



REPUBLIC OF KENYA



**Republic v Kelvin & another (Criminal Case 1 of 2017)  
[2022] KEHC 14645 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14645 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE 1 OF 2017  
MM KASANGO, J  
OCTOBER 31, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LOHORERE KELVIN ..... 1<sup>ST</sup> ACCUSED**

**MUKOOLI JACKSON ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Lohorere Kelvin (Kelvin) and Mukooli Jackson (Jackson) are in this case charge with the offence of murder of Mailu Meli Wambua (deceased) contrary to section 203 as read with section 204 of the [Penal Code](#). Section 203 of the [Penal Code](#) provides: -

“Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”

2. The prosecution called out a total of 15 witnesses. The prosecution’s case is that Kelvin and Jackson were employed as herdsmen who looked after and milked the cattle at Komothai farm. They were employed by Sarah Wambui Githo, PW13. When the incident occurred, the subject of the murder charge, they had been employed for a few months. Kelvin’s and Jackson’s duties were to feed and milk the cows. Milking was done at 10.00 am, 1 pm and 5 pm. They were tasked with the responsibility of taking the milk to the dairy which was not far from the farm. The farm was separated from the main house, the employer’s house, by a stone wall. There were two gates on that farm. One was the main gate which was adjacent to the main road. The second gate, described as a mini gate was beyond the main gate. Kelvin and Jackson were provided with accommodation. Each had their own room and shared a kitchen. They lived near the cowshed. Their rooms were beyond the small gate.



3. The deceased worked in that same farm as a watchman the deceased. The deceased had worked at that farm for 5 years. His duties apart from guarding and keeping the gates and the main house secured, was to assist in sweeping the compound and feeding the dogs. The deceased resided in the main house and when Kelvin and Jackson wanted to access the main house compound in order to take the milk to the dairy, they had to ask the deceased to open the gate and grant them access. The deceased worked 24 hours a day.
4. There were casual workers who did not reside at the farm who reported to the farm in the morning to pick coffee and their shift ended at 1.00 pm. Nancy Njeri, PW2 and Mary Wanjiku, PW3 were some amongst many other casual workers who worked at the farm picking coffee. Nancy had worked at that farm for 3 years, while Mary had worked for 2 years. They knew Kelvin and Jackson as employee at Komothai farm. They said the two had been employed there for few months. They testified that Kelvin and Jackson resided on the farm, as well as the deceased. All the other casual workers reported on duty at the farm at 8.00 am and their shift ended at 1.00 pm. On December 6, 2016 they stated that when their shift ended they all left the farm leaving Kelvin, Jackson and the deceased.
5. Wamboyo Simon, (Simon) (PW4), was employed at the farm as a manager. Simon however did not reside on the farm. On December 6, 2016, Simon had gone to Kamothai farm to collect manure. As he left the farm, he confirmed that he left Kelvin, Jackson and the deceased at that farm.
6. Kagwa Njoroge (Njoroge), (PW6) is also a farm manager at Komothai farm. He reported on duty at the farm December 7, 2016 and as he normally did, he used the back gate through the farm. On this occasion however, he said the deceased did not open that gate for him. Njoroge telephoned the deceased twice but the deceased did not answer the call nor did he open the gate for him. On entering the compound, Njoroge found the cows in the shed agitated they were making a lot of noise because they had not been milked and there was no feed in their trays. Njoroge went to the rooms used by Kelvin and Jackson. Njoroge in evidence stated:-

“I entered the room used by Kelvin. He was not there nor his clothes. I also saw a *panga* thrust in fire place amongst ashes. The room of Jack (Jackson) was equally deserted. Clothes gone.”
7. Njoroge stated that the *panga* had blood stains. He continued looking for the deceased and as he went around, he saw the deceased’s hat behind the main house which he noted had blood. He stated that on seeing this he became scared and he called Simon, (PW4) on telephone.
8. Simon’s in evidence also confirmed that he arrived at the farm in responses to Njoroge’s phone call. He stated the two accused, Kelvin and Jackson were not at the farm. They had left with all their belongings. Both Simon and Njoroge on going round looking for the deceased, they found the deceased’s body lying down behind a stone near the main house. They both confirmed he was dead. They found deceased’s body lying down with his face facing downwards. The deceased had a deep cut on the back of the head. Njoroge stated of the deceased:-

“Simon came. We went around again and we found the deceased lying on the ground with deep cut on the back of the head – very deep almost severing neck. He was dead.”
9. There was a grinder that was made available to the employees, Kelvin and Jackson to sharpen implements which they used to get fodder for the cows. Njoroge and Simon found that grinder



connected to a socket in the garage. The grinder was left below the window of the main house. Njoroge had seen the two accused use that grinder on December 5, 2016. This is what he stated:-

“On December 5, 2016 I saw the grinder being used by the accused persons (Kelvin and Jackson). The two accused used grinder daily to sharpen tools for cutting fodder. They sharpened pangas almost daily for this purpose.”

