



**Republic v Gakunya (Criminal Case 10 of 2019)
[2022] KEHC 16644 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 10 OF 2019
CM KARIUKI, J
DECEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

ISAAC GITONGA GAKUNYA ACCUSED

JUDGMENT

1. The accused was charged with the offense of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 Laws of Kenya. The particular being that on March 26, 2019, at Kiboya village Leshau Pondo Sub Location in Mathingira Location within Nyandarua County murdered Stanley Maina Githu.
2. He pleaded not guilty, and the matter went to a full hearing. He was thereafter put on his defence, and he tendered sworn defence.
3. Prosecution evidence.
4. PW 1 Antony Ngunjiri Wahome testified that both the accused and the deceased were working for him on the house he was building. The accused was his site manager, while the deceased was a welder working on the doors and windows of the house.
5. He testified that on May 26, 2019, the accused person called him and informed him that there had been an argument between the deceased and a Boda Boda rider who had carried the deceased. The accused demanded Kshs 150 from PW1 to pay the said Boda Boda rider; PW1 promised to send him the money the following day. He later learned that the deceased had been killed.
6. PW2 Titus Wahome Kimondo is the father to PW 1. He testified that on May 26, 2019, he heard some shouting and commotion from PW1's compound. Upon arrival at PW 1's compound, he found that the gate to the compound was closed from the inside, and he found this unusual. Once inside the



- compound, he found the deceased lying unconscious with visible head injuries. He interrogated the accused, and the accused told him that he had hit the deceased on the head with a wooden stick.
7. He also said that earlier in the day, he was with the deceased at Ndogino market, where they had taken some alcohol. He testified that the police collected the wooden stick which the accused used to hit the deceased and kill him. PW3, Peninah Mugure Muchiri corroborated PW2's testimony.
 8. PW4 Emmanuel Maweu Nzioki, was the Boda boda rider who carried the deceased on the fateful. According to his testimony, they had agreed on a fare of Kshs 150 to Kiboya, PW 1 's compound. Upon cross-examination, PW4 stated that he did not hit nor attack the deceased or other bodaboda riders if they were there.
 9. The investigating officer PW 8 Sergeant Liana testified that during her investigations, she established that the accused person was infuriated that the deceased boarded a motorcycle and then refused to pay the Boda Boda rider who had given him a ride.
 10. The boda bodarider took it out on the accused person, which made the accused angry. She informed the court that this led to a fight between the accused and the deceased.
 11. The post-mortem report produced by PW5 as exhibit No 3, on page 1, clearly indicates the date and time of death as May 26, 2019 at 2300 hours. The deceased died due to severe head injury following multiple blunt force trauma to the head.
 12. In his defence accused denied killing the deceased.
 13. The parties were directed to tender argument via submission, which they filed and exchanged.

Prosecution Submission

14. The prosecution submitted that the ingredients of murder are well set out in the case of *Republic v 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.The death of the deceased has occurred
15. Stanley Maina Githu was identified as the deceased. The post mortem, exhibit No 3, on page 1, clearly indicates the date and time of death as May 26, 2019 at 2300 hours. The deceased died due to severe head injury following multiple blunt force trauma to the head.
16. The doctor who performed the post-mortem, Doctor Miringu, confirmed that he performed the post-mortem on May 30, 2019, four days after the deceased had died; he died on May 26, 2019. The post-mortem was done in the presence of the deceased's brother, Stephen Mwangi Githu, and the deceased's sister, Esther Nyambura Mathenge.
17. All the witnesses, PW1, PW2, PW3, PW4, and PW8, recorded statements at the police station that the incident leading to the deceased's death occurred on May 26, 2019. The witnesses further testified in court that the deceased died on May 26, 2019.
18. That the accused committed the unlawful act which caused the death of the deceased.
19. PW 1 Antony Ngunjiri Wahome testified that both the accused and the deceased were working for him on the house he was building. The accused was his site manager, while the deceased was a welder working on the doors and windows of the house.
20. He testified that on May 26, 2019, the accused person called him and informed him that there had been an argument between the deceased and a Boda Boda rider who had carried the deceased. The accused



demanded Kshs 150 from PW1 so as to pay the Boda Boda rider; PW1 promised to send him the money the following day. He later learned that the deceased had been killed.

