



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Gichira (Criminal Case 3 of 2013)  
[2024] KEHC 11048 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 3 OF 2013  
LW GITARI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BENJAMIN MURIITHI GICHIRA ..... ACCUSED**

**RULING**

1. The accused person Benjamin Muriithi Gichira is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) (Cap 63 Laws of Kenya)

The particulars of the offence as stated on the information dated 27/6/2013 are that on 3/6/2023 at Njigi village within Kirinyaga County, murdered Johana Njeru Mboi.

2. The accused denied the charge. The prosecution proceeded and called witness in support of their case.

**A summary of the prosecution Evidence:**

3. Nancy Wandia Njeru (PW1) is the deceased's wife. She testified that she was informed of the death of the deceased by one Kariuki (PW5) who is accused's brother that the deceased was hit by his brother but that PW5 was not there when the deceased was hit as he had been away from home only to be called by the daughter of the accused who informed him of the incident. The PW1 did not witness the incident but only relied on what she was told.

PW2 was Samson Ndambiri is a brother to the deceased. He testified that on 3/6/2023 at about 4.00 p.m he was informed of the death of deceased by PW1 who is the wife of the deceased. He proceeded to the mortuary on 4/6/2013 and confirmed that the deceased was dead. He was given the documents of the deceased which included, an ID Card, bank card and a coat. He told the court that the deceased was killed at the home of Kariuki.



4. PW3 was Gichira Therenya Gatei who is the accused's father. He was treated as a hostile witness. His evidence is therefore worthless
5. PW6 is Police Constable Charles Nderitu who testified that on 3/6/2013 a report of murder was made at Kagio Police Station and further that the assailant was being subjected to beatings and was almost being lynched by a mob. He accompanied the OCS to the scene and found the accused being beaten by a mob. They managed to rescue the accused. He then saw the body of the deceased who was already dead within the compound. He recovered a piece of wood next to body which he suspected was the one used to beat the deceased. He also recovered a blue cap and some pieces of wood. According to PW6 he received information from the members of the public that the accused is the one who beat the deceased to death and that the accused was of unsound mind. The said members of public were not called nor were they named. His evidence is hearsay. He did not investigate the case and did not know how it was investigated.
6. Anne Wamboi Wanjohi (PW4) is a sister to the accused. She told the court that on 3/6/2023 she was called by James Kariuki who informed her that Johana Kariuki was lying down and was bleeding. She proceeded home but she did not see anybody. She requested the motor cyclist to take her inside the home. Upon entering the compound, she saw the deceased on the ground and that he was bleeding on the head. The body was near the home of James Kariuki. She started screaming and motor bike riders went to the scene and enquired as to what was happening. She showed them the body of the deceased and told them that the accused is the one who was at home. She went to the road and met the accused who was in company of his father. The motor bike riders asked the accused what happened and he said he did not know. The motor cycle riders started beating the accused. PW4 took a motor bike and went and reported at the police station.
7. In cross-examination she told the court that she did not see anybody beating the deceased nor did she hear anybody say he witnessed as to who killed the deceased.  
  
PW7 was Doctor Karomo Ndirangu who testified that on 20/6/2013 he performed a postmortem on the body of the deceased. He testified that the body of the deceased had a sub (scapular) hemorrhage, fractured left and right) parietal bone with depressed skull fracture of the left parietal bone and subdural haemotoma. He formed the opinion that the cause of death was severe head injury due to blunt trauma. He produced the postmortem Form as exhibits 3. With that the prosecution closed its case.
8. The prosecution and the defence then filed their written submissions on whether the accused has a case to answer.

### **Prosecution's Submissions:**

9. They submit that under Section 203 of the Penal Code, the prosecution had the burden to prove that:-
  1. The death of the deceased occurred
  2. The death was through unlawful acts or omissions of the accused
  3. The accused had malice aforethought.The prosecution submits that the evidence tendered so far places the accused person at the scene of crime squarely and the death of the deceased was due to the wrongful act of the accused.  
  
That the Section 206 of the Penal Code stipulates that malice aforethought shall be deemed to be established by evidence proving-



- a. An intention to cause death or grievous harm.
- b. Knowledge that the act or omission causing death will probably cause death or grievous harm to the same person.
- c. An intention to commit a felony.

**Accused person's Submissions:**

10. On the evidence, it is submitted that the evidence of PW1 & 2 is of little value as they did not witness the killing of the deceased by any person. That the testimonies of PW3 and PW5 was of little value as they were declared hostile witnesses and they never saw any person assaulting the deceased. The accused submits that PW4 did not witness the incident and only stated that she told motor bike riders who came after she screamed that it was the accused who was at home. As for the testimony of PW6, the accused submits that he relied on hearsay evidence and he was not the investigating officer.
11. Finally on the evidence of the doctor it is submitted that the doctor was called to confirm the fact of death and he confirmed that the cause of death was severe head injury due to blunt trauma to the head. That the doctor did not expound whether the blunt trauma to the head was caused by a fall or being hit by a human being especially the accused person.
12. The accused submits that the prosecution's evidence has left the court in a dilemma as to who caused the death of the deceased herein. That the prosecution has not established a *prima facie* case against the accused person beyond any reasonable doubts. That the burden should not be shifted on the accused person but the same should rest solely on the prosecution. The accused relies on the case of [\*Republic v Silas Magongo Onzere\*](#) H.C. Kajiando Criminal Case No 5 of 2016.  
He prays that he be acquitted as the prosecution has not discharged the burden placed on it by Section 203 of the [\*Penal Code\*](#).
13. The issue which arises for determination is whether at the close of the prosecution's case the prosecution has adduced sufficient evidence to establish a *prima facie* case against the accused. At this stage the court is called upon to consider the evidence tendered by the prosecution to determine whether the accused has a case to answer. The burden was on the prosecution to establish that the accused person has a case to answer the charge. The burden is placed on the prosecution based on the presumption of innocence of the accused person which is a constitutional right to a fair trial. Article 50(2) (a) of the [\*Constitution\*](#) provides that:-  
  
