



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Gitonga & 3 others (Criminal Case 71 of 2017)  
[2022] KEHC 3095 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3095 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 71 OF 2017  
TW CHERERE, J  
JUNE 30, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PAUL GITONGA ..... 1<sup>ST</sup> ACCUSED**

**MICHAEL KINYORU ..... 2<sup>ND</sup> ACCUSED**

**SAMWEL MWIKUMIA ..... 3<sup>RD</sup> ACCUSED**

**AYUB KITHINJI ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Paul Gitonga, Michael Kinyoru, Samwel Mwikumia and Ayub Kithinji (Accused 1 to 4 respectively) are charged 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 09<sup>th</sup> September, 2017 at Nduruma Location, Abothuguchi East Division in Imenti Central sub-county within Meru County murdered Kirera Thamia

2. Accused persons denied committing the offence and the prosecution called a total of six (6) witnesses in support of their case.

**Prosecution Case**

3. The prosecution case as narrated by PW1 Joshua Kailemia testified that around 1990, Mzee Marete, who is his mother's brother and father to Accused 4 asked his father to settle on his land, take care of him in exchange for a portion of land. That they settled on the land but after Mzee Marete died. He recalled that on 09.09.2017, Accused persons and one John Mugiira went to Mzee Marete's farm at around 07.00 am with a tractor and ploughed it. That immediately after the ploughing, about 20



people descended on their houses demolished them and the goods therein. He stated that after Accused 2 pulled Mzee Kirera out of the house, he ran away and stopped about 100 meters away from where he saw Accused 1 hit his Mzee Kirera on the back with a piece of timber whereas Accused 4 hit him on the chest with a stone as the other persons pelted the family members with stones. That their screams were drowned by the attackers who were also screaming and by the time the matter settled, Mzee Kirera had been killed and his body set ablaze.

4. PW2 Rebecca Mwonjiru Kirera, wife to Mzee Kirera recalled that she was at home with Accused 4 and John Mugiira went to their farm and started to plough it with a tractor. It was her evidence that Mzee Kirera upon seeing the houses in his compound being demolished, he went into the house with his granddaughter Mwendwa from where he was pulled out by Accused 2 and 3 and it was then that Accused 1 who was armed with a piece of timber and Accused 4 who had a stone assaulted Mzee Kirera and sent him sprawling to the ground. She similarly stated that their screams for help were drowned by the attackers who were also screaming. She managed to escape from the scene with her son Joshua and granddaughter Mwendwa and later returned to find Mzee Kirera had been killed and his body set ablaze.
5. PW3 Julius Mutiga Kirera, stated that his father Mzee Kirera and his family had for a long time settled on a portion of land belonging to Accused 4's father Mzee Marete with the consent of Mzee Marete. He recalled that on 08.09.2017, Accused 4 went to the home of who had settled on his father's land and threatened to commit murder if they did not vacate from the land of Mzee Marete where they had settled. That fearing for their lives, he accompanied his father who reported the matter to police. That the following morning at about 07.00 am, Accused 1, 2 and 4 went to their land and ploughed it with a tractor and his father Mzee Kirera sent him to report the matter to police, That while he was away, his brother PW1 informed him that their houses had been demolished and their father Mzee Kirera had been killed. That he arrived at the scene to find their homes flattened and their father's body which had been set ablaze smoldering.
6. PW4 CPL Joshua Sila arrived at the scene to find the houses of Mzee Kirera flattened, the land ploughed and Mzee Kirera killed and his body burnt. He removes the deceased's body to the morgue where a post mortem was conducted and the cause of death identified as 100% burns as shown on the postmortem form PEXH. 1. In cross-examination, he stated that in the first report, it was reported that Mzee Kirera was killed by members of public who were not named and that Accused were later implicated by PW2 and PW6.
7. PW5 CPL Japhet Gitura, Senior Chief Nduruma Location recalled that on 17.08.2017, Accused 4 went to his office and reported that his father had died. That Accused 4 informed him that he would not bury his father who used to stay with Kirera until Kirera returned his father's title deed and ID card. That he called Kirera and his family on 23.08.2019 and they delivered the title deed to him and the ID card to Accused 4 and his father was subsequently buried on 11.09. 2017. The witness told court that Accused 4 later informed him that he wished to lease his father's land. That Kirera reported to him on 08.09.2017 that Accused 4 had threatened to harm him and he asked him to report the matter to police. That the following day, he was informed that Kirera had been attacked and he reported the matter to police. He later proceeded to the scene to find houses demolished and Kirera had been killed and his body set on fire. It was his evidence that he did not identify Accused persons in the crowd that had gathered at the scene of crime.
8. PW6 Nelly Mwendwa who is granddaughter to Mzee Kirera stated that on 09.09.2017, a tractor with Ayub Kithinji (Accused 4), John Mugira and a driver she did not identify was driven into the farm of her grandfather Kirera Thamia and it started to plough. That all this time, Accused 4 was shouting and when they heard him, they locked themselves in the house. That about 10 to 15 people among



