



Director of Public Prosecutions v Gichuru & 2 others (Criminal Case 4 of 2017) [2024] KEHC 7192 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 4 OF 2017
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTOR

AND

TIMOTHY MWENDA GICHURU 1ST ACCUSED

JACKSON MUGAMBI MUTWIRI 2ND ACCUSED

NATHAN MURIUKI MUTHURI 3RD ACCUSED

JUDGMENT

1. On 14th December, 2016 APC Esther Nyawira was working at Capital Sacco at Nkubu Township in company of her colleagues when person who were intent of robbing the Sacco stabbed her as a result of which she died.
2. APC Joseph Murega stated that on 14th December, 2016, he was working at Capital Sacco at Nkubu Township with APC Esther Nyawira. He stated when at about 09.00 am, four men went to the Sacco, two of whom entered the banking hall and two remained outside. That one of the men that remained outside stabbed Esther with a knife and grabbed her gun as the second tried to wrestle the gun from the witness. That members of public went to their rescue and the men escaped with Esther’s gun.
3. The witness identified Esther’s gun after it was recovered. Upon the arrest of Accused 1, the witness identified him as the one that robbed Esther of her gun and Accused 2 as the one that tried to rob him of his gun. He also identified Accused 3 as the one that stabbed Esther.
4. Sgt Moses Kimathi received a report of the attack at Capital Sacco on 14th December, 2016. On the same day, he arrested Accused 1 from some building after members of public reported that he looked suspicious.



5. Stanley Mutwiri Arimi stated that on 14th December, 2016 he gave his motor cycle KMDF 582K to one Sungura. That later in the day, he received information that a rider had been lynched at Igoji and he called his son Accused 2 to go and find out if it was Sungura because he could not be reached on phone. That he later called Accused 2 and could not reach him on phone. The following day, he found his motor cycle at Igoji Police station. He also found Accused 2 had been arrested and locked up at the same station. He later found out that Sungura had been killed by lynching.
6. Erick Mutwiri Muriki, an employee of Capital Sacco Nkubu Township recalled that on 14th December, 2016, he met Accused 1 outside the bank at about 08.30 am and he went to buy him alcohol and left him at a nearby bar. Upon returning to the bank about an hour later, he found a crowd and was informed that there was an attempted robbery at the bank. He saw Esther who had an injury on the neck lying outside the bank.
7. On 14th December, 2016 at about 09.00 am, Kenneth Muthomi was at his butchery a few metres from the bank when he noticed two men trying to grab a gun from a police officer outside Capital Sacco at Nkubu. He rushed to the scene to find a lady police officer lying on the ground. He stated that one of the men was arrested by members of public and lynched as the other one escaped with a gun. He later identified Accused 1 in an identification parade as the one that ran away with a gun. In cross-examination, he conceded that he did not record in his statement to the police that he had identified any suspect.
8. PC Musa Aol visited Capital Sacco on 14th December, 2016 from where he recovered 2 blood stained knives and a white cap. He also received Accused 1 who had been arrested and Accused 1 later led police to the recovery of a G3 Rifle S/No. 78098637, a magazine with 19 rounds of ammunition of 7.6mm caliber hidden in a coffee plantation that had been robbed from Esther on the material date. He stated that Accused 2 was arrested when he went to Igoji police station seeking information concerning a motor cycle that had been recovered at the scene of crime whereas Accused 3 was arrested on 16th December, 2016 by Uruku location area chief.
9. The witness confirmed that Esther succumbed to the injuries she sustained on 14th December, 2016. With the consent of the defence, the witness tendered the postmortem PEXH. 16 for Esther filled by Dr. Bett on 21st December, 2016 and it reveals she sustained a stab wound on left side of the neck measuring 5 cm wide and 12cm deep cutting off the jugular vessels of the left neck and had died of excessive bleeding secondary to stab wound on the neck.
10. Accused 1 absconded before the conclusion of the prosecution case.
11. Accused 2 in his sworn defence stated that on 14th December, 2016, his father Stanley Mutwiri Arimi informed him that his cousin Sungura whom he had given his motor cycle had been lynched. He went to Igoji police station to make a follow up after he was informed police had recovered his father's motor cycle and he was arrested, locked up and later charged. He called his wife and sister as witnessed who testified they were with him the whole morning of 14th December, 2016 until about 02.00 pm when he left them after he received information that his cousin Sungura had been lynched.
12. Accused 3 stated denied the offence. He stated he was at this place at Michiimikuru Tea Factory the whole day on 14th December, 2016.

Analysis and Determination

13. Section 203 and 204 of the *Penal Code* under which the accused persons are charged provide for the offence of murder and the punishment for it.



14. In the case of *Joseph Gitbua Njuguna v Republic* [2016] eKLR the Court of Appeal outlined the ingredients of the offence of murder as follows: -

“... Under section 203 of the *Penal Code*, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. It is clear from this section that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are;

- (a) the death of the deceased and the cause of that death;
- (b) that the appellant committed the unlawful act which caused the death of the deceased;
- (c) and that the appellant had harboured malice aforethought.

See *Milton Kabulit & 4 others v Republic* [2015] eKLR.”

