



**Republic v Gitari & another (Criminal Case 32 of 2018)  
[2024] KEHC 6584 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL CASE 32 OF 2018**

**LW GITARI, J  
MAY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ANTONY MUGAMBI GITARI ..... 1<sup>ST</sup> ACCUSED**

**KENNEDY KIRIMI NKONGE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 of the Law of Kenya). The particulars of the offence were that on 26<sup>th</sup> November, 2018 at Kandugu Location, Maara Sub-County within Tharaka-Nithi County, the accused persons, jointly with others not before court unlawfully murdered one Micheni Reche.
2. Both accused persons denied the charge and the matter proceeded to trial. In a bid to prove the charge against the accused, the prosecution marshaled six (6) witnesses then closed its case.

**The Prosecution Case**

3. PW1, Ephapharm Njeru, stated that on the material day, he was at home at around 4.30 p.m. He went to check on his farm where he found many people (about 30 men) carrying firewood. He inquired on what was happening and he was told that the people were going to lynch a suspect of theft. PW1 did not recognize the people as they were from Gikumbo, which is a different sub-location. He also did not get to see the suspected thief. It was PW1’s testimony that he told the crowd of people that they could not lynch the suspect on his farm but they threatened to kill him. PW1, fearing for his life, then ran to the road and called the chief, Martin Njagi (PW3), who came and arrested two people as the others fled. The chief directed the two accused persons to show him where the suspect was and when they



- reached the farm, they found a dead person near Nithi River. The chief then called the police from Marima Police Station and they left the scene as it had started raining.
4. PW2, Phineas Mwenda, testified that on the material day he was on his way home. On reaching the gate to his home, he met two people seated on the side of the road. The two people appeared to have been arrested by a crowd of around 8 - 10 people. He saw PW1 at the scene and went to inquire from him what had happened. The two arrested persons were not familiar to PW2. PW1 explained to PW2 that some people wanted to burn a dead body. They went to where the dead body was and PW2 saw a heap of dry grass and some branched of trees along a valley. PW1 states that he only got to see the legs of the dead body as the crowd was big. He then left after it started drizzling. PW2 confirmed that the two persons who had been arrested are the two accused persons herein.
  5. PW3, Martin Njagi, is the chief of Kandugu location. He stated that he got to know the accused persons herein at the scene of the subject crime where a crowd of people had caught them. He confirmed that he received a call from PW1 on the material day between 4 p.m. and 5 p.m. That PW1 told him that there were some people who wanted to burn a body on his farm. PW3 instructed PW1 to gather people who could arrest those who wanted the body as the crowd had started dispersing. PW3 was accompanied to the scene by two assistant chiefs who were with him. They arrived at the scene 20 minutes later where they found the two accused persons had been ordered to sit down. PW3 handcuffed the accused persons and asked them to show him where the body was. According to PW3, the accused persons denied killing the deceased and stated that the deceased had been suspected of stealing a goat. PW3 stated that they found twigs and grass at the scene of the crime and only the legs of the deceased could be seen. That he knew PW1 and the deceased's body was found in PW1's farm. It was further PW3's testimony that the two people who had been caught by the crowd of people were the two accused persons herein.
  6. PW4 was Dr. Nicholas Nkonge. He produced a postmortem report that was authored by the late Dr. Kitili. He confirmed that he was familiar with Dr. Kitili's handwriting and signature. He stated that the postmortem examination was conducted on 6<sup>th</sup> December, 2018. The doctor formed the opinion that the cause of death was haemothorax due to blunt trauma to the chest.
  7. PW5, SGT Steven Busienei, testified that on the material day at around 6 p.m., he received a phone call from PW3 that he had received a report from member of the public that there was a person who had been murdered and buried using leaves. That PW3 had gone to the scene and confirmed the report and that he had arrested the suspects. PW5 telephoned the OCS Ntumu Police Station who went with a vehicle and they proceeded to the scene. On reaching the scene, they met PW3 and two assistant chiefs who had handcuffed two suspects. The two suspects led them to where the body of the deceased laid which was near River Nithi. There was a stretcher next to the body which they used to carry the body of the deceased and moved it to Marina Police Post. The suspects were also arrested and on interrogation, they stated that they had been looking for persons suspected of stealing goats. On cross-examination, PW5 confirmed that the police had not received a report of theft.
  8. PW6 was P.C. Amos Tali, formerly attached at DCI Maara sub-county. It was his testimony that on the material day at around 7 p.m., he was on duty when he received a call from one Mr. Joseph Onera who requested to accompany him to a scene of murder. They proceeded to the scene which was along River Nithi where they met the OCS Ntumu Police Station as well as the area chief (PW3). They found the body of the deceased covered with dry sticks, firewood, and dry leaves. They body of the deceased was in the farm of PW1 who is the one who prevented the crowd of people from burning the deceased's body. They uncovered the body and put it in the police vehicle. According to PW5, it is PW1 who identified the accused persons herein as the ones who wanted to burn the body of the deceased and stated that they were also the ones who were collecting firewood and placing it on the deceased's body.