them Accused 4, his wife, Mukaria, Karambu, Kinyuru (Accused 2) and Muriithi that she saw by peeping through a wooden window started to demolish the house of Mzee Kirera, and she escaped and returned in the evening to find Mzee Kirera had been killed and his body lynched. She stated that she was standing about 50 metres from the scene when she saw a large crowd attack Mzee Kirera and specifically stated that it was Accused 1 that pulled Mzee Kirera out of the house and hit him on the head with a stone and that it was Accused 4 that burnt Kirera's body. She also stated that Accused 2 and 3 were also at the scene.

### **Defence Case**

9. In their sworn statements, Accused 1, 2 and 3 denied that they were at the scene of crime. Accused 1 called a witness who stated he was with him at Mitunguu on the material date. Accused 4 stated that on 09.09.2017 in the morning, he got information that some people had fought at his father's farm and proceeded to the scene where he found a crowd gathered and there learnt that Mzee Kirera had been killed. Further to his evidence, he stated that he had on the same date at about 08.00 am gone to plough the farm that Mzee Kirera was occupying.

### **Analysis and determination**

10. Section 203 and 204 of the Penal Code under which the accused is charged provide for the offence of murder and the punishment for it. They require that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:
  203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
  204. Any person who is convicted of murder shall be sentenced to death.”
11. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the deceased; that Accused caused the death and that he was actuated by malice.
  - a. The death of the deceased
12. The postmortem form PEXH.1 reveals that the died of 100% burns and his lower limbs were missing from the level of knee joint.
  - (b) Proof that accused person committed the unlawful act which caused the death of the deceased
13. The evidence by PW1, PW2 and PW6 reveals that the attack on Mzee Kirera was preceded by an invasion on the land by Accused 4 and others who ploughed the land using a tractor. PW6 stated that after the ploughing, Accused 4 whistled and a group of people descended on their home and started to demolish their houses. PW1 identified Accused 2 as the one that pulled Mzee Kirera out of the house whereas Accused 1 hit Mzee Kirera with a piece of timber and Accused 4 hit him with a stone. PW2 identified Accused 2 and 3 as the ones that pulled Mzee Kirera out of the house and Accused 1 and Accused 4 having assaulted Mzee Kirera with a piece of timber and a stone respectively. PW6 identified Accused 1 as the one that pulled Mzee Kirera out of the house and hit him on the head with a stone.
14. Whereas Accused 1, 2 and 3 deny that they were at the scene of crime, the evidence by PW1, PW2 and PW6 places each one of them at the scene and gave details of how they participated in the death of Mzee Kirera. And although Accused denies taking part in the death of Mzee Kirera, he concedes



he was at the scene on the material day. There is evidence that he not only summoned the crowd that killed Mzee Kirera but also took part in the assault.

15. The prosecution evidence taken collectively forms a chain so complete that there is no escape from the conclusion that all Accused persons were at the scene of crime and together with others committed the acts that led to the death of the Mzee Kirera. Consequently, I find that the alibi defences have no merit and they are rejected.
  - c) Malice aforethought
16. The offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the Penal Code evidence proves 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.”
17. That the injuries inflicted on Mzee Kirera were severe. That his legs were cut at the level of the knees and his body was set on fire demonstrates the vindictiveness and callousness on the part of Accused persons ought to have known that such serious injuries could probably cause the death of or grievous harm to Mzee Kirera. I am therefore satisfied that malice aforethought has been established in terms of Section 206 (a) and (b) of the Penal Code.
18. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused 1, 2, 3 and 4 are found GUILTY of the offence of murder and they are accordingly convicted.

**DELIVERED AT MERU THIS 30th DAY OF June 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**Accused 1, 2, 3 & 4 - Present**

**For the Accused 1, 2 & 3 - Mr. Gitonga Advocate**

**For Accused 4 - Ms . Nelima - Absent**

**For the State - Ms. Mwaniki (PPC)**

