



**Republic v Mwangi & another (Criminal Case 16 of 2016)
[2024] KEHC 16358 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 16 OF 2016
RM MWONGO, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DOUGLAS WAWERU MWANGI 1ST ACCUSED

SAMSON GUCHU WAITHAKA 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 17th of October, 2016 at Kianjogu Plaza in Kagio within Kirinyaga County, they jointly unlawfully murdered an unknown African male adult.
2. On 22.10.2024 the 1st Accused opted to enter into PBA. This judgment therefore concerns the 2nd Accused.

Prosecution Case

3. The prosecution called a total of 6 witnesses in support of its case.
4. PW1 Dr. Joseph Thuo testified he conducted a mental assessment on the 1st accused person on 25th October, 2016 in his clinic. He was brought by police officers of Kagio Police Station. He was found to be mentally fit to stand trial. He produced the filled and signed report as PExbit-1. Further, he examined the 2nd accused person. He found him to be mentally fit to stand trial. He produced the filled and signed report as PExbit-2.
5. PW-2 Dr. Ndiragu Karomo testified that on the 2nd November, 2016 he carried out the Post Mortem of the deceased at the Karatina District Hospital. After he examined the body, he formed the opinion



that the cause of death was due to Cardio Pulmonary arrest secondary to severe head injury inflicted by a blunt object.

6. In cross-examination, he stated that the deceased had multiple defensive marks on the hands. He formed the opinion that the injuries on the hands were due to the assault. He issued death certificate number 7485 and produced the post-mortem form as PExhibit -3
7. PW3 Nelson Njenga Kamuyu testified that he was called by the 2nd Accused on the night of 16th - 17th October 2016 that a thief had been arrested at his shop.

He testified that he called one Ndungu, the chairman of boda boda, and they immediately went to the shop but saw three people at the carwash which is next to their shop. He was able to identify both the 1st Accused Douglas Waweru Mwangi and the 2nd Accused Samson Gachu Waithera as the security lights were on. The 1st accused was a watchman and the 2nd accused was the owner of the carwash.
8. He said that he persuaded the two to release the deceased as there was nothing that had been stolen from the shop but left them with a person who he did not know at about 1 am. The deceased was sitting down. He did not have injuries and he did not see anyone beating him. The 2nd accused told him the following day that the arrested man had been killed.
9. In cross-examination PW3 said that the man who had been arrested had his hands tied and was sitting down. It was at night and the security lights were on. The man had no injury on him.
10. PW4 Peter Ndungu Kamau testified that he was called by Njenga (PW3) and being informed that a spare part shop had been broken into and things stolen. Since he was requesting to be taken to the shop, he volunteered and they proceeded to the place. When they got there, they realized that the shop was not broken into neither was there anything stolen and that everything was intact.
11. He stated that having been called by the 2nd Accused person Samson Waithera he went to see if his shop had been broken into. He found it was also intact. He testified that he bumped into the said Samson with his watchman and he could clearly see them as the security lights were on. He noticed a man sitting with both legs and hands tied and upon inquiring what was happening, he was informed that the man was the thief.
12. PW4 stated in cross-examination that the watchman had a stick (rungu) and a panga. He did not see any injury on the arrested man. At the juncture, he told his companion they leave the scene as there was no thief. He only learnt the following day that the person they had seen had been killed.
13. PW5 Lucy Njeri Kinyua testified that she witnessed first-hand the 1st accused Douglass Waweru Mwangi assaulting the deceased with an iron bar claiming that he was a thief. This was on the night of 16th - 17th October 2016. She had been walking home at about 9.00 pm when she heard noise at the car wash, and noted a man screaming. She went there and found someone being beaten who was tied on both hands and both legs.
14. She said that her effort to have the 2nd Accused Samson Gachu Waithera intervene fell on deaf ears as the 2nd Accused chased her away. She did not see the 2nd accused beating the deceased. The following morning, she heard people saying someone was beaten at the car wash and died.
15. In cross-examination PW5 said she did not see Samson beating the deceased, but heard from the people gathered there. She heard the arrested man saying he was not a thief, and that they should not kill him. The man wore a shirt but no trouser or shoes. Samson came there at around 11.40 pm.



16. PW6 Isaak Gachoki Nyamu a boda boda operator from Kagio testified that he was about 30-50 meters away from the scene when he heard someone say 'don't kill me'. He saw a watchman beating the man with a metal rod.
17. He was clear that he saw the 1st Accused Douglas Waweru Mwangi assaulting the deceased who was defenceless as he had been tied both hands. That he used a metal bar to assault the deceased. They were chased by 2nd Accused, Samson, the owner of the car wash. The deceased was pleading with them not to kill him.

