



**Republic v Makokha & another (Criminal Case 20 of 2014)
[2024] KEHC 1918 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 20 OF 2014
PJO OTIENO, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

EDWIN MUKWEYU MAKOKHA 1ST ACCUSED

BENSON MAHITSI MAHAKA 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were given to be that on the 18th day of April, 2014 at Mukhulusu village, Marhanda location in Kakamega East District within Kakamega County, the accused persons jointly and unlawfully murdered Geoffrey Mambili.
2. The accused persons pleaded not guilty to the charge, a trial ensued and in order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from nine witnesses.

The Evidence

3. PW1, Richard Mukhovelov Musonye testified that the deceased was his brother and that on 18/4/2014 he was at his home in Mukhulusu village when he received a call from one Titus informing him that his brother had been stabbed by the accused persons at a place called Khodolo. He rushed to the scene and found that one Titus had placed him on a motorbike. He then spoke to the deceased who informed him that he had been stabbed by the accused persons and that they had stolen his mobile phone, Tecno make. The deceased was thereafter rushed to hospital and the next day the doctor called him and informed him that the deceased had succumbed to the stab wound. He then reported the incident at the Kakamega Police Station.



4. On cross examination he stated that the deceased informed him that the accused persons had waylaid him on the road and that he knew the accused persons before the incident.
5. PW2, Jane Masalitsa testified that she was a resident of Mukulusu sub location who was on 18/4/2014, at about 6PM, at her stall which was in her compound when she saw the accused persons and one Boaz passing while singing and dancing. After about 20minutes she saw the deceased coming from the direction the three young men had come from and he came to her shop asking for a jacket since she sells second hand clothes. He then went towards the direction the three young men had gone and 5 minutes later she heard screams with a voice calling her husband Shimangi to go help him as he was being killed. In the company of her husband they went to the direction of the screams and found the deceased running while being chased by the accused persons. The deceased fell close to her gate and the accused persons descended on him with knives stabbing him. The witness and the husband pleaded with the accused persons to stop and the 1st accused retorted at then and told them that they had warned the deceased never to visit the area. The deceased then got up and ran towards her house and the accused persons went away. The deceased was bleeding profusely from the abdomen and she tied him with a shawl as first aid. The deceased then told her that the accused had stolen his phone and he asked her to call his sister who came to the scene and took him to hospital. The next day he heard the sister screaming saying that her brother had died. She identified the knives the accused persons had and further stated that she had known them since they were children.
6. On cross examination she stated that though it was not recorded in her statement, the accused persons had knives. She further stated that she was not aware if the deceased had quarreled with the accused persons.
7. PW3, Henry Shimenga Lipenga, husband to PW2, testified that on 18/4/2014 at about 6PM he was in the house listening to radio when his wife, PW2, who was in her stall called him to come fast as there were people fighting. They stepped out of the compound and saw the deceased coming from the direction in which there was a tractor, running towards his house. Before they could get to him the deceased fell next to the neighbors shamba and the accused persons then set on the deceased and started to stab him with knives. When the accused persons got up, the deceased ran towards his house while the accused persons ran away. The deceased was heavily bleeding from the ribs and the abdomen and they tried to tie him with two shawls. PW2 then called the deceased's relatives who took him to the hospital and the next day the witness learnt from the police that the deceased had died. He further stated that he knew the accused persons and that he had never quarreled with them. On cross examination he stated that each of the accused persons had a knife.
8. PW4 was Wikunza Elias who stated that on 19/4/2014 he was at his home sleeping when he heard screams from a neighbours house. He went there and was informed that the deceased had been killed by the accused persons. He then went for a bull fighting event where he saw the accused persons dancing and when they saw him they ran away. He informed the people that were around who chased the accused persons and arrested them and retrieved a blood-stained knife from the 1st accused which they surrendered to the police. He clarified that the accused persons were from his village and that he has never quarreled with them. On cross examination he stated that no one had sent him to arrest the accused persons.
9. PW5, Winishaw Wigunza, gave evidence that on 18/4/2014 at about 6:30PM he heard screams at a neighbor's house and when he went there he was told that the deceased had been stabbed and had been taken to hospital. The next day he again heard screams at the neighbor's house and when he went there he learnt that the deceased had died. He informed the area chief and when they heard that the accused persons had been spotted at a bull fighting event, they rushed to the scene, arrested them and retrieved