21. PW2 Titus Wahome Kimondo is the father to PW 1. He testified that on May 26, 2019, he heard some shouting and commotion from PW1 's compound. Upon arrival at PW 1 's compound, he found that the gate to the compound was closed from the inside, and he found this unusual.
22. Once inside the compound, he found the deceased lying unconscious with visible head injuries. He interrogated the accused, and the accused told him that he had hit the deceased on the head with a wooden stick. He also told him that earlier in the day; he was with the deceased at Ndogino market, where they had taken some alcohol. He testified that the police collected the wooden stick which the accused used to hit the deceased and kill him. PW3, Peninah Mugure Muchiri corroborated PW2's testimony.
23. PW4, Emmanuel Maweu Nzioki, was the Boda Boda rider who carried the deceased on the fateful. According to his testimony, they had agreed on a fare of Kshs 150 to Kiboya, PW 1 's compound. Upon cross-examination, PW4 stated that he did not hit nor attack the deceased or other Boda Boda riders if they were there.
24. From the testimony of the prosecution witnesses, it is clear that the accused was at the scene of the murder, and he is the one that hit the deceased with a wooden stick on the head.
25. He even told PW2 that he hit the deceased on the head. The deceased was killed by the accused, who beat him on the head with a wooden stick, causing a severe head injury that led to the death of the deceased.
26. The investigating officer PW 8 Sergeant Liana testified that during her investigations, she established that the accused person was infuriated that the deceased who boarded a motorcycle and after that refused to pay the Boda Boda rider who had given him a ride.
27. The Boda boda rider took it out on the accused person, which made the accused angry. She informed the court that this led to a fight between the accused and the deceased. This corroborates the evidence of PW1 and PW4.
28. The accused person was infuriated with the deceased and thus hit him several times on his head, leading to his death. The post-mortem report shows that the deceased died as a result of multiple blunt force trauma to the head. The accused intended to seriously injure the deceased.

Accused's Submissions

29. The defence counsel submitted that the charge sheet's particulars fall short of the statutory and constitutional requirements. In that, in the particulars of the information, allege that the date of death was March 26, 2019 and proceeded during the trial to tender evidence of May 26, 2019 as the date of the fight without ever amending the information at the close of their case. The exact time and date of death are unknown as no medical evidence was led in that regard. The post-mortem was done on May 30, 2019 at 3.30 pm.
30. It is submitted that the information put the place of death as Kiboya village, yet according to the evidence lead at trial, no death ever took place at the said village and consequently the evidence shows at practice contradicts the information.
31. The particulars omit the essential ingredient of men's rea, the malice afore thought or premeditation. It also omits the requirements of actus reus, namely, causing death or killing another person by unlawful



act or omission. It is not enough to say ...” murdered another person”. To that extent, the charge is fatally and incurably defective.

32. The plea taken on a defective, ambiguous, and vague charge cannot be unequivocal, let alone form the basis for the trial or prosecution of the accused person, a finding on a case to answer, or conviction.
33. The prosecution must prove their case beyond a reasonable doubt. This burden of proof does not shift. It rests on the prosecution throughout the trial.
34. In an attempt to discharge the burden, the prosecution called a total of 8 witnesses.
35. The brief facts are that the accused person Isaac Gitonga Gakuya and the complainant Stanley Maina Githu were employees or workers of Anthony Ngunjiri Wahome at a construction site in Kiboya village.
36. The prosecution alleges without official complaint that the two were engaged or involved in a fight where both sustained injuries.
There was no independent eye witness who testified in this case as having witnessed the alleged fight.
37. The witnesses who visited the scene of the fight at Kiboya Village found the two alive; the accused person, who was bleeding from his face and his clothes were blood-stained, is alleged to have been stabbed by Stanley Maina Githu using a kitchen knife exhibited in court. The said kitchen knife is not a murder weapon.
38. Stanley Maina Githu is alleged to have had several injuries, although nobody knew who saw or witnessed their infliction or by what means. He was rushed to the Nyahururu County and Referral Hospital for treatment and was admitted. The accused person was also treated and discharged at the same hospital.
39. There is no evidence that the two ever met again after that. There is no medical evidence in the form of or like a P3 form or any other medical evidence from the said Hospital to shed light on the degree of harm or at all sustained by Stanley Maina Githu as a result of the fight or whether they were life-threatening or not.
40. The fact that the said Stanley Maina Githu died subsequently does not, on the face of it (prima facie), connote murder. If the subsequent death can be termed as murder, then the said Hospital must be called upon to account or explain the real cause of death other than medical negligence. The prosecution miserably failed to table evidence of any official complaint regarding murder by the accused person.
41. The investigating officer that PW8 failed to produce any occurrence book report on any fight, let alone murder. Any criminal investigation not anchored or based on an official complaint is foreign to our laws and the Constitution and is bound to fail as it is a wild goose chase. It beats logic and is preposterous for the prosecution to intend to charge the two for affray, which they changed on paper to murder without any new evidence, medical evidence, or official complaint. The trial without shame purported to change or to treat Kiboya village as the murder scene, yet it was not so.
42. There is evidence that Stanley Maina Githu was transported to Kiboya Village by PW4, who said upon arrival the said Stanley Maina Githu, who was drunk and had urinated on himself, refused to pay the fare, saying he had no money; he denied having been driven there, he turned against the rider, threw a stone at him thereby causing an argument, commotion and a disturbance for which the accused intervened and spoke to their employer over the phone on the payment of the fare.



