



**Republic v Kariuki (Criminal Case 17 of 2016)  
[2024] KEHC 16875 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16875 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 17 OF 2016  
RM MWONGO, J  
OCTOBER 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH MWANIKI KARIUKI ..... ACCUSED**

**JUDGMENT**

**Prosecution Case**

1. The accused person was charged with murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars of the offence were that on the 9<sup>th</sup> day of April 2016 at Kagumo Shopping Centre, Kerugoya within Kirinyaga County, he unlawfully murdered George Njagi Njiru. On 24<sup>th</sup> November 2016 he pleaded not guilty.

The prosecution summoned a total of ten witnesses in support of its case.

2. PW 1 Martha Wambura Karanja is a tailor from Kagumo testified that on 9.4.2016, at 2:00 am she was asleep in her house with her husband, Erastus Waweru, when she heard a knock on the door. She could hear there were many people saying “it is here” from outside. She screamed as they knocked for about 30 minutes. After they shouted, the people left. When they opened the door they saw a mob outside, so they then returned in fear to the house.
3. The next morning at about 7:00 a.m they heard people screaming. She then called her sister who informed her it was police case. On her part she did not know what had happened. Later the police came for her to record a statement at the station.
4. PW2 Erastus Waweru Warui testified that on 9.4.2016, at about 2:00 am, he was asleep in his house when he heard a knock on the door. The people knocking told him to open. He shouted, ‘Jesus’ and



- they left. Later he opened the door and saw a mob at a distance surrounding something, he feared and returned back into the house.
5. The next morning, he heard screams outside and went out to where there were many people. He then went to look for his pastor who advised him to report to the police. When he went back the police had arrived. They took his identity card, and escorted him to the police station to record a statement. He was later informed on what had happened to the deceased. He did not know the deceased.
  6. PW 3 Ecra Njeri Nderitu testified that she heard noises at night as someone knocked at her door. She asked who it was and was informed it was Joe. She knew Joe and asked whether there was a problem, he told her there were people she knew so she goes to identify them. She went and identified the people beaten as George and Kevin from Kabonge. Her husband worked as a driver. George could speak but was unable to stand as he seemed to have fractured his legs. She asked where he was going and he informed her he was taking Kevin to meet his girlfriend. He said he did not expect such beating. He told her that the owner of the plot had beat him. He told her he missed the door, and he informed the owner of the plot but he continued to beat them.
  7. According to PW3 Joe was the one who was beating them. She claimed her husband was in the house with the child who was sick, and he was also drunk. She then went back to the house as the child was crying. The next morning the police came and she recorded a statement with them, she testified that she saw the accused person beating the deceased that night. She identified him in court.
  8. She was not cross-examined initially as her statement was missing from the prosecution's file. However, she was recalled on 24<sup>th</sup> January, 2019 for cross-examination. She stated that she recorded her statement with Mr Mutua, the investigating officer on 9<sup>th</sup> April, 2016. She stated that she saw the accused beating the deceased. However, this was not recorded in the statement.
  9. PW 4 Daniel Kinyua is a resident of Kabonge. This witness was stood down for lack of a signed statement.
  10. PW 5 Faith Wanja Njiru recalled that on 9.4.2016 she was at home, at 6:38 she was called by her brother-in-law and asked whether her younger brother Sammy had called her. She called Sam immediately, he told her there was an issue involving George, but that she wanted to go and find out. She rushed out and took a motor bike taxi, and found her brother George lying on the ground on the side of the road to Kangaita. He could not speak. She lifted his T-shirt to feel his pulse and realized he was already dead. He had marks on his body like whip marks. The police came after a short while. Her mother and uncles were present at the scene, she recorded a statement at Kerugoya Police Station.
  11. PW 6 Jacinta Wanjiru Nyambura testified that on 9.4.2016 she reached home at 11.00 pm and went to sleep. At about midnight she heard noises in the plot. Her husband went out because his motorbike was outside. She later went outside and found people sitting down outside the gate surrounded by many people. She did not know them. Women were told to go back to the house. The owner of the plot Joe, was there too. The next morning, she was awoken by noises, she heard that one of the people had been beaten and died. Later she recorded a statement with the CID.
  12. PW 7 Jane Wanjiru Gichangi she recalled that on 9.4.2016 she received a call from her sister Catherine Njoki informing her that her nephew, Kelvin, was very sick at Mount Kenya Hospital. She went there and was informed that he had been transferred to Mathari Hospital. She found her sister Margaret crying as the hospital had informed her that Kevin had already died. She did not view the body out of fear. They proceeded to Kabonge to inform their family. While at Kagumo a sister to Kevin showed her the scene at which Kevin had been beaten. She recorded a statement at Kerugoya Police Station.



