



REPUBLIC OF KENYA



**Republic v Ntimuthinge & 4 others (Criminal Case 16 of 2018)
[2022] KEHC 3056 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE 16 OF 2018**

LW GITARI, J

APRIL 28, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

AGNES KANGARIA NTIMUTHINGE 1ST ACCUSED

PRICILLAH KENDI MWANAKE 2ND ACCUSED

BEN NGUGI KANYARU 3RD ACCUSED

ROSALINE KAITHI MUTIIRIA 4TH ACCUSED

MBITI MWARANGE MIRIIGA 5TH ACCUSED

JUDGMENT

1. The five (5) accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*, Chapter 63 of the Laws of Kenya. The particulars of the offence as per the information dated 17th September 2018 were that on 13th August 2018 at Mwanyani Location, Tharaka South Sub-County within Tharaka -Nithi County, the said accused persons jointly with others not before court murdered one Peter Nyaga Kireru.
2. The accused persons underwent mental assessment and were all found to be fit to stand trial. They all denied committing the offence and the matter proceeded to trial. The prosecution called a total of eight (8) witnesses.

Prosecution's Case

3. PW1 was Beatrice Kathambi, the daughter of the deceased. She is also a neighbour and relative to all the accused persons. She recalled that on the material day at around 1 p.m. she was at her home with PW4, her sister, together with two of her younger siblings. The 5th Accused came to their home with his



- nephew. The nature of the conversation between them was that PW5 was looking for his brother, the deceased and also PW1's father. PW1 told him that she did not know the whereabouts of his father and 5th Accused asked her to tell the deceased to attend a funeral which was taking place on the same day in their neighbourhood, about 500 metres from their home. About 2 hours later, PW1 heard screams from the venue of the funeral. She rushed to the scene and found many people had gathered around the grave site. They had surrounded someone. She passed through the crowd and found that it was her father who had been surrounded.
4. The accused persons joined forces in tying the deceased up and burying him alive. In the process, one of the deceased shoes (P.Exhibit 1) fell off from his leg. The 4th Accused suggested that PW1 should be tied together with the deceased. She tried getting hold of PW1 but PW1 broke free and ran away. PW2 went home and informed her sister. They then called their brother James Muthaira who informed their mother. PW1's brother and mother then went to report the incident.
 5. The following day, they realized that the deceased had been murdered and buried in the grave that had been dug for the late Koome Mwarange, the brother to both the deceased and 5th Accused person. The police went to the scene, uncovered the grave and found the body of the deceased. PW1 noted that the deceased was still tied up although the ropes were those from the bark of a tree (P.Exhibit 2) and not the ropes she had seen on the material day. The body had injuries on the head and stomach. A panga was also recovered from the grave and the deceased's body was then taken away to a mortuary.
 6. PW1 did not know all the people there but recognized the 1st, 2nd, 4th, and 5th accused persons as well as one Ngungi Mwarange and Damaris Karea. According to her, the deceased was not tied and had not been beaten when she arrived at the scene. The deceased was tied and beaten in her presence.
 7. PW2 was Peter Mutembei. He recalled that on the material day he was headed to Kwang'ombe using a bodaboda. On nearing a river, he heard people singing "Kuna ndovu. Kuna ndovu." He decided to go find out what was happening. He found the deceased surrounded by a crowd of around 30 people. The deceased's hands and legs had been tied with ropes from the bark of a tree and he was pleading to be given time to pray. PW2 recognized the 1st, 2nd, 3rd, and 4th Accused persons at the scene. According to him, the 4th Accused is the one who threw the deceased into the grave. She was assisted by one Damaris. PW2 also recognized other people at the scene including one Kiogora, Nyaga, Gitonga, Kirimi, Muthomi, Mutembei, Isaiah, Kirimo, Muchoma and Muteria. According to him, some people were throwing stones at the deceased as he lay in the grave while some had sticks. He saw one Nyaga and one Kiogora throwing stones. As the deceased was being stoned, PW2 heard him crying out loud saying "Ndugu yangu Nisamehe". It was his testimony that the deceased was pleading with one Kirimo to forgive him. The deceased was then buried alive.
 8. PW3 was Joshua Muindi. He recalled that on the material day he went to the house of the late Koome to dig his grave. He was with one Mbiti, Koome, Gitonga and Mucungu. As they were digging, the deceased came to the site but he was chased away by Kirimi Mbiti. Mbiti told the deceased that old men should not be there digging a grave. The deceased went away but returned after 2 hours. He was again chased away by Mbiti. They then finished digging the grave. The deceased came back at the graveside a third time. He had brought food (rice and beans), but the people there refused to eat his food. Subsequently, the gravediggers went to take baths at Kathita River, leaving the deceased alone. The deceased followed them to the river with the food and the people still refused to eat. The deceased went and stood under a tree and started talking to one Maseria. PW3 then left and was informed later that the grave they had dug had been used to bury the deceased after he was killed. He went to the grave site the next day when the police were exhuming the deceased's body. He assisted in exhuming the body.



