



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Korir (Criminal Case 59 of 2019)
[2025] KEHC 3153 (KLR) (Crim) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 59 OF 2019**

K KIMONDO, J

MARCH 4, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

KELVIN KIPROP KORIR ACCUSED

JUDGMENT

1. On the night of 23rd August 2019, David Mwaura Muiruri (hereafter the deceased) and his girlfriend Eunice Njeri Wamaitha (PW3), were walking down Racecourse Road. They were accosted by two men. According to PW3, she saw one of the assailants, who was dressed in red, raise a knife and stab the deceased on the left side of the body. The deceased succumbed to the fatal wound thereafter.
2. Later that night, another woman, Berryl Shasha Oduk (PW1) was walking along the same road when she was attacked by two robbers and stabbed. She identified the one who was dressed in a red jacket and wielding a luminous grey knife. Days later, she picked out the accused at a police identification parade held at Kamukunji Police Station.
3. The Republic thus brought information to the High Court charging the accused with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that on 23rd August 2019 along Racecourse Road within Nairobi County, he murdered the deceased.
4. He pleaded not guilty. The prosecution called ten witnesses. It was a mix of some direct and circumstantial evidence. The accused defended himself under oath and did not call any witnesses.
5. The deceased's girlfriend (PW3) testified that-
(two) men appeared by the side. They caught David. I jumped ahead of them the moment they caught him. I could see he was struggling with them. I saw the man who was dressed in red raise



a knife. I saw him stab David with it on the left side of the body. The second man was in the meantime still struggling with David. The 2 men then crossed the road to the other side where they attacked another lady. I saw as they held us. I went and raised David, but he fell down. I ran to look for a motor cycle. When I got one, we went back with the rider to where David lay. The rider told me he could not carry him and that I get an Uber. He took me to OTC to get one. I got one and I took the Uber. On reaching where David was, I found a big crowd gathered. I was told that David had died. The Uber took me to Kamukunji Police Station where I reported the incident.

6. On 4th September 2019, PW3 was summoned by the police to identify a suspect. When she was shown the accused, she told the police that she could not identify the him since she never saw his face at the scene. But she added that there was bright light from the Total Petrol Station, and that she saw another lady being attacked. She however concentrated on helping the deceased.
7. Berryl Shasha Oduk (PW1) was leaving work well after midnight on the material night. As she walked past the OTC along Race Course Road, she saw a crowd of people gathered. As she approached the Total Petrol Station next to OTC, she was confronted by two thieves. The tall one stood at a distance while the shorter one brandished a knife and ordered her to give them her bag. It contained her new Techno Phone, 1 Samsung phone, pair of shoes, some cash, national Identity card and an Equity ATM card.
8. She resisted but the robber snatched it and stabbed her five times on her left hand, left rib and back. The thieves ran towards the river bank. She screamed and chased them but became overwhelmed by the pain. She was rescued by a motor cyclist who dropped her home at Kariokor. She was then taken for treatment at Kenyatta National Hospital. The time was now approximately 02:30 hours.
9. She reported the matter to Kamukunji Police Station the following day. On 7th September 2019, she received a call from PC Gitonga of DCI Kamukunji to attend an identification parade. The police informed her that they had arrested two suspects in the case. She identified the accused as the person who stabbed her. She said she struggled with him and that from the time he demanded her bag to the attack, it took about three minutes. She said the area was lit by both street lights and the petrol station.
10. When she was recalled to the stand, she said that the police showed her CCTV footage of the two attackers captured at the scene before she proceeded to the parade. She admitted that the print was in black and white but insisted that she could see the attackers clearly.
11. In earlier cross-examination, she stated-

"The 2 men approached me about 50 metres from the Petrol station. The 2 men came from the side where the crowd was. I saw as they crossed the road. They first ran across the road in front of me. Then they came to me. Then I heard the shorter man shout, "drop the bag." I turned and saw him. The other one did not speak. The taller one was a short distance from him. It is the shorter one who was near me. When I heard "angusha bag," I turned and saw him come to me. He was in a red jacket. I could see this well as he was close to me. There was street light. I cannot remember the trousers he was wearing. He was not shaved. He had a knife, luminous grey."
12. PW2 was Corporal Komen. He was instructed by his senior to attend the scene of the murder. He went there with PC Zachary Gitonga (PW5) and PC Muriuki. They found the deceased lying inside a police vehicle with stab wounds on the neck and back. He was unconscious but still breathing. He was rushed to Kenyatta National Hospital for treatment. The witness also found PW3 inside the vehicle at the scene. They combed the area but did not find the knife.