15. The foregoing sections require that the prosecution prove beyond reasonable doubt. In *Stephen Nguli Mulili v Republic* [2014] eKLR the court emphasised the prosecution’s duty in a criminal case and stated that;

“...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, (2013) eKLR”

16. I have considered all the evidence availed in this case as set out above and the issue in question is whether the prosecution has proved the death of the Esther; that Accused persons caused the said death and that that they were actuated by malice.

a. The death of the Esther

17. That Esther suffered a stab wound on left side of the neck measuring 5 cm wide and 12cm deep cutting off the jugular vessels of the left neck and had died of excessive bleeding secondary to stab wound on the neck was confirmed the postmortem form PEXH. 16 filled by Dr. Bett on 21st December, 2016.

b. Proof that Accused persons committed the unlawful act which caused the death of the Kirimi

18. In order to establish the accused’s culpability, the prosecution mainly relied on the evidence of visual identification and recovery of a gun that was robbed from Esther.
19. Concerning Accused 1, APC Joseph Murega stated he identified him as the one that robbed Esther of the gun. PC Musa Aol stated that upon his arrest, Accused 1 led police to the recovery of a G3 Rifle S/No. 78098637, a magazine with 19 rounds of ammunition of 7.6mm caliber hidden in a coffee plantation. The said firearm and ammunition are the same ones that had been robbed from Esther on the date she was murdered.
20. Accused 1 absconded and the evidence of the two witnesses remain uncontroverted. Whereas there is evidence that Accused 1 did not inflict the fatal injuries on Esther, he was among the person that murdered Esther and a common intention to kill can be inferred against him.



21. Section 21 of the *Penal Code* defines common intention as arising:

“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.”
22. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act. (See *Dickson Mwangi Munene & Another v Republic* [2014] eKLR).
23. In *Solomon Mungai v. Republic* [1965] EA 363, the predecessor of the Court of Appeal held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.
24. In *Njoroge v Republic*, [1983] KLR 197 at p. 204, the Court of Appeal stated that: -

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not 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.”
25. As to proof of common intention, the predecessor of the Court of Appeal held referring to its earlier decision in *R v Tabulayenka s/o Kirya* (1943) EACA 51, it continued to state that:

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”
26. Common intention does not only arise where there is a pre-arranged plan or joint enterprise and can develop in the course of the commission of an offence. The Court of Appeal in *Dracaku s/o Afia v R* [1963] EA 363 held that

“that is not necessary if an intention to act in concert can be inferred from their actions” like
“where a number of persons took part in beating a thief.”
27. In this case, the Prosecution proved that it was in the course of Accused 1 robbing Esther of her gun that she was fatally stabbed. The act of disarming Esther at that critical moment made her vulnerable and it was that moment of helplessness that she was stabbed and killed.
28. From the evidence on record, I am satisfied that Accused 1 and others formed a combined force to execute an unlawful purpose of robbing the bank and one of them in the prosecution of the robbery killed Esther. Consequently, Accused 1 is guilty for the death of Esther caused by the act of another that was in his company in the course of their endeavours to effect the robbery.
29. Concerning Accused 2 and 3, APC Joseph Murega identified Accused 2 as the one that tried to rob him of his gun. He identified Accused 3 as the one that stabbed Esther.
30. Both Accused 2 and 3 denied committing the offence with each raising the defence of alibi.



31. Concerning the defence of alibi, the Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held:
- “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.” (Emphasis added).
32. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal held that -
- “Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the *Criminal Procedure Code* to rebut the appellant’s defence”. (Emphasis added).
33. Indeed, Section 309 of the *Criminal Procedure Code* provides that: -
- “If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
34. Accused 2’s evidence that he was not at the scene of crime was corroborated by his sister and wife who said they were with him the whole morning until his father sent him to Igoji to follow up on his motor cycle. His father confirmed sending Accused 2 to Igoji to make a follow up concerning his motor cycle. Indeed, PC Awol confirmed that Accused 2 was arrested at Igoji police station when he went to inquire about his father’s motor cycle.
35. Accused 2’s defence of alibi in my considered view casts a reasonable doubt on the uncorroborated evidence of APC Murega and that benefit of the doubt is given to Accused 2.
36. Concerning Accused 3, he too was implicated by APC Murega as the one that stabbed Esther. Of interest to note is that the prosecution did not explain the circumstances under which he was identified at the time of his arrest APC not having given Accused’s 3’s description or being present during the arrest. The chief that arrested Accused 3 did not testify and the circumstances that led to his arrest and the link between him and the murder herein are lacking.
37. The prosecution did not lead any evidence to discredit Accused 3’s alibi defence and since the uncorroborated evidence by APC Murega cannot be said to be overwhelming, Accused 3 similarly gets the benefit of doubt.
38. I have considered whether malice aforethought has been proved. In *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR, the Court of Appeal cited with approval *Rex v. Tubere S/O Ochen* (1945) 12 EACA 63 where the former Court of Appeal for Eastern Africa stated thus on the issue of malice aforethought:
- “It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”
39. The injuries inflicted on Esther with a sharp object that cut off the jugular vessels of the left neck leave no doubt that the injury was intended to cause her death. I therefore find that malice aforethought has been proved.



40. In the end, I find Accused 2 and 3 are found not guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) and are hereby acquitted under Section 322 (1) of the [Criminal Procedure Code](#).
41. It is ordered that Accused 2 and 3 be set at liberty unless otherwise lawfully held.
42. As concerns Accused 1, he is found guilty of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) and he is convicted in absentia under Section 322 (1) of the [Criminal Procedure Code](#).
43. Warrant of arrest for Accused 1 shall remain in force.

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances:-

Court Assistants - Kinoti/Munene

Accused 2 - Absent

Accused 3 - Present

For the Accused 2 - Mr. Omari Advocate

For the Accused 3 - Ms. Gumato Advocate

For DPP - Ms. Rita Rotich (PC-1)

