



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v Kimani & another (Criminal Case 17 of 2019)
[2022] KEHC 12361 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 17 OF 2019
CM KARIUKI, J
JULY 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

JAMES MWANGI KIMANI 1ST ACCUSED

JOHN NJENGA WANJIKU 2ND ACCUSED

JUDGMENT

1. The Accused persons were charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya which they denied and matter went into full hearing.
2. After prosecution called 8 witnesses their case was closed and the court found accused with a case to answer.
3. The Accused persons tendered sworn defence but called no witness. The Prosecution case is that PW 1 GN 14 years old one of EG one of the victim was in their house on 28th September 2019 was in their house when her mother was called by Gitonga (another victim) to take to him a charger.
4. The two were lovers but were staying separate houses. It was at night she used to go and spend at Gitonga's house. After she left a person opened from house and removed his hat and witness said that she recognized. He was with group of people and then walked. He left and left with other people. There was electricity light on. The person who entered house had stained teeth and fat cheeks. He had 2 pangas and witness testified that she had seen him at Rurii. She did not know his name. In the morning 5.00am she left for school. Gitonga's house was 30 meters away and thus passed at Gitonga's place for school for fees.
5. She called but no answer but a person came out and pointed panga at her. She said she had seen the man at Rurii. His fat cheeks and stained teeth this was same person she saw earlier in their house. Neither



- her mother or Gitonga responded to call, call (verbal). She left for school. She left at 3pm and went home to Beth's house. She arrived at 7pm and was told her mother was killed.
6. In cross examination, she said the person she saw she had seen him before but did not know his name. She did not tell police he had stained teeth and fat cheeks. She did not tell police nature of light obtaining at the time she saw the person. It was raining that day. She said she had heard people talking outside and locked the door. She said in the morning at Gitonga house, she stood at the door and saw inside clothes and back of Gitonga's head. There was a person holding panga outside the house. She told police she saw somebody in Gitonga's house. She had told police she had seen the person at Zulugan.
 7. On Re-examination she said she did not give police description of the person.
 8. PW 2 Stephen Mwangi brother to Gitonga (deceased) on material day while on his boda boda job saw Mwangi Gitau who used to work with his brother Gitonga and asked him his brother Gitonga's whereabouts and that his phone was off air. He checked in 3 other places in vain but decided to go to his house.
 9. He found his brother's house doors open and pushed door to enter as nobody was responding to his call. He found clothes on the floor and his body on sitting room and was dead. There was blood on his head. He called police who came and upon entry found a second body inside the house. Both bodies had head injuries. He did not know the name of the second person who was a lady and she was naked.
 11. The police removed the bodies and took to the mortuary. He also later witnessed postmortem of Gitonga's body.
 12. PW 3 testified Mwangi Gitau testified to the effect of how and PW 2 went to Gitonga's house and narrated the findings PW 1.
 13. PW 4 witnessed postmortem of his mother Elizabeth Wanjiru after identifying the body.
 14. PW 5 Rose Wanjiru Wangari was a worker in a butcher who left job at 8.30p.m. and left for home. She knew Mwangi Rasta and Mwangi. While on the way she noticed Mwangi Rasta through the aid of cell phone light but the other Mwangi hit her on the head and she fell down before falling down Mwangi Rasta had pulled her for 15 feet before other Mwangi hit her. Mwangi was in maize plantation before he hit her.
 15. She regained consciousness after 3 weeks.
 16. She had injuries at the eye and head. She was admitted for 3 weeks she said she knew attackers and identified them in court.
 17. On cross examination she said at that time it was cloudy and it was raining. There was small size moon and she was using Techno phone small size. She was attacked at maize farm. None of attackers talked. They had jembe handle and both are Mwangi and in court as her attackers.
 18. In Re-examination she said she saw one who attacked her in a moonlight. She also said there was security light like from Court to main road distance (about 50-meter court notes). She said she saw Mwangi before he hit her.
 19. In further cross examination she said there were buildings and trees along the road.
 20. PW 6 Josphat Thiga Muna witnessed also Gitonga (deceased) postmortem.



