



**Republic v Kariuki (Criminal Case E017 of 2022)
[2023] KEHC 26671 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE E017 OF 2022
KW KIARIE, J
DECEMBER 19, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

PHAMINUS KARIUKI ACCUSED

JUDGMENT

1. Phaminus Kariuki is charged with an offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. The particulars of the offence are that on the 21st day of July 2015, at Andu village in Rangwe Sub County of Homa Bay County, murdered Samuel Odongo Lusi.
3. When a contingent of police officers and the provincial administration officers went to Gem in Rangwe to raid for chang'aa brewers, they entered a home. They found several people who were imbibing chang'aa. They ordered them to lie down. A majority defied and ran away. In the process of attempting to arrest them, the deceased was fatally injured. The accused was charged with the offence.
4. The accused in his defence denied that he was the one who fatally injured the deceased.
5. The issues for determination are:
 - a. Whether the accused was the one who fatally shot the deceased; and
 - b. Whether the offence of murder was proved.
6. It was not disputed that there was a raid which was conducted to nab illicit brewers. Equally, there is consensus that the accused herein was one of the officers who went to the home where the deceased met his death.



7. When the officers arrived at the home, they ordered the partakers of chang'aa to lie down but a majority defied and started to run away. It was at this juncture the deceased was allegedly fatally shot.
8. Dr Odundo Nichodemus (PW10) performed a post-mortem on the body of the deceased on the 10th day of August 2016. He found an entry gun wound on the left lower back and an exit wound on the left subcostal region (below the left ribs). The cause of death was excessive bleeding secondary to a gunshot. I, therefore, find that the prosecution proved to the required standards that the deceased was fatally shot.
9. Four police officers were in the raid party. All four were armed with guns. According to the evidence of Rorian Cheron (PW1), the Assistant County Commissioner -Rangwe, after she had heard a bang, somebody cried that he had been injured. She proceeded to where the cry came from and found a man lying down.
10. The evidence of PC Paul Kiragu (PW5) is that upon their arrival at a homestead, they found a group of about fifteen people taking chang'aa. These people dispersed and ran in different directions. They gave chase and he arrested one suspect. When he took him to the vehicle, he found CPL Kariuki (the accused herein) and they were later joined by PC Lang'at who informed them that he had found a man who had been injured. This however contradicted the version of the driver, CPL Harry Kipyatich Steve. (PW6). His evidence was that after about fifteen minutes, CPL. Kariuki called him from where he had remained and directed him to go where they were. Upon arrival, he found two suspects who had been arrested with some chang'aa and there was a person who had been injured.
11. The other witness who was with the illicit brew-raid party was Elisha Malela Ogutu (PW4). He is the chief Komolo location. He only heard a gunshot from the officers who were ahead of him and PW1.
12. The evidence of the witnesses who went for the raid does not only fail to implicate the accused, it is also contradictory. The court of Appeal in the case of *Ndungu Kimanyi vs. Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

Other than placing the accused at the scene of the fatal shooting, the evidence of these witnesses has no other evidential value.
13. Joshua Ouma Lusi (PW2) testified that he was in the home where police officers raided for chang'aa. He ran away. Though he heard a gunshot, he did not know which police officer fired. The evidence of Martin Okumu is similar on the issue of the gunshot. However, this witness said he defied the order to lie down and was arrested at the scene. Though he purported to have known the accused, he conceded that his statement to the IPOA indicates that learnt about Kariuki the following day. He equally did not know who fired.
14. The evidence of Chief Inspector of Police Emmanuel Oduori (PW9) was that the Firearm Movement Register indicated that a Ceska pistol serial number F4010 was issued to CPL Phaminus Kariuki. The copy of the Arms Movement register indicates that the Ceska pistol was issued on the 19th day of July 2016 with 15 rounds of ammunition and returned on the 22nd day of July 2016 but spent one round of ammunition.
15. When Superintendent of Police Charles Koilegi (PW8) received the Ceska Pistol serial number F4010, pistol magazine and 14 rounds of ammunition he was requested to ascertain whether the Ceska pistol



was capable of firing and its calibre. He testified that the pistol was capable of being fired. He therefore concluded that the pistol and the ammunition were firearm and ammunition as defined under the Firearms Act Cap. 114 Laws of Kenya.

16. Either the investigating officer deliberately omitted to request for the examination of the pistol to confirm if it was recently fired, or he was not conversant with the investigations of this nature. The accused having denied that he fired from the pistol, this could have been the best evidence, though circumstantial. In the case of *Mohamed & 3 Others vs. Republic* [2005]1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the instant case, find that due to the failure to adduce evidence as to whether the Ceska pistol in issue had been recently fired, I am unable to infer that the accused fired the fatal shot.

17. The investigating officer, Humphrey Moses Khaunya (PW12) sat in court when PW1 to PW9 were testifying. It would appear he is not aware of the requirement for witnesses to remain out of the court until the time of their testimony and thereafter. This is to prevent a witness from amending his evidence and fill in the gaps from the evidence of the previous witnesses. Though the court will admit such evidence, the weight given to it would be very minimal. This will be the fate of his evidence where it attempted to implicate the accused.
18. I have previously opined that where a police officer is accused of misuse of the firearm against a civilian or where a civilian raises a complaint against a police officer in the course of his/her duty, the matter should be investigated from the onset by an independent body to avoid accusations of cover-up. This case cannot escape such accusations.
19. The upshot of the foregoing analysis of the evidence on record, I find that the prosecution has failed to prove their case against the accused to the required standards. I accordingly acquit him of the offence of murder and set him free unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF DECEMBER 2023

KIARIE WAWERU KIARIE

JUDGE