Defence Case

18. The 1st Accused gave unsworn testimony. He said that on the night of 16-17 October 2016 he was at work as a watchman at the shop of 2nd Accused. He was guarding the houses of the 1st Accused. On 20th October 2016 he was arrested and asked to help with investigations. He stated that on that night he never witnesses anything, and saw no one. He was not involved in any killing.
19. The 2nd Accused Samson Guchu Waithaka testified that he was a business owner. He owned a car wash and a shop. The 1st accused was his watchman. He was at work on the material date 16th -17th October, 2016. He went to the scene and found a large crowd and a person told him that a thief had been caught. His shop had not been broken into. There was nothing stolen so he urged people to leave the scene. They started leaving. He left too and did not see any dead person.
20. In cross-examination, he stated that he did not interact with the 1st Accused that night, nor did he see the alleged thief or beat him up. He headed to Nairobi to take a client to hospital. He said he saw a large crowd gathering at the scene that night, but he did not see any fighting or hitting. So, he told the crowd to leave as there was nothing happening.
21. The parties filed written closing submissions as directed by the court.

Prosecution Submissions

22. The prosecution submits that the accused persons Douglas Waweru Mwangi and Samson Guchu Waithera being the only people with the deceased on the night of 16th - 17th October 2016 were responsible for the death of the deceased who remains a stranger even in death. The deceased cried and pleaded for mercy as is attested by all who testified that they saw nothing strange that would warrant him to die.
23. The Death of the deceased, the prosecution submitted that this was proved by the Doctor who performed the Post-Mortem. He confirmed that indeed the deceased died as a result of Cardio Pulmonary arrest secondary to severe head injury inflicted by a blunt object. Further, PW5 and PW6 witnessed the deceased being assaulted by the 1st accused Douglass Waweru Mwangi and the 2nd Accused Samson Guchu Waithera chased them.
24. The state further submitted that the acts by the two accused persons demonstrate the intention to cause death, or cause grievous harm or both. The Post-Mortem indicate the injuries the deceased suffered at the hands of the two accused persons.
25. Section 203 of the Penal Code defines murder in the following terms:

“ Any person who of Malice aforethought causes the death of another person by an unlawful act or commission is guilty of Murder.”



Defence Submissions

26. No submissions were filed on behalf of the 1st Accused. Instead, the state indicated that a Plea-Bargaining Agreement was in the process of being entered by the 1st Accused. The issue is pending.
27. The 2nd Accused submitted that for the Prosecution to secure a conviction on the charge of murder against the 2nd accused, it had to prove the three ingredients as summarised in Anthony Ndegwa Ngari vs Republic [2014]eKLR, these are:
 - a. The death of the deceased occurred;
 - b. That the accused committed the unlawful act which caused the death of the deceased: and
 - c. That the accused had malice aforethought.

The death of the deceased

28. What is in dispute is; whether the deceased is actually the same person as the alleged thief of 16th /17th October, 2016. The defence submitted that the court should note that none of the prosecution witnesses saw the alleged thief being killed and neither was the deceased properly identified by any of the witnesses. It is not a disputed fact that none of the prosecution witnesses attended the morgue to identify the body of the deceased.
29. Further the court should note that none of the prosecution witnesses who testified recovered the body to confirm that it was indeed recovered from the 2nd accused's car wash.
30. In addition, most of the prosecution witnesses confirmed that they did not see the deceased to confirm if he was the alleged thief. Only PW6 testified to have seen the deceased. His evidence is not corroborated by any witness or evidence to confirm that the deceased is indeed the alleged thief. The defence relied on sentiments of Justice S N Riechi in Republic v Makokha (Criminal Case E001 of 2020) [2022] KEHC13216(KLR)(21 July 2022) (Judgment) in which the honourable judge cautioned the court to be cautious on using un-corroborated evidence.
31. On Identification, the defence submitted that none of the prosecution witnesses identified the 2nd accused as the person who attacked or beat the deceased. Even though PW3, PW 4, PW5 Lucy Njeri Kinyua and PW6 Isaac Gachoki Nyamu averred that the 2nd accused was known to them, the circumstances of the case were not favourable enough to cast out mistaken identity. It was in PW3 and PW4's evidence that it was about midnight and it was dark. Whereas PW3 stated the car wash was about 5meters from his shop which had security lights, PW4 confirmed in cross examination that the bulb at PW3's shop was an energy saver bulb which did not go far. Thus, the intensity of the lighting of an energy saver bulb which is 5 meters away was no ascertained. PW5 also testified that the 2nd accused told them to leave his premises.
32. . On Actus reus: The 2nd Accused & defence submits that none of the prosecution witnesses testified that the 2nd accused assaulted or even touched the alleged thief on the night of 16th October, 2016.
33. In his testimony, PW3 Nelson Njenga Kamuyu who was with the accused persons between midnight and 1:00am confirmed that the alleged thief was in proper shape and he "did not see any person beating him. He did not appear to have been beaten. "At cross examination by Ms. Kiragu, PW3 confirmed that "the person I found in the night had no injuries".
34. In cross examination, the PW3 and PW4 testified that the alleged two people were just standing and the 3rd person was seated with his hands tied and he was "okay", he had not been beaten and he was



