



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kimani & 3 others (Criminal Case 39 of 2015)
[2025] KEHC 2066 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 39 OF 2015
PN GICHOHI, J
FEBRUARY 11, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

HARRISON KIMANI 1ST ACCUSED

MICHEL NAKUTI 2ND ACCUSED

SHADRACK MITSELA 3RD ACCUSED

BRYDON VWAMU 4TH ACCUSED

JUDGMENT

1. Harrison Kimani, Michel Nakuti, Shadrack Mitsela and Brydon Vwamu (herein referred to as the 1st, 2nd, 3rd and 4th accused respectively) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on the 23rd day of May, 2015 at Kiratina area in Nakuru District within Nakuru County, they jointly murdered Anthony Gatonye.
2. Each of them denied the charge and the case proceeded for hearing with the Prosecution calling nine (9) witnesses in support of its case.

Prosecution case

3. The Pathologist Titus Ngulungu testified as PW1. He told the Court that he examined the body of the deceased on 26th May, 2015 and prepared the Post Mortem Report (Exh. 1). He concluded that the cause of death was bleeding in the upper gastronal tract as a result of bleeding in the stomach and small intestine as a result of injury to the brain and abdomen either through a kick or punch.



4. In cross examination, he stated that the body had no clothing when he received it from the mortuary. It was his evidence that the injury to the body could not have been inflicted after death. He explained that the enlargement of the head could have been as a result of the injury.
5. The 18-year-old Lawrence Ngugi Wangare (PW 2) testified that he was the deceased's brother and lived in Kiratina within Nakuru. It was his testimony that he was at a funeral function of his mother on the 23rd of May 2015 and that they were dancing. At about 12 midnight, he stepped on a girl's toes as a result of which she abused him several times. Another man slapped him and a quarrel ensued. He knew the man by seeing him. The man pushed PW2 outside and he and his friends started beating PW2 and that is when his brother (deceased) was called.
6. The 1st accused and his friends started beating the deceased. He explained that the 1st accused beat him with timber while the 4th accused hit him with a stone. The 3rd accused kicked him till he fell down.
7. PW2 left the deceased lying down and while in company of his uncle Joseph Mutua, they ran after the men and managed to get two of them. The others disappeared. They found the 2nd accused with the girl who had abused him. They took him to the area chief.
8. The deceased was taken to Mediheal Hospital but when his uncle went there, he found him dead. In the morning, they went to Teachers Police Post to record a statement. He stated that his brother (the deceased) was not sick. He identified the accused persons in the dock.
9. In cross examination, he told Court that the funeral function was at the plot. It was dark. He could not identify the people. There was moonlight. He did not know them before. They were many when dancing and he stepped on the girl twice but he apologised to her.
10. He identified the accused persons in the dock and told the Court that the 1st Accused did not beat the deceased. He stated that the deceased was not sick.
11. Rebecca Wangari (PW3) was the deceased's mother. She stated that on the 23rd of May 2015, at 12 midnight she was called by one Lucy asking her to go and help her (PW3's) son Anthony . She went and found him lying down. She was assisted by Joseph Mutua to place him on a motor cycle. They took him to Mediheal Hospital. She explained that on arrival, the deceased was talking. Lucy told her that he was beaten by some men who ran away.
12. She further stated that PW2 told her what happened and how he and his father together with many other people followed the men to Mugo's plot where they had escaped to.
13. At the plot they found Joseph Mutua holding 2nd accused and a girl. They took the 2nd accused to the chief's office . While there, she was informed that her son had died. She did not see the other accused persons. She recorded a statement at the police station.
14. On being cross examined, she told the Court that the scene of crime was about 1 ½ Km from her house. She could not recall if there was moonlight. She did not know who beat the deceased but he was not sick.
15. Patrick Waweru Gatonye (PW 4) and Francis Njoroge Gatonye (PW 5) testified that the deceased was their nephew. They went to Nakuru hospital mortuary on 26th May 2015 and identified deceased's body for purposes of post-mortem examination. Each explained that deceased's body had no clothes.
16. Joseph Mutual Wambui (PW 6) told the Court that he and his wife Rebecca (PW3) were asleep on 23rd May 2015 and it was raining. At 11.30 – 12 midnight, a neighbour named Lucy called them. She informed them that their step-son (deceased) had been beaten and was lying on the road. That he had