10. Njoroge said that the window grill of the main house had been partially cut.
11. Sarah Wambui Gicho owns Komothai farm. She said she resides in Nairobi. The weekend prior to the incident, she had spent it at Komothai farm. She confirmed deceased worked for her for 5 years. On December 7, 2016, she received a phone call from her farm manager informing her the deceased had been killed and the two herdsmen, Kelvin and Jackson were not at the farm. Upon going to the farm, she referred to the grinder which was below the window of the main house. She further stated:-

“It seems that an attempt had been made to cut the grills to the window of our house on the farm using the grinder. There was evidence of cutting of the grills of the door. The grinder is for sharpening fodder cutter blade so would not cut through metal.”

12. She stated that one window pane was broken and that the main house had ordinary household items which included electronics.
13. PC Stephen Koshoman who visited the scene found the deceased body at the scene. He documented the same stating the he found the body of the deceased at the scene lying on the ground with deep cut on the backside of the head. He also collected the panga, the grinder and the deceased’s blood-soaked hat.
14. Detective Constable Nassir Omar Kanane also proceeded to Komothai farm. He obtained the mobile telephone number of Jackson from the farm managers. That telephone number on being traced was located at Nairobi tea room area. He went to the tea room area in the company of the farm manager but Jackson was not traced that day. The tracing of his telephone number revealed he returned to Kiambu county. On December 8, 2016 they traced the telephone number in Nairobi tea room area but again did not succeed to find Jackson. On December 9, 2016 the telephone number was traced in Bungoma County. The police officer communicated with DCIO of Sirisia requesting that they assist in arresting Jackson. PC Benson Mwinzi, while at a police station in Bungoma at the Kenya/Uganda boarder received a whatsapp message which informed him of four Ugandans who were suspected to have committed murder in Githunguri area. He was informed that it was suspected that they would attempt to return to Uganda. He was informed that Jackson’s mobile phone number was traced heading to the area where the police station was, that is at Lwakhakha. The officer stated in evidence:-

“10. 20 am the same day (December 9, 2016) a Nairobi bus which operated Nairobi/Lwakhakha arrived at Lwakhakha market. Passengers were heading to immigration office ... which is 10 meters from police station. The routine is the passengers leave their luggage at our station. I saw a man and I suspected him. I called him Jack he responded *poa*.”

15. On being arrested, Jackson did not reveal where his mobile telephone was. He was later searched and his mobile telephone was found hidden in his “private part”. It had been switched off. Jackson was requested to switch on the phone and when he did the police called his number which call was received on Jackson’s mobile telephone.



