



**Republic v Kiinge & another (Criminal Case 84 of 2017)
[2022] KEHC 11454 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 84 OF 2017
TW CHERERE, J
MAY 26, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

JACKSON KIINGE 1ST ACCUSED

ALICE KANANU ALIAS MWENDWA 2ND ACCUSED

JUDGMENT

1. Jackson Kiinge and Alice Kananu alias Mwendwa (accused 1 and 2 respectively) are jointly charged with others not before the court with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on October 4, 2017 at Lailuba sub-location, Buuri Location, in Tigania East Sub-County within Meru County, jointly with others not before the court murdered Charles Kalunge alias Kadogo

Prosecution Case

2. PW2 Monica Naita Taimuti recalled that on October 4, 2016, she was in her farm when Thurania and Gakii went to accused 1's goat that had strayed into her farm. That before the two left with the goat, they were joined by her son Kadogo and they went away together. That immediately thereafter, the goat strayed into her shamba again and she reported the matter to the chief and Athanasio Igweta the assistant chief. That at about 11.30 am while she was still in her shamba, she saw Gakii, Mwendwa, accused 1 who was armed with a stick and accused 2 walk towards her and she left and went to report the matter to the sub-area (village elder). She later returned to find her son Charles Kalunge Alias Kadogo had been assaulted. She saw her son who had serious injuries and she was assisted by PW3 Henry Kimathi to take him to hospital where he died while undergoing treatment on October 6, 2016. PW4 PC Nancy Mutoria the investigating officer stated that on October 6, 2017, PW2's reported that her son Charles Kalunge alias Kadogo had been assaulted by Thurania, Gakii, Mwendwa, Mwendwa



and Kiinge had assaulted on October 4, 2017 as a result of which he died on October 6, 2017. She commenced investigations and caused accused persons to be arrested and having failed to trace the other suspects. A postmortem on the body of Charles Kalunge alias Kadogo was conducted by PW1 dr Paul Wambugu on October 11, 2017 and he formed the opinion he died of severe head injury secondary to assault caused by a blunt object as shown on the postmortem report PEXH1.

Defence Case

3. Accused 1 in his sworn statement denied the offence. He stated that on the material day at about 01.00 pm, he was going to hos shop when he found Charles Kalunge alias Kadogo lying by the road side surrounded by a crowd including school children. He stated that he went his way and was arrested 3 days later and charged.
4. Accused 2 in her sworn statement similarly denied the offence and stated that he did not know Charles Kalunge alias Kadogo, was not at the scene of crime and did not know how he died.

Analysis And Determination

5. I have considered the evidence on record and I have deduced the following issues for determination is whether the prosecution case has been proved to the required standard.
6. For prosecution to secure a conviction on the charge of murder, it has to prove three ingredients the death, that accused persons committed the murder and that they were actuated by malice. (See [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR).
 - a. The death of the deceased
7. That Charles Kalunge alias Kadogo died was confirmed by all PW2, 3 and 4 and was corroborated by the evidence of the doctor contained in the postmortem form tendered as PEXH. 1 which reveals that he died of severe head injury secondary to assault caused by a blunt object.
8. In order to establish the accused's culpability, the prosecution relied mainly on the evidence of PW1 who stated that the last time she saw her son alive was on the morning of October 4, 2017 when he walked away from her shamba in company of Thuraira and Gakii who were driving away a goat, which she said belonged to accused 1, that had strayed into her shamba. The witness stated that on the material day at about 11.30 am, accused 1 who was armed with a stick had together with accused 2, Gakii and Mwenda walked into her shamba and she left in fear only to thereafter receive information that her son had been assaulted and seriously injured. In conclusion, she conceded that she did not see the persons that caused her son the fatal injuries but stated that she suspected accused persons together with Gakii and Mwenda.
9. I have considered the evidence by the prosecution and it reveals that the only reason that accused persons were charged was that they had with others stormed deceased's mother's shamba on the material day around the same time that PW1 found the deceased injured. There is therefore no doubt that accused persons were charged on the basis of suspicion. In [Sawe v Rep](#) [2003] KLR 364 the Court of Appeal held:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”



10. In *R Kipkering Arap Koske & Another [1949] 16 EACA 135*, the Court of Appeal for Eastern Africa had this to say:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

11. Accused persons denied killing the deceased. There being no evidence to link them to the murder, I find that the evidence by the prosecution is in the circumstances of this case insufficient to sustain a conviction.

c) Malice aforethought

12. The prosecution having failed to prove *actus reus*, it would be futile for this court to delve into the issue of malice aforethought.

Disposition

13. In the end, I have come to the conclusion accused persons are not guilty of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) and are hereby acquitted. They shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU 26TH DAY OF MAY 2022

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

accused 1 - Present

accused 2 - Present

For the accused persons - Mr. Wamache Advocate

For the State - Ms. Nandwa (PC 1)