- gone for a funeral. It was his evidence that they proceeded to the road, where they found the deceased lying. One Lawrence told him that those who beat him had run away.
17. PW6 followed up with others and found the men at a plot. He found people shouting and pointing at them. He held a man and a woman while the others ran away. In company of a boda boda man, he took the two to chief's office. He then went back to the scene and found that the deceased had been taken to hospital.
 18. They were however told by the doctor that he had died. After seeing the body, he went back to the chief's camp. He was assisted with a vehicle and took the body to the mortuary.
 19. After that, they reported the matter at Teachers Police Station and he recorded a statement. He told the Court that the man he found captured at the plot was sitting at the dock.
 20. On being cross examined, he stated that it was about midnight and he walked from his house. There was street light. He could only identify in Court one of the people he had arrested. He did not see any marks of beating on the body. He was not present during post-mortem.
 21. PC Caleb Simbiri (PW7) was the Scene of Crime Officer based at DCI Headquarters Nakuru. He visited the scene of crime at Lanet on 23rd of May 2015 and found broken sticks and a shoe. He took photographs of the scene and later viewed the body at Nakuru mortuary. He processed and supervised the processing of the photographs and prepared the certificate to that effect. He produced bundle of 10 photos as Exhibit No. 2 (a) –(i) and the Certificate as Exhibit No. 3.
 22. In cross- examination, he told the Court the sticks he found at the scene were the ones used to beat deceased and that the shoe belonged to the deceased. He handed them over to the Investigating Officer for further action.
 23. Evans Amwai (PW 8) testified that he knew the deceased as he was his neighbour at Lanet. That on the 23rd of May 2015, he was at a funeral function about 2:00 a.m. As he went home, he met some young men along the road fighting over girls. He knew all of them by faces and appearances. He shouted to them to stop.
 24. One of them took a piece of timber from the fence and immediately, PW8 saw one man down. He jumped over the fence and found the deceased down. He knew him as Tony. He ran after the boys to where they used to live. They were four men and two girls. He got them about 9 meters from where the body was. He found the 2nd , 3rd and 4th Accused outside their plot where they lived. He did not see the 1st Accused there.
 25. He asked them to go and take the deceased to hospital. They wanted to beat PW8 up but neighbours helped him and arrested the 2nd and 3rd accused who were inside the house. They went to Lanet chief's camp where statements were made. He was told that the deceased had died and taken to mortuary.
 26. He stated that the young man who picked the timber is 2nd accused and that the 3rd Accused told 2nd Accused to beat them up so that they could stop disturbing them. They were all fighting over the girls and the deceased was the smaller boy.
 27. Though PW8 told the Court that the incident was at night, he stated he was able to identify them as there were street lights on the road. He identified all the four accused persons in the dock but explained that the 1st accused was defending the girl he was with while the others were fighting. He testified that the accused were in the dock and that the 1st Accused was the one defending the girl he was with while the others were fighting. He recorded his statement at Teachers police post.



28. In cross examination, he explained that the dispute among the young men had started earlier but the fight was at about 2.00 a.m and took about 10 minutes. He saw the 2nd accused beat the deceased at the neck using the piece of timber. He explained that the deceased may have been beaten by others because they were fighting. It was his evidence that he did not know where in particular they lived but they lived in the plot.
29. No. 61184 CPL Gedion Mutarali Mugwika (PW9) was at Teachers Police Post on 23rd May 2015 when it was reported that there was a funeral function where some young men started fighting over some women and that during the fight, one of them was beaten to death.
30. The following morning, PW9 was accompanied by two other officers and went to the scene of crime. They found many people and they were told that the man had died. Back at the station, the public brought the four men said to be the ones fighting. He placed them in the cell and took their statements. He went to the mortuary where he saw the deceased. He later charged the accused persons with this offence.
31. It was his evidence that one Agnes Wambui Kunyuk, who was said to be a friend of the 1st Accused told them that she saw everything that happened and that she was the reason the fighting occurred. She recorded her statement but the police were unable to trace her
32. In cross examination, he told the Court that he attended the post mortem and the cause of death was beating at the stomach. He explained that it was the public that arrested the accused persons.
33. After close of the prosecution case, the 1st Accused was acquitted while the 4th accused jumped bail.

