



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL CASE NO. 16 OF 2015**

**REPUBLIC.....RESPONDENT**

**– VS –**

**BERNARD GITARI MWANGI.....1<sup>ST</sup> ACCUSED**

**JAMES WAWERU MUTHIKE.....2<sup>ND</sup> ACCUSED**

**ELIUD NDEGWA KANGANGI.....3<sup>RD</sup> ACCUSED**

**PETER NDIWGA KARIUKI.....4<sup>TH</sup> ACCUSED**

**DAVID KARANI MUNYI.....5<sup>TH</sup> ACCUSED**

**RULING**

**INTRODUCTION**

1. The accused persons Bernard Gitari Mwangi, James Waweru Muthike, Eliud Ndegwa Kangangi, Peter Ndwiga Kariuki and David Karani Munyi were charged with murder contrary to **Section 203 as read with 204 of the Penal Code**.
2. The particulars of the offence were that on the 29<sup>th</sup> day of March 2013 at Kiamiciri Village, Kabare Location Kirinyaga East Sub County within Kirinyaga County, they jointly unlawfully murdered James Ndegwa Matiro.
3. They all denied the charges and the prosecution summoned a total of eleven witnesses in support of its case.

**4. Prosecution Case**

**PW 1 Martin Munene Kiragu**, testified that on 29.3.2013, he was asleep in his house with his young brother Danson Muiruri when his house was broken into by a mob in which Karani Virginia, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 1<sup>st</sup> accused persons were part of, looking for his elder brother Jeremiah Macharia. There was no light but sufficient moonlight outside, they left and shortly after he heard a scream from the house of James Ndegwa about 500 meters. They then left towards Kiamiciri trading center, he could see them through his fence as his house was near the road. He recognized the voice of Karani the 5<sup>th</sup> accused as the deceased was being beaten. His neighbours Humphrey Njau and Samuel Maina followed the group upto Kiamiciri trading center. They returned and informed them that people had been killed that is Gitari, James Ndegwa, Muiruri and Njui that before they came for James Ndegwa they had killed the other three. He confirmed the same at the Embu mortuary and found that they were stabbed and burnt, he identified them as they were from his home area. He reported to the police at Kianyaga.

**5. PW2 Humphrey Ngari Makungu**, recalled that on 29.3.2013, at about 11:30 p.m., he heard commotion from his neighbours home and found Florence Wairimu screaming that people had come for her son, Macharia as there was theft at Kiamiciri and that he had been suspected, they suspected him, as part of a group of thieves, But because he was at home asleep they left. The next morning, he was told by one Erick Muiruri his neighbours were killed at Kiamiciri, he knew the deceased.

**6. PW 3 Samuel Maina Gitari** testified that he heard noises at night from the home of Muriuki, he met pw1, who informed him that there were thieves at Kiamiciri who ran away from the area. The next day he was informed the thieves were lynched by a mob. He did not know the deceased He denied parts of his written statement that he had met Karani or tried to block the mob. He also denied meeting pw2 or being at the scene. He denied recording a statement.

7. **PW 4 Erick Muriithi Wachira**, a resident of Njojuini, recalled that on 29.3.2013, at about 11:30 p.m., he was called by PW1 his friend, who enquired whether his brother Dennis Muturi was home. When he called him back PW4 picked the call, and informed him his brother and three others were killed. He called the village in charge and later PW1 again who informed him of the mob that was going around picking names. He called his neighbours but they did not go to the scene. The next day they went to Kibugi funeral home, they were told the bodies were at Embu mortuary. The body of James Ndegwa had burns and cuts, he later recorded a statement at Kianyaga police station.

8. **PW 5 Dr. Ndirangu Karomo** the pathologist submitted the post mortem form exh-1 that was conducted on 10.4.2013 at 2:00 p.m. His observation was that the deceased was about 37 years, he has suffered inhalation burns that covered 110% of the body, with multiple deep cut injuries. He submitted that the cause of death was 110% burns secondary to mob justice. He submitted that the inhalation burns signified he was alive when he was burnt.

9. **PW 6 Bernard Muciiri Mithamu** the assistant chief Mikarara sub location, recalled that on 30.3.2013 he was called by the chief Kabare location Mr. Muchiri Richo who informed him of the lynching at Kiamiciri Market it was about 5:00 a.m. He had sent CPL Mutiga and the elder David Karani the 5<sup>th</sup> accused at Kiamiciri Village. He was called to go to the scene, where he met the Kirinyaga East DCIO and the OCPD, there was also a big mob, he saw the burnt bodies, he could not identify them, they were taken by the police to the mortuary.

10. **PW 7 Peterson Njogu Kithaka** former boda boda driver testified that on 29.3.2013 he was at Kiamiciri at his home. He was called by Karani (5<sup>th</sup> accused) his neighbour to take him to Kutus police base as his workers were arrested. He asked the police to release the employees but was told to wait till the next day. He then took him back home. He was later called by Karani and requested him to take him to Kiamiciri as he was called by the chief. He did not as his motorbike had no fuel after two months he was summoned by the police to give his statement.