43. PW4 further testified that Stanley Maina Githu had to jump over the fence into the compound. It is submitted that the commotion occasioned by Stanley Maina Githu to PW4 was of such a magnitude that he might have been assaulted as a result of his refusal to pay and violent conduct of throwing stones at the raider.
44. Looking at the post-mortem report, Stanley Maina Githu sustained multiple injuries, including whip lashes, for which the prosecution rendered no explanation.
45. PW8 by exhibiting the kitchen knife used to stab the accused person and the three blood-stained clothes worn by the accused person during the fight, as well as a black jacket and two alleged clubs found at the scene of the fight, can be said to have been testifying of affray and not murder.
46. PW8 did not deem it fit to have the blood on the kitchen knife or the two clubs or the clothes medically tested and examined to shed light on whether it was human blood and whose it was.
47. For example, the blood on the kitchen knife and the three clothes worn by the accused person, if they had been medically examined and found to belong to the accused person, would conclusively prove that the accused was a victim who would have died from the aggression by the said Stanley Maina Githu. Again, the blood on the two clubs, if the same had been tested, could have shown that the same belonged to the accused and not Stanley Maina Githu; therefore, the two clubs were not used to assault him.
48. The two clubs, if indeed they were used during the fight one, fail to understand why they caused four wounds on the head of Stanley Maina Githu without breaking or depressing his skull or breaking his hands, legs or trunk, or shoulder blade! The four wounds have been inflicted by a sharp object, not a blunt one.
49. The evidence of PW5 as to the cause of death is highly doubtful, unsupported by facts, and lacking in any scientific value or credibility. For example, the allegation of three wounds on one side of the head and one wound on the other side of Stanley Maina Githu were caused by a blunt object, yet they were open wounds for which one had to be stitched using six nylon sutures.
50. This beats logic, and the testimony of the said doctor is incredible, suspect wishful thinking, and of no probative value to the prosecution's case. The doctor assumed that the said Stanley Maina Githu had been killed at Kiboya Village, and his body was transferred to the mortuary, which was not the case.
51. He had no medical evidence of the admission of Stanley Maina Githu at the Hospital, the kind of treatment received, or the fact that he died while undergoing treatment. He had no evidence to attribute the death to a fight or due to medical negligence approved to murder.
52. The hard-pressed prosecutor PW8 to explain the motive for the fight or affray and not necessarily murder, to which she said there was commotion arising from the Stanley Maina Githu's refusal to pay the fare, which, again could be explained that the accused while intervening and calling the employer over the non-payment of the fare connotes lack of malice aforethought, premeditation, grudge or any of the mental statuses under the law requirements for murder.
53. The prosecutor failed to produce the certificate of death, serial number 1xxxx3. The prosecution could not pinpoint the actual date and time of death, which differs from the time of the alleged fight at Kiboya Village. The post-mortem was conducted on May 30, 2019 at 3.30 pm.
54. The missing medical evidence of admission, treatment, time of death, and body transfer to the mortuary cannot be presumed or ignored.



Issues, Analysis, And Determination.

55. After reviewing the evidence on record and the submissions filed, I find the issues are; whether the ingredients of murder were proved beyond any reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find conviction in a criminal case; the trial court has to be satisfied with the accused person's guilt beyond a reasonable doubt. On proof beyond a reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1, where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in many instances. See *Festus Mukati Murwa v R*, [2013] eKLR.”

56. In the famous case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated about the degree of proof beyond a reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Suppose the evidence is so strong against a man to leave only a remote possibility in his favour which can be dismissed with the sentence. In that case, it is possible, but not in the least probable, that the case is proved beyond a reasonable doubt. Still, nothing short of that will suffice.”