smartly dressed. PW4 further confirmed that he held a conversation with the alleged thief and he was not informed of any assault.

35. Evidently, all the prosecution witnesses (P W3, PW4, PW5 and PW6) on oath stated that the 2nd accused did not assault the alleged thief. This is evidence which is consistent and well corroborated. Further, PW4 confirmed that none of the accused persons had weapons. As such, it was submitted that the prosecution evidence exonerates the 2nd accused of the charges.
36. On Mens Rea: The 2nd accused testified that there had been nothing stolen from his car wash and upon confirming the same, he proceeded to take his passenger to Nairobi on the fateful date.
37. Thus, no prosecution witness testified that indeed the deceased's body was recovered from the 2nd accused's premises. None of the prosecution witnesses saw the deceased at the car wash and identified him as dead. There is also no evidence that the deceased was assaulted let alone murdered by the 2nd accused.
38. The Investigating Officer who is a crucial witness did not even testify nor did any person who removed the body from the scene of crime. This waters down the circumstantial evidence relied upon by the prosecution. Even though PW6 states that he saw the deceased's body, he does not confirm that he saw it at the carwash.
39. The defence finally submits that the prosecution has failed to prove the existence of any of the circumstances listed under Section 206 of the Penal Code. The prosecution has failed to prove that the 2nd accused person had any intention of causing the death of the deceased and/or that he had knowledge of an act or omission that would cause death to the deceased.

Issues for Determination

40. The issue for determination is whether there is evidence linking the 2nd Accused to the death of the deceased.

Analysis and Determination

41. I have considered the testimonies of the seven (6) prosecution witnesses and the 2nd accused's defence. The question is whether the evidence tendered suffices to prove that the 2nd accused killed the deceased. For the Prosecution to secure a conviction on the charge of murder against the 2nd accused, it had to prove the three ingredients set out in Anthony Ndegwa Ngari vs Republic [2014] eKLR, namely:
 - a. The death of the deceased occurred;
 - b. That the accused committed the unlawful act which caused the death of the deceased: and
 - c. That the accused had malice aforethought.The death of the deceased occurred
42. This was proved by the PW-2 Dr. Ndiragu Karomo who performed the Post-Mortem and confirmed that the deceased died as a result of Cardio Pulmonary arrest secondary to severe head injury inflicted by a blunt object. He produced the post-mortem form as exhibit - 3 and issued death certificate number 7485. In cross-examination, he stated that the deceased had defensive marks on the hands which were multiple. He formed the opinion that the injuries on the due to assault.
43. The 2nd accused however, disputes the identity of the deceased. He submits that none of the prosecution witnesses saw the alleged thief (deceased) being killed and neither was the deceased



properly identified by any of the witnesses. It is not a disputed fact that none of the prosecution witnesses attended the morgue to identify the body of the deceased.

44. One witness, PW6 testified to have seen the deceased. His evidence is not corroborated by any other witness or evidence to confirm that the deceased is indeed the alleged thief (deceased). There is no evidence of identification of the deceased linking him to the incident at the car wash.

45. In the case of *Republic v Makokha* (Criminal Case E001 of 2020) [2022] KEHC 13216 (KLR) (21 July 2022) (Judgment) caution was urged in relation to absence of corroborative evidence. The court there stated:

“In this case while the Prosecution witnesses knew the accused well, they testified they did not know the deceased well. They only stated they saw the body and recognized it as that of the person with the accused. That being the case this Court needs to be cautious and more particularly in this case where there is no other corroborative evidence.”

46. The prosecution did not bring the persons that identified the deceased’s body to testify concerning where the body was found, who handled it and its condition when found. Further, the investigating officer did not testify which would have helped to ascertain the identity of the deceased body.

