



**Director of Public Prosecutions v Gikundi (Criminal Case
E027 of 2023) [2024] KEHC 4882 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E027 OF 2023
TW CHERERE, J
MAY 9, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

DENNIS MUGENDI GIKUNDI ACCUSED

JUDGMENT

1. Dennis Mugendi Gikundi (Accused) is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code in that together with others not before the court murdered one Samwel Kaberia Daudi on 01st February, 2023.
2. Accused denied committing the offence of and the prosecution managed to call five witness.
3. The first witness, Jane Mwonjiru stated she was living with Samwel Kaberia Daudi (Kaberia) who was her sister's grandchild. She stated on the morning of 02nd February, 2023, she found Kaberia lying dead in the farm of her neighbor one Ntongai but dd not know the circumstances under which he met his death. Agnes Kendi, Kaberia's aunt and David Mwongera M'Mugwika too found Kaberia lying dead in the farm of her neighbor one Ntongai on the morning of 02nd February, 2023 and similarly did not know the circumstances under which he met his death.
4. Naftali Gikangu stated on the night of 01st February, 2023 about 11.00 pm, he heard the voices of Accused and one Mwiti saying that they had arrested a thief. That he went out and saw them walking towards the river and he followed them. That from the light of torches that one Mwiti and Kirimi had, he saw Accused who was his neighbour armed with a panga and a rungu and together with about 10 others saw them beating Kaberia. He stated that he reported the matter to the chief the following morning.
5. The investigating officer upon receiving the murder report visited the scene on 02nd February, 2023 and removed Kaberia's body to the mortuary. He also collected a bloodstained stick which was suspected



to be the murder weapon. On the strength of the report by Naftali Gikungu, he arrested Accused and charged him with murder. A postmortem report PEXH. 1 filled by Dr. Muthomi who conducted an autopsy on the body of Kaberia on 15th February, 2023 reveals that Kaberia died of traumatic injury to the brain resulting from blunt trauma to the head.

6. Accused denied the offence. He denied that Naftali Gikungu was their neighbor or that his father had a miraa farm from where miraa could be stolen. He stated he arrived home from school on the evening of 01st February, 2023 and did not leave home that night.
7. His mother similarly stated Accused used to sleep in a room in her house and he did not leave home on the night of 01st February, 2023.

Analysis and Determination

8. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence. Any doubt raised by an accused person is to be given to that accused.
9. I have considered the evidence on record and the issues for determination is whether the DPP has proved the three main ingredients of murder i.e the death, that Accused person/s committed the murder and that they were actuated by malice. (See Anthony Ndegwa Ngari v Republic [2014] eKLR).
10. In Republic vs Andrew Muecha Omwenga, Maraga J (as he then was) considered the provisions of section 203 of the Penal Code and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.”

a. The death of the deceased

11. That Kaberia died was confirmed by a postmortem form PEXH. 1 dated 15th February, 2023 which reveals that Kaberia died of traumatic injury to the brain resulting from blunt trauma to the head.

b. Proof that accused person either jointly or severally committed the unlawful act which caused the death of the deceased

12. In order to establish the accused's culpability, the prosecution relied on the evidence by Naftali Gikungu who stated the light from torches that one Mwititi and Kirimi had enabled him to identify Accused herein as one of the persons that assaulted Kaberia on the night of 01st February, 2023.
13. The offence was committed at night and the first issue for determination is whether Accused was positively identified.
14. I have considered the evidence of visual recognition against the Accused 1 as adduced by PW2. Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume & Another v R {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such



evidence must be water tight. (See Abdalla bin Wendo & Another v R, {195} 20 EACA 166; Wamunga v R, {1989}).

15. In the case of Maitanyi vs Republic (1986) KLR 198, the Court of Appeal Court stated as follows in relation to identification at night

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

16. Concerning evidence of voice recognition, the Court of Appeal in Karani vs. Republic, (1985) KLR 290 held at page 293:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases, care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.

17. Accused has denied that he was at the scene that PW3 stated to have seen him on the night of the murder. He raised the defence of alibi that he was at home with his parents and siblings. His mother stated Accused slept in a separate room in their house and did not leave the house on the material night.

18. The Supreme Court of Nigeria in the case of Ozaki & Anor Vs The State (1990) LCN/2449(SC) held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.

19. Our own Court of Appeal in the case of Kiarie v Republic [1984] KLR held that: -

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

20. I have weighed the uncorroborated evidence by Naftali and the prevailing circumstances he testified to have identified Accused vis a vis the defence of alibi raised by Accused as corroborated by his mother.

21. The prosecution failed in its duty to lead evidence as to the nature of the torch light that the attackers had, the strength of the light, its size and its position relative to Accused thereby rendering the evidence of visual identification unreliable. The prosecution similarly failed to dislodge Accused’s defence that he was unknown to Naftali and he could therefore not be identified by his voice for he was not at the scene of crime.

22. From the foregoing, I find that the uncorroborated evidence by Naftali cannot be said to be so strong as to hold a conviction.



Malice aforethought

23. The prosecution having failed to prove actus reus', it would be futile for this court to delve into the issue of malice aforethought.

Disposition

24. From the foregoing analysis, I find Accused not guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and hereby acquit him accordingly. He shall be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU THIS 09TH DAY OF MAY 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused - Present

For the Accused - Ms. Gachohi Advocate

For the State - Ms. Rita Rotich (PC 1)