On conducting his investigation, it was PW6's finding that the allegation of theft was false as the owner of the allegedly stolen goat denied the same. PW5 then recorded statements from the witnesses.

### **The Defence Case**

9. The accused were then placed on their defence. The 1<sup>st</sup> Accused testified as DW1. He stated that on the material day, he was at home before he left at 11.00 a.m. to go to the market at Ndakani to look for work as a mason. That he got a job which was to commence the following Wednesday and that on his way home, he met a man called Njeru (PW1) who ordered for his arrest together with the 2<sup>nd</sup> Accused who was apparently behind the 1<sup>st</sup> Accused. According to the 1<sup>st</sup> Accused, he later of an allegation that him and the 2<sup>nd</sup> Accused, together with other, had lynched the deceased. He further stated that he had never met the 2<sup>nd</sup> Accused prior to that day. He thus denied committing the offence and further denied knowledge of the alleged theft of goats.
10. On his part, DW2 stated that he was not related to the 1<sup>st</sup> Accused but they came from the same area. That he also knew the deceased from his home area. According to him, he spent the incident day on in his home shamba where he was planting miraa. He later decided to go from Kanoro from Ikumbo and on reaching Kanoro, he met Njeru (PW1) who was complaining that a person had been murdered and had been dumped in his shamba. That Mugambi (1<sup>st</sup> Accused) appeared from the opposite direction and they started a conversation. That later, the chief (PW3) and the assistant chief went to the scene and that is when PW1 was interrogated and identified the accused persons as the perpetrators of the murder. The accused persons were then arrested.

### **The Final Submissions**

11. The parties subsequently filed their final submissions. Counsel for the prosecution submitted that it had proved all the ingredients of the offence of murder beyond a reasonable doubt. That the element of death was proved by the production of a postmortem report (P.Exhibit 1). That though there were many people at the scene, the two accused persons herein were the ones who were caught and that they had come together with a common purpose of killing the deceased. Further, that the injuries inflicted on the deceased were evidence that the accused persons were determined to murder. On the defence given by the accused persons, counsel for the state submitted that the same was a but a denial and that the same should be dismissed.
12. On the other hand, counsel for the 1<sup>st</sup> Accused Person submitted that the 1<sup>st</sup> Accused was not positively identified as the only alleged eyewitness, PW1, testified in cross examination that he did not see the 1<sup>st</sup> Accused killing the deceased. further, that the identification of the 1<sup>st</sup> Accused was not free from the possibility of error as no identification parade was done and no evidence was given by PW1 as to how he was able to single out the 1<sup>st</sup> Accused person in a crowd of 30 people. In addition, it was submitted that the identification of the 1<sup>st</sup> Accused was uncorroborated and hence the evidence adduced by the prosecution cannot support a safe conviction. On the issue of whether there was malice aforethought on the part of the 1<sup>st</sup> Accused, it was submitted that there was no evidence that the 1<sup>st</sup> accused held or used any weapons to inflict injuries on the deceased. Further, tat there was evidence to support the allegation that goats had been stolen. It was thus submitted on behalf of the 1<sup>st</sup> Accused that the 1<sup>st</sup> Accused had no intention to kill and that he did not actually kill the accused person. Finally, counsel for the 1<sup>st</sup> Accused submitted that the prosecution had failed to proved its case against the 1<sup>st</sup> Accused on the charge of murder beyond reasonable doubt.



### **Issues for Determination**

13. The prosecution was duty bound to prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under Section 203 as read with Section 204 of the Penal Code, prosecution must prove beyond any reasonable doubt:
  - a. That there was death of deceased occurred.
  - b. That the accused committed the unlawful act which caused the death of the deceased.
  - c. That the said death was unlawfully caused with malice aforethought, either directly or indirectly, by the accused persons.

### **Analysis**

#### **Fact of Death**

14. On the fact of the death of the deceased, there is no doubt that he died as nearly all the prosecution witnesses confirmed that they saw the deceased's lifeless body on the material day. Further, the postmortem report produced by PW4 confirmed that the deceased indeed died.