13. But while still at the scene, a street boy, Benson Gitau, approached him and said that he knew the assailants. He said the attacker was a street boy known as Saffara who normally slept under the bridge of Nairobi river, along Race Course Road. The police found 5 men sleeping there but Saffara was not amongst them. Gitau told them to try the Muthurwa bridge where he slept at times but they did not get him.
14. PW2 said that they took statements from Benson Gitau and Njeri (PW3) the same night. The following day, PW2 was on night duty when Benson Gitau came to the office. He informed him that he had seen Saffara, around Total Petrol Station on Race Course Road, not far from the scene of the robbery. He, PC Mutisya and PC Mwai proceeded there. Benson identified the suspect and he was arrested. That is when he got to know that the suspect was known as Kelvin Kiprop Korir.
15. PW5 revisited the scene and extracted CCTV footage which showed the two attacks. In the first, the deceased was seen being attacked by two people who ran across the road and attacked another lady. The footage had been requested by Senior Sergeant Andrew Nyagah Gaichu (PW7) via a letter to the Integrated Control Centre at Jogoo House (Exhibit 5). The witness also referred to the original Occurrence Book for Kamukunji Police Station for 2/8/2019 to 4/9/2019. He produced the OB extract number 36/24/8/2019. (exhibit 4).
16. As I have stated, PW7 was Senior Sergeant Andrew Nyagah. He testified on the CCTV footage (exhibit 6). It shows the junction of Racecourse Road and Kirinyaga Road and captures. It confirms the attack on the deceased and the subsequent robbery against PW1 but he could not identify the accused from the clip. The witness clarified that Benson Gitau Mwangi was a witness and not a suspect. The other suspect who had been arrested was Jacob Omwoyo but no charges were preferred against him.
17. The CCTV footage and certificate were produced by Chief Inspector Andrew Limo (PW9) as exhibits 6 and 8 respectively. He gave a running commentary as follows-

At 02:00 hours, there are two people walking; a man and a woman at 02.00.45. At 02.02.11 the two people can be seen. The lady is near the road. At 02.02.42 the scuffle /fight occurs on their side of the road. Two men then cross the road and attack the lady near a vehicle. They snatch her bag and she can be seen chasing them.
18. That analysis was re-confirmed by PW5 when he was recalled to the stand. He stated-

At 02.02.28 two men can be seen crossing the road and confronting a lady. At 02.02.48 they struggle with her and take her bag. They then run away with the lady chasing them until she gave up.
19. The post mortem examination was conducted at the City Mortuary by Dr Peter Ndegwa (PW6). The body was identified by the deceased's brother, Stephen Muiruri (PW10). The pathologist found a perforated left lung and a left-side hemothorax of 2 litres. He concluded that the cause of death was "exsanguination due to chest injury from a penetrating sharp trauma".
20. PW8 was the police surgeon, Dr. Kamau Mariga. He produced the medical notes made by his colleagues Dr. Kamau and Dr. Maundu (both deceased) relating to the injuries suffered by PW1 during the robbery (exhibit 1). She had a stab wound on the left side of chest wall and left upper arm. The injuries were three days old and the degree was "harm".



21. When the accused was placed on his defence, he protested his innocence. In his sworn testimony, he stated as follows-

Fred Benson Gitau is unknown to me and I have never met him. I do not know the deceased and never stabbed him. I saw Shasha Oduk (PW1) the first time at the Police Station. I did not have persons looking like me lined up at the parade. I do not wear a cap and was not in one during the parade. I did not have a friend, family member or lawyer at the parade.

