



REPUBLIC OF KENYA



**Republic v Muriithi (Criminal Case 1 of 2018)  
[2023] KEHC 18181 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL CASE 1 OF 2018**

**FN MUCHEMI, J**

**MAY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SAMUEL KAGIRI MURIITHI ..... ACCUSED**

**JUDGMENT**

1. The accused person faces a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge are that on the 10<sup>th</sup> day of January 2018, at Chorongi area in Nyeri Central District within Nyeri County, jointly with others not before the court murdered one John Warui Mwendu. He pleaded not guilty to the charge.
2. At the inception, the case was before Matheka J. who heard six (6) prosecution witnesses. At the close of the prosecution case, the 2<sup>nd</sup> accused one Jackson Wachira Muriithi was acquitted. The judge was transferred and this court took over this case. Directions under Section 200(3) of the *Criminal Procedure Code* were taken and the accused opted to proceed from where the former trial judge reached. This court the proceeded to hear the defence case.
3. Precisely, the evidence of the prosecution was that on 9<sup>th</sup> January 2018, the accused called PW2 using a mobile phone number that PW2 had not saved and requested him and PW3 to meet him at an appointed place. The three men met at Salim's hotel where the accused asked PW2 and PW3 to accompany him to Ruringu to meet a lady and offered to buy them alcohol. The three men then proceeded to Carnival pub and started drinking. After a while, seven men came to the bar and told PW2 and PW3 that they wanted to talk to them outside the pub. While outside the pub, one of the men asked PW2 to take them to the deceased's home. The men then forced PW2 and PW3 on their motorcycles, took them to Muthathini area in Chorongi and beat them up thoroughly using iron bars and rungs. The men then forced PW2 to take them to the deceased's home after PW2 tried calling the deceased on his mobile phone with no response. Upon reaching the deceased's house, the accused



- and his accomplices called the deceased loudly and threatened to burn his house if he failed to open the door. The deceased came out of his house and the accused immediately grabbed him forcing him on a pick up. The accused and his gang took the accused, PW2 and PW3 to the scene where they had earlier assaulted PW2 and PW3.
4. The men the beat up the deceased as PW2 stole the moment to escape from the scene. PW3 remained behind for he could not walk due to injuries inflicted on his leg. He said that he witnessed the accused person and the other men beat the deceased and force him to drink petrol before tying a tyre around him and setting him on fire. the deceased rolled on the ground trying to save himself from the raging fire. the accused and his accomplices tied the deceased again and placed a burning tyre on him causing an explosion before leaving the scene.
  5. The accused was thereafter arrested and taken for mental assessment where Dr. Richu Mwenda declared him fit to plead. Post mortem of the deceased's body was conducted by Dr. John Muthuri who formed the opinion that the deceased died as a result of 73% 3<sup>rd</sup> & 4<sup>th</sup> degree burns with multiple injuries due to blunt force trauma in keeping with the assault.
  6. Upon being put in his defence, the accused in his sworn statement of defence stated that he was a matatu driver with 2NK Sacco during the same period and that on the material day, he was on duty on the Nyeri/Othaya route driving motor vehicle registration number KBU 279E. He took passengers to Othaya and then others to Nairobi on the same day. For both destinations, the accused said he reported to the Sacco offices and signed for the deliveries he had. He further testified that he left Nairobi for Nyeri at 9.00am on 10/1/2018 and upon arriving in Nyeri at 12.30 pm he was arrested.
  7. The prosecution and the defence filed their submissions in this case which the court has perused and considered in this judgment.
  8. The prosecution cited the case of *Republic v Albert Tirimba Ogata* [2014] eKLR and submitted that it has proved its case beyond reasonable doubt. The prosecution submitted that the intention by the accused to cause grievous harm is evident from the way he beat the deceased and placed a burning tyre on him after tying him with a barbed wire. Further evidence of the malice aforethought by the accused is evident in his threat that the deceased would return in a coffin to his home as he took him from his home to the murder scene. The prosecution further submitted that the magnitude of the injuries inflicted on the deceased by the accused and his accomplices are evident that they intended to kill him. The post mortem report stated that the cause of death was 73% 3<sup>rd</sup> & 4<sup>th</sup> degree burns with multiple injuries due to the blunt force trauma which is consistent with the injuries inflicted on the deceased.
  9. The prosecution further submitted that there was evidence of unlawful acts on part of the accused for PW2 testified that he saw him hit the deceased with an iron bar on the head, which evidence was corroborated by that of PW3. Further, PW3 testified that he saw the accused place a burning tyre on the deceased.
  10. The prosecution submitted that the accused was positively identified since PW2 and PW3 knew him before the incident. PW2 testified that he knew the accused who was a taxi driver before he was employed in the 2NK Sacco as a matatu driver. The accused used to ferry PW2 home quite often.
  11. The prosecution further argued that although the accused raised the defence of an alibi, the prosecution argued that he did not call any witnesses to support his alibi, not even his workmates at the sacco. Furthermore, the prosecution submitted that PW2 and PW3 placed him at the scene of the crime and thus the defence of *alibi* by the accused cannot stand.