13. PW 8 Dr. Joseph Thuo, is a psychiatrist at Embu Level 5 Hospital, testified that he conducted a mental examination on the accused person on the 8.11.2016. He produced the medical reports as PExb1 in which he submitted the accused person had no mental abnormality and was fit to stand trial.
14. PW 9 Dr. Ndirangu Karomo is a medical officer working at Kerugoya Hospital testified that he conducted the post-mortem on the deceased George Njagi Njiru, on the 13.04.2016. The deceased was 25 years old and had multiple bruises and fractures. The cause of death was cardio respiratory arrest secondary to multiple injuries resulting from trauma with a blunt object. The body was identified by the uncle and sister. He produced the postmortem report as PExb 3
15. PW10 CPL Simon Mutua No.35774 the investigating officer, testified that he was formerly attached to DCI Kirinyaga Central. He recalled that on 9.4.2016 he received a call at 6:30 am from the acting DCIO C/P Cheborino. The DCIO requested him to proceed to Kagumo together with OCS Kerugoya C/P Chuvi to attend to a murder scene, where it had been reported that 2 people were murdered by members of the public. On getting there he found many people at the scene and one dead body. It had bruises, and was identified as that of Njagi Njiru.
16. At the scene, they learnt the 2<sup>nd</sup> person had been rushed to Mt. Kenya Hospital, for treatment. There were broken pieces of wood scattered around the dead body. PW10 said he received information that they were beaten with a piece of wood. There was an allegation that they wanted to break into the house to steal. He called the scenes of crime officer to come immediately and he took photos. He removed the body. He produced the photos and a report as PExbs 5 (1) -13.
17. PW10 said he found two long pieces of wood and a panga. He showed the two pieces of stick, and a panga. He compared with the one he had collected at the scene and the one found at the door of the accused. The two sticks were produced as PExbs 6 and 7.
18. The accused informed him that he had collected the sticks to put on his Jembe. He established that when the deceased knocked on the wrong door, an alarm was raised. The accused confirmed that he was at the scene and was armed with a panga which was produced in court.
19. In cross-examination, PW10 testified that PW3 did not state in her statement that she saw the accused assaulting the deceased. He admitted he did not have evidence to charge him with murder. He did not do any forensic investigation on the stick.

### **Defense Case**

20. The accused DW1 Joseph Mwaniki Kariuki, gave a sworn statement and was cross-examined. He had no witness. He testified that he did not know the deceased. He stated that on the night of 9<sup>th</sup> April 2016 he was at their family plot. when he had screams outside the house. The noise was coming from PW2. When he got out he found two young men being beaten by members of the public. It was dark and the incident was happening on the road. Some people were saying that the assailees were thieves but one of the persons being beaten said that he had come for their girlfriend, Ecra, PW3. He told the people to stop beating them and went to PW3 house to call her.
21. PW3 came to the scene together with Waweru who screamed to the crowd to stop beating the deceased. PW3 recognized them and said that she would call their relatives. The people stopped beating the victims. DW1 then went back to his house. The following day he heard that the victims had died.
22. Further he testified that the evidence of PW3 was false as she did not say in her report to the police that she saw him. She lied because when he went to call her, she was in her house with her husband.



In cross-examination, he stated that he called PW3 so that the beatings could stop. He did not suggest that they stop the beatings and wait for the police nor did he call the police.