The CCTV footage did not show me. I was not wearing red jacket. I was dressed in black. Since 2019 I have been in custody. I have undergone training as a barber, making soap etc. So I beg to be released. I hail from Elgeyo Marakwet and came to Nairobi with friends. We lost touch and I became a street boy. I was arrested at OTC for this offence. I was not told the reasons for my arrest. The officers said I would learn later. That is all.

22. Learned defence counsel, opted not to file final submissions but to rely on the earlier set of submissions filed under section 306 of the *Criminal Procedure Code*. Those submissions are dated 18th September 2024. Like I observed then, their pith was that the prosecution failed to prove the charge of murder. In particular, he contended that the accused was neither placed at the locus in quo nor positively identified as the person who murdered the deceased.
23. Furthermore, the prosecution was faulted for failing to call the street urchin named Benson who had led the police to the accused. It was submitted that the lapse watered down the subsequent police identification parade. Reliance was made on a number of precedents including, AHM v Republic [2022] KEHC 12773 (KLR); Njihia v Republic, Nakuru Court of Appeal, Criminal Appeal 13 of 1986 [1986] eKLR; and, Wamunga v Republic [1989] KLR 424.
24. I take the following view of the matter. The burden of proof that the accused murdered the deceased lay squarely with the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332.
25. Section 203 of the *Penal Code* provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
26. There are three key ingredients that must be present: first, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.
27. There is no doubt about the death of the deceased. His body was identified by his brother, Stephen Muiruri (PW10). Doubt of the death is completely erased by the post mortem report (exhibit 7) produced by Dr. Peter Ndegwa (PW6). In the opinion of the pathologist, the cause of death was “exsanguination due to a chest injury from a penetrating sharp trauma”.
28. That conclusion is consistent with the evidence of stabbing by PW3, PW2, PW4 and PW5. From that evidence, I readily find that the death was unlawful.
29. The next question then is whether the Republic proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased.
30. The foremost matter revolves around identification. On the night of the murder and while still at the scene, a street boy, Benson Gitau, approached PW2 and said that he knew the assailants. In particular, that it was a street boy known as Saffara who normally slept under the bridge of Nairobi river, along Race Course Road or the Muthurwa bridge. The police did not find him in the two places.



31. The following day, PW2 was on night duty when Benson Gitau informed him that he had seen Saffara, around Total Petrol Station on Race Course Road, not far from the scene of robbery. He led police officers there, pointed out the accused and he was arrested. However, Benson Gitau never testified. The prosecution told the court that they could no longer trace him.
32. Based on that lapse, the defence implored me to find that there was no positive identification. That submission fails to appreciate the combined evidence of PW1, PW3, the results of the police identification parade and the circumstantial evidence from the CCTV footage produced by PW9.
33. The identification parade was conducted by PW4 at Kamukunji Police Station's search room. The witness was PW3 and was at the DCI office located upstairs. PW4 assembled 8 members who had almost similar characteristics with the suspect, a fact contested by the defence. He informed the accused of the purpose of the parade and got his consent. He claimed the accused opted not to have a friend, lawyer or friend at the parade.
34. The accused chose to stand between members number No. 4 and 5. PW4 then called the witness and informed her of the procedure. She identified the suspect by touching him. PW4 as well as the accused signed the form (exhibit 3). However, the accused informed him that he was not satisfied with the parade "because he was not there during the incident".
35. The Force Standing Orders provide that members of the parade should be at least eight and as far as practicable of similar height, age, general appearance and class of life of the suspect. See Rule 6(iv)(d). The police officer in charge of the case may be present but should not conduct the parade. Under Rule 6(v), the parade should be conducted in private and out of the view of the public. In a nutshell, the identification parade should be conducted with scrupulous fairness or its value will be lost
36. The accused in his defence said that PW1 "passed me at first, then spoke to police and then identified me". As I stated earlier, at the end of the parade, the accused told the police he was not satisfied with it because he was not at the murder scene. But in the end, he was identified by PW1 by touching. I find that the parade in this case largely met the above threshold.
37. There was a weakness however. The witness was shown the CCTV clips before the parade. Nevertheless, all the relevant witnesses agreed that the black and white video clips were grainy and no faces could be identified. Furthermore, PW1 gave clear description of her attackers to the police the following day. In her evidence, she stated-