12. The defence submitted that the prosecution had failed to prove its case beyond any reasonable doubt in that although PW2 and PW3 testified that they were assaulted by the accused person and other people on 10/1/2018 they did not produce any medical evidence to prove that they were assaulted. The defence further submitted that no evidence was produced from the mobile provider to confirm the correspondence and telephone conversation between the accused, PW2 and PW3. Further, PW2 admitted that he visited the accused person in prison but he did not disclose the reason for his visit and only denied that he had gone to solicit for money from him.
13. The defence relied on the cases of *Erick Orieno Meda v Republic* Criminal Appeal No. 55 of 2015 and *Kiarie v Republic* (1984) KLR and submits that the accused raised a defence of alibi which was not displaced by the prosecution. He further submitted that he raised the defence long before he was charged with the offence and the investigating officer failed to investigate the said *alibi*. The defence submitted that the accused person was implicated by PW2 and PW3 for undisclosed reasons. Their evidence is doubtful and cannot be relied upon to place the accused at the scene of the crime.

### **Analysis & Determination**

14. The burden of proof in criminal cases lies on the prosecution to establish that the death of the deceased died as a result of the unlawful act of the accused person; that he was positively identified at the scene, that he caused the death by an unlawful act; and that he had malice aforethought at the time of the offence.
15. Upon the death of the deceased, PW1 Dr. John Muthuri conducted an autopsy on the deceased which showed that the cause of death was 73% 3<sup>rd</sup> & 4<sup>th</sup> degree burns with multiple injuries due to blunt force trauma consistent with the assault. In my considered view, that the death and cause of death have been established by the prosecution herein.
16. PW2 testified that he saw the accused person hit the deceased with an iron bar on the head and that his accomplices also beat up the deceased. PW3 corroborated the evidence of PW2 in regard to the assault. PW3 further testified that he saw the accused and his team force the deceased to drink petrol and thereafter placed a tyre round him and set him on fire. The deceased rolled on the floor in an effort to prevent his body from burning but he was beaten up again using weapons by the assailants. When the deceased attempted to roll again, the accused person picked a burning tyre and placed it on the deceased. The said evidence was supported by the post mortem report on the cause of death which was due to 73% 3<sup>rd</sup> & 4<sup>th</sup> degree burns with multiple injuries due to blunt force trauma. The blunt trauma of the injuries must have been caused by the iron bar and other blunt weapons. Apart from the evidence of PW2 and PW3 placing the accused at the scene of the crime, PW3 witnessed further brutal assault and lynching of the deceased after PW2 escaped from the scene.
17. The accused person was identified as a person known to PW2 and PW3. PW2 testified that he knew he accused from Nyeri town as he was a taxi driver who used to often ferry him home using his motor bike before he was employed as a matatu driver. PW3 said that he knew the accused and that it was not the first time he was seeing him that fateful night. The identification of the accused was by recognition which is more reliable than identification at the scene of crime. Before the incident took place that evening, PW2 and PW3 had been drinking in a bar known as Carnival at around 10pm which was lighted with electricity. PW3 said that when the accused and his assailants were beating the deceased, there was moonlight at the scene that enabled him to see what was happening.
18. The accused person raised the defence of *alibi* where he testified that on the fateful day he was on duty as a driver of a public service vehicle on the Nyeri Othaya route and later travelled to Nairobi. When an



accused person has pleaded an alibi, the onus is on the prosecution to prove that the alibi is not true. The Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held:-

An *alibi* raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

19. Similarly in *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal held:-

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence as to establish the accused's guilt beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

20. It is not in doubt that the defence of alibi was raised at the earliest opportunity. PW6, the investigating officer testified that when he asked the accused person where he was on 9/1/2018 and 10/1/2018, he told him that he was on duty on 9/1/2018. He stated that he took passengers to Nanyuki, came back at around 3pm then took passengers to Othaya and at around 5 pm he proceeded to Nairobi and came back to Nyeri on 10/1/2018. The investigation officer stated that what the accused person told him was not true because the IT Manager at 2NK Sacco was reluctant to record a statement. He further testified that PC Nancy took over the investigations and he advised her to record a statement to follow up the defence of alibi by the accused.