#### **Cause of Death**

15. The evidence of PW4 was to the effect that externally, the deceased sustained bruises on the forehead, on both shoulders, on the chest, on the back and on the thigh and leg. Internally, there were fractures of the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> ribs on the left side and blood in the chest cavity. From the said in juries, Dr. Kitili, the medical officer who conducted the postmortem examination, formed the opinion that the cause of death was haemothorax (bleeding in the chest cavity) due to blunt trauma to the chest.

#### **The Actus Reus**

16. The next ingredient that the prosecution was to prove was that the accused persons herein were criminally culpable for the act that led to the death of the deceased. This is what is referred to as the "actus reus" of the offence.
17. In this case, none of the witnesses testified that they saw the accused persons killing the deceased. From the investigations done by PW6, there was a stretcher at the scene of the crime which suggested that the deceased was killed elsewhere before he was carried to the PW1's farm where he was found.
18. PW1 who identified the accused persons as the suspects stated that he saw them placing firewood on the body of the deceased. PW2 and PW3 only heard from PW1 that he found a crowd of people in his farm who wanted to lynch the deceased's body. The evidence of PW1 remains that of a single witness. In this regard, it was held in the case of *Kiragu v. Republic* [1985] eKLR that:

"It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this Court has to satisfy itself that in all the circumstances of the case, it is safe to act upon it."

19. I have considered the evidence adduced by the accused persons. Both of them confirmed that they were at the scene of the crime on the material day. PW1 was categorical that he saw the accused persons in the crowd and that on inquiring what had happened, he was told that the people wanted to burn the deceased's body. PW3 confirmed that he received a call from PW1 on the material day between 4 p.m. and 5 p.m. This is around the time that PW1 had left his home for the shamba. PW3 then advised



PW1 to mobilize people who would arrest the suspects and by the time PW3 arrived at the scene, the accused persons had been arrested by members of the public and ordered to sit down. Given the time that everything happened, it is my view that the source of light was sufficient to make a positive identification of the perpetrators. Further, while neither PW1 nor PW3 knew the accused persons prior to the incident, the occurrence of the events as per the testimonies of PW1, PW2 and PW3 are consistent and well corroborated and point towards the culpability of the accused persons. It would seem that the accused wanted to cover up the murder by alleging the deceased was a thief so that he could be lynched. Section 21 of the Penal Code provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of

such purpose, each of them is deemed to have committed the offence.”

The Court of Appeal in the case of *Njoroge- v- Republic (1983) KLR* held as follows:-

“If several persons combine for an unlawful purpose and one of them in prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or no provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

The accused were spotted carrying the body of the deceased. They had formed a common intention to murder the deceased then lynch him to cover up the real cause of death. No other person could have caused the death of the deceased other than the two accused.

### **Mens Rea**

20. 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.”

In the case of *Republic -v- Mohammed Dadi Kokane & 7 Others, (2014) eKLR* the court stated:

“Malice aforethought shall be deemed to be established evidence providing 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.”
21. On whether the accused persons herein had the requisite mens rea, it was the evidence of PW1 that the deceased was a suspected thief who had allegedly stolen goats. In this regard, PW6 stated that the allegation that there had been theft of goats was a rumour as the owner of the allegedly stolen goats denied such an allegation. Whether or not the deceased had stolen is in my view a non-issue as no one should take the law into their own hands.
  22. In the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used in causing death, the number of injuries inflicted upon the victim, the part of the body where such injury was inflicted, the manner in which the weapon was used, and the conduct of the accused before, during and after the attack.
  23. Guided by the above authority, it follows that an inference of malice aforethought can be made in the present case considering the injuries inflicted on the deceased as well as the common intention that had been formed to lynch the deceased’s body.

The defence of the accused persons is a sham. I reject it.

The evidence does not show how the accused caused the death of deceased. I however find that there is ample evidence which point to the guilt of the accused. This is what is termed as circumstantial evidence which is sufficient to prove the guilt of the accused. In the case of Ahamad Abolfathi –v- Mohammed and Another –v- Republic (2018) eKLR.

The Court of Appeal stated as follows with regard to circumstantial evidence:-

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables the court to deduce a particular fact from circumstances or facts that have been proved such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Haward, CJ stated as follows on circumstantial evidence in Republic – v- Taylor, Weaver and Donovan (1928) CR. Appeal .R. 21.

It has been said that the evidence against the applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of a surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation to say that the evidence is circumstantial.”