16. Kelvin was arrested on December 11, 2016 with assistance of an Ugandan who resided in Mathare. That Ugandan was a leader in what is referred to as “Kampala Ndogo”. When he was re-arrested at Pangani police station by Constable Nassir Omar Kanene, the constable noted Kelvin’s T-shirt had some stains. Kelvin consented to the police taking his T-shirt as an exhibit.
17. Both Kelvin and Jackson offered their defences under oath.
18. Kelvin testified in Swahili. He confirmed he worked in Githunguri as a cattle herder. He was employed in November, 2016. He is a Ugandan national. He arrived in Nairobi on November 6, 2016 on being promised that he would get employment. It was his first time to being Kenya. On his arrival to Kenya, he did not understand Swahili. He understood Kigisu. He communicated with his employer at Komothai farm with the assistance of another employee who was Ugandan national called Yusuf who worked at that farm. Yusuf was not at the farm on December 6, 2016 because he had travelled to Uganda. This is what Kelvin testified of the occurrence on December 6, 2016:-
- “We woke up well as workers. I and Jackson lived where we worked. We used to take care of cows, milk and bring feeds for them.”
19. Kelvin stated that when it was 5.30 pm, he and Jackson agreed that one of them would boil water for milking the cows while the other one was to milk the cows. Kelvin said that they agreed it was him who was to go boil the water. He then narrated what happened as he went to the ‘jiko’ to boil the water:-
- “As I reached gate I heard grinder making noise. I was not concerned by that noise because it was used by all to sharpen things.”
20. Kelvin said he was then on the way to the store to cut firewood. Kelvin said he saw the deceased who spoke to him by sign language indicating he should go back. Kelvin said he too used sign language to tell the deceased he needed to milk the cows. Deceased allowed him to continue. Kelvin then stated:-
- “I went to cut firewood. I passed the first corner of the house. On reaching the 2<sup>nd</sup> corner the soldier (deceased) was waiting there to hit me with wooden stick ...
- When he attempted to hit me, it hit the ground. It missed me. I stepped backwards. He tried to hit me the second time.”
21. Kelvin said on the deceased trying to hit him the second time, he and the deceased “confronted” each other. As they struggled, the grinder stopped operating. Kelvin stated:-
- “When it stopped I saw someone coming, he had uniform like that of the soldier (deceased). He had a knife. It is as though he wanted to stab me. When I realized they were two I realized they wanted to steal. They were bigger than me. I decided to protect myself. I cut soldier with the *panga* I was going to use to get firewood. When I cut him he threw the wood(en) stick. He held onto me.
- The second person was 10 meters away. When I noted soldier wanted to hold me and the other person was coming closer, I cut the soldier the second time.”
22. Kelvin said the other person ran away. Kelvin further said that Jackson was then in the farm getting cattle fodder. Kelvin said since he was scared and he could not speak Swahili he decided to look for help. He said he kept walking and sleeping by the roadside until two people who spoke Kiganda walking by directed him to other Ugandan nationals. At Pangani area, he saw Yusuf and together they went to Pangani police station.



23. Kelvin stated that on the subject day he did not use the grinder and he denied he tried to break into his employer's main house.
24. Jackson also confirmed he was a Ugandan national. He came to Kenya November, 2016. On the material day at 3.30 pm he said:-

“We went to cut napier grass.”
25. That at 5.30 pm as he returned from the farm carrying a banana he noted the gate was not closed. He did not see Kelvin. As he went through the gate, he saw the electric wire of the grinder was connected to the socket. On the compound he saw deceased's hat covered in blood and also saw deceased lying down as though he was dead. He was unfamiliar with the area. He left the farm and used his Ugandan identity card to get assistants of the conductors. He was arrested before he reached Uganda.

### **Discussion and Determination**

26. Death of deceased was confirmed by many witnesses who were at the scene on December 7, 2016. Death was also confirmed by the doctor who performed the postmortem. The postmortem report noted the injuries the deceased suffered as:-

“Multiple deep cuts on the right side of the neck, and head.  
The right ear has multiple cuts.  
Right temporal bone fractured.  
Facial bones on the right side fractured.  
Right mandible fractured.  
Right carotid and jugular blood vessels.  
Fractured cervical spine (C1-C3) and transected cervical spine.  
Crusted blood on the face and scalp.  
Cut wounds (defence wounds) on the right fore arm 4 cm long.  
Multiple abrasions on the anterior chest and abdomen and on face.”
27. In the doctor's opinion death of deceased was caused by multiple severe injuries to the head and neck caused by penetrating head and neck injuries consistent with assault.
28. Having confirmed deceased's death, the next issue to consider is whether the deceased's death was as a result of an unlawful act or omission of the accused.
29. Kelvin and Jackson confirm they were at Komothai farm in the company of deceased on December 6, 2022. Kelvin testified that he was involved in a confrontation with the deceased and he cut the deceased according to him twice in self defence.
30. The prosecution's evidence, which was not contradicted by defence, was that the deceased was the guard at the Komothai farm. There was no evidence adduced of the presence of a second guard. The defence, when that evidence was adduced, did not pose question about a second guard, wearing similar uniform to that used by deceased being present at the farm. There was no question posed whether another guard wearing same uniform would attend the Komothai farm. The presence of a second guard was first introduced at defence hearing by Kelvin. In my view, the fact that evidence was concealed



until defence hearing points to Kelvin's defence being an afterthought. It is not credible that an issue so major to Kelvin's defence, that another guard was there attempting to steal from the main house would not be made prominent in cross examination of the prosecution's witnesses. It ought to be recalled that the deceased had worked at the farm for 5 years. There is no hint in the prosecution's evidence of the deceased being untrustworthy in carrying out his duties at all. Indeed, all the evidence points to the deceased being so trusted that not only did he reside in the employer's main house but the small gate leading to the main house was kept locked and access was obtained when the deceased opened the gate.

