



**Republic v Kangocho & another (Criminal Case 11 of 2020)  
[2023] KEHC 2489 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 11 OF 2020  
LM NJUGUNA, J  
MARCH 22, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ROBERT IRERI KANGOCHO ALIAS ROBO ..... 1<sup>ST</sup> ACCUSED**

**AJEDIO NAMU MUSYOKA ALIAS JAPAN ..... 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](#), the particulars being that on May 25, 2020 at Karioko Village, Ishiara Location in Mbeere North, within Embu County jointly with two others not before the court murdered Martin Macharia Ndwiga.
2. Upon arraignment, they pleaded not guilty and a plea of not guilty was entered. The case proceeded for trial and wherein the prosecution called a total of six (6) witnesses who testified in support of its case.
3. PW1, Kennedy Magu Namu testified that on the material day, he was at home when he was called by the 1<sup>st</sup> accused but he didn't pick. That as he was going for a short call, he heard some noise coming from the 1<sup>st</sup> accused person's home and upon going there, he found a man sitted with his hands tied at the back. That while there, the 2<sup>nd</sup> accused person told him that the 1<sup>st</sup> accused had informed him that he had arrested a thief. That the young man had injuries on his forehead and was also bleeding; he stated that the young man informed him that he went to borrow water in the said homestead, but was instead accused of having gone there to steal. In cross examination, he stated that he did not see any of the two accused persons assaulting the deceased.
4. PW2, Timina Wanja Ndwiga stated that on May 26, 2020, she received a call from a friend informing her to go to her place of work. That upon reaching Karioko, she found her brother, the deceased herein in a bush along the street; and that he was unconscious with injuries on the face, swollen hands



- and his legs were burnt. She testified that she called the OCS who sent an officer to the scene where photographs were taken and thereafter, the deceased was taken to the hospital. It was her evidence that the deceased was pronounced dead on arrival at the hospital. She also stated that she did not know the people who were responsible for the death of the deceased.
5. PW3, Silvano Mugendi Njiru stated that on May 25, 2020, while at Karioko, he saw the deceased, the two accused persons and Michael Kariuki walking from Ishiara market heading to the 1<sup>st</sup> accused's person's home. That he stayed at Ishiara until 6.30 p.m and on his way back home, he saw the accused persons and the deceased again. He stated that they were ahead of him like a distance of thirty metres and the trio were arguing and quarrelling about money. It was his evidence that the deceased was demanding his money while the 1<sup>st</sup> accused person was telling him to wait till the following day. That he entered his home as the trio continued with their journey but later heard some distress calls coming from the direction of the 1<sup>st</sup> accused person's home. That the deceased was shouting and at that point, he heard the father of the 1<sup>st</sup> accused enquiring what was happening. That the deceased informed him that they were involved in a business but the 1<sup>st</sup> accused had refused to give him his money and at that instance, the father of the 1<sup>st</sup> accused chased them away. He proceeded to state that after about two hours, he heard some distress calls again and upon going to check, he found the deceased tied on a tree hanging upside down and that there was fire that had been lit there. That he went back home for a bow and arrows and thereafter approached the accused persons demanding to know what was happening. At that point, the two accused persons told him that the deceased had stolen their fathers' cow which the accused denied but instead, he (the deceased) informed him that they had done business with the accused persons but the 1<sup>st</sup> accused had refused to pay him his money. That he advised them to report the matter to the police and they left but after a short distance, the accused persons started beating the deceased using a rungu. That at around 6.00 p.m. he went back to check on them and found somebody lying with serious injuries not far from where he had left the accused persons.
  6. PW4, Karuku Gichovi testified that on June 2, 2020, he identified the body of the deceased to the pathologist who performed the post mortem.
  7. PW5, Sudi Wekesa testified that he was the investigating officer after he was given directions by the DCIO Mbeere North. That by the time he took over the investigations, three suspects had been arrested to wit the 1<sup>st</sup> accused, 2<sup>nd</sup> accused and PW1. It was his evidence that on June 16, 2020, he escorted the accused persons to Meru Hospital for mental assessment while on June 3, 2020, he attended the post mortem and thereafter presented the accused persons herein before this court with the charge of murder.
  8. PW6, Dr Winnie Wambui Njeri testified that, on the 2/6/2020, she carried out the autopsy on the body of the deceased. She stated that in her opinion, the cause of death was as a result of sub-dural haemorrhage and asphyxiation secondary to assault. She also produced the mental assessment report by Dr Andrea Mwikamba which showed that the accused persons herein were fit to stand trial.
  9. The prosecution closed its case and the court gave directions on filing of submissions by the parties and wherein the prosecution chose to rely on the evidence on record. The 1<sup>st</sup> accused person submitted that the prosecution failed to prove the elements of the offence of murder in that; there was no evidence linking the accused persons to the death of the deceased. It was his submission that the burden of proof did not shift, in that, the prosecution's evidence was riddled with contradictory testimonies. It was stated that there was neither direct nor indirect evidence to link the 1<sup>st</sup> accused person with the offence herein. The court was therefore urged to acquit the 1<sup>st</sup> accused.