21. PW 7 was the scene Crime Officer who visited scene and documented it. He produced photographs of the scene in the home and outside plus of the bodies of the victims and report thereof.
22. PW 8 Joseph Chirchir DCIO Nyandarua investigated the case. He visited the scene and ensured Scene of Crime Officer documented it. He recorded witnesses' statements.
23. He goes story of PW 1 daughter of the Elizabeth Wanjiru Gachagua deceased and victim of the incident.
24. She told him she said she identified a man who came to their house after her mother left as there were full lights in the house. She pointed to the second accused as the person she identified. She did not know the attackers. While in the house in bed she heard people shouting for help but did not know they were. There was a lady in maize plantation called Rose Wanjiku following day. She was in critical conditions and was rushed to hospital. She told the witness that while walking at night hence, the accused persons attacked her. The attackers (accused persons) were traced and arrested. The body were collected and post mortem was conducted and same was produced as an exhibit.
25. In Cross-examination he said that, he said Rose did not give descriptions when taken from maize plantation.
26. PW 1 told him she did not know attackers but had seen accused (2) before, but did not know his name. She gave descriptions only. Rose said Rasta she saw was accused 1. She mentioned the the two (2) deceased persons houses were
27. 100 meters apart. The night of attack had a lot rains such that no neighbours heard the incident of attack.
28. In cross examination, he said Rose gave names of attackers after she came out of a coma (3 months after) when being taken to hospital, Rose mentioned 2 accused persons. PW 1 mentioned the 2 accused persons.
29. At this State Prosecution closed case and Court Ruled accused persons had a case to answer.

Defence

30. The accused gave sworn evidence but did not call witness.
31. DW 1 James Mwangi Kimani denied being at the scene of crime at date and time in issue 26th September 2019. He said that day, after day of work he went evening to watch TV at Mama Martin and was arrested on 26th September, 2019 in the morning. He found 2nd accused in police motor vehicle. He did not know him before. He used to live at Rurii.
32. On cross examination he said he went home at 7.30pm.
33. DW 2 John Njenga Wanjiku was arrested at Rurii on 26th September 2019 he worked till 6p.m. He had schooled with Gitonga the deceased. He learned of death of victims on that day but did not go to the scene. The police took his phone and that of his wife. He was not told why he was arrested. He did not know accused one (1).
34. The defence was closed and Court directed Counsel's parties to canvass submissions via written argument which they filed.

Prosecution Case and Submissions

35. The Prosecution called a total of eight witnesses in support of its case and at the close of its case and accused persons were placed on their defence. They gave sworn evidence and did not call any witnesses.



36. The ingredients of murder are well set out in the case to *Republic vs Henry Obisa Ouko* [2018]eKLR as:
- a. The death of the deceased has occurred
 - b. That the accused committed the unlawful act which caused the death of the deceased
 - c. That the accused had malice aforethought.

The death of the deceased has occurred

37. It is not contested that Michael Gitonga Mathenge and Elizabeth Wanjiku Gachagua were properly identified as the deceased persons. Post mortem reports confirmed the death of both deceased persons.
38. PW 1 Grace Nyambura Wanjiku, daughter to the deceased Elizabeth Wanjiku stated that on the fateful night, the 2nd accused who she knew as Njenga came to her bed, armed with a rungu, when she was sleeping and asked her several questions. He asked her about her whereabouts of her mother. PW 1 then told him that her mother had gone to the deceased's house, Gitonga. He threatened to kill her but she pleaded with him to spare her life. She was able to identify him because when he walked outside, the security lights were still on outside. She had seen him severally. She was frightened. After a short while she heard screams of a man and woman. The screams were that of the late Michael Gitonga Mathenge and Elizabeth Wanjiku Gachagua. This places the 2nd accused Njenga squarely at the scene of the crime. He came looking for the deceased persons with the intent of killing them.
39. The witness Rose Wanjiku Wangare who testified in court, confirms that the second accused was in the company of the first accused on the fateful night when Michael Gitonga Mathenge and Elizabeth Wanjiku Gachagua were murdered. She stated that on the fateful night of the murder she was seriously attacked by the two accused persons when she was heading to her home after work. She says after being hit she saw the two accused persons who were known to her before. They attacked her and left her for dead but luckily, she survived the ordeal.
40. A CT scan for the witness Rose Wanjiku Wangare was produced to confirm that she sustained serious head injuries when she was attacked by the two accused persons. The injuries she sustained are consistent with injuries sustained by deceased persons according to their post-mortems. This leaves no doubt that the two accused persons murdered Michael Gitonga and Elizabeth Wanjiku Gachagua.
41. Malice aforethought is well defined in section 206 of the *Penal Code* as:
- i. An intention to cause the death of or do grievous harm to any person whether that person is the person actually killed or not.
 - ii. 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, by wish that it may not be caused.
 - iii. An intent to commit a felony
 - iv. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony.
42. The accused came to the bed of PW 1 on the fateful day when she was sleeping and asked her about the whereabouts of her mother. PW 1 told him that her mother was at Gitonga's house. He threatened to kill her but she pleaded with



