



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mwangi & 8 others (Criminal Case 5 of 2015)  
[2023] KEHC 237 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 5 OF 2015  
LM NJUGUNA, J  
JANUARY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PATRICK MURUA MWANGI ..... 1<sup>ST</sup> ACCUSED**  
**PETER KARIUKI NYAGA ..... 2<sup>ND</sup> ACCUSED**  
**PETER NYAGA NJOGU ALIAS GITHONGO ..... 3<sup>RD</sup> ACCUSED**  
**VELIRA WANJIRA KARIUKI ..... 4<sup>TH</sup> ACCUSED**  
**SALOME NJERI NJUGUNA ..... 5<sup>TH</sup> ACCUSED**  
**SUSAN MUTHONI NGUNYIKA ..... 6<sup>TH</sup> ACCUSED**  
**SIMON MURIITHI NJERU ..... 7<sup>TH</sup> ACCUSED**  
**DIONISIO GATARI NJIRU ..... 8<sup>TH</sup> ACCUSED**  
**JOHN NJERU GATARI ALIAS MBOGO ..... 9<sup>TH</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](#). They were accused of murdering Fredrick Njue Ndoro on 15.12.2014 at Riandu location in Mbeere North Sub-County in Embu County. They pleaded not guilty to the charge and in support of its case the prosecution called a total of 8 (Eight) witnesses.
2. PW1, Gideon Thiga Njeru testified that he didn't know any of the accused persons before the incident as he was new in that village. That he met the deceased on December 15, 2014 at around 3pm and the deceased tasked him to look for 3 labourers to help him pick miraa at Riandu which he did. That at



about 3.30 p.m., the deceased ferried the three of them; Samson Mwenda, Mary and himself on his motorbike to Riandu and they embarked on picking miraa. That after a short while, a drunk man came and started abusing them resulting to exchange of insults but the deceased asked them to stop exchanging with him. That after about 30 minutes, four people came armed with bows and arrows and asked them to surrender lest they strike. That the number of armed attackers increased and all were armed with pangas. That they ran for their lives and as they were approaching the gate, the deceased went for his motorbike and it is at that point he was cut with a panga on his left hand.

3. It was his evidence that he managed to identify the eight accused persons as well as the one who was hurling insults at the ladies saying they (the deceased and the other (3) should be killed. He stated that the 4<sup>th</sup>, 5<sup>th</sup> and the 6<sup>th</sup> accused were the ones who were screaming and saying PW1 and the other 3 should be killed. However, in cross-examination he stated that he did not identify any of those people but some were women.
4. PW2, Samson Mwende testified that in the company of Mary, PW1 and himself, they went to the deceased's farm at Mbeere using a motor bike. They went to pick miraa in the deceased's farm and they arrived there at 3.00 p.m. As they embarked on the work, a drunk man came and sat where the burnt house previously was and started hurling insults at them. The witness stated that the deceased told them to ignore the man as he was the one who burned his house. That shortly thereafter, three people came from one direction and some other three emerged from a different direction and at that point, the deceased asked them to try and save their lives. The attackers were armed with pangas, arrows and sticks and that they caught up with the deceased whom he later learnt had died. The witness said that he was not able to identify the attackers as the incident happened many years ago and that it was his first time in that village. It was also his testimony that he did not see the deceased's brother at the scene.
5. PW3, Jonathan Muchiri Mwaniki testified that on the fateful day, a Mr. Mwaniki, a brother to the deceased went to the bodaboda stage at Muchonoke and requested to be taken home because his brother had been attacked. On the way to Kabora village near a river, there was a crowd of people picking miraa about 20 meters away. He requested me to stop the motorbike but one of those people said

“ this is his brother;”

as a consequence, he requested me to drop him home in a hurry. That on his way back, PW3, heard people shout;

“ *mwizi mwizi*”

but he did not see the deceased being killed and that he could not identify anyone and that the crowd was at the shamba and not at Mwaniki's home.