9. PW4 was Fridah Muthoni, another daughter of the deceased. She corroborated PW1's evidence to the extent that they were at home on the material day when PW5 came and asked about the deceased's whereabouts. They later heard a scream from the venue of the funeral and PW1 went to find out what had happened. PW1 returned 30 (thirty) minutes later with one of the deceased's shoes. They decided to go to the scene and on the way, they met one Geoffrey who told them that the deceased had been killed and buried in the grave that had been dug for the late Koome. The following day, she witnessed the body of her father being exhumed and saw a panga with a black handle (P. Exhibit 3) being retrieved from the grave. He also saw that the deceased had injuries on his head, stomach, and forehead.
10. PW5 was Simon Mucee Mbiti, the area Chief of Mwanyani location. He recalled receiving a call on the material day at around 5.30 p.m. from one Muetio Mwanake. He was informed that the deceased had been murdered. He rushed to Miomoni AP camp and then went to the scene with two AP officers. They learnt that the deceased had been murdered and buried. He then called the OCS Marimanti and they decided to meet at the scene the following day. The next day, they went and exhumed the deceased body.
11. PW6 was Mary Kanjira Gaichu. She recalled that on the material day she left her home to attend the burial of the late Julius Koome. She found that the body of the late Koome had not arrived. Shortly after, she heard screams and then saw a man dragging the deceased. The man was unknown to her. The deceased's hands were tied with a rope from the back of a tree (P.Exhibit 2) and then tied to his neck. She saw the 1st Accused beating the deceased using a folded rope. When she asked the 1st Accused what the deceased had done, the 1st Accused threatened to hit her too. After that, she did not follow her or go to the scene where the deceased was eventually killed.
12. PW7 was Dr. Nkonge Nicholas from Chuka Hospital. He produced the postmortem form of the deceased that was filled by one Dr. Kitili (now deceased). He stated that he was familiar with the writing and signature of the late Dr. Kitili. It was his testimony that the late Dr. Kitili conducted a postmortem on the body of the deceased on 24th August 2018 which was identified to him by two relatives. He produced the postmortem form as P. Exhibit 4.
13. PW8 was CPL John Bwami, the investigating officer in this case. He recalled that on 14th August 2018, he received a murder report from the OCS Marimanti. He went to the scene together with the OCS Marimanti, Corporal Gatemo, and the assistane chief Miomboni sub-location. At the scene, they found a grave where it was alleged that someone had been buried alive. The grave was photographed, and the body exhumed. The deceased was tied with a rope on his legs and hands. He also had one shoe on the right leg and there was a panga that was recovered from the grave. They then removed the body from the scene and escorted to the mortuary. They questioned witnesses and recorded their statements. According to PW8, the witnesses alleged that the deceased had killed many people. He then produced the bamboo ropes, the shoe and the panga recovered from the grave, the photographs taken at the grave, and a certificate of the photographic evidence as P. Exhibits 2, 1,3, 5, and 6.
14. The prosecution closed its case on 19th October 2021 and by a ruling of this court that was delivered on 25th November, 2021, it was held that a prima facie case had been established against the accused persons and they were put on their defence.

Defence case

15. The 1st, 2nd, 3rd, and 4th Accused Persons denied killing the deceased and they each stated that they did not attend the burial of the late Julius Koome on the material day. DW1, the 1st Accused Person herein stated that on the material day, she was at home with a child, and she did not leave her home.



DW2, the 2nd Accused Person herein stated that on the material day, she took her allegedly sick child to hospital in Mukothima on that day and after she was treated, they returned home. DW3, the 3rd Accused Person herein stated that on the material day he was at work in Mikinduri. He attempted to raise the defence of alibi stating that on that day, he was at work carrying sand from a river to a vehicle with two other persons. DW4, the 4th Accused Person herein, stated she was at Kithioroka on the material day preparing charcoal. According to her, she did not attend the burial as it would have been a painful experience for her.