31. Furthermore, if indeed Kelvin was defending himself when he attacked the deceased the injuries found on the deceased's body do not reveal use of reasonable amount of force to defend oneself: see the Court of Appeal decision *Lucy Mueni Mutava vs Republic* (2019) eKLR. The deceased was cut multiple times. The said cuts were mainly on the right side of the deceased's head. The cuts were so severe that they led to 3 vertebrae in deceased's spine to be cut across, severed. Deceased had carotid and jugular vessels severed and his right mandible bone, the largest bone in the human skull was fractured. All those injuries were suffered by the deceased if we are to believe the evidence of Kelvin when he, Kelvin, was protecting himself from a stick which the deceased allegedly wielded a 1½ meter long stick. It is pertinent to note that there was blood stains found on Kelvin's T-shirt whose DNA was confirmed by the government chemist to match DNA of the deceased.
32. The danger Kelvin may have apprehended when confronted with 1½ meter long stick did not justify the extensive and horrific injuries suffered by the deceased.
33. The evidence of Kelvin is that the deceased attempted to hit him with that stick but the stick hit the ground. Kelvin when under cross examination stated that the deceased was standing in front of him when he tried to hit him. There was no evidence adduced showing Kelvin was left handed. It follows that as he and deceased faced each other, Kelvin held the *panga* with his right hand. He used that right hand to strike deceased as stated, to protect himself from the stick. Such strike with the *panga*, if both Kelvin and deceased stood facing each other would have cut the deceased on the left side. Yet that is not what the doctor who did the post mortem found. The doctor found the major injuries were on the right-hand side of the deceased. This implies deceased was cut as his back was towards the attacker. In other words, deceased was not facing his attacker when he was struck with a *panga*. Further, if indeed Kelvin only struck the deceased with the *panga* twice then the question that begs an answer is, where did all the other injuries on the deceased's body come from.
34. Kelvin was mute on where he took the *panga* after he used it to cut the deceased. All the prosecution's evidence of the witnesses who were at the scene pointed to the *panga* being put in the ashes in the kitchen shared by Kelvin and Jackson. The *panga* understandably, when examined by the government chemist did not have traces of blood perhaps due to exposure to the ashes. If the action of cutting the deceased was for self-protection why was the *panga* put in the ash in the kitchen. Why was there concealment of traces of blood on the *panga*.
35. The other evidence which was not contested by defence, which discredits the defence of self defence is the fact that both Kelvin and Jackson ran away having carried away all their belongings. It is important to consider a decision of Canadian Supreme Court, which I find persuasive, that is the case of *R vs Davis* 2021 ONSC 8163 (CanLII) as follows:-

“In R v Pigeon, 1992 CanLII 869 (BCCA), the British Columbia Court of Appeal was considering an appeal against sentence. In its judgment, the Court of Appeal referred to the trial judge's ruling wherein it was stated:



Normally a person who runs away from the police in such circumstances does so because he wants to escape, and an innocent person does not normally have any reason for wanting to escape from the police. If I am to find that Pigeon's sole reason for running away was that he did in fact fear that he would be brutally treated by the police there must at least be some evidence before me, beyond mere speculation, to raise a reasonable doubt about his state of mind. I have not heard any evidence that Pigeon himself shared the attitude of fear of police brutality said to be held by most other aboriginal people..."

36. The fact Kelvin and Jackson left the farm with all their belongings points to the fact that they ran away with the hope of escaping the consequences of what they had done. The reason for going away from the farm as narrated by both Kelvin and Jackson is not credible. Kelvin spoke and testified before court in perfect Swahili. Jackson, although he spoke through an interpreter, I noted in his evidence at one time, he responded to a question posed by his advocate in Swahili, even before the interpreter had opportunity to interpret the same in Kigisu language. I have no doubt that both Kelvin and Jackson at the material time spoke and understood Swahili language. Why else did they not pose a question when cross examining the prosecution's witnesses to suggest they did not understand any other language but Kigisu. Jackson had a mobile phone. He had obviously shared his number with the farm manager. When the farm manager (Njoroge) arrived at the farm and did not find Kelvin or Jackson said he tried to telephone Jackson but the call was not answered. The only reason the manager would have called Jackson is because they would have been able to communicate. I also noted Justice J Ngugi (as he then was), on February 20, 2017 when he took plea of both accused, he recorded in the proceedings:-

"Court: The court confirms that both accused understand Kiswahili but notes that the 2<sup>nd</sup> accused (Jackson) will need a Kigisu interpreter during the trial and other consequential hearings."

