



**Republic v Shitambasi (Criminal Case 42 of 2021)
[2024] KEHC 1954 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 42 OF 2021
PJO OTIENO, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

KELVIN AMAYI SHITAMBASI ACCUSED

JUDGMENT

1. The accused, Kelvin Amayi Shitambasi, faces the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 29th day of April, 2014 at Shimutu Village, Shirere sub location, Bukhungu location within Kakamega County, the accused person jointly with others not before court murdered Dismus Shikoto Amalemba. When the charges were read out to him, he pleaded not guilty to the charge and the stage was then set for full trial.
2. In order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from five witnesses.
3. PW1, Nelson Shikoto testified that in 29/4/2014 at about 7PM he was at his home listening to the news on radio when he heard shouts of “thief! thief!”. He went to the place where the noise was coming from which was about 100 meters from his house and found that his brother, the deceased, being beaten by the accused using a rungu and there were other people at the scene as well. He says that he was able to see and identify the accused with the aid of the light from his house. He claimed that apart from being beaten with the rungus, the deceased was also stabbed and that the police came and took him to hospital where he was confirmed dead.
4. On cross examination he stated that there was a big crowd at the scene and that they were all beating the deceased. He was only able to identify the accused and one Pius Mboi and his wife Maryanne Mboi. He further stated that he saw the accused hit the deceased on the back of his neck.



5. PW2, Scholastica Chimoli testified that on 29/4/2014 at about 7PM she received a call from his son Nelson informing her that Dismus had been killed by Kevin. She went to the scene and found that the deceased had already been taken to the hospital and confirmed dead. The evidence elicited no cross examination.
6. PW3, Dr. Dixon Mchina, a Consultant Pathologist based at Kakamega County Hospital testified that on 2/5/2014 he conducted an autopsy on the body of the deceased and recorded that externally; the body had torn clothes which were soiled and blood stained, had widespread soft tissue injuries on the face, all four limbs and the anterior and posterior of the trunk had cut wounds, lacerations, abrasions and contusion. He had a stab wound on the right chest and above the right hip. Internally, the deceased had a fracture of the 6th rib involving the right lung. He also had three minor cut wounds on the head.
7. The Pathologist formed the opinion the deceased died due to extensive soft tissue injury secondary to mixed force trauma following assault and produced the post mortem report which was marked as PEXH 2. On cross examination, the witness said that it was documented that the case was one of mob justice and that the name of the accused was not in that documentation.
8. PW4, Wycliffe Amalemba Shikoto gave evidence that he was a brother to the deceased and that on 29/4/2014 at about 7PM he was in the house when he heard voices from outside. He opened the door and saw people as if they were chasing a thief and the people had torches. He took his torch ran in the same direction as the people who were running towards the homestead of the accused. The homestead had many people who were armed with pangas, spears and arrows. He saw the deceased who was completely undressed and was being beaten as he cried asking what he had done. He was held by ten men and frog marched to a neighbour's compound where they stopped beating him. He then saw the neighbor, the accused and accused's mother talking. He then went and called his father but he did not leave the homestead. His brother Alfred then informed him that he had called the police and he headed to where the deceased was being beaten only to stumble upon the deceased's body. The police then came and put the body in the police car during which time he noticed that the deceased's intestines were out. The deceased was confirmed dead on arrival at the hospital. He further stated that he saw the accused armed with a panga which he used to hit the deceased on the cheek and while at the compound of the deceased he heard the accused tell the deceased, "umekatazwa kwa hii boma" (you have been banned from this home). He also stated that when they got to the neighbor's house, the accused stopped beating the deceased though he still had a panga with him.
9. On cross examination he stated that he knew the accused very well and refuted claims that he told the police that the deceased, who was his step brother and the accused were bothering the village.
10. PW5, No. 235621 Inspector Kiprono testified that he was attached at the Kakamega Police Station and that he had taken up the investigations from Inspector Samson Bor. He stated that on 29/4/2014 Inspector Samson received a call from CI Musyoka informing him that an individual had been subjected to mob justice at Shimundu village and he instructed him to visit the scene. One Wycliffe Amalemba also came to the station to report the incident and when he went to the scene he found the deceased lying naked with extensive injuries on his body though breathing. They rushed the deceased to Kakamega County General Hospital for treatment but he was pronounced dead on arrival. On 23/2/2014 at about 11:30 PM another report was made by the accused to the effect that a person had entered their homestead in an attempt to steal and was beaten by villagers and subjected to mob justice. The next day Inspector Simon visited the scene and discovered the scene of crime was the accused's homestead. Being wanted for the offence of robbery with violence, the accused fled his home and was arrested later.