2nd Accused's defence

34. In his sworn statement in defence, 2nd Accused (Michael Nakuti) told the Court that at about 8.00 a.m. on 23/5/2015, he was in company of two other people not before this court. They were going to work at a construction site and carried a harmer and a metal pipe.
35. They were stopped by group of people who he did not know before. The group identified themselves as village elders and informed them that they suspected them of having been involved in a fight the previous night but he did not say where the fight was.
36. They responded that they were not involved in any fight and that the tools they had were for work but the alleged village elders took them to Teachers Police Post as suspects. After about four (4) hours, the Investigating Officer told them that whoever arrested them had not recorded any report. He told them that in the circumstances, he could not continue holding them . He asked each of them to give him Ksh.1,500/= to be released.
37. It was his testimony that he was locked up as he had no money while his two colleagues gave out the money requested and were released.
38. He was brought to Nakuru Central Police Station the following day where he was charged with the offence of murder which he denied was has been in custody since then. He explained that the two colleagues he was arrested with were never brought to Court. He was charged with three (3) others.
39. He told the Court that he does not know the deceased and was shocked when witnesses testified that they arrested him and took him to the chief yet neither the chief nor the police came to give such evidence and further, no witness from chief's office testified how he was allegedly arrested on the material night and taken to the chief's camp.



40. In cross examination, he told the Court that he lived in Teachers at Two-in-One where he was a tenant. That on 23/5/2015, he woke up at 6.00 a.m. and prepared to go to work at white house. He was with two other people who he had met the previous night where he normally waits for work. He did not know the two before even by names. They walked for about half an hour heading to white house. He had never seen the three alleged village elders before.
41. He could not recall the time he entered his house on the night of 22/5/2024. He denied having gone out on a night vigil on the night of 22/5/2015 but he had no one to confirm that. He explained that he did not know Lawrence (PW2) before he testified in court.
42. He explained that he was arrested at 8.00 a.m on 23/5/2015 and placed in the cells though he had no evidence to show he was arrested on that hour and date but he was brought to court for plea on 2/6/2015.
43. It was his testimony that he did not know the witnesses herein before they testified . He accused Evans (PW8)of lying to Court.
44. He denied knowing Harrison Kimani and Brydon Vwamu (1st and 4th accused) who he only came to see here in Court. He did not know when the 1st and 4th accused were arrested.

3rd accused's defence

45. Shadrack Mitsela Orwete alias chap chap (3rd Accused) testified that he lives in St Beatrice Fanusi area of Kiratina in Nakuru and on 23/5/2015, he woke up at 6.30 a.m and went to look for work at pipeline but was not successful.
46. He therefore went to Green State still in Nakuru but again, he did not get any. He proceeded to Mzee Wanyama area and was to produce his ID card if he needed work. He had lost his Identity Card.
47. He went home and washed his clothes and at about 1.30 p.m. on the same day, he went to the chief's office to pursue issue of the Identity Card. He was told to get a Police Abstract.
48. He therefore went to Teachers Police Post on the same day at about 3.30 p.m and while there, he saw five men, two youths and three women but he did not bother about them. He went straight to the report office and explained that he was seeking a police abstract. The officer asked him where he lived and he explained that he lived in Kiratina. The officer went to another office.
49. It is then another Police Officer came and asked him whether he was fighting at Kiratina and lost his Identity Card there. He denied and was informed that he would be taken to the cells for more investigations. He resisted arguing that he had lost his Identity Card three weeks before. At that point, two other men came and forced him into the cells. It was 5.00 p.m.
50. The following morning, he was taken to the report office and found the same youths, men and 3 women who he had seen at the report office the previous day. One of them identified him as Shadrack and said that they suspected him to be one of them. He did not understand what he meant.
51. He was brought to Central Police Station Nakuru the following day at about 10.00 a.m where the same man came and told the 3rd Accused that he will know that there was no need of resisting to be placed in the cells the day before. The 3rd accused came to realise that the man was the Investigating Officer in this case. The 3rd accused was charged and brought to Court. He maintained that he does not know his three co-accused persons in this case and does not know the deceased either.