6. PW4, Julieta K Njagi testified that the deceased was known to him as he was a resident in her sub-location. She stated that on December 15, 2014, she received a call from an anonymous caller reporting of a person who was being burnt by a mob. She reported the matter to the deputy OCS a Mr. Nziu; she testified that all the accused persons were known to her as they hail from her area of jurisdiction. She also said that the deceased was burnt at the boundary of Mithano and Riandu sub-locations.
7. PW5, Dionisio Mwaniki Ndolo stated that he knew the accused persons well as they were neighbours to his late brother. He testified that on December 15, 2014 while at Muchonoke town, a neighbour called him with information that somebody was killing his brother. He immediately took a motorbike to his brother's place and on arrival, found people at the scene. He stated that he found his brother surrounded by a mob of people and they were beating him. He stated that at the time of arrival, the



deceased was still alive but he couldn't see the extent of the injuries but he saw some on the head. The witness stated that he was able to identify some of the people he saw and that some were armed with jembe handles, pangas and axes. The 2<sup>nd</sup> accused had a panga while the 4<sup>th</sup> accused had a stick and in the meanwhile, the 4<sup>th</sup> accused was telling the 2<sup>nd</sup> accused to ensure the deceased does not run away. The 5<sup>th</sup> accused had a stick while the 6<sup>th</sup> accused was among those shouting and saying that he (PW5) should be arrested as well and burned. The 7<sup>th</sup> accused had an axe and he used it to cut the hand of the deceased, he also identified the 1<sup>st</sup> accused. It was his evidence that he saw all the accused persons at the scene and that they were armed. Further, it was his statement that he escaped from the scene and went home and informed other people but later on, he returned to the scene only to find the mob burning his brother. That at around 6.00 p.m., PW6 called the police who came and took the deceased away. He later identified the body at Embu level 5 hospital during the postmortem.

8. PW6, Sospeter Ndiga Ndolo stated that on the December 15, 2014 while at home, he was called by a lady by the name of Jane Muthoni who asked him whether he had received news about a group of people who were surrounding the deceased's house with a view to killing him. That he took his motor cycle and in the company of his son, headed to the deceased's home where he found a green paper bag at the gate; inside the compound, there was a wind breaker jacket and a torch but he did not find the deceased. That they decided to go to the deceased's shamba and while there, he saw the 1<sup>st</sup> accused person in company of other people. While there, PW4 asked him if he was aware that his brother was being killed at the river; and so he headed there and found many people among them the 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> accused persons. It was his evidence that the accused persons gathered dry grass and firewood ready to set the deceased on fire and the deceased was bleeding on the head. He added that the 8<sup>th</sup> accused took out a match box and gave it to a small boy who set ablaze the deceased's body.
9. PW7, Dr. Godfrey Njuki Njiru, stated that December 22, 2014 he carried out a post mortem on the body of Fredrick Njue and that it had multiple cut wounds on the right side of the head, a cut wound on the left eye, a stab wound on the left lumbar region and the gut was protruding. He further stated that the body had no smoke indicating that it was burnt after death. There was a fracture on the left parietal region and severe brain contusion. In his opinion, the cause of death was severe head injury with other injuries on the body which were all consistent with mob justice.
10. PW8, Jane Muthoni Njiru testified that she knew the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused persons. That on the material day, she was at home when a man called Ngari informed him that the deceased had been surrounded by people who wanted to kill him. She informed the court that she called PW6 and informed him of all that was happening. Additionally, that she took a motor bike to the scene where she found many people. That she saw the 1<sup>st</sup> accused person cut the left hand of the deceased; the 2<sup>nd</sup> accused also had a panga that he used in attacking the deceased from the back. She testified that she saw the 5<sup>th</sup> accused help Susan Muthoni to collect dry leaves which in the end was used to burn the deceased. That the 6<sup>th</sup> accused was working together with the 5<sup>th</sup> accused while the 7<sup>th</sup> accused held a panga and the 8<sup>th</sup> was the person who gave his son a match box to light the fire.
11. PW 9, No. 240057 Inspector Jatani testified that he was the investigating officer after he took over the instigations following the demise of the initial investigating officer. That he followed up through correspondences and file movement and traced the file and wherein he found the statements of the witnesses, post mortem report and thus familiarized himself with the case. It was his evidence that he called the witnesses whose statements were in the file and learnt that there were some other suspects who were still at large. Additionally, he testified that upon contacting the O.D.P.P, he was given the way forward to trace the suspects. That he did not find the photographs of the scene of crime and neither



