



**Republic v Kuria & 5 others (Criminal Case 19 of 2019)  
[2024] KEHC 4690 (KLR) (Crim) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4690 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 19 OF 2019  
LN MUTENDE, J  
MAY 6, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID KURIA ..... 1<sup>ST</sup> ACCUSED**

**SHADRACK OTIEDNO ..... 2<sup>ND</sup> ACCUSED**

**KENNEDY MURIMI NJOROGE ..... 3<sup>RD</sup> ACCUSED**

**JAMES BAHATI NYAMALA ..... 4<sup>TH</sup> ACCUSED**

**KENNEDY MUNGAI FELISTER ALIAS KABUDA ..... 5<sup>TH</sup> ACCUSED**

**JAMES MAKORI SABERA ALIAS CHEI ..... 6<sup>TH</sup> ACCUSED**

**RULING**

1. David Kuria, Shadrack Otieno, Kennedy Murimi Njoroge, James Bahati Nyamala, Kennedy Mungai Felister alias Kabuda, James Makori Sabera alias Chei are indicted for the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) as follows:

**COUNT I**

Particulars of the offence are that; on the 20<sup>th</sup> February, 2019 at unknown time at Total Petrol Station along Race Course Road in Nairobi City within Nairobi County jointly with others not before court murdered David Nena Saitoti.

**COUNT II**



Particulars of the offence are that; on the 20<sup>th</sup> February, 2019 at unknown time at Total Petrol Station along Race Course Road in Nairobi City within Nairobi County jointly with others not before court murdered Sidio Losioki.

### COUNT III

Particulars of the offence are that; on the 20<sup>th</sup> February, 2019 at unknown time at Total Petrol Station along Race Course Road in Nairobi City within Nairobi County jointly with others not before court murdered Justus Omenyo Arita.

2. This is a case where David Nena Saitoti, deceased in Count I was found at Nyamakima area on the 20<sup>th</sup> February, 2019 lying unconscious with a deep injury on the head.
3. Sidio Losioki, the deceased in Count 2 was stated to have been assaulted on 20<sup>th</sup> February, 2019 along Racecourse road by street boys and was rushed to Kenyatta National Hospital while unconscious but died while undergoing treatment on 2<sup>nd</sup> March 2019.
4. Justus Omenyo Arita, the deceased in Count 3 was subjected to mob-injustice within Kamukunji area. The body was found on 20<sup>th</sup> February, 2019.
5. To prove the case the State called six (6) witnesses. PW1 Daniel Wekesa denied knowing all the accused. He stated that he had been forced to testify. That he knew nothing about the case but had been promised some help if he agreed to testify. He alluded to have been told by people he did not know to give testimony regarding some murder at Riverside something he knew nothing about. In the result the State caused him to be stood down.
6. PW2 David Ekiro Lokwawi a street boy stated that on 20<sup>th</sup> February, 2019 at 1.00 am he was woken up by his friends Kabuda (Accused5) and Yagusa that he identified as Accused 1 who told him that someone had beaten their friend Sammy, now deceased, hence they wished to revenge. However, he declined to join them. The following morning he learnt of the occurrence of deaths. On cross examination he denied having seen any person being killed. He also denied having seen Kabuda at OTC where the Maasai was killed.
7. PW3 Ripayion Ole More witnessed the postmortem that was conducted on the body of David Nena Saitoti.
8. PW4 Francis Rabanga Nyaega, a nephew to Justus Arita Omenya received a call regarding the deceased. He went to Kenyatta National Teaching and Referral Hospital where he had been taken but found him dead. Subsequently he identified his body to the Doctor who performed the postmortem.
9. PW5 Doctor Edward Mundia, a pathologist with specialization in forensic pathology conducted postmortem on the body of some of the deceased. He testified that upon examining David Nena Saitoti he had a deep cut wound on the head that damaged the head. The cause of death was head injury due to blunt and sharp force.
10. Sidio Losioki had multiple injuries on the body. In the head there was haemorrhage. It was concluded that he died as a result of multiple injuries, force trauma and a motor vehicle accident.
11. Justus Omenya had incised wounds and bone fractures. The head had fractures to the brain and bleeding inside the head. It was concluded that he died of head injury due to sharp force.
12. PW6 No. 93009 PC. Innocent Manzi testified that on 19<sup>th</sup> February, 2019 while on duty he received ten-fifteen street boys aboard a public service vehicle (matatu). With them was the body of one Samuel Nginya alias Sammy. They reported that he had been attacked by a watchman who worked at Rhino



Petrol Station at Race Course Road and at the point of being taken to hospital he was pronounced dead; and, they (police) referred them to Kilimani Police Station.

