



REPUBLIC OF KENYA



**Republic v Muriuki & another (Criminal Case 16 of 2015)  
[2022] KEHC 353 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 16 OF 2015  
LM NJUGUNA, J  
APRIL 28, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ANDREW MURIUKI ..... 1<sup>ST</sup> ACCUSED**

**GABRIEL MURIITHI WARUE ..... 2<sup>ND</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 and the particulars of the offence being that on 26.02.2015 at Kiangungi Village, Kiangungi sub location in Embu County, jointly with others not before the court murdered David Njiru Njoroge.
2. When the accused persons were arraigned in court they pleaded not guilty to the charge and a plea of not guilty entered and hence the case proceeded to a full hearing.
3. PW 1, John Muthee Njoroge stated that on 26.02.2015 at about 8.30 a.m., he went to harvest his mother's tea in her farm at Kiangungi with one Wawira, Wambura, Mugendi and Dorothy. That the tea farm is registered in the name of their father and it has macadamia, maize and other crops. He continued to state that all over sudden, four people ( being Andrew Muriuki, Gabriel Muriithi, Wamuthee Warue and Mugendi Gabriel) came to the farm with baskets used for harvesting tea and at that point, the 1<sup>st</sup> accused removed a panga from the basket and cut the deceased herein on the left side of the head while Muthee cut him (PW1) with a panga on the upper right arm. That the deceased fell on the ground after being cut on the head. He (PW1) took his shirt and tied his left hand which was bleeding while Dorothy Wawira and Wambura called for help which prompted the neighbours to come. He stated that the four men thereafter fled the scene and the injured were taken to Runyenjes police station where they obtained a P3 Form and thereafter treated at Kyeni Hospital. He testified that the deceased



was seriously injured and was transferred to Kenyatta National Hospital but thereafter died while undergoing treatment. That there is a land case pending before court in relation to the land. Upon cross examination, he stated that it is the 1<sup>st</sup> accused who attacked the deceased while the 2<sup>nd</sup> accused person never cut the deceased in as much as he was in the company of the 1<sup>st</sup> accused. He reiterated that there was a dispute in relation to the land where they were picking tea but further denied that they were picking tea belonging to the mother of the accused persons.

4. PW2, Niceta Mbura stated that on 26.02.2015 at around 8.30., she was picking tea at her mother's farm with her kins David Njiru (Deceased), Dorothy Karimi, Cecelia Wawira and Muthee Njoroge. That four people (Andrew Muriuki, Gabriel Muriithi, Muthee Warue and Mugendi) went to the farm carrying baskets for harvesting tea while pretending that they were picking tea. That they removed their pangas from the said baskets and the 1<sup>st</sup> accused proceeded to cut the deceased on the head. She stated that Muthee and Mugendi attacked PW1. He continued to state that they called for help and people came to the scene but the accused persons with their accomplices ran away and thereafter they took the deceased and PW1 to Kyeni Hospital and later the deceased was transferred to Kenyatta Hospital where he died. Upon cross examination, she stated that the deceased was assaulted by the 1<sup>st</sup> accused while the 2<sup>nd</sup> accused never assaulted anyone. She stated that the land in question belongs to her mother but the accused persons also live on the same land. It was her evidence that she was not aware of any existing ELC case in court and in the same breadth, she denied that they were the aggressors.
5. PW3, Maritha Ciakuthii testified that on 26.02.2015 she had sent her children (the deceased, Wambura, Wawira, Muthee and Dorothy) to go harvest tea in her tea plantation while she stayed at home. That she heard people screaming and she made her way to the farm and found the deceased lying on the tea plants with a cut on the head. She stated that she ran back home to take a lesso to tie the deceased's bleeding wound and thereafter the deceased was taken to Kenyatta National Hospital but later on died. It was her evidence that she never knew the reasons that prompted the assault of the deceased. Upon cross examination, she stated that she did know whether Honorata was given the land and neither was she aware if the mother of the accused persons was given a portion of the same land but she confirmed that the land has had a long standing dispute.
6. PW4, Patrick Munene testified that on 07.03.2015, Martin Ireri and himself went to Kenyatta National Hospital Mortuary where they identified the body of the deceased.
7. PW5, Dr. John Thuo of Embu Level 5 Hospital stated that on 03.03.2016, the two accused persons herein were taken to him for mental assessment. That he assessed them separately and found that they were mentally fit to stand trial.
8. PW6, Dr. Edwin Walong stated that on 10.03.2015, he conducted a post mortem on the body of the deceased at the request of the OCS Runyenjes. On examination, there was a posterior fixed lividity but the body was well preserved. That externally, the body had abrasions on the lower back and on the right forearm, a surgical incision on the left side of the skull which had been approximated by eight stitches; there was evidence of medical intervention externally of needle marks. That internally, the scalp of the head had a haemotoma and there was a fracture of the skull on the frontal parietal and temporal (right) bone; the brain portrayed raised intercranial pressure. He therefore formed the opinion that the cause of death was severe head injury due to assault consistent with sharp and blunt trauma. He proceeded to produce the post mortem report as Pexh 2. On cross examination, he stated that the fracture was on the bones on the skull extending from the front to the back on the right side and that it was a combination of blunt trauma and forced trauma; the weapon used was in a chopping motion and that the single injury affected all the head bones. Later on, he made a correction to his report that the injury was on the left side of the head.