52. He further maintained that he was in his house on the night of 22nd towards 23rd May, 2015 having entered the house at 8.30 p.m. on 22/5/2015 and never left the house until the following day at 6.30 a.m. and that he was arrested at Teachers Police Post where he had gone to get a Police Abstract.
53. He maintained this defence during cross examination and told the Court that he did not know why the witnesses who did not know lied to this Court. He stated that he never attended any night vigil on the material night and that he even made calls to people while in his house on that night but he did not have a Safaricom report to support it. He further told the Court that the plot he lives in does have a watchman who he could call as a witness.

Submissions by Accused persons

54. Emphasising that the burden of proof was on the Prosecution, Mr. Okiro for the two accused persons submitted the Prosecution had to prove the ingredients of the offence of murder that is:-
 1. Death of deceased.
 2. Cause of deceased's death was as a result of the direct consequence of accused's unlawful act or omission (actus reus).
 3. The unlawful act was or omission was committed with malice aforethought (mens rea).
55. On the first ingredient, Counsel submitted that the issue that death did occur was proved in that PW1 testified that he examined the body of the deceased and the body was identified by PW5 and PW9.
56. On the second ingredient, it was submitted that the death of the deceased herein was caused by acts which are not excusable by law considering PW1's testimony that the death of the deceased was as a result of "bleeding in the upper gastronal tract as a result of bleeding in the stomach and small intestine as a result of injury to the brain and abdominal either through a kick."
57. On the third ingredient, Counsel highlighted the provisions of Section 206 of the Penal Code on when Malice aforethought is established and further cited the case of *Roba Galma Wario v Republic* [2015] eKLR where the Court of Appeal held that:

"For the conviction of murder to be sustained, it is imperative to prove that the death of the accused was caused by the appellant and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter as it would mean the death of the deceased during brawl was not intentional."
58. Counsel therefore submitted that where there exists doubt in the mind of a judge or a jury in relation to the matter presented before them in a criminal trial, the most noble and just recourse is to acquit the accused person.
59. It was submitted that in this case, PW2 stated that the 1st Accused beat the deceased with timber yet in the cross examination, it was stated that the 2nd Accused is the one who beat the deceased with timber while the 1st Accused did not beat the deceased. It was further submitted that according to PW2 and PW3, they found 2nd Accused with the girl who had abused PW2 but PW8 did not find the 1st Accused.
60. In the circumstances, this Court was urged to acquit the accused persons under Section 215 of the Criminal Procedure Code on the grounds that the prosecution has failed to satisfy the ingredients of the charge of murder and therefore, the Prosecution failed to prove this case beyond any reasonable



doubt as provided for by the law and case law, including the case of *Woolmington v DPP* {1935} A. C. 462, where it was held:-

“Throughout the web of English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to the defence of insanity and subject to statutory exceptions, if, at the end of and on the whole of the case, there is a reasonable doubt, by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal no matter what the charge is the prosecution bears the burden of proof on every issue in a criminal case beyond reasonable doubt.”.

Submissions by Prosecution

61. Mr. Kihara for the Prosecution simply highlighted the defence by the the two accused persons herein evidence and submitted that their defence did not shake the prosecution case and further, they did not avail any alibi defence in support of their case.
62. He submitted that PW2 and PW8 were able to identify the three persons specifically Michael Nakuti who picked the log and struck the deceased and Shadrack Mitsela waiting outside the house. They were fighting over the girls.
63. It was submitted that the Prosecution’s evidence confirmed the two accused persons having been at the funeral meeting and that the two were seen on that day by two witnesses who were well known to them and that members of the public arrested four of them.
64. It was also submitted that Michael Nakuti did not deny being arrested by several persons but stated that his was a case of mistaken identity while Shadrack Mitsela alleged to have presented himself at the Police Station after loss of his Identity Card but was implicated by persons he found at the station.
65. Lastly, it was submitted that the two Accused persons never raised their alibi defence during the prosecution case thus making it an afterthought. Counsel urged that on the strength of the prosecution evidence against the weak defence, the accused persons should be convicted.

Determination

66. Having considered the evidence on record and the submissions by parties, it is this Court’s duty to determine whether the charge of murder has been proved beyond reasonable doubt and to start with, Section 203 of the *Penal Code* defines the offence of murder as follows:-

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

67. In order to prove a charge of murder, the Prosecution must prove three ingredients of the offence beyond any reasonable doubt , that is:-
 1. Proof of the facts of the case and the cause of death of the deceased.
 2. Proof that the deceased died as a result of an unlawful act or omission on the part of the accused which is referred to as actus reus.
 3. Proof that the said unlawful act or omission was committed with malice aforethought that is mens rea.



