



**Republic v Mayende & 4 others (Criminal Case 6 of 2021)  
[2024] KEHC 617 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE 6 OF 2021  
JN KAMAU, J  
JANUARY 29, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ZABLON ANYULU MAYENDE ..... 1<sup>ST</sup> ACCUSED**

**ZEDEKIAH AKAKA AMACHI ..... 2<sup>ND</sup> ACCUSED**

**JOSEPH ASITIBA OTENYO ALIAS SMATI ..... 3<sup>RD</sup> ACCUSED**

**WYCLIFFE ANG'ANA AMACHI ALIAS NEHEMIAH SIBO ..... 4<sup>TH</sup> ACCUSED**

**SILAS MUGUNA ABISAI ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The Accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the Charge were that:-  
  
“On the 22<sup>nd</sup> day of August 2020 at Ilonje village, Esibakala Sub-Location, Ipali Location in Emuhaya Sub-County within Vihiga County, jointly murdered Paul Muyera Barnaba.”
2. The Prosecution’s case was heard on diverse dates between 17<sup>th</sup> May 2021 and 20<sup>th</sup> June 2022 when it closed its case. On 7<sup>th</sup> October 2022, Musyoka J who was initially seized of this matter found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence. The defence case was heard on diverse dates between 24<sup>th</sup> February 2023 and 20<sup>th</sup> September 2023.



3. The said Learned Judge took the evidence of Barnaba Odeno Jason (hereinafter referred to as “PW 1”), Philister Mauwa Esipala (hereinafter referred to as “PW 2”), Rose Amisi Ananda (hereinafter referred to as “PW 3”), James Emisiko Jimmy Naul Swaka (hereinafter referred to as “PW 4”), Rosemary Esipala (hereinafter referred to as “PW 5”), Twakan Okila Omchele (hereinafter referred to as “PW 6”), Dr Nixon Mchana Mwaludindi (hereinafter referred to as “PW 7”), Polycarp Lutta Kweyu (hereinafter referred to as “PW 8”), No 629919 PC William Kembo (hereinafter referred to as “PW 9”), No 231470 Chief Inspector James Yano (hereinafter referred to as “PW 10”), the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons.
4. This court became seized of this matter on 23<sup>rd</sup> March 2023 on which day the Accused persons and the State indicated that they wished to proceed with the matter from where it had reached. This court therefore took the evidence of David Amuga Amuya (hereinafter referred to as “DW 6”), Paul Amachi Amadi (hereinafter referred to as “DW 7”), Margaret Saisi Liboi (hereinafter referred to as “DW 8”), Joyce Amunabi (hereinafter referred to as “DW 9”), Joseph Ongonda Amachi (hereinafter referred to as “DW 10”), Paul Opwanda Amuka (hereinafter referred to as “DW 11”) and Velma Aitso (hereinafter referred to as “DW 12”).
5. The Prosecution’s Written Submissions were dated and filed on 9<sup>th</sup> November 2023 while those of the Accused persons were dated and filed on 21<sup>st</sup> November 2023. The judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

6. The issues that were put before this court for consideration were as follows:-
  - a. Whether or not Paul Muya Barnaba (hereinafter referred to as the “deceased”) died?
  - b. If so, was his death caused by an unlawful action(s) and/or omissions?
  - c. If so, who caused the unlawful action(s) and/or omissions?
  - d. Was there malice aforethought in the causation of the deceased’s death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

#### **I. Proof Of Death Of The Deceased**

8. PW 7 who was the Pathologist conducted the post-mortem examination on the deceased. The examination could only have been conducted if the deceased was dead. On his part, PW 8 who was the Government Analyst tendered in evidence a Government Analyst Report dated 6<sup>th</sup> July 2021. His analysis of the samples of nails, cartilage and cotton swab showed that the DNA profile of the blood stains on the swab matched the DNA profile of the deceased.
9. As both the Prosecution and Defence witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

#### **II. Proof Of Cause Of The Deceased’s Death**

10. The cause of the deceased’s death was a pertinent issue. PW 7 tendered a Postmortem Report dated 26<sup>th</sup> August 2020 in respect of the deceased herein as an exhibit in this matter. After conducting the



postmortem examination, he formed an opinion the deceased died of injury on head caused by blunt force trauma following assault.

11. It was therefore clear from his evidence that the deceased's death was not as a result of natural causes. Rather, it was due to having been assaulted. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