23. Parties filed written submissions.

### **Prosecution Submissions**

24. The prosecution considers that the central issue for determination is whether the accused Joseph Mwaniki Kariuki murdered the deceased person. They submit that the deceased met their death at the hand of a mob which the accused was part of. They cite Section 21 of the *Penal Code* which provides that:

“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 the probable consequence of the prosecution, each of them is deemed to have committed the offence.”

25. In the case of *Republic v Tabulayenka s/o Kirya (1943) EACA 51* the Court of Appeal held that:

“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”

26. The prosecution submits that PW-1 Martha Wambui and PW-2 Erastus Waweru were present and witnessed the episode. That PW-3 Ecla Njeri Nderitu testified and confirmed that the accused Joseph Mwaniki Kariuki was the one who woke her up to witness the unfolding events, that the accused was indeed armed with a jembe stick. She confirmed knowing the two deceased persons and they informed her they were only looking for her boyfriend Daniel Kinyua who owned a Probox car and had wanted him to take them home.

### **Accused's submissions**

27. The defence highlighted the defence of PW3 who said that the accused person woke her up on the material night. He told her that there were 2 people who were being beaten and that they had said that they had come to visit her and knew her, but that they had knocked on the wrong door and had been mistaken for thieves. She further said that she talked to the deceased and he was injured. Her testimony was that she saw the accused person beat the deceased persons and that she went back to bed. That in the morning she learnt that the deceased had died.
28. The defence submitted that PW3, her evidence was untrue, unreliable and incredible for the following reasons: Firstly, in her initial statement to the police she did not state that she saw the accused person assault the deceased. She said that she told the investigating officer but he did not note it; Secondly the investigating officer (PW10) stated that he recorded the statement of PW3 and that she did not state that she saw the accused beat the deceased; and thirdly, that the contradictions between the statement PW3 recorded with the police and her evidence in Court is material and should be resolved in favour of the accused person. If indeed she had seen the accused person assault the deceased, she would have said so in her initial statement. If she had given the said information to the investigating officer, there is no logical reason as to why he would not write it down.



29. The Defence relies on the case of Jackson Mwanzia Musembi v Republic [2017] eKLR where it was held:

“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

30. The defence also highlighted the evidence of PW10, the investigating officer who confirmed that the deceased knocked the house by mistake and she raised alarm. Members of the public then came out and beat the deceased. That the deceased said he had wanted to go to the home of PW3 but that he had gone to the wrong house by mistake. The accused person then went to call PW3. Further, PW10 clearly admitted that he:

“did not find evidence to charge him with murder”.

31. With regard to the issue whether the accused had malice aforethought. The defence pointed out that the accused did not know the deceased and had no reason to harm or kill him. Malice aforethought was not proved as required under Section 206 of that [Penal Code](#).

32. The defence relied of the case of Joseph Kimani Njau V. Republic [2014] eKLR

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.”

### **Issues for determination**

33. The issues which the court deems necessary for determination are:

- i. Whether the deceased died.
- ii. Whether the death was caused by an unlawful act or omission of the accused.
- iii. Whether the accused unlawfully caused the death of the deceased.

### **Analysis and Determination**

34. The accused is charged with the offence of murder. Section 203 of the [Penal Code](#) defines the offence of murder and requires proof of the following elements beyond reasonable doubt; proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, on the part of the suspect; and that the unlawful killing was done with malice aforethought.

35. On this issue, there is no dispute concerning the deceased’s death. This was confirmed by most of the prosecution witnesses. More importantly the evidence of the Pathologist PW9 who carried out the postmortem on the deceased’s body. After the examination, he not only certified the death but also reached the conclusion that the cause of death was cardio-respiratory arrest secondary to multiple injuries resulting from trauma with a blunt object.