9. PW 7 Inspector Nelson Tansi testified that he was the investigating officer in the matter herein and that on 26.02.2015 while in his office, he was informed by inspector Mwema who was in charge of the crime office that PW1 had arrived at the station in a private vehicle with the deceased and PW1 recorded a statement that they were confronted by the accused persons herein and 2 others while they were picking tea. That the 1<sup>st</sup> accused pretended that he was going to pick tea on their family land but all over sudden, drew pangas and metal bars and then confronted them. He stated that the deceased was profusely bleeding and he advised PW1 to rush the deceased to the hospital and thereafter, they (together with Inspector Mwema) proceeded to Kiangugi Village where the incident had occurred and while there, they were directed to the scene of the incident. That there was a pool of blood and they went to the home of 1<sup>st</sup> accused whom they found but the other three suspects were missing. That he arrested the 1<sup>st</sup> accused but never recovered any weapon; he therefore charged him with the offence of assault but upon realizing that the deceased had succumbed to his injuries, he withdrew the charges and instead preferred the charge of murder against him. That having been informed on 08.03.2015 that the 2<sup>nd</sup> accused person had resurfaced from his hiding, he arrested him and charged him with the offence of murder. On cross examination, he stated that he was informed that the four men (accused persons herein included) attacked every person that they found on the farm and that he only arrested the two accused herein while the other two are still at large. He confirmed that there was an existing land dispute of the land and the same is still pending before the court for determination.
10. The prosecution proceeded to close its case and in a ruling delivered on 04.10.2021, the accused persons were put on their defence upon the court finding that the prosecution had established a prima facie case.
11. DW 1 Andrew Muriuki stated that on 26.02.2015 he woke up in the morning and went to the farm of Mariko Kanyekira to pick tea. That he lives on the farm of the family of Videa Warui Njoroge and that Onorata also have a share in the same farm and that as he was picking tea, he saw seven people in the company of Martha. It was his case that Martha Njoroge, John Muthee Njoroge, Niceta Mburu Mbindu, Cecily Muthee Njoroge, Dorothy Marigu Njoroge and Virginia Njiru Njoroge are all from the family of Martha Njoroge and they ordered him out of the land and at that point, PW1 threw a *panga* at him which instead landed on the deceased. That he reported the matter at Kathageri Police Station and was informed that the police were already aware of the matter. Later, he was arrested and charged with the offence of assault but the same was later withdrawn and substituted with the offence of murder. It was his evidence that there has been a land dispute between the family members but denied that he was responsible for the death of the deceased
12. DW2, Gabriel Muriithi Warui testified that on 26.02. 2015, he woke up and went to the farm which borders Tharaka Nithi County and that he was supervising the process of tea picking and further reiterated that he never killed the deceased. He stated that he only returned home at 17.00 Hrs and that he was arrested on 09.03.2015 at night and was charged with the offence of murder.
13. DW3, Flora Kanyua Kariuki testified that on 26.02.2015 they were together with the 2<sup>nd</sup> accused during the morning hours and he only left at 11.00 a.m., but later went back and informed them that he had heard of the death of the deceased herein and that they stayed together till 5.00 p.m.
14. DW4, Njoka Kanyakiri John stated that the land where the accused persons were picking tea belongs to Mariko Kanyakira. He confirmed that the land has long standing dispute between the family members. He thus produced an order in Succession Cause No. 435/2012, report by the registrar, ruling in ELC 128/2014 as DExh 2 and DExh 3 respectively. On cross examination, he stated that he never witnessed the fracas as he was in court on that day.



