



**Office of the Director of Public Prosecutions v Kitti (Criminal Case
12 of 2020) [2022] KEHC 16414 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 12 OF 2020
A. ONG'INJO, J
NOVEMBER 24, 2022**

**BETWEEN
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR
AND
KAULY DZOMBO KITTI ACCUSED**

JUDGMENT

1. The accused Kauly Dzombo Kitti is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars are that Kauly Dzombo Kitti on the May 11, 2020 at Vwevvesi village in Kizingo sub-location, Chonyi, Sub-County within Kilifi County, jointly with others not before court murdered Gabriel Munga Mwaidza.

Prosecution case

3. The prosecution tendered the evidence of 6 witnesses. PW1 testified that the deceased was his friend & that on May 11, 2020 he and the deceased boarded a motorbike to go for a burial in Katikirieni. When they arrived it was raining so they sheltered at a club as they took palm wine.
4. That at 2.00 pm other people also went to the club. That they took their drink (palm wine) up to 4.00 pm. That the deceased then made a phone call to his girlfriend who went to the club after 6pm.
5. That the deceased and PW1 together with the girlfriend then went to deceased persons place to avoid curfew. That they entered a nearby club where they bought palm wine. That after about half an hour the accused person arrived.
6. PW1 said the accused is his neighbour and he had known him since childhood. That the accused entered the club and called the deceased and they went to the road and spoke for over 30 minutes. That



- when the deceased returned to the club he explained to his girlfriend that he had a man talk with the accused.
7. That after about 30 minutes the accused again went to the club and told the deceased they should get to the deceased persons place of work which is about 10 minutes-walk. That immediately the accused and the deceased left they heard noise and when he went to see what was happening he found the accused and the deceased quarrelling.
 8. That the accused was asking about a goat. That a crowd had gathered and accused started slapping the deceased and other people joined and attacked the deceased. He said the people who attacked the deceased were armed with iron bars, knives and stones. PW1 said that accused was among those who attacked the deceased. That the deceased and his group made the deceased board a motor cycle while demanding to know the whereabouts of goats.
 9. PW1 said that the attackers attacked anyone who approached to intervene. That the attackers went to the scene in 6 motorbikes which they boarded and went towards Kizingo. PW1 said they followed on foot and on arrival at Kizingo they found the deceased had been killed and burnt and the attackers had escaped.
 10. PW1 said they waited for the police at the scene and they went the next day to collect the body at 2.00 pm. PW1 in cross examination said the accused did not go to Kizingo with the people who went on motorbikes and they did not find him there. He said the accused did not try to rescue the deceased but it was his son who tried to rescue the deceased.
 11. PW2 Nicholas Mzungu Mwakirende testified that on May 11, 2020 at 6.00 pm he was at home and that the deceased and Joseph Kiti went to his palm den in the company of a female customer and sat on one table. That while the deceased and his companion were drinking the accused went to the club and joined them and after a while left in the company of the deceased and went to a shade about 10 metres away where they spoke for 15 minutes before the deceased went back to the club.
 12. PW2 said that it was still day time when the accused went to the club to get the deceased and that even at night there is usually security lights. PW2 said the accused and deceased spoke for 15 minutes in normal tones and their discussion did not attract anyone's attention.
 13. That at 6.30 pm the deceased left and PW4 also went to his house at 6.45 pm from where he heard boda boda riders making noise and he did not pay attention as it was normal for them to make noise. The next day PW2 learnt that Gabriel had been killed by the people who were making noise the previous evening. PW2 said he had no dispute with the accused.
 14. PW3 Penina Kaloki Rimba testified that she heard screams on May 11, 2020 at 8.00 pm in about 2 minutes' walk away from her home. She proceeded to the scene and found it was her uncle's son Gabriel who was being beaten. She said she recognized Gabriel's voice and he was crying and identified the white shirt he was wearing during the day.
 15. PW3 said the assailants beat the deceased for 30 minutes after which they carried him on a motorbike and rode away. PW3 went to inform the deceased's brothers about the assault and they accompanied her towards the direction the assailants went. That they walked for 2 hours and found Gabriel had been killed and his body dumped in Kizingo where he lay facing upwards while half naked. PW3 said she did not see the accused who is the brother to her husband.
 16. PW6 said she found 6 people beating the deceased but it was dark and she did not identify them. She said she did not know why the deceased was being beaten. She said the assailants were not from their village. She said fencing polls were used to beat the deceased.