11. The evidence of PW5 marked the close of the prosecution case and the court upon appraising the evidence ruled that a prima facie case had been established against the accused person and he was thus placed on defense.
12. The accused called two witnesses. He testified as DW1 in a sworn testimony and said that on 29/4/2014 he woke up and spent the entire day preparing the farm for planting. At 4:30PM he took the cows to graze near the river and returned home at 6:30PM. That evening as his sister and girlfriend were preparing supper, he heard dogs barking and saw movement in the house with a torch being flashed outside. He went to her mother's house to ask the girlfriend if she had locked the door. He then decided to step out to see what was happening and raised an alarm and people who were inside the house stepped out running with one dropping a brief case that he had stolen. He went back to the house and could hear noise from outside and he came to learn that the villagers while responding to the alarm had arrested and beaten a person. He called his father who came with his brother and advised him to report the incident with the police. The next day the police informed him that the person who was beaten had died. He was arrested 2-3 months after the incident.
13. On cross examination he stated that he knew the deceased since they lived in the same area. He refuted claims that he beat the deceased and claimed that when he went to the scene after returning to the house, he found the deceased had been arrested.
14. DW2, Florence A. Musambai also gave sworn evidence stating that she was the accused's mother who was on 29/4/2014, at about 7PM, at home with the accused and others taking supper when she heard dogs barking and the accused went out and saw torches flashing. The accused asked the girlfriend if she had locked the door and then he stepped out and saw somebody with a torch running away. He came back with a bag and raised an alarm and people responded and when they heard noises and stepped out they found the police had left with the person who was beaten by the mob. They then called her husband who was at work and he came with his brother who accompanied the accused to the police station.
15. On cross examination she refuted claims that the accused assaulted the deceased and further stated that she did not see PW1 that night and that the accused was not a friend of the deceased.
16. DW3, Patrick Shitambasi, in a sworn testimony told the court that on the night of 29/4/2014, he was at work when at about 9PM his wife called him and informed him that the accused's home had been broken into and some items stolen. He went home and advised them that they report the incident with the police and at the police station the police asked them to return the next day which they did only to learn that the deceased had died.
17. On cross examination he stated that when he got home he found that neighbors had gathered and that he did not go to the scene where the deceased had been beaten which was 200 meters from his home.
18. The defense closed their case with the parties filing respective rival submissions.
19. It is the submission by the prosecution to have proved the offence of murder against the accused by establishing on the strength of evidence that the death of the deceased was proven by the post mortem report. On whether the death of the deceased was occasioned by an unlawful act it is submitted that it was the opinion of Dr. Dixon Mchana in the post mortem report that the deceased's cause of death was severe cardiopulmonary collapse secondary to severe head injury following assault. On whether the accused person was properly identified as the person who injured the deceased leading to his death, they argue that the accused was identified by PW1 who stated that he saw the deceased having been grabbed by the accused and that the accused was beating him and since it was 7PM in the night, he was able to see what was happening because of the light from the accused's house. The evidence is



corroborated by PW4 who stated that he saw the accused assaulting the deceased with the flat side of a panga since he was 5 meters away from where the accused was beating the deceased and that he was also able to see since the torches were on.

20. On the last element of malice aforethought, they argue that the injuries suffered by the deceased and the part of the body where he was injured namely compounded body injuries which included disseminated soft tissue injuries mainly on the face and all the four limbs, cut wounds, 2 stab wounds, lacerations, abrasions and contusions show that the accused person intended not only to inflict grievous injuries to the deceased but ultimately and his life.

Accused Person's Submissions

21. For the accused it was submitted that it is not clear who assaulted the deceased apart from the evidence of PW1 who stated that he saw the accused and other boys assault the deceased but failed to name the other offenders. He further contends that from the evidence tendered, the incident happened on the road and not the accused person's home. He added that he reported an incident of burglary at his home and questions why the police took months to arrest him yet he even attended the deceased's burial.