15. At the close of the hearing, the prosecution chose to rely on the evidence on record while the defence filed their submissions wherein it was submitted that the prosecution did not prove the case beyond any reasonable doubt as required by law. Reliance was placed in the case of *Republic v Esau Wekesa Makboha & 4 others* [2020] eKLR. In the end, it was prayed that the accused persons be acquitted of the charges they are facing.
16. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions by the defence. The accused persons herein were charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The offence of murder is defined under section 203 of the [Penal Code](#) in the following terms;-
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
- [See *Republiv v Boniface Isawa Makodi* [2016] eKLR].
17. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubts, three ingredients against an accused person. Those ingredients are as follows:-
- a. The death of the deceased and the cause of death;
  - b. That the accused committed the unlawful act which caused the death of the deceased; and
  - c. That the accused had malice aforethought.
- [See *Anthony Ndegwa Ngari v Republic* [2014] eKLR and *Johnson Njue Peter v Republic* [2015] eKLR].
18. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein murdered the deceased (See *Woolmington v DPP* [1935] AC 462). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See *Miller v Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proved to the required standards.
19. Right to life is protected by our [Constitution](#) under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 the court held that;-
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- [See also *Sharm Pal Singh* [1962] EA 13 and *Daniel Nzioka Mbuti & another v Republic (supra)*].
20. The cause of the death of the deceased herein was not excusable or authorized by law and thus was unlawful. According to PW6, the cause of death was severe head injury due to assault consistent with sharp and blunt trauma.
21. As to whether the accused persons herein committed the unlawful acts which caused the death of the deceased herein. PW1 and PW2 testified that on 26.02.2015 at about 8.30 a.m., as they were harvesting tea in their mother’s tea plantation, four people (being Andrew Muriuki, Gabriel Muriithi, Wamuthee



Warue and Mugendi Gabriel) came to the farm with baskets used for harvesting tea and at that point, the 1<sup>st</sup> accused removed a panga from the basket and cut the deceased on the left side of the head.

22. It is quite evident from the several pieces of evidence above and as confirmed by PW6 that the body of the deceased had a surgical incision on the left side of the skull which had been approximated by eight stitches. PW6 stated that internally, the scalp of the head had a haemotoma and that there was a fracture of the skull on the frontal, parietal and temporal (right) bone; that the brain portrayed raise intercranial pressure. He therefore formed the opinion that the severe head injury was due to assault consistent with sharp and blunt trauma and that the weapon used was in a chopping motion and that the single injury affected all the head bones. The cause of death was consistent with the evidence of PW1 and PW2 on the injuries that were inflicted on the deceased by the 1<sup>st</sup> accused.
23. The evidence from the post mortem report clearly shows that the deceased met his death through unlawful acts of assault.
24. As to whether the accused had malice aforethought, malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the Penal Code defines it as follows;

206. 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.
25. The Court of Appeal in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR stated as follows on the prove of malice aforethought;-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, Cr. App. No. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”



26. In this case, the evidence adduced before this court points out that the 1<sup>st</sup> accused herein removed a panga from the basket and cut the deceased on the left side of the head. From the evidence adduced by the prosecution, the 1<sup>st</sup> accused person was not only identified by the prosecution witnesses, he was equally placed at the scene of crime. [See *Turnbull & others* [1976] 3 ALL ER 549]. The lingering questions to the facts of the case in particular include: For how long did the witnesses have the accused persons under observations? At what distance? In what light? Was the observation impeded in anyway, such as by passing traffic or a press of people. Had the witnesses ever seen the accused persons before or how often? In the present case, its logical to conclude that the recognition of the 1<sup>st</sup> accused person is not a fabricated story by the witnesses. It is a case of sound evidence that goes to satisfy the criteria of consistency and credibility to prove the accused persons were at the scene and that the 1<sup>st</sup> accused was the perpetrator of the murder, beyond reasonable doubt.
27. However, 2<sup>nd</sup> accused raised the defense of alibi to the effect that he was never at the scene of crime on the material date. The burden of proving the falsity of the defense of alibi rests on the prosecution. [See *Victor Mwendwa Mulinge v R* [2014] eKLR].
28. However, the Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR while discussing the defence of alibi laid down rules to be applied in considering the defence of alibi and the Learned Judges of Appeal held as thus;-
- “23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
- An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. [See *Mhlungu v S* (AR 300/13) [2014] ZAKZPHC 27 2014].
29. In the instant case, the said defence was not raised during the prosecution’s case to allow them time to disprove the same. Nonetheless, the same was corroborated by the evidence adduced by DW2’s witnesses. That notwithstanding, it was PW1, PW2 and PW6 evidence that the 2<sup>nd</sup> accused person as much as he was present at the scene, he never hit the deceased. There was no evidence adduced that connected him directly or indirectly to the cause of death of the deceased herein.
30. In the end, I find that:
- i. The prosecution has proved the case of murder against the 1<sup>st</sup> accused person and I therefore find him guilty as charged and convict him accordingly.
  - ii. The prosecution failed to prove their case against the 2<sup>nd</sup> accused person and I hereby acquit him.
31. It is so ordered.



**DELIVERED DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**L. NJUGUNA**

**JUDGE**

