



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Lusuli (Criminal Case 11 of 2018)  
[2024] KEHC 1761 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 11 OF 2018  
SC CHIRCHIR, J  
FEBRUARY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SIMON IKUNZA LUSULI ..... ACCUSED**

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the offence are that on the 21<sup>st</sup> day of January 2018 at Shaviranga village, Murhanda location in Kakamega East Sub- county within Kakamega county, jointly with others not before court murdered Wycliffe Muyale Matekwa
3. The accused person pleaded not guilty to the charge and the case went to trial. The prosecution called a total of six witnesses.

**The Evidence.**

4. PW1, testified that the deceased was her son. She recalled that on 21/1/2018 while in church, she received a phone call from her in-law informing her that her son had been arrested and she was told to go to Murhanda.
5. She recalled that upon arrival at the police station, the police officers told her to talk to him. He was very weak.
6. She further stated that the deceased raised his hands and said Ikunza had killed him; that as he was passing by when Ikunza called him to where he was and told him that “*Nyumba Kumi*” had stopped people from moving around. He began to assault him using a sharp stick. Ikunza fractured his leg; He further told her that Ikunza then started shouting that there was a thief. A crowd formed. Among those



- in the crowd was Collins, Harriet, Kevin and Jumba. She further stated that the deceased was getting weaker as he narrated the incident and the police advised her to take him to hospital. He took him to Shinyalu, was referred to Mukumu and eventually to Kakamega County hospital. He was treated and they went home. He got worse and died on 25.1.2018. She further testified that the deceased told him all those things in the presence of the Accused.
7. She further stated that she knew Ikunza. They use to go to the same church; that Ikunza was in court and the witness pointed at the Accused in the dock.
  8. On cross examination she testified that she went to the chief's office around 12noon-1 pm and found the deceased with a sergeant and a corporal: and that Ikunza and Bernard Alisiala later joined them.
  9. She further stated that her son was attacked by 5 people, who were Collins, Ikunza, Harriet, Kevin and Jumba. She did not witness the Assault. She got reports that the Assault took place at a foothpath in Masaiakali.
  10. PW2, told the court that he was a village elder at Itenji sub- location and that the deceased was his nephew. He recalled that on 21/1/2018, he was at home when he received a call from Fred Kimani Andole, asking him if he knew where his nephew. He then was and told him to go to the office of the chief at Murhanda. He found the deceased, he had a leg fracture and blood in his chest. The deceased informed him that he was assaulted by Simon, Kevin, Collins and Jumba.
  11. He stated that when the police arrived, they were informed to take the deceased to the Shinyalu hospital and later to Kakamega General Hospital where the deceased died.
  12. He stated that the accused was later arrested while the other suspects escaped.
  13. On cross examination, the witness testified that he went to the Chief AP's camp at 12.30 and found the deceased seated on the ground, and they talked for almost 30 minutes.
  14. According to the witness, the injuries sustained by the deceased were from several people. He was carried to a motor cycle, when being taken to the hospital, since he could not walk.
  15. He further stated that the deceased's mother was present when he talked to the deceased and that it was the deceased's mother who took him to hospital. He asked Ikunza why he had assaulted the deceased and Ikunza said the deceased had been found with chicken. He told the court that he knew the Accused, that he was a farmer and he is an "Askari" of the local Assistant chief. He further stated that the deceased's mother was also present when he talked to the deceased. She came in later than him and she is the one who accompanied the deceased to the hospital.
  16. PW3, testified that on 21/1/2018, he received a call informing him that someone had stolen chickens from his home and that a suspect had been arrested. He went to the Administration Police (AP's) camp, and found 2 of his chicken. However he did not know the name of the suspect. That the suspect who had been beaten was later taken to the hospital.
  17. On cross examination, he told the court that he did not know why the accused had been arrested and he was only informed of the offence. He found the Accused at the AP's camp.
  18. PW4, was the pathologist. he testified that deceased had extensive injuries on both shoulders, both legs and back and his left leg was fractured. He observed that the lungs were inflated and the small blood vessels had fatty materials- embolism. He concluded that the cause of death was respiratory failure due to pulmonary Embolism, following assault. He produced the post mortem report ( Pexb 1)