Issues, Analysis and Determination

22. The law attributes, under section 203, Penal Code, the offence of murder upon any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
23. It is thus the onus of the prosecution in any and every murder trial to prove beyond reasonable doubt that the deceased is dead, died out of unlawful acts or omission of the accused who were propelled by malice aforethought in perpetrating the unlawful acts or omissions. Those parameters then define and determine the issues that must be isolated and determined by the court.
24. On the first issue, whether Dismus Shikoto Amalemba is dead, there cannot be contention because there is an autopsy report dated 2/5/2014 prepared by Dr. Dixon Mchana in which he captures that the deceased died on 29/4/2014 at 2157hrs. In addition, both sets of evidence from the defence and even the evidence by accused and his two parents did not displace the fact of death.

Did the accused kill the deceased?

25. According to the post mortem report, the deceased was subjected to a mob justice and this position was confirmed by both the prosecution and the defence. Whether a mob justice is excusable homicide was pronounced upon in Republic v Kelvin Amata Omboto & another [2017] eKLR where the court observed as follows;

“I note that he (deceased) was clearly a victim of what is often touted as mob justice but what should ideally be "mob injustice" Mob justice is a very primitive and barbaric method of meting out justice that should be discouraged and condemned in the strongest terms possible as it has no place in a civilized society that observes the rule of law.”

26. The question that now arises is whether the accused was part of the mob of villagers that assaulted and fatally injured the deceased.
27. It was the evidence of the accused, DW1, that he noted that were intruders at his homestead and that he went out collecting a stolen briefcase that had been dropped by one of the intruders, he raised an alarm and went back to the house. PW1 testified that while in his house he heard people shouting, thief! thief! And when he stepped out he saw a group of people, armed, heading towards the homestead of the accused. PW4 equally testified that he also heard the noises, picked his torch and followed the crowd



which also had torches with them and was heading towards the accused's homestead. Both PW1 and PW4 stated that they saw the accused and other villagers beat up the deceased. According to PW4, after being beaten, the crowd frog marched the deceased to a neighbor's house where they left him for the dead. The accused, DW1 and DW2 stated that they were in the house though they could hear noises outside, the villagers beating up the deceased. It is difficult to fathom, considering the natural reaction to human being when purporting or person is threatened by an intruder, that he accused and his kins would be comfortably in the house well aware of an intrusion, with neighbours in the compound without them coming out. The account of the accused and his witnesses are difficult to believe. That discounts the defence evidence as untrue but finds the evidence of PW1 and PW4 believable in that the accused was part of the crowd that assaulted the deceased.

28. The accused was a neighbor not only to the deceased, but also. To know who was in the mob attacking the deceased the witnesses only needed to recognize the accused unlike the identification of strangers. The court finds that the identity of the attackers of the deceased given by the 1st and 4th prosecution witness was free from error and that indeed the accused was in the gang that attacked and inflicted the fatal injuries upon the deceased.
29. The last element of the offence considers whether the actions of the accused was propelled by malice aforethought. That is determinable from the events surrounding the attack including the ferocity of the attack and the extent of injuries inflicted. Intention to cause death or grievous harm, is enough to demonstrate malice aforethought.
30. Where the death of a deceased is attributed to mob justice, a common intention may be drawn from the presence of the assailants at the scene of the offence and their contribution in assaulting the deceased.
31. Section 21 of the Penal Code defines a common intention as where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.
32. In this matter, it is undisputed that a number of villages participated in assaulting the deceased leading to his death. Therefore, in such a case, in order to constitute common intention, it is not necessary that there should have been any concerted agreement between the accused and the other assailants prior to the attack on the so called thief. In *Rex Vs. Tabula Yenka s/o Kirya & others* (1943) 10 EACA 51 while discussing who to discern common intention, the court said;

“To constitute a common intention to prosecute an unlawful purposeit is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omissions of any of them to disassociate himself from the assault.”
33. Furthermore, as said before, malice can be inferred from nature of the injuries inflicted on the deceased. In this matter from the evidence of PW3, the deceased suffered widespread soft tissue injuries on the face, all four limbs and the anterior and posterior of the trunk had cut wounds, lacerations, abrasions and contusion, stab wound on the right chest and above the right hip and internally, the deceased had a fracture of the 6th rib involving the right lung and three minor cut wounds on the head. The injuries are grievous and very extensive. To inflict such injuries the attackers, a gang to which the accused belonged must be inferred to have intended to occasion at least grievous harm to him if not outright death. The attackers are determined to have been accentuated by malice aforethought.



34. Flowing from the above discussion and conclusions, the accused person is determined guilty of the offence of murder contrary to Section 203, as charged, and is convicted accordingly.

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

No appearance for Wekesa for the Accused

Accused present

Court Assistant: Polycap

