



**Director of Public Prosecution v Thuranira (Criminal Case E078 of 2021)
[2023] KEHC 22941 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E078 OF 2021
TW CHERERE, J
SEPTEMBER 28, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

DAVID GITONGA THURANIRA ACCUSED

JUDGMENT

1. Accused David Gitonga Thuranira is charged with the offence of the murder of one Charles Koome that was committed on November 5, 2021.

Prosecution case

2. John Kinoti M' Abara stated that on the night of November 3, 2021 while was at his place of work guarding Kiutine Petrol Station, one Makasa who was riding on Accused's motor cycle went to the petrol station looking for his colleague, Koome whom he threatened to kill and upon failing to get Koome went away. That Koome was later to be killed on the night of November 5, 2021.
3. Kevin Mwenda stated that on the night of November 5, 2021, he was walking home with Koome when Accused who was carrying Makasa on a motor cycle caught up with them. That Accused slapped Koome once and handed to Masasa a panga that was tied onto the motorcycle with which Makasa chased Koome and that he could hear Koome screaming from a distance. That he ran away and Accused and Makasa chased him but they were unable to catch up with him. That the following day, he learnt that Koome had been murdered and Makasa lynched.
4. Paul Gikonyo Johana and Geofrey Mutwiri who were watchmen at Pambasuko Bar at Kiutine Market stated that Koome and Kevin Mwenda left the bar together on the night of November 5, 2021 and shortly thereafter, they heard screams and when they went out saw Makasa chase and cut Koome with a panga after which he escaped aboard a motorcycle. Both of them stated that they did not see Accused on the material night.



5. PC Antony Karua visited the scene of murder on the November 5, 2021 and removed the bodies of Koome and Makasa to the mortuary. He subsequently arrested Accused after he was implicated by Kevin Mwenda as the one that carried Makasa on a motor cycle on the night Makasa killed Koome.
6. An autopsy conducted on the body of Koome revealed that he died of severe head injury due to penetrating sharp force trauma to the head as shown on the report tendered as PEXH. 1.
7. Accused 1 stated that he was a bodaboda rider and was on duty both on 03rd, 04th and November 5, 2021. He stated that Makasa was unknown to him and denied carrying on his motor cycle the man that killed Koome.

Analysis and Determination

8. Our Criminal Law recognizes the sanctity of life by prohibiting the unlawful killing of another human being. The right to life is entrenched in article 26 of *the Constitution*.
9. At the trial, the burden is on the prosecution to prove that Accused was a significant contributing factor of the deceased death. It is trite law that the burden to prove the guilty of an accused person lies throughout on the prosecution. The standard of proof is guilt beyond reasonable doubt. An accused person assumes no burden to prove his innocence. Whatever defence he may raise to the criminal charge through sworn evidence, or unsworn statement in the dock, or through the cross examination of prosecution witnesses, is to be considered only on a balance of probabilities, and if it is found to be probably true, then the benefit of doubt raised is to be given to that accused, who shall then be acquitted. It is only when the accused's defence is rejected, and when the prosecution has proved the guilt of that accused, beyond reasonable doubt that he shall be convicted.
10. I have considered the evidence on record and the issues for determination is whether the DPP has proved the three main ingredients of murder i.e the death, that Accused person/s committed the murder and that they were actuated by malice. (See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).
11. That Koome died was confirmed by a postmortem form which reveals that he died of severe head injury due to penetrating sharp force trauma to the head.
12. Mwenda stated that Makasa that killed Koome was aboard a motor cycle that Accused was riding and that it was Accused that handed over the killer panda to Makasa but Accused raised the defence of alibi that he was not at scene of crime.
13. The Supreme Court of Nigeria in the case of *Ozaki & Anor Vs The State* (1990) LCN/2449(SC) held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.
14. Our own Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held THAT:

“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.
15. I have weighed the prosecution case vis a vis the defences of alibi raised by Accused as well as the evidence by Paul Gikonyo Johana and Geoofrey Mutwiri who stated that they saw Makasa kill Koome but did not see Accused at the scene of murder. I find that the defence of alibi is well corroborated



and it introduces into the mind of the court a doubt that is reasonable considering that the case of the prosecution against Accused cannot be said to have been watertight.

Malice aforethought

16. The prosecution having failed to prove actus reus', it would be futile for this court to delve into the issue of malice aforethought.
17. In the end, I have come to the conclusion that Accused is not guilty of the offence of murder Contrary to section 203 as read with section 204 of the Penal Code and he is hereby acquitted. He shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU 28TH DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Accused - Present

For the Accused persons - Mr. Ng'entu Advocate

For DPP - Ms. Rita (PC-1)