### III. Identification Of Perpetrators Of Deceased's Death

12. All the Accused persons denied having been with the deceased on the material date of 22<sup>nd</sup> August 2020 and raised the defence of alibi.
13. They were emphatic that they were variances in the prosecution evidence which had no cure in criminal law. They also contended that there were glaring gaps between various Prosecution witnesses' testimonies that should create doubt in the mind of the court.
14. It was their case that the burden of proof beyond reasonable doubt rested on the shoulders of the Prosecution and that through their defense of alibi, they had been able to demonstrate their innocence. They therefore urged the court to acquit them under Section 215 of the Criminal Procedure Code.
15. The 1<sup>st</sup> Accused person testified that on the material date PW 3, who was his wife, called him while he was at work and informed him that his house had been broken into and two (2) chicken stolen. He denied having been at the scene where the deceased was killed and asserted that he learnt of his death on the material date at 11.00 am. DW 6 who was his workmate explained that they were together at work on that material night.
16. The 2<sup>nd</sup> Accused person also denied killing the deceased. He averred that at the material time, he was with DW 7 at DW 9's home at Muicho, Egunza, Ebusami where he had gone to assist her with farm work. Both DW 9 and DW 7 confirmed that he was at DW 9's house on that material date.
17. DW 3's evidence was that on the material night he went to drink and returned home. His testimony was corroborated by the evidence of DW 8 who was his wife who was emphatic that they were together on the said date and that he was drunk.
18. The 4<sup>th</sup> Accused person told this court that he was an electrician and that on the material date, he had gone to Kisumu to purchase materials. DW 10 who was his brother asserted that the 4<sup>th</sup> Accused slept in his house in Kisumu. DW 11's evidence was that he saw the 4<sup>th</sup> Accused person and DW 10 at a stall in Kisumu on 20<sup>th</sup> and 21<sup>st</sup> August 2020.
19. The 5<sup>th</sup> Accused person testified that he was at a funeral on the material night and did not therefore participate in the killing of the deceased. His evidence was corroborated by DW 12 who was his biological sister who told this court that they were together at the funeral during the material night.
20. On the other hand, the Prosecution submitted that their defence of alibi was contrary to its witnesses' evidence.
21. In the Black's Law Dictionary, 10<sup>th</sup> Edition, alibi is defined as "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
22. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The East Africa Court of Appeal came to a similar conclusion in the case of Republic vs Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145.



23. It is also trite law that once a respondent raises an alibi defence, the onus shifts to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR.
24. In this case this court noted that defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-
 

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
25. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the alibi evidence of the Accused persons and their witnesses to have been watertight enough to have weakened the inference of guilt on their part.
26. Notably, PW 1 who was the deceased’s grandfather testified that on the material date at 0300hrs, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons came and removed the deceased from his house. They beat him saying that he had stolen chicken. He asked the 1<sup>st</sup> Accused person to take him to the police instead of beating him. The Accused persons left with the deceased. At 9.00 am, he was informed that the deceased had died and that he had been left lying somewhere not far from his home.
27. He said that he was able to see the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons because there was light outside. However, he did not recognise the 5<sup>th</sup> person because he had a torch that was facing away from his face.
28. PW 2 was PW 1’s neighbour. The deceased was a friend to his son called Onaya. She corroborated PW 1’s testimony that on the material date, she saw the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons hit the door of the deceased (sic) and beat him. She added that the deceased was holding his trousers and had blood all over his face. She said that she was able to see the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons because they had a solar torch and there was light from her house.
29. It was her testimony that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons also went to her house looking for her son Onaya alleging that he was with the deceased when the chicken were stolen. She insisted that he could only be arrested by Government agents.
30. PW 5 was Onaya’s sister. She also corroborated PW 2’s evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons went to their house looking for Onaya. She said that she was also able to see them because there was moonlight.
31. Her further evidence was that at the material time, the 1<sup>st</sup> Accused person had a torch, the 2<sup>nd</sup> and 4<sup>th</sup> Accused persons had pangas (machetes) while the 3<sup>rd</sup> Accused person had a wooden stick.
32. PW 6 testified that on the material night at about 2.00 am, he was asleep when the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons woke him up and told him that the deceased had mentioned that he was with him.
33. He said that the 1<sup>st</sup> Accused had a panga/fimbo, the 2<sup>nd</sup> Accused had a panga, the 3<sup>rd</sup> Accused had a fimbo, 4<sup>th</sup> Accused had a panga while the 5<sup>th</sup> Accused had a metal rod at the material time. He confirmed that he was able to recognise the Accused persons as there was light in his home and that they had torches.
34. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1, PW 2 and PW 5 saw the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons with the deceased on the material



- date. PW 6 was the only one who saw the 5<sup>th</sup> Accused person together with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Accused persons in the company of the deceased at his (PW 6's) house.
35. The source of light was from the moonlight and the torches the 1<sup>st</sup> and 5<sup>th</sup> Accused persons were carrying on the material night. There was sufficient light as PW 1, PW 2, PW 5 and PW 6 were able to see them beating the deceased.
  36. Using the light from the moon and torch respectively, PW 2 and PW 6 were also able to see the deceased bleeding and for PW 5 and PW 6 to have seen the crude weapons the Accused persons were carrying at the material time.
  37. PW 1, PW 2, PW 5 and PW 6 all placed the Accused persons at the scene of crime. There was sufficient lighting that was favourable for their positive identification of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 4<sup>th</sup> Accused person.
  38. This court was persuaded to find and hold that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons were positively identified by PW 1, PW 2, PW 5 and PW 6 as aforesaid. Identification was by way of recognition. They were all neighbours and knew each other. They each spent sufficient time communicating with the Accused persons who were with the deceased at the material time. This could not have been a case of mistaken identity.
  39. The Accused persons did not demonstrate that there was any motive for PW 1, PW 2, PW 5 and PW 6 to have colluded to frame them as the people who unlawfully caused the deceased's death on that material date.
  40. Consequently, it was this court's finding that the defence of alibi raised by the Accused persons was an afterthought and had to fail. It did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 5 and PW 6.