11. **PW 8 CPL John Mutiga** an administration police officer attached to Kirinyaga East Headquarters, formerly attached to chief's office Kabare. He received a call at about 11:00 p.m from members of the public about the lynching a Kiamiciri shopping centre, he informed sergeant Kanyotu his boss. He was accompanied by Sgt. Wanjohi, on the way they met the 5<sup>th</sup> accused a village elder, they found the bodies lynched in a big fire, the four were dead, upon interviewing members of the mob, they claimed the deceased persons were thieves. They tried putting off the fire with twigs and tree branches, but they were burnt an unrecognizable. They left Sgt Wanjohi at the scene to call the chief, when they returned to the scene they found officers from Kutus police base. He later recorded a statement at Kianyaga police station. He claimed he did not know who committed the crime.

12. **PW 9 P.C Hillary Cheruiyot Tanui**, attached to Kianyaga police station testified that on the fateful night at about midnight he received a report of a mob justice, he was in the company of IP Makau, at the scene there were about 300 people, he called the DCIO and OCPD, he later accompanied the bodies to the mortuary, and witnessed the post-mortem He conducted further investigations and recommended those named to be summoned to issue witness statements but he subsequently left the station.

13. **PW10 Samuel Matiru Githinji** recalled that on 30.3.2013 at about 3:00 a.m. he received a call from his neighbor Edward Comba and told to go to his brother's house the deceased. He went and discovered his brother was not there. He called Edward Comba and was informed his brother James Ndegwa and Edward's brother Samuel Comba were both killed at Kiamiciri. He and his family visited the scene the next day, they saw bloodstains and ashes. He stated that after burying his brother he received threats that those who killed his brother were looking for him. He relocated from the area with his aged parents from Njongoi to Kirinyaga county. He was later informed by pw2 and pw3 that those who killed his brother were the accused persons with the exception of the 5<sup>th</sup> accused.

14. **PW11 Dr. Joseph Thuo**, the psychiatrist at Embu Level 5 Hospital, that did the mental examination on the accused persons. He produced the medical reports exhibits 2,3,4,5 and 6 in which he submitted each of the accused persons was fit to stand trial.

15. At the close of the prosecution's case counsel for the accused persons filed written submissions, it is upon the court to determine whether the prosecution has produced sufficient evidence to establish a prima facie.

### **ANALYSIS AND FINDINGS**

Prima Facie case is defined in Blacks Law Dictionary 9<sup>th</sup> Edition in Page 1310 as '*the establishment of a legally required rebuttable presumption. A party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour.*

16. In this case the facts at issue involve the elements of the offence of murder. A prima facie case to the charge of murder is thus proved by the inference of the three elements of the offence as set out in **Section 203 of the Penal Code**, that there was an unlawful death, that the accused persons caused the unlawful death of the deceased by an act or omission and that there had been malice aforethought as set out in **NZUKI VS REPUBLIC [1993] KLR 171.**

17. The evidence as outlined by the prosecution in respect of the accused persons is based purely on circumstantial evidence. As no witness produced by the prosecution gave an eye witness account on how the offence was committed. The offence committed was a heinous act from the postmortem report grievous harm with intent to cause death was clearly the motivation of the perpetrators. The element of malice aforethought can be inferred from the circumstance that caused the death in **Republic v Tubere S/O Ochen [1945] 12 EACA 63:** The court inferred malice aforethought based on the following factors:

**(a) The nature of the weapon used.**

**(b) The part of the body targeted**

**(c) The manner of killing or in which the weapon is used**

**(d) The conduct of the accused before, during and after the attack**

18. The main contention as to whether there is a prima facie case is therefore the issue of whether the accused persons caused the death of the deceased. The death in this case was caused through a mob lynching.

The Court of Appeal also held in MUSILI TULO V. REPUBLIC (2014) Eklr.

*“Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”*

18. The court of appeal set out the threshold for circumstantial evidence as follows:

- a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- c) 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.

20. It also considered a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480:

*“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”*

21. Upon evaluating the charge, evidence by the eleven witnesses summoned by the prosecution and submissions by counsel for the accused persons, the following authorities are relevant.

22. The English Court in May vs. O’Sullivan [1955] 92 CLR 654 as quoted in Republic v Jones Mutua Anthony & 3 others [2019] eKLR held that:

*“When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law.”*

23. In the case of Republic v Jones Mutua Anthony & 3 others [2019] Eklr similar circumstantial evidence existed and a lack of eyewitness that linked the accused to the crime, J.Odunga held that:-

*There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival.*

*I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution vs. Zainal Abidin B. Maidin & Another that: “It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805.*

He further held that:

*‘Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has not been made out. As has been said time and again a prima facie case does not necessarily mean a case which must succeed. In other words, despite finding that a prima facie case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer.’*

24. The Court’s decision, in the light of the foregoing analysis of evidence, is taken within the terms of Section 306 (1) of the Criminal Procedure Code (Cap. 75) which stipulates:

*“When the evidence of the witnesses for the prosecution has been concluded, the Court, if it considers that there is no evidence that the accused or anyone of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”*

25. In the instant case only circumstantial evidence has identified the accused persons, as the persons who committed the offence, with the exception of the 5<sup>th</sup> accused who seems to be excluded by PW3, who recanted his statement but was placed at the scene by PW 6 and PW8. Nevertheless, the circumstantial evidence has sufficiently proved a prima facie case against all the accused persons.

**FINDING**

26. Consequently, for the foregoing reasons the prosecution has established a prima facie case against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused person. The Accused persons will therefore be put on their defence as provided under **Section 306 of the Criminal Procedure Code**.

**Dated at Kerugoya this 30<sup>th</sup> Day of July 2020.**

**L. W. GITARI**

**JUDGE**