- a blood-stained knife from one of them which they took to Kakamega Police Station. He further stated that he knew the accused persons well. On cross examination she admitted that he did not witness the incident.
10. PW6, Titus Shikobolo Shimenga, testified that he was a boda boda rider and that on 18/4/2014 at about 7:30 PM he was at his home when Petronilla visited and informed him that the deceased had been stabbed by the accused persons and asked him to help in ferrying him to the hospital. He called PW1 who came to the scene and they placed the deceased on the motor cycle and took him to Kakamega Hospital where he was admitted and the doctors later informed him that the deceased had died. He then recorded his statement at Kakamega Police Station. He further stated that the deceased identified the accused persons to be the people that had stabbed him.
 11. PW7, Petronilla Sambe, testified that she was the deceased's sister and that on 18/4/2014 she received a call from PW2 informing her that her brother had been stabbed and that he wanted her to take him to the hospital. She went to the scene and found the deceased bleeding from the abdomen. She called PW6 who then took him to the hospital. She returned to her home and at about 11PM the accused persons knocked at her window but she did not open. The following day her mother informed her that the deceased had died. she further stated that the deceased told her that it was the accused persons who had stabbed him. On cross examination she stated that she did not witness the incident.
 12. PW8 was No. 249863 Patrick Adie. He testified that he was the investigating officer having stepped in for the initial investigating officer, one Inspector Sure who had since retired. He relied on the diary kept by Inspector Sure's, and narrated that upon being assigned the matter he proceeded to Mukulusu village where the incident occurred and recorded statements. He produced the blood-stained knife as PEXH 1A and a pouch it had as PEXH 1B. He then witnessed the post mortem examination on the deceased. At the postmortem examination he collected blood which was matched against the blood stains in the knife at the government laboratories and produced the analyst's report arising as PEXH 2. He stated that it was the 2nd accused who was found in possession of the knife.
 13. PW9, Dr. Dixon Mchina, testified that he was a consultant pathologist at Kakamega County Referral Hospital and that his colleague Dr. Ahonya conducted an autopsy on the body of the deceased on 21/4/2014. The body had four cut wounds on the front right chest ranging between 2-4cm wide. There was an operation wound on the abdomen about 26cm long done at the hospital. The back had three cut wounds on the right lower back, below the chest and on the back. There was also a cut wound on the right thigh and all the injuries had been stitched. Internally there was blood on the right half of the chest cavity and three perforations on the right lungs. On the digestive system the stomach had 3 perforations which were repaired by surgical intervention and the spleen was absent.
 14. Dr. Ahonya was of the opinion that the cause of death was due to severe blood loss both internal and external secondary to sharp force trauma following assault. He produced the post mortem report as PEXH 4.
 15. The evidence of PW9 marked the close of the prosecution case, the court then ruled that a *prima facie* case had been established against the accused persons and both were thus placed on defense.
 16. The 1st accused testified as DW1 and in his sworn evidence he denied the charges and stated that on 18/4/2014 he was working in the forest when he saw the deceased near a posho mill and accused suddenly and without explanation hit with a rungu on the head. He did not understand why the deceased hit him and he decided to ran away. He stated that before he met the deceased he was in the company of Boaz and that at the time the deceased hit him he had a jembe with him. On cross examination he stated that on the material day he was with the 2nd accused and Boaz.



