



**Republic v Keverenge & 2 others (Criminal Case 47 of 2021)  
[2024] KEHC 2026 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL CASE 47 OF 2021  
JN KAMAU, J  
FEBRUARY 27, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENARD KEVERENGE ..... 1<sup>ST</sup> ACCUSED**

**BRITON JARENGAH ..... 2<sup>ND</sup> ACCUSED**

**BENARD USINDE ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

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 12<sup>th</sup> day of June 2018 at Mudungu village in Wodanga Location within Vihiga County, with others not before court murdered Nicholas Analo.”
2. This matter was part-heard by Musyoka J. The Prosecution’s case was heard on diverse dates between 24<sup>th</sup> October 2018 and 20<sup>th</sup> September 2022 when the Prosecution closed its case.
3. The said Learned Judge took the evidence of Sheila Kageha (hereinafter referred to as “PW 1”), Hellen Khaziga Khadambi (hereinafter referred to as “PW 2”), Sylvia Adelo Alex (hereinafter referred to as “PW 3”), No 229900 Corporal Keith Wafula Sabatia CID (hereinafter referred to as “PW 4”), Dr Masika Collins Were (hereinafter referred to as “PW 5”), Morgan Mwasaji Analo (hereinafter referred to as “PW 6”) and Reagan Agwona Analo (hereinafter referred to as “PW 7”).
4. This court became seized of this matter on 7<sup>th</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. On 18<sup>th</sup> April



2023, this court delivered its Ruling on a case to answer and found that the Prosecution had established a prima facie case against the Accused persons and thereby put them on their defence.

5. The defence case was heard on diverse dates between 11<sup>th</sup> July 2023 and 25<sup>th</sup> September 2023.
6. This court therefore took the evidence of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons, Hellen Lumasi (hereinafter referred to as “DW 4”) and Gladys Kavaya (hereinafter referred to as “DW 5”).
7. The Prosecution’s Written Submissions were dated and filed on 7<sup>th</sup> November 2023 while those of the Accused persons were dated 7<sup>th</sup> December 2023 and filed on 11<sup>th</sup> December 2023. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

### **Legal Analysis**

8. The issues that were put before this court for consideration were as follows:-
  - a. Whether or not Nicholas Analo (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?
9. 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**

10. PW 5 who was the Pathologist conducted the post-mortem examination on the deceased. The examination could only have been conducted if the deceased was dead.
11. 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. Cause of the deceased’s death**

12. The cause of the deceased’s death was a pertinent issue. PW 5 tendered a Postmortem Report dated 19<sup>th</sup> June 2018 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 intracranial hemorrhage secondary to trauma.
13. 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**

14. All the Accused persons denied having been at the scene of crime and beating the deceased and/or having participated in beating him on the material date of 12<sup>th</sup> June 2018.
15. They submitted that the court ought to exercise caution in determining the issue of identification on their part. They disputed PW 1’s evidence and pointed out that she was away when the incident occurred and it would not have been possible that she saw them beating him.



16. They contended that there were glaring gaps which raised many questions between various Prosecution witnesses' testimonies and that the Prosecution's case was only an afterthought based on hearsay evidence. They drew the court's attention to the duration of time it took for them to be arrested, the witnesses who adduced evidence but did not place themselves at the scene of crime and the fact that the police who were close to the scene could sit back and watch the deceased being killed and further fail to identify the perpetrators.
17. They urged the court to cast doubt on the Prosecution case as it had failed to prove the offence against them beyond reasonable doubt and acquit them under Section 215 of the Criminal Procedure Code.
18. The 1<sup>st</sup> Accused person testified that on the material date, he arrived at the scene of crime after the deceased had already been beaten.
19. The 2<sup>nd</sup> Accused person averred that at the material time, he was at his home but could see what was happening at the deceased's home because they were immediate neighbours.
20. The 3<sup>rd</sup> Accused person only conceded that he was an immediate neighbour to the deceased.
21. DW 4 testified that on the material date at around 3.00 pm, she heard some noise coming from Sabatia-Hamisi Road. She came out of her house to see the cause of the noise. She found the deceased being beaten by many people. She pointed out that she knew the Accused persons as they were all her neighbours but did not see any of them at the scene of crime.
22. When she was cross-examined, she asserted that she could see them in their houses from her house. She added that she did not see PW 2, PW 3, PW 6 and PW 7 at the scene of crime.
23. DW 5's evidence was similar to that of DW 4. She only added that on the material date she saw DW 4 at the scene of crime from her house but that she did not step there. She also averred that she did not see PW 2, PW 3, PW 6, PW 7 and the Accused persons at the scene of crime. When she was re-examined, she contended that she went to the place where the deceased was being beaten.
24. On the other hand, the Prosecution submitted that the Accused persons were positively identified by the witnesses as it was by way of recognition. It submitted that it had proven this element beyond reasonable doubt.
25. Notably, PW 1 testified that her chicken got lost on 5<sup>th</sup> June 2018 while she was at a funeral. She pointed out that she reported the incident to one Mwaisali who was a local Village Elder and the deceased's father. He also told her that he had also lost one of his chicken.
26. She further said that on the material date, while on her way to the shop, she saw her chicken at the deceased's home. She averred that she had nicknamed her chicken "manono". When she called out that name, it responded by a particular sound, "koroo". She said that she waited for the deceased. He came and gave her the chicken.
27. However, the deceased followed her saying that the chicken was his but she left him and went home. At the time she was with neighbours. She was later called by police who told her to return the chicken to the deceased. When she arrived at his house, she found him seated in the sitting room. He had been hit and was bleeding from the mouth. She did not know who hit him.
28. PW 2 testified that on 12<sup>th</sup> June 2018, she had gone to work at Jipundani at one Pastor Masimba's home when she received a call at 6.00 pm to go and see how her husband was being assaulted. When she arrived at the scene of crime, she saw the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons who were armed with weapons.