See also Musili Tulo-v- Republic Cr. Appeal No.30/2013. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated;

“Before circumstantial evidence can form the basis of a conviction it must satisfy several conditions which are designed to ensure that it unerringly points to the accused person and no other person as the perpetrator of the offence. In Abanga alias Onyango –v- Republic Criminal Appeal No.42/1990 this court set out the conditions as follows:-



It is settled law that when a case rests on circumstantial evidence such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is drawn must be cogently and firmly established,
- ii. those circumstances should be of a definite tendency unerring pointing to the guilt of the accused.
- iii. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

See also Court of Appeal in *Sawe –v- Republic* (2003) KLR where the Court of Appeal stated that there are no other co-existing circumstances which could weaken or destroy the inference of guilty. Taking these tests into account and applying it to the present case, the circumstantial evidence is that the two accused were the last persons to be seen with the body of deceased who they wanted to lynch. This court must draw the conclusion that they were the last persons to be seen with deceased when he was still alive. The reasonable conclusion to be drawn based on this circumstantial evidence is that they were with deceased when he was alive and cause his death. The circumstantial evidence is weighty and lead to only that one reasonable conclusion

### **Conclusion**

24. The upshot of the foregoing, in my considered view, is that the state proved its case against the accused to the requisite standard, that, of beyond reasonable doubts. I find the accused persons guilty as charged and I convict them.

Dated, signed and delivered at Chuka this 2<sup>nd</sup> day of May 2024.

L.W. GITARI

JUDGE

### **R U L I N G O N S E N T E N C E**

I have considered the mitigation by the defence Counsel. I have also considered the submissions by the Prosecution’s Counsel Mr. Ketoo.

The accused are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. This court called for a pre-sentencing report from the Probation Officers. Detailed reports were filed by the Probation Officer, Lydia Boore who has also filed the victim impact statement.

I have considered the pre-sentence reports and the victim impact statement, the mitigation and what the Prosecution stated.

1. The accused are no doubt charged with a very serious offence which carries a maximum sentence of death. The Sentencing Policy Guidelines requires that the courts be guided by the guidelines therein. The guidelines outlines the objectives of sentencing at page 15 paragraph 4.1 which include:-
  1. **Retribution-** To punish the offender for his/her criminal conduct in just manner.
  2. **Deterrence:** To deter the offender from committing a similar offence.



3. Rehabilitation: To enable the offender to reform his criminal disposition and become a law abiding person.
4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. Community Protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct. Section 216 of the Criminal Procedure Code, (Cap 75 Laws of Kenya) provides:

***The court may before passing sentence or making an order against an accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.”***

25. The Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & Another –v- Republic, Petition No.15/2015** while considering **Section 329 of the Criminal procedure Code** gave the following guidance.

***The court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. It is without a doubt that the court ought to take into account evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”***

26. In this case the pre-sentence report states that the accused person denied committing the offence and did not express any remorse. The community has confirmed the participation of the accused in committing the murder. It also confirms that other known person who took part in committing the offence are running at large and have not been arrested. These factors rule out a none custodial sentence. The accused are not likely to reform as they are not remorseful. The victim impact statement shows that the deceased was a young man who was unmarried. The family demands justice for their fallen son. I note that not all the perpetrators of the murder were arrested. (I hope the State takes note of that). The sentence must therefore send a message that mob injustice is crime like any other and shall be punished with the full force of the law to serve as deterrence and to ensure community protection. Members of the Public must learn to adhere to the rule of law and desist from taking the law in their own hands. The sentence for murder is death. I will however exercise my unfettered discretion and pass a custodial sentence instead.
27. I therefore sentence the accused to serve **twenty (20) years** imprisonment each.  
There is right to appeal within 14 days.
28. For the 1<sup>st</sup> accused, I note that he was in custody as from **13/12/2018** to **30/4/2019** a period of four months and seventeen days. The sentence imposed on 1<sup>st</sup> accused shall be reduced by that period.
29. As for the 2<sup>nd</sup> accused, he was in custody from **13/12/2018** to **2/5/2024** when the Judgment was delivered. This accounts for a period of **five (5) years** and four months and eighteen days. The sentence imposed on the 2<sup>nd</sup> accused shall be reduced by **five years, four months and nineteen days**. This is to take into account the period spent in custody in compliance with **Section 333(2) of the Criminal Procedure Code**.

**Dated, signed and delivered at Chuka this 22<sup>nd</sup> day of May 2024.**



**L.W GITARI**

**JUDGE**

**22/5/2024**

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