



**Director of Public Prosecutions v Mugambi & another (Criminal Case 93 of 2018) [2024] KEHC 7211 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 93 OF 2018  
TW CHERERE, J  
JUNE 13, 2024**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... PROSECUTOR**

**AND**

**JUDAH KIRIMI MUGAMBI ..... 1<sup>ST</sup> ACCUSED**

**MOSES GITONGA MBOROKI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Judah Kirimi Mugambi and Moses Gitonga Mboroki (Accused 2 and 3 respectively) were jointly charged with another that died during the pendency of this case, with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) in that they murdered one Stephen Kiarie on the night of 5<sup>th</sup> and 6<sup>th</sup> October, 2018 at Kooje area in Imenti North Sub County within Meru County.
2. Accused persons denied the offence and the prosecution called a total of three witnesses.
3. The first witness, Alex Muriithi stated that him and Stephen Kiarie were tenants of Timothy Mboroki the father to Accused 3 whereas Accused 2 was the chairman of Nyumba Kumi in the area.
4. He recalled that on the material night at about 11.00 pm, he heard screams and he went to the house of Kiarie where the screams were coming and he found Accused 2 and 3 and Timothy Mboroki beating Kiarie using sticks on the ground that he had not paid rent to Mboroki and had broken into his house after he was locked out. In order to save Kiarie's life, Alex reported the matter to Sgt Gitonga who arrived at the scene and upon seeing the extent of Kiarie's injuries instructed the assailants to take him to hospital but they refused. The witness woke up the following morning to find that Kiarie lying dead outside his house. The witness vehemently denied that he had given false evidence against the 2<sup>nd</sup> Accused on account of having been previously arrested by him for possessing bhang.



5. Retired Sgt Gitonga confirmed he received a call from Alex Muriithi on the night of 5<sup>th</sup> October, 2018 at about 11.00 pm and was informed that a man was being assaulted outside the residential plot of one Timothy Mboroki in Kooje area. The witness stated he rushed to the scene and found Accused persons and Mboroki assaulting Kiarie. He also confirmed that he found Alex Muriithi at the scene. The witness stated that he noticed that Kiarie's goods had been removed from the room he had rented and that the room had a broken window pane which Kiarie was alleged to have broken to gain entry into the room. The witness after noticing that Kiarie was injured instructed Accused persons and Mboroki to take him to hospital and he went away. The following day, he was informed Kiarie had died. He went to the scene and found Kiarie's body on a public road.
6. PC Siele, the investigating officer received a report from one Fridah Kagwiria that her uncle was lying dead along a road at Kiandune area. The witness visited the scene in company of his colleagues and removed the body which had injuries to the morgue. With the consent of the defence, the witness tendered a postmortem PEXH. 1 filled by Dr. Kihumba on 11<sup>th</sup> October, 2018 in which he found that Kiarie suffered left sided subdural hematoma and died of severe head injury due to blunt force trauma.
7. In his defence, Accused 2 denied the offence and stated he was called to the scene by Timothy Mboroki and arrived to find Kiarie already assaulted. He confirmed he was a member of Nyumba Kumi and also that he saw Alex Muriithi and Sgt Gitonga at the scene on the material night. He accused Alex Muriithi of giving false evidence on account of a previous encounter in which he had arrested him for possessing bhang.
8. Accused 2 in his sworn defence similarly stated he arrived at the scene long after Kiarie was assaulted.

### **Analysis and Determination**

9. 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.
10. I have considered the evidence on record and submission filed on behalf of Accused persons 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).
11. In *Republic v 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**

12. That Kiarie died was confirmed by a postmortem form PEXH. 1 dated 11<sup>th</sup> October, 2018 which reveals that Kiarie suffered left sided subdural hematoma and died of severe head injury due to blunt force trauma.



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

13. In order to establish the accused's culpability, the prosecution relied on the evidence by PW1 and PW2 both of whom stated that they saw Accused persons' assault Kiarie.

1. In *Elizabeth Waitiegeni Gatimu v. Republic* [2015] eKLR, Mativo, J (as he then was) stated that:

“To my mind, the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

15. Even though Accused person denied the offence, they confirmed that they were at the scene of crime and so were Alex Muriithi and Sgt Gitonga.

16. I have weighed the defence by Accused persons vi a vis the corroborated evidence by Alex Muriithi and Sgt Gitonga both of whom placed Accused persons at the scene of crime and identified them as among the persons that assaulted Kiarie and I find that the defences do not in my considered view introduce into the mind of the court any doubt as to the truthfulness of the two witnesses. Even if, as claimed by 2<sup>nd</sup> Accused that Alex had a grudge against him, his evidence was corroborated by Sgt Gitonga thereby upsetting the defence by Accused 2 that Alex had given false evidence.

**Malice aforethought**

17. 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...”



18. The injuries inflicted on Kiarie were severe and concentrated on the head and this court has come to the conclusion that Accused persons were actuated by malice for Accused persons ought to have known that such grave injuries could possibly cause grievous harm or the death of Kiariei.
19. Right to life is protected by Article 26 of the Constitution and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. (See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63). The death of Marangu was in the circumstances of this case intentional and unlawful.
20. In the end, both Accused person are found guilty of murder Contrary to Section 203 as read with Section 204 of the Penal Code and they are convicted under Section 322 (1) of the Criminal Procedure Code.

**DELIVERED AT MERU 13<sup>TH</sup> DAY OF JUNE 2024.**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistants - Kinoti/Munene

Accused 1 - Present

Accused 2 - Present

For Accused persons - Mr. Mwanzia Advocate

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