17. PW4 Mariam Mbodze Gonyo the wife to the deceased testified that when she returned from the farm in the evening with her children, she prepared supper after which she prepared the children to go to sleep but she remained awake with her daughter up to 10.00 pm when she heard people outside saying 'mtu ameuliwa'. By then the deceased who usually returned home at 10.00 pm from the grocery shop had not returned.
18. That she checked for other family members within the compound but they were not there. That she followed the people she heard say someone had been killed and when they reached the scene she found it was her husband who lay on the ground facing upwards and did not have a shirt. She said the husband had panga cuts all over the head. That police went to the scene and collected the body for preservation at Kilifi. PW4 said she learnt her husband had been killed because of a goat. She said she had never seen her husband take home any suspected stolen items.
19. PW5 Ibrahim Sheria Saidi testified that on May 10, 2020 at 11.00 pm he was asleep when sister-in-law to the deceased went to him and informed him that the deceased was being beaten at Vwevvesi school junction. She told him brothers of the deceased had already gone ahead. That he followed and he caught up with John and Jimmy near the junction. That he went ahead of them and on reaching where he was told the deceased was being beaten they did not find him but saw people walking back from vipingo directions. The people they met told them the person had been finished. That they walked ahead and found the deceased already dead. That the body had burn injuries and his hands were tied at the back. That the clothes he was wearing were burnt and blood was oozing from the back of the head. That when PW5 called the accused who is a close family member to confirm if he was aware of what had happened and the accused confirmed he was aware but that he was at his house sleeping.
20. That at dawn they went and reported to chief before going back to the scene and chief started looking for the accused but he was in the farm 1 hour 30 minutes walking distance. That police went to the scene and recorded statements and took body to the mortuary. That PW5 was instructed to inform the accused to go to the Kijipwa Police Station but he was not reachable on phone. That when PW5 later met the accused he denied having been involved in the murder but confirmed that his goats were stolen and he had not recovered them.
21. In cross examination PW5 said the members of public who were at scene said the deceased was killed for allegedly stealing the accused person's goats but he was not at scene.
22. PW6 Dr Ruth Nyang Wallinge of Kilifi County Referral Hospital examined the body of the deceased and established cause of death as head injuries due to blunt face trauma and complications of 54% degree burns on total body surface area.
23. The prosecution was given time to avail the investigating officer to testify but after 4 consecutive adjournments at the instance of the prosecution the court declined to grant adjournment and the prosecution case was closed.

Defence case

24. The accused was placed on his defence and he denied having killed the deceased. He said he was at home the entire day on May 11, 2020 and while at home he learnt his goats were stolen. It is Samuel Chapa Katana who takes care of his goats who reported to him at 4.00 am that his goats were stolen. That he went and reported to his friend John Chitovi that his 4 goats were stolen and John told him to go back home. That when he went back home they had a birthday for Tobia's Christopher Kiti and he remained at home.



25. That on May 11, 2020 at 7.00 am, he went to the road where he met Gabriel who asked if it was true that his goats were stolen and he confirmed. That Gabriel said he would help with investigations of who stole the goats and promised to meet him in the evening. That in the evening he went to Gabriel's kiosk and he was told he was at the palm wine club. That when he went to the club Gabriel saw him and went to where he was and told him he wanted more time as he was with a lady. That he waited for Gabriel but because of curfew he went and told Gabriel he was going home at about 7.45 pm. He said he left Gabriel at the club and went home. That while at home he heard screams.
26. That Ibrahim called him and informed him Gabriel had been apprehended by a mob and taken to Kizingo. He said he did not get out when he heard screams. He said he heard screams concerning goats and that people were saying the goat thief had been found. The accused said he did not see the deceased being beaten. He said the following day he learnt that Gabriel had been finished and burnt at Kizingo. He said he did not go to Kizingo which is 2km. The accused said he did not quarrel with the deceased and he was not involved in the murder. He said the deceased person's children played with his children as they were neighbours.
27. In cross examination the accused said that he reported to John Chiyovi the brother of the deceased that his goats had been stolen. He said the deceased was his neighbour and that he saw the deceased at the palm wine club prior to the incident.
28. He confirmed Bandari was with the deceased at the club together with another woman. He said he did not go to the club the 3rd time but when he had wanted for the deceased for 35 minutes, he went to tell the deceased he was going home. The accused said he could not remember if the deceased made any phone calls when they were together. He also denied having told police that he and Gabriel were attacked together.
29. The accused said he did not know who beat the deceased. He said that he escaped when people started beating him and the deceased. He said Runya his elder brother made a phone call asking where he was and he said he was at home. He said his brother wanted to know if he was safe. The accused said that he told the police about his child's birthday but it was not recorded in his statement.
30. He said he heard screams while people were escaping and even when in the house he could still hear the screams from the mob. He said that Joseph Kiti testified that he saw the accused hit the deceased on the neck. The accused said that Joseph knew him very well. The accused said Joseph Kiti who was with the deceased at the club was his uncle.