- She pointed out that the 1<sup>st</sup> Accused person beat the deceased with a metal bar while the other two (2) Accused persons hit him with whips.
29. She was emphatic that she was able to see them well because it was about 5.00 pm and there was enough light. She pleaded with them to stop beating him but they began assaulting her. Police later came and took him to Sabatia Hospital where he later died.
  30. PW 3's testimony was that on the material date at around 5.00 pm, she heard noise coming from the deceased's house. When she went to check to see what was happening, she found PW 1 in a tussle with the deceased over an allegation of stolen chicken. She averred that the dispute was resolved by the deceased's father and PW 1 went home with her chicken.
  31. When she went back to her home, the deceased's children, PW 7 and another came to tell her that the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons had taken their father from the house and were dragging him towards the road while assaulting him.
  32. It was her evidence that when she went to find out, she found the two (2) Accused persons seated on top of the deceased at Mudungu-Sabatia Road. She stated that it was not dark as it was about 6.00 pm and she could see the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons and one Abundu and Igando who were assaulting the deceased.
  33. She asserted that the 1<sup>st</sup> Accused person was assaulting the deceased with a metal bar, the 2<sup>nd</sup> Accused person assaulted the deceased with a metal pipe which had cement inside while Abundu and his brother Igando had firewood. She tried to tell them to stop assaulting him but they threatened to assault her if she got closer.
  34. It was her further evidence that PW 2 arrived at the scene when they were still assaulting the deceased and when she tried to stop them, they pushed her next to him and started assaulting her. She said that she was present when the police came and took the deceased who had injuries on the left hand and on the forehead to hospital. Later at 8.00pm she heard that the deceased had died.
  35. When she was cross-examined and re-examined, she stated that there was an alleged grudge between the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons.
  36. PW 4 was the police officer who visited the scene of crime and took the deceased to Sabatia Hospital. He said that he found the crowd had dispersed and that when he got to the deceased's house, he found him seated on a chair with blood on his clothes. His family informed him that the neighbours had attacked him on an allegation of stealing chicken. He said that after he died, his body was moved to Mbale Mortuary for post mortem examination.
  37. PW 6 and PW 7 were the deceased's children. They told the Trial Court that they saw their father being dragged from the house by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons who were in the company of others who were not before the court and taken to the road. They told him, "tumekutaka sana"(we have wanted you a lot (sic)). They followed them and saw them beat their father with big sticks and canes plucked from trees.
  38. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 2, PW 3, PW 6 and PW 7 saw the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons beat the deceased on the material date. The evidence of PW 3 corroborated that of PW 2. The evidence of PW 7 corroborated that of PW 6. There were no inconsistencies.



39. The incident occurred between 5.00 pm to 6.00 pm. There was enough light for PW 2, PW 3, PW 6 and PW 7 to have seen the Accused persons beating the deceased with the metal bar, whips, sticks and canes as it was not dark. They all placed the Accused persons at the scene of crime.
40. For that reason, this court was persuaded to find and hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons were positively identified by PW 2, PW 3, PW 6 and PW 7 as there was sufficient lighting that was favourable for their positive identification. Identification was by way of recognition. They were all neighbours and knew each other. This could not have been a case of mistaken identity.
41. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the evidence of the Accused persons and their witnesses to have been watertight enough to have weakened the inference of guilt on their part.
42. They did not demonstrate that there was any motive for PW 2, PW 3, PW 6 and PW 7 to have colluded to frame them as the people who unlawfully caused the deceased's death on that material date.
43. Consequently, it was this court's finding that the defence raised by the Accused persons did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 2, PW 3, PW 6 and PW 7.

#### **IV. Malice aforethought**

44. Having found and held that the Accused persons' defence 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.
45. 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.
46. It submitted that assault on someone resulted in bodily harm. It was categorical that the intracranial haemorrhage witnessed by PW 5 was due to trauma and that the said harm was brought about by the actions of the Accused persons whose intentions was to cause subsequent death.
47. 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.
48. 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.
49. 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.
50. PW 1, PW 3 and PW 4 told the Trial Court that the deceased was bleeding from his mouth and his clothes were blood stained. PW 2 and PW 3 testified that the Accused persons beat the deceased repeatedly and when they tried to stop them, they did not stop but threatened to assault them instead. On their part, PW 6 and PW 7 said that the Accused persons hit their father repeatedly.



51. PW 1 confirmed that her chicken was indeed stolen and that she recovered it from the deceased's home. PW 2, PW 3, PW 6 and PW 7 connected the Accused persons to his death. The thorough beating they meted on the deceased could only have been intended to kill him for the theft.
52. The seriousness of the injuries that the deceased sustained was confirmed by PW 5. Upon conducting the postmortem examination, he observed that the deceased had bruises on the right lower lung and a wound on the same side, bruises on the chest, dislocated shoulder joint and skull fracture on the head. 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.
53. 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.
54. It was immaterial that the deceased was a thief as they 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.
55. Accordingly, having analysed the evidence that was adduced by both the Prosecution and the Accused persons and their respective Written Submissions, 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.
56. It thus 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 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**

57. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</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).
58. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024**

**J. KAMAU**

**JUDGE**