- did he recover any blood stained sticks or any exhibits in the case herein but he managed to arrest the 9<sup>th</sup> accused whom he proceeded to identify in the dock.
12. At the close of the prosecution's case, each of the accused persons gave sworn evidence without calling any witnesses save for the 4<sup>th</sup> and the 5<sup>th</sup> accused persons.
  13. DW1, Patrick Mwangi testified that on the material day, he left for the shopping centre at Riandu town which is about one hour's walk and thereafter, went back home at 7.00 p.m. and on arrival, he heard that the deceased had been killed. It was his evidence that in as much as there existed a grudge between the deceased and himself, he did not see him on the material day and therefore, there was no way he could have been involved in the death of the deceased.
  14. DW2, Peter Kariuki Nyaga testified that on the material day, he woke up and went to check the burning of charcoal that was underway until 12 noon and thereafter left for Riandu. That on his way, he passed through Mrs. Ndeke's place who wanted some charcoal. That he later went for his money at Mrs. Ndeke's place. That thereafter, he went to take tea and while there, people asked him what had happened but he said that he was not aware. That he stayed there till 8.00 p.m. but after about one month, he was arrested and charged with the offence herein.
  15. DW3, Peter Nyaga Njogu stated that the deceased was a person well known to him as he was his neighbour. That he had bought a piece of land near Kathitu before he died. It was his evidence that on the material day, he was at home and he spent his time in the shamba and at 12.00 noon, took his cows to the field to graze till 6.30 p.m. That in the evening, he saw a text message in his phone to the effect that a person had been killed near Rweria River. That he was later arrested and charged with the offence herein.
  16. DW4, Velina Wanjira Kariuki stated that on December 15, 2014, she woke up in the morning and prepared her children to school. That while still at home, her husband left to go burn charcoal while she left for a group meeting but since she did not have enough money, she went to her sister's place who lent her some money and thereafter left for the group meeting. That after the meeting she passed through her sister's place to refund the money and then went to pick miraa where she stayed till around 9.20 p.m. That while at home, the children asked her if she had heard what had happened and she sought to know what had transpired and was informed that the deceased in this case had been killed. She testified that she was later arrested and charged with the offence herein.
  17. DW5 Salome Njeri Njuguna, testified that on December 15, 2014, she was at Kabaru at a dowry ceremony and that she stayed there till 9.00 p.m and thereafter, proceeded for 'macakaya' at Wambui's place. She was categorical that she spent the night there and only learnt of the death of the deceased after three days. She conceded to being a party to the Siakago case but reiterated that she had been acquitted. She was arrested and charged with the offence before this court. She called two witnesses namely Grace Muthoni and Teresia Wanjiku in support of her case. They both testified that they were with her at the dowry ceremony and also at the "macakaya" later that evening.
  18. DW6 Susan Muthoni, the 6<sup>th</sup> accused person testified that on the material day, she woke up early and left for a group meeting and later went to her sister's place to take to her some money where she spent the night and only left the following day. She denied being involved in the death herein. She called the said sister one Alice Wanja as her witness who testified that DW6 was at her place and she spent the night there having arrived there at 5.30 p.m. on the material day.
  19. DW7, Simon Murithi Njeru testified that on the fateful day, he woke up early and attended the court session at Siakago Law Courts in Criminal Case Number 1096/2014 where he stayed till 5.00 p.m. He produced his bond and the same was marked as Dex 1; that he thereafter left for home where he arrived