19. PW5 testified that the deceased was her nephew. she and Gerald Muganda were the only ones who attended the post-mortem. She stated that the deceased had a fracture on the left leg.
20. PW6 recalled that he was on duty on 12/2/2018 when two people came to report that there was someone on the road who had been beaten. He was later brought to the station. He further testified that the accused is the one who brought the deceased to the station claiming that he had found him on the roadside. The deceased's mother was called to the station. He stated that on 14/2/2018, the deceased father came to the station with names of the people he alleged were involved with the death of his son and the accused was named as one of them.
21. He testified that he and his colleagues went to the accused home, arrested and escorted him to Shinyalu police station. He identified him as the person who had earlier brought the deceased to the police post .
22. On cross examination, he testified that the accused made the report on 12/2/2018 and he brought the deceased using a motorbike
23. He clarified that he was the arresting officer not the Investigating Officer. That on 14/12/2018, the accused was arrested after the deceased 's father reported the incident claiming that the deceased had named the people involved in the assault He further stated that on 12/2/2018, the deceased had informed him that the person who had brought him to the station is the one who had assaulted him. That the deceased only told him this after the person who brought him had already left.
24. The accused gave a sworn statement . He testified that on the material day, he was on his way to the house when he heard noise and saw a crowd and when he inquired, he was informed that a thief had been caught . He told them that the thief should be taken to the police. He further stated that he forced his way through the crowd , got hold of "the thief" and took him to the Chief's Camp. He testified that he knew the suspect and his mother as they went to the same church . He took the phone and the called the family to inform them of the incident. and that he went back home and after a week the victim passed away and he participated in the burial as well as the funeral arrangements.
25. He claimed that he was arrested two weeks later and when asked, he claimed that he did not know who assaulted the deceased as there was many people in the crowd.
26. He stated that he did not have any differences between the victim and his family. He testified that he was the only one arrested at the chief's camp and that he and PW3 went to the police station to record a statement since he was a good Samaritan and was only helping the deceased since he had a good relationship with the family.
27. On cross examination he stated that he was headed to the shops when he heard noises and saw a crowd assaulting the deceased and he was persuading them to stop although he could not identify the people in the crowd and that the deceased look at him and he took a boda boda and took the deceased away from the crowd to the chief's camp.
28. He claimed that he intervned since he knew the deceased and his family and that the crowd claimed that the deceased had stolen some chicken
29. He testified that they went to the police station to report about the stolen clothes and that he was the only person who was arrested.
30. On re-examination he claimed that he was a good Samaritan and that the deceased was still talking when he rescued him but he did not know if the deceased had recorded a statement.
31. The defence closed its case.