The 2 men approached me about 50 metres from the Petrol Station. The 2 men came from the side where the crowd was. I saw as they crossed the road. They first ran across the road in front of me. Then they came to me. Then I heard the shorter man shout, "drop the bag." I turned and saw him. The other one did not speak. The taller one was a short distance from him. It is the shorter one who was near me. When I heard "angusha bag," I turned and saw him come to me. He was in a red jacket. I could see this well as he was close to me. There was street light. I cannot remember the trousers he was wearing. He was not shaved. He had a knife, luminous grey.

38. So much so that the CCTV images were not the primary source of identification. Rather, they reinforced the statement of PW1. The parade took place inside two weeks of the attack. I have also kept in mind that PW1 was not a witness to the murder but was testifying on events surrounding her own robbery. That robbery took place immediately after the attack on the deceased across the same street. The deceased's companion (PW3) in fact saw the attackers robbing PW1 but her mind was now fully engaged with the life of the deceased.



39. There is thus little doubt that PW1 identified the accused as one of the two robbers; and, that the accused stabbed her several times with a knife before disappearing with her property towards the river bed. The question then is whether this was the same robber who stabbed and killed the deceased earlier.
40. I have kept in mind that these were two incidents which occurred moments apart at the same location next to the Total Petrol Station on Racecourse Road. The scene was well lit by street lights as well as light from the gas station. There is also a close nexus. Soon after the deceased was stabbed, PW3 saw another lady being attacked. She was emphatic that “the men then crossed the road and attacked the lady”
41. That other lady was PW1 and was attacked at the same location by two robbers who emerged from where a crowd had gathered. In addition there is the grainy CCTV footage. True, the camera was from a distance and the faces of the attackers are not clear. But taken together with the evidence of PW1 and PW3, I am satisfied beyond any doubt that the persons who attacked and stabbed the deceased were the same ones who stabbed PW1 and stole her property.
42. While under cross-examination, the accused claimed that he was not dressed in red and was in fact in black jeans on the material night. By saying so on oath, he placed himself at the locus in quo. He at first said that he was not in Nairobi on 22nd August 2019. But when reminded that he was arrested on 23rd August 2019, he said that he travelled to Nairobi from Elgeyo Marakwet with friends who took him to Bus Station and the OTC area. He claimed he lost touch with them and ended up as a street boy.
43. Lastly, the accused was arrested the following day at the same location. I thus find that the accused was positively identified. See generally *Wamunga v Republic* [1989] KLR 424; *Maitanyi v Republic* [1986] KLR 198 at 201.
44. I have already stated that the persons who attacked and stabbed the deceased were the same ones who stabbed PW1 and stole her property before escaping towards the river bed. On the totality of the evidence from the 10 witnesses called by the State, I find that the conduct of the accused is inconsistent with his plea of innocence. By attacking and stabbing the deceased with a sharp object that perforated his lung, he and his accomplice knew or ought to have known that it was likely to cause grievous harm or death.
45. Accordingly, the accused had malice aforethought as defined in section 206 (b) of the *Penal Code*. The deceased died as a consequence of his conduct. I have found that the defence set up is a sham and completely evasive. The entire corpus of direct and circumstantial evidence points irresistibly to his guilt.
46. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty and convict him of murder contrary to section 203 as read with section 204 of the *Penal Code*.
- It is so ordered.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF MARCH 2025.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of: -

The accused.

Mr. Kingoina for the accused person instructed by Kingoina-Obuya & Company Advocates.



Ms. Kigira for the Republic instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

JUDGMENT NAIROBI HCCRC 59 OF 2019 *Republic v Kelvin Kiprop Korir* Page 3