43. him to spare her life. He came to Elizabeth's house with the intention of committing the offence of murder. He then went to look for Elizabeth in Gitonga's house. After a short while PW 1 heard screams of a man and woman. The screams were that of the late Michael Gitonga Mathenge and Elizabeth Wanjiku Gachagua. He came looking for the deceased persons with the intention of killing them.
44. The 2nd accused Njenga was previously seeking sexual favours from the deceased Elizabeth Wanjiku and when she refused/rejected him, he decided to kill her. This demonstrates malice aforethought.
45. Defence Submissions
46. The defence case is that; the identification of the accused persons was improper and wanting and the accused persons had alibis. On The identification of the accused persons was improper and wanting. Contrary to what the prosecution has put down in their submissions PW 1 did not recognise the 2nd accused person, at least not until she was in court. Identification on the dock is suspect where there was no previous identification.
47. PLw1 statement of the witness, Grace Nyambura Wanjiku at page 2 of the Kiswahili-recorded statement, the second paragraph reads "Hapo niliweza kumuona vizuri kwa vile stima bado zilikuwa zinawaka. Nikaona ni mtu nimewai kumwona mara nyingine lakini jina lake ndio sikuwa najua". I've looked at the rest of the five-page Kiswahili statement and no description whatsoever has been given of the alleged perpetrator nor has his name been given.
48. The Investigation Officer said that PW 1 is the one who told them the name of the 2nd accused, but this is far from the truth. The Investigation Officer did not present an extract of the first report which would have proved his claim. A look at his handwritten witness statement particularly at pages 4-5 and it is evident that no description nor name of the accused was given to the Investigation Officer.
49. The question of a first report to police vis –a vis the later statements was addressed in the case of; *Maitanyi versus Republic* (1986) KLR 198 wherein the court of appeal had this to say:

“If a witness received a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained”. Also cited is the case of *Simiyu & another versus Republic* [2005] KLR 192,
50. In the instant case, it is only in open court that PW 1 pointed out the 2nd accused as the person she saw. In his recorded witness statement, the Investigation Officer, PW 8, wrote that the girl, PW 1 gave a description of the 2nd accused to the villagers. Upon being pressed during cross examination, the Investigating Officer revealed that it was not to him but to some villagers that the description of the 2nd accused was given.
51. None of these so-called villagers was called as a witness to corroborate that a description matching that of the 2nd accused was given to them. Both accused persons “Mwangi” and yet one of the accused persons is not known by that name. Can we really call her a reliable witness when she calls the man allegedly married to her mother-in-law Mwangi and yet he is called Njenga?
52. More important is that Rose was attacked at night and she says she saw the accused persons by the light of her phone and security lights at the town centre. It was raining and so there could not have been any moonlight up above. The phone she is said to have been using was not brought to court to ascertain the brightness of its light.



53. It was never ascertained how far the suspects were in relation to the torch light. On cross examination, PW 5 revealed that the phone light went off soon after she was dragged into a shamba. We cannot be sure how long she was able to observe her assaulters as she did not tell us.
54. Of note is that PW 5 was assaulted next to a maize plantation with full grown maize. Tall maize plants tend to cast long shadows. On cross examination, she admitted that she was a bit far from the shopping centre and that there were several buildings between the town centre and the place of assault. Security lights at the town centre would have been of little or no help to her. Otherwise, why bother using the phone's light to illuminate her way home when she could have been using the said security lights?
55. All these observations lend credence to the fact that PW 5 never actually saw any of her attackers. Reliance is made on the case of *Maitanyi – versus- Republic* (supra).
56. In the case, the nature of light and its position relative to the suspects does not give credence to a positive identification of the suspects by the complainant.
57. Even assuming it was indeed the accused persons who assaulted the witness PW 5, this does not translate to a murder. The assault and the murder occurred many hours apart. The assault is said to have taken place at around 8p.m. The murders are said to have been committed after 1am.
58. It is one thing if the murders and the assault had been committed within a short time span of each other, but it is unbridled speculation to connect two different crimes at two different locations merely because the two individuals had been spotted in each other's company. Not a single witness could place the 1st accused at the scene of the murders.
59. It was held in the case of that:
 - “7. suspicion, however strong, cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt”.
60. I associate myself
61. The prosecution's conclusion that the 1st accused was involved in the murder is simply based on suspicion with no cogent evidence to back it up. suspicion, however strong, cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt. Reliance made on *Sawe versus Republic* [2003] KLR 364.
62. On alibi, both accused persons gave sworn evidence. They confirmed that they were at different places when the murders occurred. The 2nd accused in particular stated that he was with his wife when the murders and the assault occurred.
63. It is worth noting that the accused persons stated that they did not know each other prior to their arrest and arraignment in court. They stated as much in their statements to the police and remained unshaken on cross examination. As a matter of fact, the 1st accused testified that he was new to the area and he hailed from Njoro in Nakuru County.
64. More importantly, the defendants' alibis were given to the police within a few days of their arrest. The Investigating Officer does not seem to have done by investigations whatsoever. He did nothing to verify any of the witness reports given to him, much less the alibi given by the defendants.
65. It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution reliance is made on the case of *Wycliffe Shakwila Mugo- versus- Republic* [2018] eKLR.,