32. In its submission dated 20<sup>th</sup> November 2023, the accused counsel analysed the prosecution witnesses and evidence. On PW1, he asserted that the deceased mother arrived at the police station after a call informing her to come to the station and that she spoke to the deceased who claimed that the accused had hit him with a sharp stick that fractured his leg while during cross examination she found the deceased in the company of the police but she did not witness the assault.
33. He analysed the witness of PW2 who had received a call informing him of the incident and at the station that the deceased informed him of the people who attacked him and he was informed to take the deceased to the hospital and later to kakamega general hospital where the deceased succumbed.
34. On cross examination, he claimed that the he was with the deceased for 30 minutes and later taken to the hospital. He stated that the witness was not present when the assault took place and that the accused was accompanied only with his mother to hospital. In his submission he questioned how the deceased was assisted only by his mother to walk when he had a fractured leg.
35. With regard to PW3, who testified that he was at Mumias when the incident occurred, he questioned why the police did not visit his home where the items had been allegedly stolen.
36. The accused questioned the evidence of PW4 who had conducted the post mortem but could not remember when the deceased was brought to the mortuary while PW5 who was present when the post mortem was conducted could not recall the date or even the burial date and that he did not witness the events that led to the demise of the deceased.
37. He stated that according to PW6, two people came to report to the police that the deceased had been assaulted on 14<sup>th</sup> February 2018 while the deceased died on 25<sup>th</sup> January 2017. He stated that the investigating officer did not witness the assault and did not record his statement or call witnesses who came to report the incident.
38. He submitted that he gave a sworn statement that he was on his way to the market when the deceased was attacked and that he intervened and took the deceased to the police station and even called the deceased mother and even attended the burial when the deceased died.
39. He stated that he was arrested two weeks later and denied any bad relationship with the family claiming he was a good Samaritan and that although according to PW1 and PW2, the deceased made a dying declaration naming the people who attacked him including a Simon although they did not clarify which Simon was being referred to and the other suspects were never arrested.
40. He made reference to the case of *Philip Nzaka Watu vs. Republic* (2016) eKLR on admissibility of a dying declaration.
41. He finally submitted that the prosecution had not proved its case beyond any reasonable doubt as he, the accused was only responsible from saving the deceased from the mob attack.

### **Determination**

42. I have considered the witness testimonies and the submissions by the defence. The only issue for determination is whether the prosecution has proved that the Accused herein murdered the deceased. The standard as always is beyond reasonable doubt.
43. To secure a conviction for murder, the prosecution must the following:-
  - a). The death of the accused and the cause of death;
  - b). That the accused caused the unlawful act or omission which caused the death; and



- c). That the accused had malice aforethought as defined under section 206 of the [Penal Code](#)

### **The Death of the Deceased and its cause**

44. The deceased died on 25/1/2018, 4 days after the day of the offence which was 21/1/2018. According to the post-mortem report (Pexb 1) prepared by Dr. Mchana the pathologist, the deceased died of respiratory failure, secondary to pulmonary Embolism following an Assault. The body was identified by two relatives. Accordingly the death of the deceased and cause of death was proved beyond any reasonable doubt.

### **Was Death Caused By an Unlawful Act of Omission By the Accused?**

45. It emerged from the evidence that the deceased was a victim of what is ordinarily referred to as mob justice, on the allegation that he had stolen chicken. There was no eye witness to the Assault. In a case of mob justice it is difficult to identify one or particular person as having hit or attack the deceased and pinpoint such an attack to the demise of the deceased. Thus in regard to offences committed by a mob section 21 of the penal code comes into play. The section provides as follows:

“When 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.”

46. While expounding on the above provision the Court of Appeal in the case of [Mabel Kavati & Another vs. R](#) [2014] eKLR while cited with approval the case of [Rex vs. Tabula Yenka S/o Kirya & 3 others](#)[1943] 10 EACA 51 where it was held:

“To constitute a common intention to prosecute an unlawful purpose...it 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 omission of any of them to disassociate himself from the assault.”

47. Thus the prosecution in this case is only required to prove that the Accused herein was present, was actively involved or stood by and watch as the deceased was attacked.
48. PW1 told the court that when she found the deceased at the police station he raised his hands and told her Ikunza had killed him. The witness identified Ikunza as the Accused in the dock. The deceased further narrated that the accused found him walking; he told him the “*Nyumba kumi*” (village Elders mandated by the Government to oversee security within a given Area – with an Area usually consisting of Ten houses in a village) had forbidden people from walking around and started beating him. He also shouted “thief” attracting a mob that continued to attack him. He identified other attackers as Collins, Harriet, Kevin Jumba. According to PW1 the deceased narrated this to her in the presence of the Accused.
49. PW6 told the court that it was the accused who had brought the deceased to the police station. In cross-examination the deceased later told him that the person who brought him is the one who had beaten him. The deceased said this after the Accused had left the station.
50. PW2 told the court that the deceased told him that he was attacked by Simon T, Kevin, Collins and Jumba. The witness identified the person in the dock as Simon Ikunza. The deceased died on 25<sup>th</sup> January 2018, about the 4<sup>th</sup> day after the attack.



