



REPUBLIC OF KENYA



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**Republic v Githuku (Criminal Case 71 of 2015)
[2025] KEHC 2311 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 71 OF 2015**

SM MOHOCHI, J

MARCH 3, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

MOSES KAMAU GITHUKU ACCUSED

JUDGMENT

1. Moses Kamau Githuku, was charged with two counts of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on the night of 15th and 16th December 2015 at Gatongu Farm in Subukia Sub-County, Nakuru county, murdered Kabuga Mochu Kambuga and Njeri Wangechi Kabuga.
2. The deceased persons were husband and wife and grandparents to the accused who pleaded “not guilty” to the charges.

Prosecution’s Case

3. PW1 Philip Ngethe testified that he knew both deceased’s in this case who were a man and his wife and they were his neighbours. He recalled that on 15th December, 2015 at about 1.00am he was asleep in his house when he heard shouts from the neighbours home. He got up and rushed to the scene where he found the son of deceased Josephat and his grandchild both crying outside. They told him that their parents had been killed. The door was open and he went to the bedroom, he had his torch and he shown it into the bedroom and saw bodies lying on the ground covered with clothes. There was blood on the floor. They were all shouting other neighbours came one man phoned the chief. Then the chief came with police.
4. There were some children who were sleeping in the sitting room. They managed to escape. He went around the house and saw a hole dug behind the house. One of the children identified the accused as



he bumped into her when he was escaping. A panga was found under the chair in the sitting room. He saw the panga which had a sow's skin on the handle, he identified it as the accused's panga. He knew accused well. He is his neighbour and they used to do farm work together. He knew the panga as he often used to see accused using it. He saw the bodies police uncovered them when they came. The man had a cut across his mouth and the wife had a cut to the back of her head, the 2 deceased's were Peter Kabuga Mochu and his wife was Ann Njeri.

5. The accused is their grandchild. He is the son of the couple's son. The accused had blood stains. The grey/cream shirt MFI 3 belongs to accused found under the tree. He had often seen him wearing it. MFI 4 the clothes were hanging on the tree.
6. The box was on the ground under the tree MFI 5. The torch was also under the three MFI 6. The accused was his friend. He was a fellow villager. The accused has never told him that he had a problem with his grandparents. He cannot tell why accused would want to kill them.
7. In Cross-Examination by Ms. Tarus the witness clarified that he saw the bodies of the 2 deceased's. He does not know who killed them. That, the panga MFI 1 was found under a chair in the sitting room. The bodies were found in the bedroom. One of the deceased's grandchildren bumped into accused as he was running away. He knew the family wells. In his view they all related well.
8. In Cross-Examination by Mr. Motende he clarified that, one child said that she grabbed the panga from accused and threw it under the chair where it was recovered.
9. PW2 Mathew Waweru testified that he knew the two deceased's Kabuga Mochu and Njeri Kabuga. They were his grandparents. That he knew the accused Moses who is his cousin.
10. He recalled that on the night of 15th and 16th December 2015 he was at home. It had rained heavily. He was asleep when he heard a shout. That he lives near his mother's house. Upon listening to the screams, he heard it was Moses Njoroge shouting, that he heard his aunty also calling out for help and he ran outside to check. They told him to go and check on his grandparents. He had a torch and went to the house of his grandparents through the sitting room where his 2 cousins were sleeping. That he called-out his grandparents he shone his torch into their bedroom. He saw clothes scattered in the bedroom and blood on the floor. He ran out screaming. He called his uncle. He gave him his torch to check. He shone the torch into the bedroom and saw the blood. He began to shout. They then went to behind the house to check. They saw a hole which had been dug leading into the house. A crowd came somebody rang the police. They came that night. The police recorded their statements. They removed grandparents were found dead in in their bedroom. The police recovered their bodies. bodies. He did not see the injuries. He did not see any weapon. Accused is his cousin. He had no problem with their grandparents. That same night the accused vanished. He was only lived near their home. On that night they went to look for accused in his house. They did not find him but the lights were on in his house. The next morning as they walked around the compound they recovered a trouser, a torch and a box beside a tree near the accused's house. He knew the trouser it belonged to accused. He had seen Camouflage him wearing it. It wasarmy ...army trouser. The accused vanished after the incident.
11. PW3: GN then a minor aged 17 testified and stated that, she knew the accused who is Moses Kamau pointing at him (dock identification) and that she knew the two deceased's persons Hannah Njeri and Moses Kabuga her grandparents.
12. That on the night of 15th and 16th December 2015 they had come from a party in Dundori while with her mother and siblings and were on the way to her grand parents' home when they met the accused who was leaving the home. That they ate supper and slept and that she and her younger brother slept