68. As rightly noted by Counsel for the Accused persons, it is a fact that the deceased died, the body identified by Patrick Waweru Gatonye (PW 4) and Francis Njoroge Gatonye (PW 5). The Posts Mortem Report (Exh. 1) bears the names of the two identifying witnesses and shows that there were no external injuries but upon dissection:-- There was a bruise located at the upper sternum measuring 40x30 mm.-The heart was enlarged.-The stomach and small intestines were bruised and on dissection, they contained blood from the stomach.- There was brain swelling.
69. Specifically, the Report stated that the cause of death of the 16-year-old minor was massive haemorrhage following a blunt force trauma to the abdomen. That a kick /punch is a possibility. In his testimony, the doctor stated that there was bleeding in the upper gastronal tract as a result of bleeding in the stomach and small intestine as a result of injury to the brain and abdominal either through a kick or punch.
70. This court is satisfied that those findings prove that the deceased's death was caused through an unlawful act, which is a fact that is not challenged by the defence.
71. From there, the question is whether the evidence on record proves that the two accused persons herein are the ones who caused the said death. The two raised an alibi defence that they were not at the said funeral meeting on the said night and hence did not commit this offence. The Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to in regard to alibi defence:-
- “In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.”
72. The accused persons stated that they were not at the night vigil as alleged but they had no witness to call or documentary evidence to prove this defence. Further this defence was raised only at the defence stage. The Court of Appeal in *Erick Otieno Meda* (supra) held: -
- “In considering an alibi, we observe that:
- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
 - (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
 - (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.”
73. The undisputed fact is that there was a fight at a funeral meeting on the night of 22nd towards the morning of 23rd May 2015 and that the fight was among young men over girls.
74. According to PW2 , he had stepped on the toes of a girl as they danced which caused her to abused him . Further, it caused another man to who he knew to slap him leading to his being thrown out and



a fight ensued. The deceased was called. They started beating him. There were several people beating the deceased.

75. According to the key witness (PW2), the incident occurred at midnight. It was dark. He could identify the people. On the same breath he told the court that there was moonlight and he could identify people. That it was the 2nd accused who hit the deceased with a piece of timber while the 3rd accused kicked the deceased at the stomach and the 4th accused hit him with a stone.
76. On the other hand, PW8 who was at the funeral meeting on 23/5/2015 at 2.00 am left to go home and on the way, he met some men fighting over girls. He shouted at them to stop. One of them picked a timber from the fence. He immediately saw the one man down. He tried to get help and the other people ran away leaving PW8 alone. The incident took about 10 minutes.
77. He ran after the four men and two girls. He found 2nd, 3rd and 4th accused outside the plot where they lived. He asked them to accompany him to the scene and take deceased to hospital. They wanted to beat him. The 2nd and 3rd accused were inside their house. Neighbours assisted and arrested them. They took them to chief's office.
78. In regard to identification at night, the Court of Appeal in *Wamunga vs Republic* (1989) KLR 426 had this to say on the issue: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

79. From the evidence on record it is clear that the fight occurred at night and involved several people. It was at dark. If there was moonlight as alleged, then the intensity of the light was not stated. The accused persons were not arrested at the scene.
80. No doubt the evidence on identification was not clear and the circumstances were not free from error. Even if it is evident that the accused person raised their alibi defence too late in the day, they were not obliged to prove it. The burden of proof first lay with the prosecution and they had to prove beyond any reasonable doubt that it is the accused persons herein who caused the death of the deceased and that they had malice aforethought.
81. The defence may be weak but the Court relies on the strength of the prosecution case. From the evidence herein, there is a strong suspicion that the 2nd and 3rd Accused were involved in beating the deceased or contributed to the death of the deceased herein but suspicion alone cannot form a basis for conviction. Indeed, the Court of Appeal in *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported) held:-

“Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.”

82. It is unfortunate that the deceased lost his life in this manner but the doubts in this case will go to the benefit of the two Accused persons.
83. In conclusion therefore, the Prosecution failed to prove its case against the 2nd and 3rd Accused herein. As a consequence, each of them is acquitted of the charge of murder.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF FEBRUARY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kihara for the State

Mr. Okiro for Accused persons

2nd and 3 Accused

Ruto, Court Assistant