Submissions

31. The accused person's advocate filed submissions dated September 26, 2022 in which it was contended that the deceased was assaulted by unknown people who forcefully placed him onto a motorbike and was later found dead in Kizingo area having been killed and burnt.
32. It was also submitted that the investigating officer did not testify and therefore there was no investigations that critically linked the accused person with the death of the deceased person. It was further submitted that the accused was also assaulted at the time the deceased was being beaten and he ran for his safety. The defence submitted that there was no single witness who stated that he saw the accused in Kizingo area assaulting the deceased and/or lighting the deceased ablaze.
33. Further that no concrete evidence has been put forth by the prosecution to show that the accused had malice aforethought and which he placed in motion leading to the death of the deceased. The defence urged the court to acquit the accused person.



Analysis and determination

34. From the evidence on record for the prosecution and defence the issues for determination are: -
- a) The fact of death of the deceased
 - b) Cause of death
 - c) Whether cause of death was unlawful act and/or omission.
 - d) Whether the accused committed an unlawful act and/or omission
 - e) Whether the unlawful act and/or omissions was actuated with malice aforethought.

Fact of death and cause of death

35. There is no dispute as to the cause of death. All witnesses for the prosecution and even the accused acknowledge and confirm that Gabriel Munga Mwaidza died and that his death was caused by head injury due to blunt force trauma and complications of 64% of the total body surface area of mixed 1st, 2nd and 3rd degree bruises as per Exp 1 – post mortem report – produced by Dr Nyangi – PW6.

Whether cause of death was an unlawful act

36. PW6 Dr Nyangi observed that the deceased had his feet tied together at the ankle joint with a sisal rope and he had recent head injuries namely: -Lacerations to the right forehead;Left forehead;Chin;Left parietal region.
- That the deceased also had mixed 1st, 2nd and 3rd degree burns on the head, trunk (front part), right upper limbs, left upper limbs, genitalia, right lower limb and left lower limb.
37. On the deceased persons head there was extensive subgaleal hematoma, with fracture at the base of the skull, complete fracture and displacement of the ethmoid bone. That there were also lacerations on the frontal lobes; extensive subdural hematoma on the right and left parietal – occipital lobes. The nature of the injuries are such that they were intentionally inflicted and were therefore not accidental and were not self-inflicted.
38. The multiple serious cut and burn wounds must have been inflicted only by a person or persons whose motive was to ensure the deceased sustained grievous harm or even death as it happened herein. The tying of the legs and burning even after inflicting fatal injuries and taking the deceased on a motorbike about 2km from his village could only have meant that he could not have been saved even if he had not died as he was removed from the reach of his relatives' family members and neighbours. This court finds that the death was caused by an unlawful acts actuated with malice aforethought.

Whether it was the accused who committed the unlawful act

39. PW1 said that he was with the deceased and a woman a palm wine club when the accused went and called the deceased and they went some distance from the club and talked for a considerable period of time. That when the deceased returned to the club and his girlfriend asked what made him take so long with the accused the deceased explained it away as man talk.
40. That after sometime the accused again called the deceased and told him they should get to his place of work, they went out of the club, it did not take long before he heard screams. On going to check what was happening, he found the accused and the deceased quarrelling. That the accused was asking about a goat. That a crowd had gathered and accused slapped the deceased and about 10 other people



joined in attacking the deceased using iron bars, knives & stones. PW1 said he saw the accused as one of those who attacked the deceased.

41. Although the accused had initially in his defence denied having been at the place where the deceased was attacked, he later said that he was also attacked together with the deceased and he ran for his life but he had no injuries. The accused person's own brother PW5 said that when he arrived at the scene where the deceased had been killed he called the accused to ask if he knew what had happened to Gabriel and the accused confirmed he knew he had been killed but he was in the house sleeping. No question was put to PW5 as to whether the accused was also attacked and injured together with the deceased. What came out is that accused person's goats were stolen at night and that he suspected the deceased and he lured the deceased to where he and his goons attacked and injured him before he was forcefully carried on a motorbike and taken 2km away in Kizingo where he was beaten more and his body abandoned after being set on fire.
42. The accused was the author of the plan to kill the deceased. He was the 1st to trigger the assault by slapping the deceased before others joined and fatally injured the deceased. It therefore does not matter that he was not seen at Kizingo that he did not go to Kizingo. It is the plan he hatched by luring the deceased out of the club that was executed and finished at Kizingo.
43. This court finds that the prosecution has proved beyond all reasonable doubt that the accused person committed the murder of the deceased herein Gabriel Munga Mwaidza. The accused is found guilty and is accordingly convicted under section 215 of *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 24TH DAY OF NOVEMBER 2022**

HON LADY JUSTICE A ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms Kambaga for State

Mr Anangwe Advocate holding brief for Mr Okanga Advocate for Accused person

Accused – Present in person

HON LADY JUSTICE A ONG'INJO

JUDGE

