



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mwangi (Criminal Case 49 of 2019)  
[2025] KEHC 3130 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 49 OF 2019  
SM MOHOCHI, J  
MARCH 3, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENARD KARIA MWANGI ..... ACCUSED**

**JUDGMENT**

1. Benard Karia Mwangi, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars were that on the 4<sup>th</sup> of October, 2019 at Kiratina Nakuru East Sub-County, Nakuru County, murdered Lucy Nyira Ndungu. The accused person pleaded “not guilty” to the charges.

**Prosecution’s Case**

2. PW1 Simon Gathiru Mugo, from Kiratina business person with rental houses testified that on the 29<sup>th</sup> September 2019, at 11.00 p.m. - 12.00 a.m. he was sleeping at home when he heard screams from a house near his and heard someone say, “usiniue”, do not kill me. He went out and saw the mzee of the house had opened the door. The voice he heard was of the woman of that house. When he opened his door, he saw the person and he called out Baba Chira. He asked him, who Baba Chira is? then got back inside and locked the door quickly, the witness was alone and he went back to wear shoes to get help, he could still hear the sounds of a fight. He went to call his neighbor whose name he could not recall. They came back together, and met the young man, Karia, and his wife Lucy, they asked his wife, she said her husband had set fire on her after pouring petrol on her.
3. That they could see her face was burnt, that before knowing what to do, they were now a crowd, and went back to Karia’s house. They saw that the seat; where his wife had sat was burnt. That they found petrol in a bottle, just a little amount that appeared to have remained in the bottle. He took and kept



it aside. Then he took Karia and his wife to police station. When they reached the police station was told to take them to hospital.

4. He went back to the car, proceeded to Nakuru Provincial General Hospital, they were received there, when Lucy was asked what had happened before treatment, she could not speak in presence of her husband. The husband Karia was chased out by doctors. That is when Lucy spoke. She said that her husband had set her on fire with petrol.
5. The doctor took her, then Karia sent to carry out the documentation to enable the admission of his wife. He brought the documents. His wife was admitted to the ward. They all left for home and two days later, he heard over the news that Lucy had died. The police at Teachers Police Post called and told him that Lucy had died and he was required to record a statement. He recorded his statement.
6. That, when he first heard noises it was about midnight. He went out and saw Karia holding onto the door. He was not sure what was happening, when he spoke to him, he went in and closed the door. That the accused also spoke to him. There is a “mulika mwizi” mast light in the vicinity, the big security light that is very bright. He could see him very well. Even if it was dark he would have recognized his voice because he knows him, and when the accused asked Baba Chira is who? It was because he did not want to intervene. That the accused had a small burn on the hand (shows the inside of the wrist).
7. That Lucy had burns on face, when they removed her clothes in hospital, she had burns on chest. He heard her say her husband set her on fire, even in the car, she was saying he had set her on fire. He knew Karia well as his tenant and doors to their respective houses face one another.
8. The deceased said the accused set her on fire. The accused was trying to say that she got burnt, she said it in his presence both in the car on the way to hospital and at the hospital.
9. The cross-examination was insignificant restating his evidence in chief save for the fact that he was with 5 other persons in the car that took the deceased to the hospital (2 women, 1 mzee, the accused, and the deceased) and that he never saw the children and that the deceased had been wrapped in lesso one big shuka.
10. PW2 Dr. Titus Ngulungu, Pathologist, Nakuru Provincial General Hospital, had post mortem, for Lucy Nyira Ndung’u, he performed on 8<sup>th</sup> October 2019 at Nakuru referral Hospital. He was told the deceased was said to have been doused with petrol, set on fire, succumbed with the undergoing treatment and he was to ascertain cause of death.
11. That the Body was identified by Jackson Ndung’u father of deceased, and Mercy Wambui the sister.
12. He examined the body. Body of female, no clothing, African, young adult, 168 cm height. Body preserved by embalming with formaline, no post mortem except cooling and handing.
13. That the Body had cyanosis, sign of lack of oxygen before death, indicates shock, before death (shown in Kiswahili). The body had burns, superficial burns, affected the skin, the burns were infected.
14. That the burns, were on the head, chest, both hands about 30% of the body. hands had 30% burns, internally, the lungs were swollen, signs of bleeding. Trachea, swollen on the inner sides, other systems were normal.
15. Cause of death, 30% infected burns, caused by dry heat, dehydration. infection. He signed the report and produced it as evidence.
16. PW3 Cpl Gideon Mugwika from Laikipia Umande Police Station who was at Teachers Police Post under Central Police Station at the material time.