51. The information received by the 2 witnesses is what the law calls a dying declaration. The *Black Law Dictionary* defines a dying declaration as

“A statement by a person who believes that that death is imminent, relating to the cause or circumstances of the person impending death.”

52. The concept of a dying declaration is an exception to the rule against hearsay and there are certain guiding principles if such declaration is to be used as a basis of conviction.

53. In the case of *Choge v. Republic* [1985] KLR 1, the Court of Appeal set out the threshold for the admissibility of a dying declaration as follows:

“The general principle on which a dying declaration is admitted in evidence is that in a dying 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 a dying declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

The need for caution had earlier been emphasized in the case of *Pius Jasunga s/o Akumu v Republic* [1954] EACA 333 where the court held:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval...it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*Republic v Eligu s/o Odel & Another* [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

Section 33 (a) of the *Evidence Act* provides that statements by a deceased person are admissible when relating to cause of death

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“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 his death comes into question.”

55. [30] Further, this Court in *Philip Nzaka Watu v Republic* [2016] eKLR, set out the principle of admissibility of a dying declaration as follows:-



56.

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

57. The dying declaration to the deceased 's mother was made in the presence of the Accused. No effort was made at cross- examination to challenge this part of her evidence . The deceased did not name just the Accused he named others , as Collins , jumba and Harriet. He also did not just tell his mother but he told PW2 and PW6, . The report on the attackers was fairly consistent on the names he gave. It is clear to me that despite his pain he was conscious of what he was clear on who had attacked him. He was not out to just state a name for the sake of it.
58. PW6 testified that the Accused is the one who brought in the deceased and filed a report. The OB extract was not mentioned so as to ascertain what the report was about. What is instructive was that the chicken was brought along. Thus it looks like the focus of the accused at that point was theft , not the attack of the deceased I would have expected him to first take the deceased to hospital then after report the incident.
59. I have considered his defence and I find it implausible. In any event he placed himself on the scene albeit while insisting that he was rescuing as opposed to attacking the deceased. He denies knowing any of the people in the scene , yet the deceased despite the trauma he was in named about 4 people.
60. It is my finding that the prosecution has proved that the deceased was amongst the mob that attacked the deceased and it is through his unlawful acts that the deceased died.
61. As stated in the above case of *Republic v Mohammed Wanyoike & another* [2017] eKLR the court held that. Every person within the mob who assaults the victim is individually liable for his/her criminal acts. Common intention does not need to be fore planned. It can be inferred from the acts of the perpetrators of the offence.

### **Proof that deceased had malice afterthought**

62. Section 206 of the *Penal Code* gives the instances when malice aforethought is established. It states that:-

“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;
  - a. 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."

63. In the case of *Hyam v DPP* {1974} AC. the Court held inter alia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

64. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held;

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack

65. Where the circumstances of the case demonstrate that in carrying out the unlawful act the accused acted with full knowledge that the act was highly capable of causing death or grievous harm malice aforethought should be inferred.

66. The attack on the deceased was a vicious one by a mob. The Accused must have known that such an attack had the potential to kill the deceased. Malice aforethought was therefore established.

67. In conclusion , I find that the Accused is guilty of the murder contrary to Section 203 as read with section 204 of the *Penal Code* and I convict him as charged.

68. For purposes of sentencing the Director of Probation and Aftercare Services – Kakamega County to prepare a Presentencing Report within 14 days of this Judgment.

**DATED , SIGNED AND DELIVERD AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**S. CHIRCHIR.**

**JUDGE**