16. Finally, DW5 was the 5th Accused Person herein and is the brother of the deceased. He stated that on the material day, he had gone for the burial of his brother the late Julius Koome. He met the deceased who told him not to go to the graveside and instead, to assist in the kitchen as the people who digging the grave needed food. The 5th Accused started helping the women who were cooking food. At about 2 p.m., a crowd of people came from the graveside saying that the deceased had been killed. According to him, he did not kill his brother as he was helping at the kitchen the whole time.

I have considered all the evidence adduced by the prosecution and the defence as well as the respective submissions.

Issues for determination

17. The accused persons are facing the charge of murder. As such, the main issues for determination by this court are:
- a. Whether there is proof of the fact and cause of death of the deceased.
 - b. Whether the accused persons caused the death of the deceased, and if so,
 - c. Whether there was malice aforethought on the part of the accused persons.

Analysis

a. Proof of fact and cause of the deceased's death

18. Proof of death is usually through medical evidence although it can also be proved from cogent and reliable circumstantial evidence. (See: *Republic v Cheya & Another* [1973] EA 500).
19. In this case, the evidence of all the prosecution witnesses, save for PW7, proves that the deceased indeed died. They all witnessed the lifeless body of the deceased either on the material day or the day that followed when the deceased was exhumed from the grave. Their testimonies as corroborated with the post-mortem form proved beyond any reasonable doubt that Peter Nyaga Kireru died on the material day.
20. According to the testimony of PW7, it was noted during the postmortem examination of the deceased's body that the deceased had blood oozing from the mouth and nose. There was a deep cut on the left side of his scalp and bruises on the left shoulder and abdomen. Internally, the deceased had a fracture of the scalp on the left side and there was a blood clot on the scalp below the brain. The late Dr. Kitili, who examined the deceased, formed the opinion that the cause of the deceased's death was a severe head injury. His testimony thus proved the cause of the deceased's death beyond any reasonable doubt.



b. Whether the accused persons caused the death of the deceased by unlawful acts

21. The definition and test for causation of death is provided under Section 213 of the *Penal Code*. Under the provisions Section 213(e), a person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of the death:

“(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”
22. The evidence of PW1, PW2 and PW6 place the 1st Accused at the scene of the murder on the material day. In her defence, the 1st Accused denied attending the burial of the late Julius Koome on the material day stating that she had gone graze her goats as she did not have anyone to do it. The late Julius Koome was 1st Accused’s brother-in-law by reason of being the brother to her husband (the 5th Accused). According to PW2, the 1st Accused hit the deceased on the head with the blunt side of an axe. PW6, on the other hand, testified that she saw the 1st Accused beating the deceased with a folded rope. In my view, therefore, the 1st Accused was positively identified as among those perpetrators whose actions led to the death of the deceased.
23. The evidence of PW1, and PW2 place the 2nd Accused at the scene of the murder on the material day. In her defence, it was the contention of the 2nd Accused that she did not attend the burial of the late Julius Koome on the material day as she had taken her sick child to hospital. She however contradicted herself during cross-examination by stating that she was not aware that the late Julius Koome had died. In any case, her claim that she gone to hospital on that day was not substantiated by any evidence. In my view, therefore, the 2nd Accused was also positively identified as one of the people who killed the deceased.
24. On his part, the 3rd Accused stated that he was working on the material day. He said that worked with a driver named Mithika and a conductor called Mutuma. He however stated that he did not have their phone numbers, and such could not reach them. In my view, his defence of alibi is a mere afterthought as the same was not raised at the earliest opportunity neither was it substantiated by any evidence. On the other hand, it was PW1 evidence that the 3rd Accused is the one who tied the deceased’s hands. According to PW2, the 3rd Accused as among the people he saw at the scene who buried the deceased. In my view, therefore, the 3rd Accused was positively identified by the evidence of PW1 and PW2.
25. As for the 4th Accused, it was her testimony that she never attended the burial on the material day. The evidence of PW1 and PW2 however placed her at the scene of the incident. According to PW1, the 4th Accused threatened to tie her up with the deceased and that is when PW1 took the deceased’s shoe and fled from the scene. The 4th Accused tried to get a hold of PW1 before she ran away. This is a clear that distance between the two who proximately close for PW1 to identify the 4th Accused. In my view, therefore, the 4th Accused was also positively identified as one of the perpetrators of the subject crime.
26. In his defence, the 5th Accused person did not deny attending the burial of the late Koome, who was his brother. He however denied killing his other brother, the deceased herein. It is only PW1 and PW4 who testified against the 5th Accused person. According to the two said witnesses, the 5th Accused person went to the deceased’s home in the morning asking about his whereabouts. He did not find the deceased in his home and thus asked PW1 and PW4 to tell the deceased to attend the funeral of their late brother when he returned. The 5th Accused however denied going to the deceased’s home on the material day. In his defence, the 5th Accused Person stated that he met the deceased at the burial, and they agreed