Wangombe versus Republic [1980] KLR 149 and *Victor Mwendwa Mulinge-versus-Republic* [2014] eKLR.

66. The accused persons gave their statements back in 2019. The least the police could have done is to check with the spouse, in the case of the 2nd accused, and the neighbours, in the case of the 1st accused, whether any of the accused persons had left home between the hours of 8pm and 1am on the date the offences were committed.
67. The accused persons' obligation with regard to a defence of alibi was simply to prove it on a balance of probabilities. Reliance is made on the case of *Elizabeth Waitiegeni Gatimu versus Republic* [2015] eKLR.
68. The alibi evidence given by both accused persons was by no means incredible. It was probable and the defendants remained unshaken during their cross examination. In view of the foregoing, it is submitted that, that the second ingredient in a murder charge has not been proved beyond reasonable doubt.
69. The police recovered the phones of the two victims at the scene of death. Accordingly, to the Investigating officer there was no evidence of communication between the deceased persons and the accused persons. None of the accused persons or the deceased persons had been spotted together the day of the deaths or even the day before.
70. Nothing seems to have been reported as missing from the home of Gitonga where the crime occurred. No weapon was produced as an exhibit in the case. No finger prints were collected at the crime scene that could connect the accused persons to the offence.
71. Issues, Analysis and Determination
72. After through the evidence on record and submissions filed, I find the issue is whether the ingredients of murder have been proved beyond reasonable doubt?
73. The ingredients of murder are well set out in the case to *Republic vs Henry Obisa Ouko* [2018]eKLR as: The death of the deceased has occurred .That the accused committed the unlawful act which caused the death of the deceased .That the accused had malice aforethought.
74. It is not contested that Michael Gitonga Mathenge and Elizabeth Wanjiku Gachagua were properly identified as the deceased persons. Post mortem reports confirmed the death of both deceased persons. The death occurrence is not contested.
75. The core question is whether the accused persons caused the death of the Deceased persons? Thus, the whole case turns on the issue of identification
76. The defence submitted that, the identification of the accused persons was improper and wanting. Contrary to what the prosecution has put down in their submissions PW 1 did not recognise the 2nd accused person, at least not until she was in court. Identification on the dock is suspect where there was no previous identification.
77. A look at the witness statement of the witness, Grace Nyambura Wanjiku; At page 2 of the Kiswahili–recorded statement, the second paragraph reads “Hapo niliweza kumuona vizuri kwa vile stima bado zilikuwa zinawaka. Nikaona ni mtu nimewai kumwona mara nyingine lakini jina lake ndio sikuwa najua”. I've looked at the rest of the five-page Kiswahili statement and no description whatsoever has been given of the alleged perpetrator nor has his name been given.
78. The Investigation Officer said that PW 1 is the one who told them the name of the 2nd accused, but this is far from the truth. The Investigation Officer did not present an extract of the first report which



would have proved his claim. A look at his handwritten witness statement particularly at pages 4-5 and it is evident that no description nor name of the accused was given to the Investigation Officer.

79. The question of a first report to police vis –a vis the later statements was addressed in the case of; *Maitanyi versus Republic* (1986) KLR 198 wherein the court of appeal had this to say:

“If a witness received a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained”.

80. In the case of *Simiyu & another versus Republic* [2005] KLR 192, the Court of Appeal held as follows:

“2. . In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of the description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.

3. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity”.

81. In the instant case, it is only in open court that PW 1 pointed out the 2nd accused as the person she saw. In his recorded witness statement, the Investigation Officer, PW 8, wrote that the girl, PW 1 gave a description of the 2nd accused to the villagers. Upon being pressed during cross examination, the Investigating Officer revealed that it was not to him but to some villagers that the description of the 2nd accused was given. None of these so-called villagers was called as a witness to corroborate that a description matching that of the 2nd accused was given to them. Both accused persons “Mwangi” and yet one of the accused persons is not known by that name.