17. He recalled that on 29<sup>th</sup> September, 2019, he went to the station saw the OB, realized he had been assigned case of a person who had been burnt. The person has been taken to Provincial General Hospital for treatment of burns.
18. He went with P.C Odhiambo to where the victim was admitted. It was a woman, Lucy Nyira Ndung'u. She had burns on whole face, neck. He asked her questions and recorded her statement. In the statement she told him that her husband Benard Karia Mwangi gave her Kshs. 9,600/= to buy Mtumba in Nairobi. She stayed there for three days. Her husband suspected she was with other men in Nairobi, because she was to go and return. A disagreement arose. She told him that her husband threw petrol on her, and set her on fire, he left the hospital with PC Odhiambo found Benard Karia reporting that their cooking gas exploded and burnt his wife. Because he had recorded his wife's statement, he arrested him, placed him in cells with the charge of attempted murder.
19. That he went to where Lucy was living in a rented house and found the landlord, who told them that he had recovered some of the petrol that had remained. His name is Simon Gathiru Mugo. They called scenes of crime personnel who documented the scene and took photos, they took the petrol to government chemist for forensics and it was confirmed to be petrol. He had the exhibit Liquid in plastic bottle, (P. Exhibit 2)
20. That, Lucy remained in hospital for treatment and succumbed to her injuries on the 4<sup>th</sup> October, 2019. Upon her death, he took body for post-mortem. The doctor said cause of death was 30%, infected burns and he went back, changed the charge of Murder Contrary to Section 203 as read with Section 204.
21. That he recorded the statement of Lucy and produced the statement, dying declaration, statement of Lucy Nyiro Ndung'u dated 29<sup>th</sup> September 2019 P. Exhibit 3.
22. He charged the accused with murder because they recovered the petrol, the statement of Lucy, the landlord who saw the fire and recovered the petrol.
23. That the accused came to report about an exploded gas. He brought himself to the police station. We learnt from the neighbor's that the accused had made threats to harm his wife when she came back from Nairobi and there was no gas tank in the house of accused.
24. That Accused showed them, and it is only where the deceased was seated that had suffered serious damage.
25. PW4: Dr Kibet Dalmas Sang a government chemists analyst based in Kisumu testified on his report dated 2<sup>nd</sup> October, 2019 with regards to a 2 litre plastic bottle containing a reddish substance. He was to ascertain they of petroleum product and found it to be petrol. He produced the exhibit as 2A and the exhibit memo as PExhibit 2B
26. PW5: Jackson Ndungu testified and stated that;
 

“he was the father to the deceased and he identified the body of his daughter on the 8<sup>th</sup> October 2019 at the Nakuru PGH, he witnessed the post mortem being conducted and was informed by the pathologist that the cause of death was fire”
27. PW6: Bernice Wangare Ndungu Stated under oath that;
 

“the deceased was her 3<sup>rd</sup> sister she attended the post-mortem identified the body and witnessed the post mortem on the 8<sup>th</sup> October 2019.



## Defence Case

28. DW1 the accused person testified and gave an unsworn statement on “alibi defence” that, he works as a motorcycle mechanic by day and boda boda rider by night and that on the material day at between 10.30pm and 11pm he had gone to Free Area to get a customer.
29. While on the way he was called by a neighbor “Joyce” and told there was trouble at his house that was on fire. He returned home and found neighbor’s awake and his wife had been burnt all over her body and that he asked for and found transport to take her to the Nakuru Provincial General Hospital in the company of neighbours and caretaker.
30. That she was attended to and he went back home until the next morning when Simon the caretaker told him he was required by the Teachers Police Station and he went there only to find the caretaker who had accused him of arson. He was arrested and remained in police custody from the 29<sup>th</sup> September 2019 to the 4<sup>th</sup> October 2019 when he was charged with murder. He denied assaulting his wife or committing arson on her.
31. That he tried to talk to the deceased to know what happened but she was unresponsive.
32. In cross examination he stated that he used a motorbike registration number KMC 982C which he never had a log book and had bought it from one “Mbugua” and could not tell his second name, he had no agreement for the purchase and claimed to have paid kshs 65,000/-.
33. He said Joyce who called him is “Mama Kevo” who he said moved out of her residence and never knew where she moved to.
34. He confirmed that it was only the sofa set that had been partially burnt. That the Client he was picking from Free Area was “Baba Kamau”
35. He denied any involvement in the alleged crime.