17. The 2nd accused testified as DW2 and he gave sworn testimony stating that on 18/4/2014 he was called by the 1st accused to help him farm in the forest. In the evening they passed by a kiosk close to the home of the 1st accused and as he was getting his change he heard noises at the gate. He went there and found the deceased and the 1st accused struggling over a rungu. The deceased then overpowered the 1st accused and hit him with the rungu on his shoulders forcing him to run away. At the time, Boaz was there. He was arrested the next day by members of the public while playing isukhuti. He claimed that he did not know who stabbed the deceased and that the knife was planted on them since he only had a slasher with him.
18. On cross examination he stated that he lived in the same village with the 1st accused and PW2 and that PW2 and the husband hated him. On being questioned by the court he stated that from the 1st accused's gate to the kiosk was about 7 meters.
19. With the two accused persons' testimonies, the defense closed its case. Parties were then directed to file submissions and the court has read and derived valuable benefit from such submissions.
20. It is the submission by the prosecution that it sufficiently proved the offence of murder against the accused beyond reasonable doubt in that the death of the deceased was proven by the post mortem report as corroborated by the evidence of the eye witnesses.
21. On whether the death of the deceased was occasioned by an unlawful acts attributable to the accused persons, it is submitted that according to the post mortem report the deceased's cause of death was severe external and internal blood loss secondary to sharp force trauma. On whether the accused persons were properly identified as the persons who injured the deceased leading to his death, they argue that the accused was identified by PW2 and PW3 who saw the accused persons stabbing the deceased and that the incident happened at around 6PM when darkness had not engulfed. They also confirmed that they had known the accused persons since childhood. They argue that the accused persons were further identified by the deceased himself through his dying declaration given to PW1 in which he told him that he had been stabbed by the accused persons who stole his phone which information was corroborated by PW2 to whom he told that his phone had been stolen by the accused persons. On the last element of malice aforethought, they contend that the degree of the injuries inflicted on the deceased and the part of the body where he was attacked which include multiple cut wounds on the anterior right side of the chest, three large cut wounds on the back, cut wound on the thigh, stab wounds on the right lung and 2 stab wounds on the stomach shows that the accused persons had intended not only to inflict grievous injuries to the deceased but ultimately to end his life.
22. The accused persons submit that the only eye witness to the incident leading to the death of the deceased was one Boaz who was never called as a witness. They further contend that the charge sheet is defective because the prosecution failed to charge Boaz. They argue that PW2 and PW8 testified that the accused persons and the deceased were fighting and therefore the appropriate charge ought to be manslaughter. They submit that a single knife cannot be handled by two people and that forensic examination did not identify whose blood was on the knife as it simply indicated "human/animal blood."

Issues For Determination

23. The offence of murder is defined and created by section 203 of the [Penal Code](#) to occur when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. With that definition, for the prosecution to sustain a conviction, all the three ingredients contained in section 203 of the [penal code](#) ought to be proved beyond reasonable doubt. The prosecution is therefore obligated to prove the death of the deceased; that the death was out



- of unlawful acts or omission of the accused and that in perpetrating the acts or omissions, he was accentuated by malice aforethought.
24. Before going to the merits of the case, the accused herein submissions alleged that the charge they face is defective. That ought to be dealt with beforehand.
 25. The substantive law on a defective charge sheet is contained in section 134 of the *Criminal Procedure Code* which prescribes what every charge or information shall contain. It is sufficient if the charge contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. There is no requirement that every person connected with the offence as a suspect be charged for the charge sheet to comply with the law. For that reason, the allegations of defect fails the test for a defective charge sheet within the meaning of section 134 of the *Criminal Procedure Code*.
 26. The prosecution reserves the right under article 157 of the *Constitution* to determine who to charge for an offence guided by the investigations carried out and the statements of the prosecution witnesses and other consideration including a strategy on how to achieve a conviction. There is no merit on allegation that the charge sheet was defective.
 27. On the substantive merits of the case, the evidence from both the prosecution and the defence converge on the fact that the accused did die on the date allege. The only dispute therefore, which the court is bound to determine is who caused the death and if the accused are to blame for the death.

Did the accused persons kill the deceased?

28. With the post mortem report showing that the deceased died due to severe blood loss both internal and external secondary to sharp force trauma, the question that then arises is whether it is the accused persons who inflicted the injuries on the body of the deceased that led to his death?
29. It was the evidence of PW2 and PW3 that they witnessed the accused persons attack the deceased with knives. Their respective evidence tallied well with both of them stating that they saw the two accused persons chase the deceased towards where they were and when they caught up with him they lay on him while both of them continuously stabbed the deceased. This evidence is corroborated by the evidence of PW9, Dr. Dixon Mchina, who testified that the deceased's body had multiple cut wounds. PW2 and PW3 narrated how they pleaded with the accused persons to stop stabbing the deceased which pleas initially fell to deaf ears though later they stopped and ran away. The identity of the accused persons as being the persons who attacked the deceased was further confirmed by the deceased's dying declaration to PW1 and PW7. Both witnesses stated that the deceased told them at different times that he had been attacked by the two accused persons. PW1 was called to the scene and when he got there the deceased told him that Edwin Mukweyu and Benson Muhitsi had injured him and stolen his mobile phone Tecno. PW2 also testified to the effect that the deceased told him that the accused persons had stolen his phone.
30. Section 33(a) of the *Evidence Act* Cap 80 Laws of Kenya declare statement made in anticipation of death, whether written or oral 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 without an amount of delay or expense, which in the circumstances of the case appears to the court unreasonable, are themselves admissible if 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 and 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 proceedings in which the cause of her death comes into question.