- in the sitting room while the deceased's slept in their bedroom. That the others slept nearby in a house within the compound.
13. That at night she woke up to see a torch at the door, she saw a man counting money, he asked her in kikuyu "why she had woken up?" That she recognized the voice of the accused and that, the accused came to where she slept and ordered her to remove her clothes, her brother woke up. That the accused had a panga which he used to hit her hand. That her brother went to open the door and the accused dropped the panga (witness identified the panga as MF11) which she picked up and hid it under the chair he was sleeping on. That the accused slapped her brother ordering him to sleep and that after being slapped the brother to the witness ran out crying and the accused followed him outside.
 14. That she saw a hole had been dug in the wall as the house was mudwalled. Her mother heard the noise and came calling out her grandmother who never responded. That her aunty entered the grand parent's room and rushed out screaming that her grandparents had been injured. That it had heavily rained that night and that she never knew how the accused entered the house. That her grand parents were dead. That the accused used to smoke bhang.
 15. In cross-examination by Ms. Tarus Advocate the witness clarified that;
It had rained that night, it was dark and the accused had a torch and she recognized the accused by his voice. That she slept at nine p.m and never heard any commotion before she woke up at midnight and that the door was still closed. That she slept in the sitting room together with her brother and the deceased's slept in the bedroom. That she saw the accused counting money and she saw a hole had been dug in the wall in the deceased's bedroom. That the accused had a torch and he shone it on the money he was counting. She could not tell when the wall in the hole was dug.
 16. PW4: MN a 14 years old student of [particulars withheld] School in class 8 knew the accused Moses Kamau who he identified in the dock as my cousin and that PW3 Grace Njeri is her sister. He knew the two deceased's who were his grandparents.
 17. He recalled the night of 15th and 16th December 2015 that they had gone to visit his grandparents in Subukia. On that night he slept with his sister PW3 in the sitting room. His grandparents slept in their bedroom. It was raining heavily. He heard his sister speak so he woke up and saw the accused was in the living room. That the accused had not slept with them in the sitting room. He got up and went outside to call his mother telling her there is somebody in the house. Then he saw somebody. (Child breaks down in tears). Then he heard that his grandparents died. He did not look at their bodies. He did not see any panga.
 18. PW5: Mary Mwhaki testified and stated that:
"She knew the accused in the dock. He is Kamau (identifies the accused in the dock). He is her nephew. She knew the 2 deceased persons Peter Kabuga and Hannah Njeri her parents' in-law. She recalled the night of 15th and 16th December 2015 at 1.00am she was at the home of her parents' in-law. she was sleeping. She heard her son 'Moses" screaming outside. She came out and opened to let PW4 into the house she was sleeping in. Then I called for PW3. She came. PW3 told her she had called her grandparents but they did not respond. She called out to her nephew Waweru to alert him, Waweru entered the room of their parents. He came out crying saying our parents have been killed. She did not go to check. When PW4 come he just said ni Kamau' i.e 'it is Kamau'. She did not herself see the accused. She did not see the bodies of the two deceased (witness breaks down sobbing and weeping) she does not know what time the deceased were killed".