that the 5th Accused would assist in the kitchen. According to 5th Accused, he never saw the deceased again after the deceased came to the kitchen and took food to the gravediggers. He also stated that he never heard the screams that attracted other villagers. In my view, while the evidence adduced by the prosecution witnesses placed the 5th Accused at the venue of the burial, none of testimonies placed him at the scene where the deceased was killed.

27. Section 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.”

28. Section 21 of the *Penal Code* therefore recognizes the act being complained must be executed in furtherance of common intention. The doctrine of common was observed in the cases of *Rex v Kyeyane Mikiari & Others* {1941} 8 EACA 84 and *Rex v Tabulayenka s/o Kirya & 3 others* {1943} 10 EACA 51, where the courts stated that:

“Where a mob sets upon a suspected thief and beat him to death, every person following the mob would be deemed to have formed a common intention with the rest to kill the thief, and would be liable for murder. it was stated that it is not necessary that there should have been any concerted agreement between the arrested persons prior to the attack on the so called thief.”

29. From the facts and evidence of this case, the 1st, 2nd, 3rd, and 4th Accused persons, jointly with others not before court, formed a common intention to actively participate in the killing of the deceased. It is my view that the prosecution proved beyond any reasonable doubt that the acts of the 1st, 2nd, 3rd, and 4th Accused Persons on the material day were unlawful and dangerous and caused the death of the deceased.

c. Whether the accused persons had malice aforethought in causing the death of the deceased

30. Malice aforethought is the mens rea in murder. The prosecution had a duty to prove malice aforethought on any of the circumstances stated under Section 206 of the *Penal Code* which defines malice aforethought 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.

31. What can be deduced from Section 206 (a) to (e) of the *Penal Code* is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR stated as follows:

“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 in 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...”

32. In the 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 in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.
33. According to PW1, the 2nd Accused forced the deceased to sit down as he tried to stand up. The 1st Accused had an axe and hit the deceased on the back of the head with the blunt side of the axe. The deceased then collapsed and lost consciousness. The 3rd Accused then tied the deceased’s hands and legs with ropes that are used to tie cows.
34. The evidence of the prosecution witnesses was well corroborated and pointed to the fact that the deceased’s body had been tied on the hands and legs with ropes from the bark of a tree. According to PW1, the body also had injuries and blood stains on the head, stomach, and the side of the face. Those exhuming the deceased’s body from the grave recovered a machete/panga (P.Exhibit 3) from the grave although it was not established whether the panga was the one used to inflict injuries on the deceased.
35. In his testimony, PW5 was questioned by this court. It was his testimony that there had been a long-standing dispute between the family of the deceased and that of Mbiti over land. The case was in Meru High Court and was decided in favour of the deceased. the details of the said case were however not disclosed in this case. Nevertheless, it is my view that the prosecution’s evidence taken in totality, proved that the deceased died a gruesome, horrific, and horrendous death through unlawful acts of the 1st to 4th Accused Persons which were actuated by malice aforethought.

Conclusion

36. The upshot of the foregoing, in my view, is that the prosecution proved its case against the 1st, 2nd, 3rd, and 4th Accused Persons beyond reasonable doubt.



The evidence tendered against the 5th accused is insufficient and has not proved the charge against him beyond any reasonable doubts. I give 5th accused the benefits of doubts and acquit him at this stage. The 1st, 2nd, 3rd and 4th accused are found guilty as charged and are convicted accordingly. They will be dealt as provided under Section 322 of the *Criminal Procedure Code*. The 5th accused is acquitted.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF APRIL 2022.

L.W. GITARI

JUDGE