- at 8.00 p.m. It was his evidence that he used the B.A.T. route and not Rweria River route. He denied killing the deceased but stated that there existed a grudge between him and PW6 which arose after he declined to campaign for him. On cross examination, he confirmed that the bond was in relation to the case where the deceased's house had been burnt but further maintained that there was no bad blood between them.
20. DW8, Dionisio Gatari Njiru testified that on the fateful day, he was at Gitibiru where he had gone to pick miraa and where he spent the whole day. That there was no bad blood between him and the deceased and that he did not kill the deceased herein but blamed his predicament on PW7 as the people from that village refused to support him when he contested for an M.C.A seat.
  21. DW9, John Njeri Gatari testified that on the same day, he woke up in the morning and went to the Embu Lands Office at 9.00 a.m. to see the secretary. That he waited for the day long but the secretary did not turn up and he arrived back home at around 9.30 p.m. It was his evidence that he was arrested after three years and charged with the offence herein. He stated that previously, he had a case with PW7 but there was no bad blood between him and the deceased herein.
  22. Parties filed final submissions. On its part, the prosecution submitted that it proved all the necessary ingredients as mandated for proof of the offence of murder. That the witnesses positively identified the accused persons. The prosecution placed reliance on the case of *Njoroge v Republic* [1983] KLR and *Dickson v Republic* in buttressing the point that there was common intention between the accused persons to cause the death of the deceased. It was contended that the accused persons were members of the group that attacked the deceased while he was on his piece of land. That they were armed with pangas, bows and arrows and when the deceased attempted to flee, the accused persons surrounded him, cut him with pangas and deliberately set him on fire. It was contended that anyone who was a part of the group had the same goal in mind and that is killing the deceased herein. That malice aforethought can be deduced from the nature of injuries occasioned to the deceased and wherein reliance was placed on the case of *Rex v Tubere* EACA 63. This court was therefore urged to find the accused persons guilty.
  23. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> accused persons filed their submissions to wit that the prosecution did not prove that they were liable for the death of the deceased herein given that there was no motivation to do so. That the prosecution did not prove the necessary ingredients of the charge of murder as the evidence was full of inconsistencies and contradictions and further, it was clear that there existed a grudge between the deceased and the accused persons. It was submitted that the only person who knew of the death of the deceased herein was one Ngari who remains unknown to this court as the prosecution failed to have him testify despite him being a crucial witness. In reference to the 2<sup>nd</sup> and 4<sup>th</sup> accused persons, it was submitted that the duo were dragged into this case for the reason of their proximity between their homes and that of the deceased.
  24. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of proof is always that of "beyond any reasonable doubts" [See *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].
  25. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as:
    - i. the death of the deceased occurred;
    - ii. that the accused committed the unlawful act which caused the death of the deceased; and



- iii. that the accused had malice aforethought.
26. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
27. On whether the death of the deceased occurred, it is not in doubt that the deceased herein died. The prosecution witnesses testified that indeed the deceased herein was killed and thereafter his body set ablaze. In the same breadth, PW7 who performed autopsy on the body of the deceased stated that the death was as a result of severe head injury.
28. As to whether the death was caused by unlawful acts, under article 26 of the [Constitution of Kenya 2010](#), right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See *Sharm Pal Singh* [1962] EA 13 and *Daniel Nzioka Mbuti & Another v Republic* (*supra*)].
29. It is quite evident from the several pieces of evidence above and as confirmed by PW7 who carried out post mortem on the body of the deceased that, the cause of death was a result of severe head injury. The evidence from the post mortem report clearly shows that the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
30. As to whether the accused persons had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder.
31. 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. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held *inter alia* that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.
32. From the foregoing evidence, it is without doubt that the deceased met his death after he was assaulted and fatally injured by a group of villagers or mob of people. This was a typical case of what is referred as “mob justice” which in real sense is actually “mob injustice”. Mob justice is nothing but a form of extra judicial punishment in which a person suspected of wrong doing is humiliated, beaten and in many cases, killed by a mob of people. Such act is criminal, pure and simple. Any person participating in it commits an offence and must invariably be held responsible for the consequences of his unlawful action.
33. The prosecution having established that the deceased was murdered in a “mob justice” incident, the issue arising for determination in this case is whether the accused persons or any one of them was