19. PW6 Daniel Wainaina a medical officer stationed at Nakuru west testified how on the 21st December 2015 he was requested by the Officer in charge Kiengere to conduct the post mortem of the deceased herein with the following findings;
 - a. The body of Kabuga Mochu Kabuga had a deep cut on the right-side of face extending from mouth to back of the head and a large cut on the shoulder, the doctor attributed the course of death to cervical spinal injury caused by sharp object.
 - b. The body of Njeri Wangechi Kabuga had deep cut on the upper neck, to detached spinal code at upper neck and course of death was decapitation caused by a sharp object.
 - c. The witness produced the two post mortem reports as Exh 7.
20. PW7: No.65518 P.C. Richard Wachira attached to Kapenguria Police Station, West Pokot County recalled how on the 16th December, 2015 he was in crime office Kirengero Police Station in Subukia 1.30a.m. When he received a report of murder at Katogu in Subukia. They called area chief for directions to the exact location.
21. The witness, Sgt. Nganga, the investigating officer in this case, P.C. Ndiwa and driver left to Katogu area with the assistance of the area chief to lead them to the scene of the incident. They reached the area left a vehicle and walked downhill only to find a big crowd that informed them that an old man and his wife had been cut by a suspect.
22. They went into the house and confirmed that the old man and old woman had been cut severally and were dead. There was blood in the mud wall house.
23. The man was identified as Peter Kabuga Mochu and the wife was Hanna Wangechi Kabuga. Investigations began and that they realized that the person suspected to have committed the offence had demolished the wall and gained entry.
24. They were told by a 15-year girl called Grace Njoki who was sleeping in the sitting room with her brother aged 12 years called Moses Njoroge Mwihi. That they are cousins to Moses Kamau Githuku-Accused.
25. That Grace Njoki narrated how Moses came to the sitting room as they slept and he had a panga – opened the girls face and flushed a small torch on her face. He threatened to cut the girl with the panga if she attempted to scream. The girl asked; “Kamau why do you want to cut me.” He started pulling her. When the girl screamed he left the panga opened the sitting room from inside and left.
26. That the girl screamed and the mother who lived nearby went to check what was happening. The witness narrated the whole story to her mother and on entering inside she found the parents had been cut.
27. The girl and her mother called area chief and informed him of the incident. The witness commenced investigations checked for the accused in his house but he was not there. In a thicket they found several things thrown there. There was a mud-stained jean trouser, a shirt which was also stained with mud and a small torch at the scene and a small box red in colour (like first aid box all exhibits identified as MFI-1- MFI-5

Defence Case

28. DW1 the accused person testified and gave an unsworn statement on “alibi defence” that, he worked for the deceased as a gardener and that on the material day on the 14th October 2018, at 8am his employer



called him and paid him kshs 5,000/- which was his salary. He then went home on the same day, that he left between 8.00 – 9.00 am and arrived at 5.00 pm and at home he met his brother DW2.

29. That, he was living with PW1's son and on the 14th October 2018, the son was there. That he never met the deceased again after the deceased paid him and that, he was arrested after three days. With regards to the charges of killing the deceased he stated that he did not kill the deceased.
30. DW2 was Collins Ngetich a brother to the accused person whose evidence was to corroborate the Alibi defence.

Determination

31. I have carefully considered all the evidence availed before Court and the only issue in question in this case is whether the prosecution have proved whether the accused persons caused the death of the deceased persons and was there actual malice?
32. The offence and punishment for murder is provided for under Section 203 and 204 of the [Penal Code](#). The said provisions provide that:
 - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
33. To establish the offence of murder, the prosecution is required to prove beyond reasonable doubt, proof of death, proof that the death was caused by the accused, by an unlawful act or omission and that, the unlawful act or omission was through malice aforethought.
34. Section 206 of the [Penal Code](#) defines Malice aforethought as follows:
 - “ 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
 - (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

Proof of Death

35. PW1 confirmed that he saw the bodies of the deceased's when he reached the scene. PW2, PW3, PW4 and PW5 corroborated the events leading to the discovery including identification of MFI 1 to MFI 6 as the recovered exhibits subsequent to the incident with MFI 2- MFI 6 being identified as the accused clothing and items.