The learned judge later on that day recorded that it was unclear if the accused fully understood Swahili.

37. What the above shows is that the accused were not entirely unable to speak or hear Swahili. In my view, the little of the Swahili language they understood to lead the court to note they both understood Swahili means that if indeed they were innocent of the offence, they ought to have reported the death of the deceased rather than run away.
38. I am conscious of the fact that apart from the admission by Kelvin that he cut the deceased with a *panga* there is no direct evidence connecting Jackson to the offence. What the court needs to consider is whether there is circumstantial evidence against Jackson where an inference of guilt can be drawn; and whether the circumstances definitely and unerringly point to accused's guilt; and whether the circumstances taken cumulatively forms a chain so complete that there is no possibility that the crime was committed by anyone else: see the Court of Appeal decision of *Abamad Abolfathi Mohammed and another vs Republic* (2018) eKLR, as follows:-

"However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr App R 21: -



“It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” ...

Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr App No 32 of 1990*, this court set out the conditions as follows:-

‘It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.’”

39. Prosecution, while relying on circumstantial evidence must establish that there are no other co-existing circumstances which could weaken or destroy inference of guilt: See the case *Sawe vs Republic* (2003) eKLR.
40. Kelvin admitted he cut the deceased twice in self defence. I have in my discussion hereinabove discounted that self defence. The attack on deceased was too vicious to account for one defending himself.
41. Further, the prosecution’s evidence was that the deceased’s body was dragged and his body was hidden behind a stone near the main house. Kelvin’s explanation in this regard is that after he cut the deceased, the deceased rolled away. I am afraid that that evidence of Kelvin is not supported by the injuries noted by the doctor. The doctor found deceased had abrasions on the chest abdomen and the face. The prosecution’s witnesses confirmed that where the deceased’s hat was found there was a lot of blood. This indeed, is supported by scene of crime photograph “a” “b” and “c”. photograph “c” which clearly shows that the deceased’s body was dragged leaving on the ground a trail of blood. The photograph does not support Kelvin’s evidence that the deceased rolled.
42. For reasons best known by Kelvin he testified that as he cut the deceased Jackson was not present. I beg to differ with that account. It would have taken more than one person to cut the deceased drag (so extensively) and hide his body then go to the kitchen and hide the *panga* in the ash. The evidence of the prosecution leads court to cogently and firmly state that the two, Kelvin and Jackson were the perpetrators of the killing of the deceased and attempted to cut the grill of the main house. There is no way one of them could have accomplished all that on their own. The cutting of the grill having not succeeded both Kelvin and Jackson decided to take away all their belongings and run away. Jackson even decided to run away to Uganda. To succeed doing so he kept switching off his mobile telephone to probably evade detection. When he was arrested in Bungoma, Jackson was found to have hidden his phone in his private part. It was then switched off. In my view the prosecution’s evidence presents such a complete chain of circumstances which leads this court to finding that within all human probability, the murder of the deceased was committed by Kelvin and Jackson and no one else. The defence offered by Kelvin is not tenable because Njoroge the farm manager testified it was only the deceased who had the key to the compound to the main house. That compound was surrounded by a stone wall. It beats logic for the person who always had the keys to the main house how he would collude with another



guard as suggested by Kelvin to break into the main house. Deceased would have been the main suspect to such a theft. Further, he had worked in that farm for 5 years until he gained the confidence of the employer. He was made custodian of the keys.

43. I reject the defence offered by Kelvin and Jackson.

### **Conclusion**

44. In the end, this court finds the prosecution proved beyond reasonable doubt that Lohorere Kelvin and Mukooli Jackson murdered Mailu Meli Wambua (deceased). I convict both of them of the charge of murder.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2022.**

**MARY KASANGO**

**JUDGE**

In the presence of:-

Coram:

Court Assistant:- Mourice

For 1<sup>st</sup> Accused:-

For 2<sup>nd</sup> Accused:-

For DPP:- Mr. Kasyoka

Court

Judgment delivered virtually,

**MARY KASANGO**

**JUDGE**

