgment) where it stated thus:

22. A dying declaration can loosely be defined as a statement made by a person concerning what he believes to be the cause of circumstances of his death, when knowing that death is imminent. The statement so made earns its credibility and evidentiary value from the general belief that most people, upon realizing that they are about to die ‘will not lie’.

25. Owing to the fact that an accused person would not have the opportunity to cross-examine the maker of the dying declaration and the deceased may have been confused owing to the nature of injuries, courts are required to exercise caution when admitting dying declarations. PW1 further testified that on arrival at the scene, he saw the minors herein run away. In the case of *Philip Nzaka Watu v Republic* [2016] eKLR, the Court of Appeal held thus:

“Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. The Court expressed itself as follows in *CHOGE V. REPUBLIC* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person “

26. I have carefully weighed the dying declaration made to PW1 and PW2 against the evidence adduced by the minors herein. DW1 on cross-examination stated that testified that the deceased had no reason to lie about them. The dying declaration was not shaken on cross-examination of PW1 and PW2. The post-mortem report indicates that the deceased died due to cerebral hypoxia secondary to drowning in water with intracerebral and subdural haematoma which was secondary to severe head injury. This is in line with the dying declaration. On the other side, the minors gave contradictory evidence as to what transpired that day, both minors admitted to fighting with the deceased. While Dw1 told this court that deceased started fighting them over a phone belonging to Edwin and they defended themselves and deceased fell into the river. DW2 on his part testified that they differed with the deceased over a phone which Edwin had given them but later demanded and he pushed deceased causing him to fall into a river into the river. The minors were at the scene at the material time yet they gave contradictory evidence. It is clear that they were economical with the truth. I reject the minors testimonies as to how the deceased ended up in the river in the circumstances. They jointly assaulted the deceased causing him seriously bodily injuries and pushed him into the river.



27. The Deceased had no reason to lie against the minors herein and he passed on shortly after the assault. I find that his dying declaration was well corroborated, truthful and credible. I find that the dying declaration indeed identified the minors as the assailants of deceased who caused him the fatal injuries and I proceed to admit the same.
28. On whether the minors herein had malice aforethought, it is trite law that prosecution must prove malice afterthought in a case of murder.
29. Malice aforethought was defined in the case of *Bonaya Tutut Ipu and another v Republic* [2015] eKLR (cited in the case of *Luvisia & another v Republic (Criminal Appeal 78 of 2017)* [2022] KECA 1424 (KLR) (16 December 2022) (Judgment)) where the Court stated thus:
- “...” malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case.”
31. Section 206 of the Penal Code provides as follows:
206. Malice aforethought
- 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.
32. In the case of *Moses Wanjala Ngaira v Republic* [2019] eKLR, the Court of Appeal held as follows:
30. In *Daniel Muthee v Republic* [2007] eKLR, this Court addressing the issue of malice aforethought stated as follows:
- “When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”
31. In the circumstances of the present case, it can also be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under section 206(b) of the Penal Code.
33. In the case of *David Wekesa Namachanja v Republic* [2021] eKLR, the Court of Appeal cited the case of *Republic v Tumbe S/O Ochen* (1945) 12 EACA 63, the Eastern Africa Court of Appeal where



the EACA set out the following factors to be considered in determining whether malice aforethought has been established:

“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.”

34. In *Dhadho v Republic* (Criminal Appeal 78 of 2021) [2023] KECA 280 (KLR) (17 March 2023) (Judgment) held that:
33. From the injuries indicated in the post mortem report adduced by PW6, we find that there was malice aforethought since it is evident that the appellant’s intention was to do grievous harm or to cause the death of the deceased. The appellant attacked the deceased on the head which is a vital part of the body. Further, the injuries were so severe that the deceased had to be admitted in the intensive care unit until she succumbed.”
35. Prosecution submitted that the minors had malice after thought as they knew the implications of hitting deceased on the head and throwing him into the river. Mr. Magara for the accused persons submitted that the accused persons got into contact with the deceased and there was an altercation and the deceased got hurt and died. In fact, Mr. Magara advanced the narrative that the death was accidental and not intentional. He did not dispel that the accused persons caused the death of the deceased, lastly either in the accused persons’ testimony nor were they able to establish the same from cross-examining the prosecutions’ witnesses.
36. Prosecution in reply submitted that the minors were within the age of criminal liability and thus understood the consequences of their actions at the scene.
37. The deceased was attacked and hit on the forehead and middle of the head by the head is no doubt a very vital and delicate part of the body. So much was the force that it appears that the deceased started swelling shortly thereafter. He was taken to hospital and was pronounced dead on arrival. The time span appears to have been quite short between the time of the assault and the death. This speaks to the deadly force used by the minor s herein. The minors were aged 13 and 14 at the material time and that were presumed to be known the consequences of assaulting deceased in the manner they did. I reject the evidence and the submission that the death was accidental.
38. Prosecution’s case is that the minors differed with deceased over the phone and assaulted him then threw him inside the river. Defence case is that the minors fought with deceased over a phone belonging to one Edwin and he slid and/ or was pushed into the river. It is clear that the minors were not happy with deceased for telling them to return the stolen phone and hence after assaulting him they pushed him into the river. I therefore find that the prosecution has proved beyond reasonable doubt that the minors herein had the intention of causing grievous bodily harm and/or death to the deceased.
39. However, no confession was recorded from the minors herein but the Court has heard sufficient evidence to find the minors guilty of killing ABJ . .
40. It is a tragedy that the life a young man has been lost and that the 2 minors at this young age committed such a heinous crime.
41. In conclusion, I find that the prosecution has proved without reasonable doubt that the minors committed the offence of murder. I proceed to enter a finding of guilt against each of them

**DATED, DELIVERED AND SIGNED AT KISII THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**TERESA ODERA**



## **JUDGE**

In the presence of:

The two minors

Mr.Koima for the State

Mr. Magara for the Accused Person/Applicant

Oigo -Court Assistant