47. In *Republic v Samwel Mwitwa Kayanda* [2020] eKLR, it was held:

“I now find that the failure by the prosecution to indicate the names of those who identified the body of the deceased in the Post Mortem Form and/or the failure to call the witnesses who identified the body of the deceased to the police and PW5 prior to the autopsy and the failure to call the witnesses who were present during the post mortem examination can only be fatal to the prosecution’s case. The lapses created sound doubts. (See *Bukenya & Others versus Uganda* (1972) E.A. 594, *Kingi versus Republic* (1972) E.A. 280 and *Nguku versus Republic* (1985) KLR 412).

Since it was not established that the body on which PW5 conducted the post mortem examination was that of the deceased this Court is unable to find that the cause of the death indicated in the Post Mortem Form related to the deceased. The prosecution therefore failed to prove the cause of death of the deceased.”

48. Similarly, in this case the deceased’s body was not properly identified, either in relation to where it was found or in relation to its condition and who handled it.

That the accused persons committed the unlawful act which caused the death of the deceased.

49. The prosecution submits that the accused persons being the only people with the deceased on the night of 16th - 17th October, 2016 they were therefore responsible for his death. The case of *Republic v David Makali Mutiso & Another* [2017] eKLR however holds:

“Section 213 of the Penal Code does define acts and various circumstances which death can be inferred and accused held responsible to include where:

- (a) He inflicts bodily injury on another person and as a consequence of the injury the deceased undergoes treatment which causes his death.
- (b) The accused inflicts injury on another which would not have caused death if the deceased fails to get proper medication and he dies as a result.
- (c) He by any act hastens the death of the deceased.



(d) His acts or omission of the person killed or of other persons.”

50. The evidence presented is that PW5 and PW6 witnessed the deceased being assaulted by the 1st accused Douglass Waweru Mwangi, and that the 2nd Accused Samson Guchu Waithera chased them away.
51. PW3 and PW4 testified that they saw the accused persons on the material night; That the deceased was tied with a rope on his hands and feet; That PW3 persuaded the accused to release the deceased as there was nothing that had been stolen from the shop but then left them with the person who he did not know at about 1 am; That PW4 noticed a man sitting with both legs and hands tied and upon inquiring what was happening, he was informed that the man was the thief, and that the next day they were informed that the man had been killed.
52. None of the witnesses testified that the deceased on whom the post mortem was done was the person they had seen tied at the scene or assaulted.
53. Further, the testimony of PW5 and PW 6 is clear that the 1st accused beat the deceased with a metal rod while the 2nd accused stood guard and chased away anyone who wanted to save the deceased from the beating.
54. The 2nd accused submitted that none of the prosecution witnesses testified that he assaulted or even touched the deceased on the night of 16th October, 2016. In cross-examination the 2nd accused stated that he did not see the alleged thief (deceased) or beat him up. He left the scene within 10 minutes and headed to Nairobi to take a client to hospital.

That the accused had malice aforethought

55. No evidence whatsoever was tendered to show that the 2nd Accused had malice aforethought. In Republic v DKK & another [2019] eKLR, it was held:

“For the prosecution to establish its case against the accused, it must prove that they committed the offence ‘with malice aforethought. Section 206 of the Penal Code sets out what the prosecution needs to place before the court for ‘malice aforethought’ to be established:

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;
 - (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.
56. In this case, PW5 testified that she witnessed the 1st accused assaulting the deceased with an iron bar claiming that he was a thief. That her effort to have the 2nd Accused Samson Guchu Waithera intervene fell on deaf ear as the 2nd Accused chased her away. She did not see the 2nd accused beating the deceased.



PW6 testified that the 1st accused assaulted the deceased with a metal rod. The deceased was pleading with them not to kill him. The 2nd accused testified that there had been nothing stolen from his car wash and upon confirming the same, he proceeded to take his passenger to Nairobi on the fateful date. The prosecution thus failed to prove that the 2nd accused person had any intention of causing the death of the deceased.

Conclusions and Disposition

57. . It is curious that there was no evidence that was tendered as to who collected the deceased's body and took it to the morgue; that there is no evidence to show how the 2nd Accused was connected to the deceased, there being no evidence of arrest and linkage of the 2nd Accused to the death of the deceased. Finally, in the absence of evidence identifying the deceased as the same person who was allegedly beat at the 2nd Accused car wash shop, all that demonstrate that the prosecution cannot prove beyond reasonable doubt that the 2nd accused murdered the deceased.
58. Accordingly, the prosecution case is dismissed with regard to the 2nd Accused only who is hereby acquitted. He shall be set at liberty forthwith unless otherwise lawfully held.
59. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF DECEMBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Mbugua for 1st Accused

Muturi holding brief for Magee for the 2nd Accused

Accused: 1

Accused: 2 Both Present in Court

Mamba for the State

Court Assistant, Murage