## Determination

36. I have carefully considered all the evidence availed before Court the filed submissions 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?
37. 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.”
38. 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.
39. 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**

- 40. PW5 and PW6 identified the body of the deceased at the Nakuru Provincial General Hospital on the 18<sup>th</sup> October, 2019.
- 41. The post mortem report by Dr. Titus Ngulungu was produced as P-Exh 1. The post mortem report revealed that the cause of death was 30% infected burns, caused by dry heat, dehydration. infection. according to the prosecution has satisfied this condition beyond reasonable doubt.

### **Whether the death was caused by an unlawful act or omission**

- 42. It is my considered view that, the prosecution has established that the accused person caused the death of the deceased by an unlawful act or omission.
- 43. The Evidence of PW1 is corroborated sufficiently by the evidence of PW2 and PW3 that the deceased informed PW1 how the accused threw petrol on her and set her ablaze and that she did inform the doctors of the same, the deceased was admitted for suffering severe burns, only the seat she sat on was partially on fire, the incident occurred late at night, the accused alleged there was a gas explosion and in his defence alleged he was away when the fire erupted. The deceased recorded a dying declaration and spoke to PW2.
- 44. The offence of murder is complete when, “malice aforethought” is established if, pursuant to Section 206 of the *Penal Code* evidence proves 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.”



45. When none of the aforesaid elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under Section 202 of the [Penal Code](#) which is punishable under Section 205 of the [Penal Code](#) by a term of imprisonment extending up to life.
46. In this instance while the deceased succumbed subsequent to an assault that resulted in her getting 30% burns that ultimately caused her death, the circumstances of the incident would presuppose some spontaneous domestic violence as the fire only partially burnt a sofa set in the sitting room.
47. According to PW1 the landlord, he responded upon alarm, found the deceased and accused by the door, the witness took the deceased to the hospital together with the accused. That in the motor vehicle the deceased was saying it was the accused that had burnt her.
48. 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.”
49. 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.”
50. The Court of Appeal in *Wangombe vs. 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.
51. 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.”
52. 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.



53. The Accused never availed supporting evidence in proof that on the fateful night he had gone to Free Area, he never called “Joyce” and “Baba Kamau” that no evidence at all was called to fortify this Alibi.
54. While PW3 testified to recording a dying declaration statement of Lucy Nyiro Ndung’u dated 29<sup>th</sup> September 2019 which he produced as P exhibit 3, this Court notes that this piece of evidence (exhibit) was not on file and that the record of exhibit does not include this exhibit.
55. This Court is thus unable to discern the chain of events leading to the accused dousing the deceased in fire while she was seated and that a person with malice aforethought would not take any steps at ensuring the victim survives. In this instance the accused not only took the deceased to the hospital but got her admitted.
56. In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*), the Court of Appeal cited the case of *Rex Vs Tubere S/o Ochen (1945) 12 EACA 63* with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

15) In this case, there is no evidence of repeated blows. This factor leads me to believe that the blow was an isolated one probably without any malice aforethought on the part of the Accused. In other words, it was likely that the Accused did not intend to kill the deceased but intended simply to hit him once.

16) The evidence as adduced by the prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person herein without malice aforethought. Sections 179 of the *Criminal Procedure Code* stipulates:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

57. As a result, Accused is found guilty of a lesser charge of manslaughter contrary to Section 202 (1) of the *Penal Code* as read with Section 205 of the *Penal Code* and is convicted accordingly.

It is so ordered.

**JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 3<sup>RD</sup> DAY OF MARCH, 2025**

**MOHOCHI. S. M.**

**JUDGE**