36. The two post mortem reports by Daniel Wainaina was produced as P-Exh 7. The post mortem report revealed that the cause of death for Kabuga Mochu Kambuga had a deep cut on the right-side of face extending from mouth to back of the head and a large cut on the shoulder, the doctor attributed the cause of death to cervical spinal injury caused by sharp object while the cause of death of Njeri Wangechi Kabuga had deep cut on the upper neck, to detached spinal code at upper neck and cause of death was decapitation caused by a sharp object. Accordingly, the prosecution has satisfied this condition beyond reasonable doubt.

Whether the death was caused by an unlawful act or omission

37. There is evidenced placing the Accused at the scene and the voice identification evidence is corroborated. PW2, PW3 and PW4 are all related to the accused and were familiar with his voice which they identified. It is noteworthy that the accused axially talked to PW3 ordering her to remove her cloths and that the accused spoke to PW4 asking him why he had woken up?
38. Identification by voice is considered admissible evidence and can carry as much weight as visual identification, but Courts must carefully scrutinize the circumstances to ensure the witness was familiar with the voice and recognized it as belonging to the accused, especially in situations where conditions might have made identification difficult; this principle is often cited from the case of "Karani v Republic".
39. It was the evidence of PW3 and PW4 that; "That at night she woke up to see a torch at the door, she saw a man counting money, he asked her in Kikuyu "why she had woken up?" that she recognized the voice of the accused and that, the accused came to where she slept and ordered her to remove her clothes, her brother woke up while PW3 identified the accused that "It was raining heavily. He heard his sister speak so he woke up and saw the accused was in the living room. That the accused had not slept with them in the sitting room.
40. The aforesaid identification is corroborated by the evidence of PW1 who not only went into the room where the deceased bodies lay but also recovered MFI2 -MFI6.
41. The accused was identified by close relatives and no evidence has been laid as to why such close relatives would implicate the accused there having been no prior bad blood.
42. In addition to identification the recovered identified Exhibits MFI1 =MFI6 corroborate the circumstances as narrated by the PW3 and Pw4.
43. The Court notes the non-production of MFI1-MFI6 by the prosecution but appreciates that the same was not fatal to the case.
44. While the circumstances of the fateful night included darkness, the accused was not only identified thrice by voice but was also seen from the illuminating light of a torch in the sitting room where PW3 and PW4 slept.
45. With regards to the defence case, an Alibi defence must be laid well in advance and the defence ought to notify the Court and prosecution of its existence as was held in the case of R v Sukha Singh S/o Wazer Singh & Others [1939] 6 EACA 145 held:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution



an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

46. It is trite that the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”

47. The Court of Appeal in *Wangombe v Republic* [1980] KLR 149 held inter alia:

“...in *Ssentale vs. Uganda* [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible.” cited by Odunga J in *Republic v SSM* [2020] eKLR.

48. In *Adedeji vs. The State* [1971] 1 All N.L.R. 75 it was held by the Nigerian Court that:

“failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.”

49. The Alibi Defence is hereby dismissed as a sham, an afterthought, as the same not having been introduced at the earliest opportune time to enable the same be investigated and verified.

50. The Accused never availed supporting evidence in proof that on the fateful night he had travelled Narok, that he had leased a potato farm and that no evidence at all was called to fortify this Alibi.

51. As for the extreme violence meted upon two hapless senior citizens, one deceased was completely decapitated while the other was almost decapitated. The accused must have known or had a reasonable to belief that the same would either cause grievous harm to the deceased or even kill the deceased, malice aforethought is accordingly inferred.

52. In totality, having considered the evidence adduced in this case it is my finding that the prosecution has proved its case against the accused beyond reasonable doubt. I find the accused herein Moses Kamau Githuku, guilty of the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) and is hereby convicted accordingly.

53. A pre-sentence report and a victim impact report shall be prepared and served to enable mitigation and sentencing.

It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF MARCH, 2025

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MOHOCHI. S. M.



JUDGE