31. The guidelines for placing reliance on dying declarations was set out by the court in *Dzomo Chai v Republic* Mombasa HC Criminal Appeal No. 256 of 2006 where the court held as follows: -
- “ A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the *Evidence Act*. Although the court can in law solely rely on such evidence, there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”.
32. The court finds what was told to PW2 on what he was told by the deceased to be admissible as a dying declaration to prove who assaulted the deceased.
33. Furthermore, the evidence of PW4 and PW5 was that when they arrested the accused persons at a bull fighting event, the 2nd accused person had in his possession a blood stained knife and a blood stained pouch which was subjected to forensic examination by PW8 and the results therefrom according to PEXH 2 was that the DNA profile generated from the blood stain on the knife and the pouch both matched the DNA profile generated from the blood sample of the deceased, Geoffrey Mambili.
34. It thus cannot be true or indeed believable as contended by the submission of the accused persons that the blood stains belonged to an animal. Moreover, the 1st accused person stated that he was in the company of one Boaz and the 2nd accused when he was attacked by the deceased. The 2nd accused on the other hand stated that he was in a kiosk when he observed that the 1st accused and the deceased were fighting over a rungu and he joined to separate them but he was hit by the deceased. The 1st accused stated that he had a jembe while the 2nd accused mentioned that he had a slasher. The court is not satisfied that three men, two of whom armed were overpowered by the deceased in the manner described. The court finds the evidence by both accused persons to place them at the scene the deceased was assaulted but is not credible on the allegation that the accused was the villain.
35. That said, I do find that the evidence of the prosecution witnesses was coherent and believable as to the identity of the persons who fatally injured the deceased to be, the accused persons. The unlawful acts by the accused as the cause of fatal injuries was thus proved beyond reasonable doubt.

Whether the accused was actuated with malice aforethought in causing the death of the deceased

36. Every time the court established in the evidence presented by the prosecution that the conduct of the accused reveal;
- “(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.”



37. To determine whether or not the killing of the deceased was premeditated by the accused persons, the court looks at the events leading up to the murder and how the murder took place.
38. It was the evidence of PW2 and PW3, who witnessed the incident that the accused persons, each armed with a knife, chased the deceased, caught up with him, lay on him and began to stab him. The deceased was not armed. PW2 and PW3 pleaded with the accused persons to stop stabbing the deceased to no avail. The accused persons and the prosecution witnesses confirmed that the deceased and the accused person came from the same village. Even after news went round that the deceased had died, the accused persons were spotted at a bull fighting event dancing. They were unbothered by their actions but accused 2 had the weapon of murder stacked in his pocket.
39. The extent of the injuries inflicted by on the deceased were told to the court by PW9 to be; four cut wounds on the front right chest ranging between 2-4cm wide, an operation wound on the abdomen 26cm long done at the hospital, three cut wounds on the right lower back, below the chest and on the back, cut wound on the right thigh and all the injuries had been stitched. Internally there was blood on the right half of the chest cavity and three perforations on the right lungs. On the digestive system the stomach had 3 perforations which were repaired by surgical intervention and the spleen was absent. Those are very severe and extensive injuries which must have been intended by the attacker to cause death or grievous harm.
40. The actions of the deceased during the attack, after the attack, the numerous stab wound to the extent that the deceased's spleen was missing, the attack on the chest, ribs and thighs can only lead to the conclusion that the intention of the accused persons was to end the life of the deceased which they ultimately succeeded in.
41. It is thus the finding by the court that the prosecution have established beyond reasonable doubt that the accused persons unlawfully and when accentuated by malice aforethought killed the deceased. Both are found guilty and convicted for murder under Section 203 *Penal Code*.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr. Maritim for Mahuni for the Accused

Court Assistant: Polycap Mukabwa