- positively identified as having been part of the mob of villagers who assaulted and fatally injured the deceased.
34. This case therefore turns on the identification of the accused persons as the offenders, hence criminally responsible for the death of the deceased. In that regard, identification evidence must always be treated with caution. It must be free from error or mistake because a witness might be mistaken even if he is honest [See, *Joseph Onyinkwa Nyariki v Rep* (2019) eKLR].
35. Further, consideration ought to be given to the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the identification of the offenders herein.
36. Even so, in such cases caution must still be exercised in order to eliminate the possibility of mistaken identity. The learned defence counsel, submitted that the charge was not proved against the accused persons beyond reasonable doubt thereby implying that the prosecution's evidence of identification was insufficient, contradictory and/or unreliable. In the case herein, reportedly, there was a case going on between the deceased and most of the accused persons and the same was yet to be finalized. The apparent hatred could have emanated from the fact that there was a land dispute relating to the land that the deceased lived on, hence the case of arson.
37. In the same breadth, it is not lost to this court that the accused persons in their respective defences denied involvement in the murder of the deceased and/or raised defence of *alibi*. The court notes in consideration of the evidence herein in totality that their defences remained shaky and unsubstantiated. [See *Kiarie v Republic* [1984] KLR]. Further, it was submitted that the only witness who allegedly witnessed what happened was one Ngari and that the prosecution ought to have availed him in court.
38. The law on the number of witnesses to be called is found in section 143 of the *Evidence Act*, Cap. 80 which states that:
- “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
39. The legal principle was affirmed in *Keter v Republic* [2007] EA 135 as follows:
- “... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”
40. In my view therefore, the witnesses that were called by the prosecution were enough to prove the prosecution's case.
41. Although the evidence of some of the prosecution witnesses was laced with insignificant discrepancies and contradictions, it was cogent and credible to prove that the accused persons were actually at the scene on the material date and time of the offence and that they actually participated in assaulting and causing the death of the deceased. [See PW 1, PW 5, PW 6 and PW8]. From the evidence by the witnesses, it was outright that some knew the suspects so well given that they were their neighbours. Further, the incident occurred during day light and the identification evidence was that of eye witnesses who were in close proximity hence the possibility of mistaken identity was highly unlikely. [See *Benson Mugo Mwangi v R* [2010] eKLR; *Republic v Florence Kola, Carol Kola & another* [2021] eKLR].
42. The prosecution submitted that the accused persons were placed at the scene of the offence by the prosecution witnesses, thereby implying that they were in the group of people who assaulted and caused the death of the deceased. In situations where the death of the deceased is attributed to “mob



justice” or “mob injustice”, it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. What is important is that they all took part in assaulting and causing him the injuries from which he succumbed. The evidence adduced by PW7 is clear that the deceased died from multiple cut wounds on various parts of the body and a stab wound on the left lumbar region.

43. However, a common intention may be drawn from the presence of the assailants at the scene of the offence, their action and even the omission of any of them to disassociate himself or herself from the assault.

S.21 of the [Penal Code](#) 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 a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

44. It was undisputedly established that the deceased herein was murdered by a mob of people comprising of his village mates. Each of them who took part in assaulting and killing the deceased was as guilty as the other for the murder.

In *Rex v Tabula Yenka s/o Kirya & others* (1943) 10 EACA 51, it was stated 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 omissions of any of them to disassociate himself from the assault.”

[Also See *Eunice Musenya Ndui v R* [2011] eKLR]

45. In this case, the deceased was assaulted and killed following a land dispute. All those who took part in the unlawful transaction did not deem it fit to let the law take its course and finally resolve the dispute thereon; instead they decided to take the law in their hands. They must therefore be held criminally responsible for the consequences of their unlawful action.
46. Additionally, their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased. See *Stephen Ariga & Another v R* [2018] eKLR. Equally, malice aforethought on the part of the defendants was established through the weapons that they had and the severity of the injuries inflicted on the deceased. [see section 206 of the [Penal Code](#)].
47. After considering all the evidence, I am satisfied that the case against the accused persons have been proved beyond reasonable doubt. They are guilty of murder contrary to section 203 as read with section 204 of the [Penal Code](#). I so find and convict them accordingly.
48. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

..... for the Accused



..... for the State