36. On this issue the prosecution has satisfied this element beyond reasonable doubt.

### **Whether the death was caused by an unlawful act or omission of the accused**

37. Article 26 (1) of *the Constitution* guarantees every person the right to life. In this case the postmortem report indicated that the cause of death was cardio-respiratory arrest secondary to multiple injuries resulting from trauma with a blunt object. The categorical evidence of PW10 the Investigating Officer, was that he did not find the deceased at the scene of the incident; He learnt the person had been rushed to Mt. Kenya Hospital, for treatment; At the scene there were broken pieces of wood scattered around a dead body; He was informed that, the person had been beaten to death; that he found two long pieces of wood and a panga; and that he proceeded to Mt. Kenya Hospital and found that the deceased had died.
38. In cross- examination, PW10 stated that the accused went to the house of PW3 and called her to identify the victims that were been beaten by members of the public. They had said that they wanted to go to her house. PW10 produced the two sticks as PExbs 6(a) & (b) and a panga as PExb 7.
39. PW3- testified that she saw the members of the public beating the deceased whom she identified as George.
40. There can be no doubt that the deceased died of an unlawful act. However, PW-3 did not confirm whether the accused was involved in beating the deceased. Her written statement and oral testimony contradicted each other on the issue of the accused direct involvement in beating the deceased. The contradictions and inconsistencies on the prosecution evidence, as highlighted by the defence raise reasonable doubt as to her credibility. Such doubts must be construed in favour of the accused.
41. PW 3 testified that the accused person woke her up on the material night. He told her that there were 2 people who were being beaten and that they had said they had come to visit her and knew her; That they had knocked on the wrong door and had been mistaken for thieves.
42. As already noted, there were contradictions in her testimony. In her initial statement to the police she did not state that she saw the accused person assault the deceased. She said that she told the investigating officer but he did not note it. In her oral testimony however, she stated that she saw the accused beating the deceased.
43. On his part the Investigating Officer PW 10 testified that PW3 did not state in her statement that she saw the accused assaulting the deceased. He also categorically admitted that he did not have evidence to charge the accused with murder.
44. Whether the inconsistencies in the evidence above is material was a point discussed in the case of Philip Nzaka Watu vs. R [2016] eKLR where the Court expressed itself thus-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.” (Emphasis added)



45. PW 10 stated that the accused informed him that he had collected the sticks to put on his Jembe. The accused confirmed that he was at the scene and was armed with a panga which was produced in court. However, PW 10 did not conduct any forensic test on the piece of stick to establish whether it had been used to beat the deceased.
46. In his evidence the accused decried that the evidence of PW3 as false as she did not say in her report to the police that she saw him. He said she lied because when he went to call her, she was in her house with her husband. In cross-examination, he stated that he called PW3 so that the beatings could stop. He did not suggest that they stop the beatings and wait for the police. He did not call the police.
47. The evidence of PW6 was that she saw the accused and other people surrounding the deceased as his friend. She returned to her house and did not know who killed the deceased.
48. Clearly, there is no witness who saw the accused beating the deceased. The evidence of PW3 is inconsistent as her testimony and written statement bore entirely different details. The only consistent evidence throughout the trial appears to be that the deceased was beaten by members of the public using sticks. As to who did that, there is no clear evidence.
49. In a nutshell, it is clear that the beatings occurred at night, at around 2.00 pm on 9.4.2016. there is no evidence of whether there was good lighting at the spot where the incident occurred. The evidence of PW3 the only witness who appears to have been an eyewitness has already been seen to be extremely inconsistent. Further, there was no identification done or identification parade carried out. The prosecution evidence is extremely weak.
50. With regard to malice aforethought the accused person testified that he did not know the deceased and had no reason to harm or kill him. Malice aforethought was not proved as required under Section 206 of that *Penal Code*.
51. It is fitting to conclude by citing the case Joseph Kimani Njau V. Republic [2014] eKLR where it was stated:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.”
52. My conclusion is that neither the actus reus nor mens rea elements were proved by the prosecution. Ultimately therefore I find that the prosecution did not prove its case beyond reasonable doubt.
53. In the circumstances the prosecution case is dismissed. The accused is hereby acquitted and shall be set at liberty forthwith, unless otherwise lawfully held.
54. Orders accordingly.

**DELIVERED AT KERUGOYA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024**

.....

**R. MWONGO**

**JUDGE**

Delivered in the presence of:



1. Joseph Mwaniki Muriuki - Present in court
2. Magee for Accused
3. Mamba for the State
4. Court Assistant, Rahab