57. And in *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized the phrase proof beyond a reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond a reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (emphasis)

58. Applying the above principles to this case, was there proof beyond reasonable doubt that there was prove of ingredients of murder in the instant matter?

59. The prosecution called a total of eight witnesses in support of its case.

60. The ingredients of murder are well set out in the case of *Republic v 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.

61. The death of the deceased has occurred;

62. Stanley Maina Githu was identified as the deceased. The post mortem, exhibit No3, on page 1, clearly indicates the date and time of death as May 26, 2019 at 2300 hours. The deceased died as a result of a severe head injury following multiple blunt-force trauma to the head.



63. The doctor who performed the post-mortem, Doctor Miringu, confirmed that he performed the post-mortem on May 30, 2019, four days after the deceased had died; he died on May 26, 2019. The post-mortem was done in the presence of the deceased's brother, Stephen Mwangi Githu, and the deceased's sister, Esther Nyambura Mathenge.
64. All the witnesses, PW1, PW2, PW3, PW4, and PW8, recorded statements at the police station that the incident leading to the deceased's death occurred on May 26, 2019. The witnesses further testified in court that the deceased died on May 26, 2019.
65. That the accused committed the unlawful act which caused the death of the deceased.
66. PW 1 Antony Ngunjiri Wahome testified that both the accused and the deceased were working for him on the house he was building. The accused was his site manager, while the deceased was a welder working on the doors and windows of the house.
67. He testified that on May 26, 2019, the accused person called him and informed him that there had been an argument between the deceased and a boda boda rider who had carried the deceased. The accused demanded Kshs 150 from PW1 so as to pay the Boda Boda rider; PW1 promised to send him the money the following day. He later learned that the deceased had been killed.
68. PW2 Titus Wahome Kimondo is the father to PW 1. He testified that on May 26, 2019, he heard some shouting and commotion from PW1 's compound. Upon arrival at PW 1 's compound, he found that the gate to the compound was closed from the inside, and he found this unusual.
69. Once inside the compound, he found the deceased lying unconscious with visible head injuries. He interrogated the accused, and the accused told him that he had hit the deceased on the head with a wooden stick. He also said that earlier in the day, he was with the deceased at Ndogino market, where they had taken some alcohol.
70. He testified that the police collected the wooden stick which the accused used to hit the deceased and kill him. PW3, Peninah Mugure Muchiri corroborated PW2's testimony.
71. PW4, Emmanuel Maweu Nzioki, was the boda boda rider who carried the deceased on the fateful date. According to his testimony, they had agreed on a fare of Kshs 150 to Kiboya, PW 1 's compound. Upon cross-examination, PW4 stated that he did not hit nor attack the deceased or other bodaboda riders if they were there.
72. From the testimony of the prosecution witnesses, it is clear that the accused was at the scene of the murder, and he is the one that hit the deceased with a wooden stick on the head. He even told PW2 that he hit the deceased on the head. The deceased was killed by the accused, who hit him on the head with a wooden stick, causing a severe head injury that led to the death of the deceased.
73. The investigating officer PW 8 sergeant Liana testified that during her investigations, she established that the accused person was infuriated that the deceased boarded a motorcycle and, after that, refused to pay the boda boda rider who had given him a ride.
74. The Boda Boda rider took it out on the accused person, which made the accused angry. She informed the court that this led to a fight between the accused and the deceased. This corroborates the evidence of PW1 and PW4.
75. The accused person was infuriated with the deceased and thus hit him several times on his head, leading to his death. The post-mortem report shows that the deceased died as a result of multiple blunt-force trauma to the head. The accused intended to seriously injure the deceased.



76. PW 8 confirms the deceased and the accused fought, resulting in the deceased being injured seriously with a result of death from severe head injuries. The prosecution sought PW8 to explain the motive for the fight or affray to which she said there was commotion arising from Stanley Maina Githu's refusal to pay the fare, which, again, could be explained that the accused, while intervening and calling the employer over the non-payment of the fare creates an inference of lack of malice aforethought, premeditation, grudge or any of the mental status under the law requisite for murder.
77. Though the accused never raised issues of fighting the deceased, this court is inclined to hold that the malice aforethought has not been proved beyond reasonable doubt but that a lesser offence of manslaughter ingredients has been established beyond a reasonable doubt. The court makes the orders;
- i. The accused murder charge is substituted with that of manslaughter, and he is convicted of the offense of manslaughter accordingly.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 21ST DAY OF DECEMBER 2022.

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CHARLES KARIUKI

JUDGE