13. That they then proceeded to Rhino Police Station and found the suspect having escaped. While on their way back they got information that the street families had re-organized themselves and were now attacking Maasai watchmen at Total Petrol Station as well as other Maasai. Upon going there they found six (6) people injured that they took to Kenyatta National Hospital.
14. In the course of investigations they arrested 31 suspects and interrogated them then ended up charging six (6) people. On cross examination he stated that the six (6) people were found at a meeting having been informed by David Okiri and Daniel Wekesa; and, that he did not talk to the management of the Sonic Hotel where the meeting was being held to establish more about the meeting which was not an illegal one.
15. It is trite that an accused person can only be placed on the defence after a prima facie case is established. In the case of *Ramanlal T. Bhat v Republic* (1957) EA 332 it was stated that:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. (Emphasis added)

16. Section 203 of the *Penal Code* defines the offence of murder as:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

17. To prove the charge the State was required to prove:

- i. The fact of the act of death.
- ii. The cause of death.
- iii. That the death was caused by an unlawful act or omission
- iv. The act or omission was caused by the accused;and,
- v. It was with malice a forethought.

18. Evidence of death of all the deceased was adduced by PW5 Doctor Edward Mundia who produced postmortem reports filed in respect of each deceased. This was proof beyond reasonable doubt of the fact of death having occurred.
19. In respect of the deceased Sidio Losioki it was concluded that the cause of death may have been a motor vehicle accident. David Nena had a deep injury on the head while Justus Omenya Arita was stated to have been subjected to mob-injustice. The death of each one of them was an unlawful one going by



- the evidence adduced by the Investigating Officer. Whoever committed the act must have intended to cause grievous harm on the victim hence the act was committed with malice aforethought. (See Section 206 of the *Penal Code*).
20. On the question of who caused their death, there was no eye witness for the act committed. It is the law that evidence adduced should be direct based on the fact of the witness personal knowledge which must have been perceived by senses.
21. None of the witnesses testified to have perceived with senses as to who carried out the heinous act. The court must hence decide whether evidence adduced may be circumstantial in nature such that it may draw conclusions therefrom that the accused did commit the offence. In the case of *Sawe v Republic* (2003) KLR 364 it was stated that:
- “In order to justify on circumstantial evidence of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
- ii. Circumstantial evidence can be a basis of a conviction only if there is no other existing, circumstances weakening the chain of circumstances relied on.
- iii. The burden of proving facts which justify the drawing of this inference exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
22. PW2 alleged that Accused1, 2 and 5 woke him up at 3.00 pm asking him to take part in their mission of revenge following their friend’s demise allegedly attacked by Maasai individual(s). However, he did not go along to establish if the act was committed as alleged. The evidence of PW2 required some corroboration to prove that the accused herein were the ones responsible for the heinous act.
23. Evidence was called of how 31 individuals were arrested and out of them only six (6) were indicted. The Investigation Officer did not state how they reached a decision to charge the accused. These persons were not identified by any witness so as to be charged. The Investigations were haphazard despite the deceased having lost life.
24. In the case of *Director of Public Prosecution v Morgan Malik & Nyaisa Matheri*, Criminal Appeal No. 133 of 2013 CAT (unreported) it was held inter alia:
- “A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one....., the prosecution is expected to have proved all the ingredients of the offence or minor cognate one thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting a burden of proof”
25. At the close of the prosecution’s case evidence adduced was not sufficient to have the accused herein defend themselves as evidence adduced by the prosecution was weak. The State failed to establish the case to the required standard.
26. In the result, the accused have no case to answer. Accordingly, they are not guilty hence acquitted pursuant to the provisions of Section 306 (1) of the *Criminal Procedure Code*.
27. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 6<sup>TH</sup> DAY OF MAY, 2024.**

**L. N. MUTENDE**

**JUDGE**