"Every accused person has the right to a fair trial which included the right-  
To be presumed innocent until the contrary is proved."  
  
14. The burden placed on the prosecution to prove the guilt of the accused never shifts and it has been stated that it lies in the prosecution's backyard and never shifts.  
  
In the case of *Woolmington v The D.P.P* (1935) AL 462 which is a landmark in the case of the House of Lords, the presumption of innocence was discussed and it was held that the burden of proof in criminal cases lies with the prosecution who must prove the guilt of the defendant beyond any reasonable doubt. The case clarifies the role of the prosecution and the defense in criminal cases and



upholds the principle of the presumption of innocence. As to what constitutes the burden of proof it was held in *Miller v Minister of Pensions* (1947 2 All E.R 372-373) it was stated that:-

“The degree is well settled but must carry a high degree of probability –proof beyond reasonable doubts does not mean proof beyond a shadow of doubts. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

15. In this case the burden was on the prosecution to prove the ingredients of the charge under Section 203 of the *Penal Code*. This include prove of death of the deceased was caused by the unlawful acts or omission of the accused. That the accused had malice aforethought. Section 203 of the Penal Code provides:

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

The prosecution adduced evidence to prove the death of the deceased. This was in testimony of PW7 who did the postmortem and confirmed that the deceased died as a result of severe head injuries. PW1, 2, 4 & 6 confirmed that they saw the dead body of the deceased.

16. On whether the accused caused the death of the deceased, out of the seven witnesses none adduced evidence on how the deceased met his death. The evidence of PW1 & 2 was hearsay. They did not witness how the injury resulting in the death was inflicted. The PW4 stated that she was called by the James Kariuki who told her that the deceased was lying down and he was bleeding. This means that by the time she went to the scene deceased had already been fatally wounded. She stated that the deceased was the one who was at home. In cross-examination she stated that she did not see anybody beating the deceased. As to whether the accused was at home it was her testimony that- “my brother James is the one who told me he left Benjamin (Accused) at home in the morning.” This testimony was hearsay and fails to prove that the accused was at the scene. Her testimony that she was told the deceased was at home required corroboration as the evidence was hearsay.

PW4 did not find the accused at home, he met him outside the gate after she saw the body of the deceased. Her testimony that the accused is culpable as he is the one who was at home is suspicion. It is trite that suspicion no matter how strong is not sufficient to prove a fact. The test for a *prima facie* case was laid down in the celebrated case of *R.T Bhatt v Republic* (1957) E.A 332-225 the Court of Appeal for Eastern Africa stated:

Remembering that the legal onus is always on the prosecution to prove the case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on the 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 a *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.”



17. The unlawful act by a person charged with murder is proved when it is caused on another person in circumstances which are not permitted or authorized by the law. Every act which causes the death of another is therefore unlawful except where circumstances make it excusable or where it has been authorized by the law. Section 306 of the Criminal Procedure Code provides:-
- (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
  - (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
  - (3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.”
18. In this case, the prosecution failed to call sufficient evidence to prove that the accused caused the death of the deceased. PW6 produced sticks and a cap which he stated that were collected at the scene. He did not investigate the case and did not tell the court how they were connected to death of the deceased. The question is whether the prosecution has adduced sufficient evidence to warrant the court to put the accused on his defence. The test is whether if he is put on his defence and opts to keep quiet the court can convict the accused based on the evidence so far tendered by the prosecution. I find that the evidence of the witnesses fails to meet the threshold required to establish a *prima facie* case. Calling the accused to give his defence would be to invite him to fill the gaps in the prosecution’s case. The case of Republic v Tubere s/o Ochen (1945) 12 E.A.CA 63 laid down the elements to be considered as establishing malice aforethought. These are, the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted and the conduct of the accused during and after the incident. For the offence of murder to be completed, the prosecution must prove the actus reus and mensrea. The ingredients of murder were therefore not proved. I find that the prosecution did not adduce sufficient evidence to prove the charge against the accused person beyond any reasonable doubts. The witnesses became hostile and others were not called to shed light on the circumstances under which the deceased met his death. In the end I find that no *prima facie* case was established to warrant the accused to be placed on his defence. I therefore enter a verdict of not guilty and acquit him at this stage under Section 306(1) of the Criminal Procedure Code unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 19TH DAY OF SEPTEMBER 2024.**

**L.W. GITARI**

**JUDGE**

**19/9/2024**



Accused- present

Mr. Igati Mwai for Accused

The Ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

**19/9/2024**

JUDGE

19/9/2024