82. More important is that Rose was attacked at night and she says she saw the accused persons by the light of her phone and security lights at the town centre. It was raining and so there could not have been any moonlight up above. The phone she is said to have been using was not brought to court to ascertain the brightness of its light. It was never ascertained how far the suspects were in relation to the torch light. On cross examination, PW 5 revealed that the phone light went off soon after she was dragged into a shamba. How long was she able to observe her attackers as she did not tell the court.

83. Of note is that PW 5 Rose was assaulted next to a maize plantation with full grown maize. Tall maize plants tend to cast long shadows. On cross examination, she admitted that she was a bit far from the shopping centre and that there were several buildings between the town centre and the place of assault. Security lights at the town centre would have been of little or no help to her. Otherwise, why bother using the phone’s light to illuminate her way home when she could have been using the said security lights?

All these observations lend credence to the fact that PW 5 never actually saw any of her attackers. It was observed in the case of *Maitanyi – versus- Republic* (supra) as follows:

“The strange fact is that many witnesses do not properly identify another person even in broad daylight. It is at least essential to ascertain the nature of light available, what sort of



light and its size and its position relative to the suspect ...to test the evidence with the greatest care...”.

84. In the case, the nature of light and its position relative to the suspects does not give credence to a positive identification of the suspects by the complainant.
85. Even assuming it was indeed the accused persons who assaulted the witness PW 5, this does not translate to a murder. The assault and the murder occurred many hours apart. The assault is said to have taken place at around 8p.m. The murders are said to have been committed after 1am. It is one thing if the murders and the assault had been committed within a short time span of each other, but it is unbridled speculation to connect two different crimes at two different locations merely because the two individuals had been spotted in each other’s company. Not a single witness could place the 1st accused at the scene of the murders.
86. It was held in the case of *Sawe versus Republic* [2003] KLR 364 that:
 - “7. suspicion, however strong, cannot provide the basis for inferring guilt which must be proved by evidence beyond reasonable doubt”.
87. The prosecution’s conclusion that the 1st accused was involved in the murder is simply based on suspicion with no cogent evidence to back it up.
88. Both accused persons gave sworn evidence. They confirmed that they were at different places when the murders occurred. The 2nd accused in particular stated that he was with his wife when the murders and the assault occurred.
89. It is worth noting that the accused persons stated that they did not know each other prior to their arrest and arraignment in court. They stated as much in their statements to the police and remained unshaken on cross examination. As a matter of fact, the 1st accused testified that he was new to the area and he hailed from Njoro in Nakuru County.
90. More importantly, the defendants’ alibis were given to the police within a few days of their arrest. it was the duty of the police to follow up and determine whether what they had been informed tallied up.
91. The Investigating Officer does not seem to have done by investigations whatsoever. He did nothing to verify any of the witness reports given to him, much less the alibi given by the defendants. And as I have stated before, there was no good explanation as to how the accused persons were both arrested.
92. In the case of *Wycliffe Shakwila Mungo- versus- Republic* [2018] eKLR, Odunga, J addressed the question of alibis extensively. Citing with approval the Court of Appeal cases of *Wangombe versus Republic* [1980] KLR 149 and *Victor Mwendwa Mulinge-versus-Republic* [2014] eKLR, the learned Judge held that:
 93. “It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution”.
 94. The accused persons gave their statements back in 2019. The least the police could have done is to check with the spouse, in the case of the 2nd accused, and the neighbours, in the case of the 1st accused, whether any of the accused persons had left home between the hours of 8pm and 1am on the date the offences were committed.



95. The accused persons' obligation with regard to a defence of alibi was simply to prove it on a balance of probabilities. As was held by Mativo, J in the case of *Elizabeth Waithiegeni Gatimu versus Republic* [2015] eKLR.

“It is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible”

96. The police recovered the phones of the two victims at the scene of death. Accordingly, to the Investigating officer there was no evidence of communication between the deceased persons and the accused persons. None of the accused persons or the deceased persons had been spotted together the day of the deaths or even the day before. Nothing seems to have been reported as missing from the home of Gitonga where the crime occurred. No weapon was produced as an exhibit in the case. No finger prints were collected at the crime scene that could connect the accused persons to the offence.

97. Thus, the court finds that the prosecution has not proved its case beyond reasonable doubt thus, the court makes the orders;

(I) The accused are acquitted and to be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.

.....

CHARLES KARIUKI

JUDGE