21. The defence argued that no data from the mobile service provider was produced to support the alleged conversation between the accused and the key witnesses before the deceased was taken to the scene of murder. In my view, the evidence of PW2 and PW3 was credible and reliable in that it presented no contradictions or doubt as to what transpired that night. Even in absence of the mobile data, the evidence on record by the eye witnesses is sufficient to be weighed together with the alibi with a view of determining its strength.

22. It was also alleged that PW2 had visited the accused in prison after he was arrested. The witness denied this allegation during cross-examination. The accused did not revisit the matter during his defence. As such the matter was put to rest.

23. The prosecution led evidence through PW2 and PW3 which placed the accused person at the scene of crime. The accused person testified that at the time of the incident he was in Nairobi and travelled from Nairobi on 10/1/2018 at 9am reaching Nyeri at around 12.30 pm. Although the prosecution did not investigate the alibi of the accused, this court has an obligation to weigh the alibi together with evidence adduced by the witnesses in order to determine the credibility of the accused's defence. The evidence of PW2 and PW3 who testified that they knew the accused before the incident was overwhelming in that it placed the accused at the scene of crime. The witnesses described in detail the act of the accused person together with his gang in assaulting the deceased as well as setting him on fire.

24. The court did not believe the accused that he was framed by the key witnesses. He did not mention that any grudge existed between him and the said witnesses. He gave no indication of ill motive on the part of one or both of the witnesses.

25. I find the defence of the accused not plausible in view of the overwhelming evidence of the prosecution.



26. In my considered view, the prosecution have proved that it was the accused with others not before the court who assaulted and burnt the deceased to death. As such, it is an established fact the accused through his unlawful act caused the death of the deceased.
27. Section 206 of the Penal Code stipulates that malice aforethought is deemed to be established by evidence when any of the following circumstances are proved:-
- a. An intention to cause the death of another.
  - b. An intention to cause grievous harm to another.
  - c. Knowledge that the act or omission causing death will probably cause death or grievous harm to someone, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
  - d. An intent to commit a felony.
  - e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

Therefore, for a charge of murder to hold against an accused person, the prosecution must prove that at the time he inflicted the injuries on the deceased or had formed the necessary intention to either cause death or grievous harm on the deceased or that the accused had knowledge that his act would cause death or grievous harm to the deceased. The prosecution submitted that the accused person demonstrated malice aforethought in the brutal manner that culminated the assault on the deceased. He placed a burning tyre on the deceased after tying him with barbed wire. Further, the prosecution submitted that the magnitude of injuries inflicted on the deceased as indicated in the post mortem report demonstrate that the accused and his accomplices had the intention of killing the deceased.

28. In my considered view, the grave nature of the injuries inflicted on the deceased by the accused and his accomplices leaves no doubt that the accused had formed the intention to bring deceased's life to an end. The post mortem report demonstrated existence of very grave injuries caused by burning the deceased, severe beating that was visible as blunt trauma after tying him with barbed wire. The utterances by the accused that the deceased would return to his home in a coffin cannot be taken lightly because he actualized his threats. It was held in the case of Republic v Ndalamia & 2 others [2003] KLR, that malice aforethought had been established whereas the accused persons had assaulted the deceased violently and persistently and despite plea to stop the assault, still continued. The deceased eventually died of the injuries inflicted on him.
29. The facts in the Ndalamia case are similar to this case in that the deceased was violently and persistently assaulted and in addition set on fire after having been tied with barbed wire. Further, that the deceased rolled on the ground, he was tied again and a tyre placed on him.
30. It is my considered view that the prosecution has proved malice aforethought against the accused person.
31. In conclusion, the evidence on record proves beyond any reasonable doubt that the accused is guilty of the offence of murder contrary to section 203 as read with 204 of the Penal Code. The accused is accordingly convicted of the offence of murder as charged.
32. It is hereby so ordered.

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

**F. MUCHEMI**



**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 25<sup>TH</sup> DAY OF MAY 2023.**