#### **IV. Malice Aforethought**

41. Having found and held that the Accused persons' defence of alibi was not sustainable as they were positively identified as the perpetrators of the deceased's death, the next pertinent question that arose was whether or not they had malice aforethought in causing his death.
42. The Prosecution placed reliance on the case of *Nzuki vs Republic* (1993) KLR 171 where it was held that malice aforethought was where there was intention to cause harm, intention to cause grievous bodily harm, where the accused knew that there was a risk that death or grievous harm would ensue from his acts and committed the acts without lawful excuse with an intention to commit a felony. It submitted that assault on someone resulted in bodily harm.
43. It pointed out that the multiple injuries above the ear, back, hands and legs, internal bruising of mid chest and stomach filled with blood and blood swelling on the brain indicated severe bodily harm that led to the death of the deceased. It was categorical that the said harm was brought about by the actions of the Accused persons whose intentions was to cause subsequent death.
44. In this regard, it relied on the case of *Republic vs Ongowo & 2 Others*(2022) KHHCIO KLB where the court therein observed that where more than one (1) accused person was charged with the same offence of murder, Section 21 of the Penal Code provided that when two (2) or more people formed a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequences of the prosecution, the same constituted a common intention.



45. It argued that the evidence that was adduced proved common intention by the Accused persons from their conduct and that it had proved beyond reasonable doubt that all the Accused persons were guilty of the offence of murder. It thus urged this court to convict them as charged.
46. This court had due regard to the case of *Morris Aluoch vs Republic* [1997] eKLR which cited the case of *Rex vs Tubere s/o Ochen*[1945] 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
47. PW 1 testified that the Accused persons were beating the deceased while saying that he had stolen chicken. PW 2 told this court that the deceased's face was covered with blood. He had injuries all over his body with blood and on his head near the ears. The 6<sup>th</sup> Accused person said that the 5<sup>th</sup> Accused person hit the deceased on the head with a metal rod when he denied that he had mentioned him (PW 6). Further, he testified that by that time, the deceased was so weak from their beating. He even pleaded with them not to kill the deceased at his home.
48. PW 3 and the 1<sup>st</sup> Accused person confirmed that indeed their kitchen had been demolished that night and two (2) cockerels were missing. The same were not recovered. PW 4 confirmed having seen the broken window to the 1<sup>st</sup> Accused person's house when he went to his house at 6.00 am on that material date.
49. PW 9 produced photos evidencing that the deceased's house had been broken into. The floor of his house had his blood stains. From PW 10's investigations, PW 1, PW 2, PW 5 and PW 6 connected the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons to the deceased's death. The thorough beating they meted on the deceased could only have been intended to kill him for the for the theft.
50. The seriousness of the injuries the deceased sustained was confirmed by PW 7. Upon conducting the postmortem examination, he observed that the deceased had injuries on his forehead, the back, hands and legs, a cut on left right scalp above the ear and right side of mid chest. The stomach was filled with blood. There was also blood on the left side of the brain coverings, moderate swelling of the brain and the bluish colour of his nails, lips and ears which suggested that he did not die immediately.
51. The extensive injuries all over the deceased's body and the fact that he did not die immediately were evident that he suffered greatly before he died. In addition, the fact that the deceased was found dead in a farm suggested that the Accused persons had no regard to his life and did not care if he died.
52. This court was thus persuaded to find and hold that there were no variances of gaps in the Prosecution's case as the Accused persons had asserted. The beatings the deceased suffered at their hands were not only unlawful but they could not be said to have been bereft of malice aforethought on their part. It was clear that they acted in concert with each other and hence had common intention to cause the deceased harm which led to his death.
53. It was immaterial that the deceased was a thief as the Accused persons had alleged. They took the law into their hands instead of taking him to the police so that the due process of the law could be followed.
54. Having analysed the evidence that was adduced by both the Prosecution and 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> the Accused persons and their respective Written Submissions, this court came to the firm conclusion that the Prosecution established to the required standard, which in criminal cases, is proof beyond reasonable doubt that the act of unlawful killing of the deceased herein was by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons herein and that the same was with malice aforethought the ingredients that had been set out in Section 203 of the Penal Code as having been:-
  - a. Proof of the deceased's death'



- b. Proof that the deceased's death was a result of unlawful actions and/or omissions; and
- c. Proof of malice aforethought in the unlawful actions and/or omissions.

**Disposition**

- 55. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Accused persons herein be and are hereby convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya) under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
- 56. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29<sup>TH</sup> DAY OF JANUARY 2024**

**J. KAMAU**

**JUDGE**