10. The 2<sup>nd</sup> accused submitted that the two eye witnesses gave not only false but also contradictory testimony not supported by forensic evidence. That none of the prosecution witnesses placed the 2<sup>nd</sup> accused person at the scene of crime. It was argued that there was neither direct nor indirect evidence pointing at the 2<sup>nd</sup> accused person to be responsible for the death of the deceased herein. That the benefit of doubt should favour the accused as the investigations were not adequate to return a guilty verdict on the 2<sup>nd</sup> accused person.
11. DW1, Robert Ileri Kangochi, the first accused, testified that on May 25, 2020, he was at home working on his farm. That he spent the whole day with his parents till evening when he went to sleep. He stated that the evidence given by PW3 that he was seen beating the deceased together with other people was not true. He contended that PW3 and himself are not in good terms because he blocked the water from flowing to his farm. He denied meeting his co-accused on the fateful night.
12. DW2, Ajedio Namu Musyoka, the second accused, testified that he did not know the deceased herein. That, on May 25, 2020, he had gone to visit one David Muthee where he spent the whole day repairing his bee hives. That, thereafter, he went to town where he bought some flour and headed home. That at about 7.15 p.m., he went back to assist David Muthee harvest honey until midnight and only got home at 3.30 a.m. He denied killing the deceased or meeting his co-accused.
13. DW3, David Muthee testified that on May 25, 2020, he called the 2<sup>nd</sup> accused person to his home to help him repair bee hives. That he spent the whole day until 3.00 a.m the following morning when he left for his home.
14. The defence proceeded to close its case and the court gave directions on filing of submissions. The prosecution submitted that the death of the deceased was proved by PW2, PW3 and PW4 who all confirmed that the deceased died as a result of the injuries he sustained on the material day. That their testimonies were corroborated by the post mortem report produced as PEX1 which concluded that the deceased died of subdural haemorrhage and asphyxiation secondary to assault. On whether the act was committed by the accused persons herein, it was argued that the accused persons were people well known to both PW1, PW2 and PW3 and that on the material night, the accused persons had a confrontation with the deceased herein. That the accused persons also confirmed that the deceased was a person well known to them and therefore, this was a case of recognition and there was no chance of a mistaken identity. Reliance was placed on the case of *Stephen Haruna Vs The Attorney General of the Federation* [2012] LPELP as cited with the authority in *Republic Vs Mwatela Nguni* [2020] eKLR. The prosecution contended that the defence of alibi raised by the 2<sup>nd</sup> accused person was dislodged by the fact that together with the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused person were the last persons seen with the deceased. Additionally, it was stated that the injuries sustained by the deceased all well pointed to the fact that the accused persons herein had intention to kill him. In conclusion, the prosecution called upon this court to convict the accused persons herein for the offence of murder.
15. The 1<sup>st</sup> accused person submitted that the prosecution failed to prove the elements of the offence of murder in that; there was no evidence linking the accused to the death of the deceased. It was his case that he was a victim of shoddy investigations carried out by the police and the repeated acts of failing to present before court of witnesses who possibly could have assisted the court to reach a just determination. He decried the fact that the witnesses who allegedly were at the scene of crime adduced contradictory evidence. He denied neither knowing the deceased nor killing him and therefore, he urged this court to acquit him.
16. I have considered the evidence presented before this court by the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the



elements of the same. (See Section 107 of the Evidence Act Cap 80 of the Laws of Kenya. The degree/standard of prove is always that of “beyond any reasonable doubts” (See Miller Vs Minister of Pensions [1947] 2 All ER 372 – 373).

17. In the instant case, the accused persons are facing a charge of murder contrary to section 203 of the Penal Code. Murder is defined as

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

The elements of murder and which the prosecution ought to prove are;

- a. the death of the deceased occurred
- b. the death was caused by unlawful acts;
- c. that the accused committed the unlawful act which caused the death of the deceased; and
- d. that the accused had malice aforethought.

(See Anthony Ndegwa Ngari Vs Republic [2014] eKLR).

18. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
19. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. PW6, Dr Winnie Wambui Njeri testified that she conducted post mortem on the body of the deceased which was identified by PW4. As such, the death of the deceased was thus proven.
20. As to whether the death was caused by unlawful acts, under Article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by the law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See Guzambizi Wesonga Vs Republic [1948] 15 EACA 63). PW6 gave evidence that the deceased herein died as a result of sub-dural haemorrhage and asphyxiation secondary to assault. The death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
21. As to whether the accused persons committed the unlawful act which caused the death of the deceased, this court has considered the pieces of evidence by the prosecution witnesses together with the defence that was offered by the accused persons and the question is whether all these pieces of evidence mirrored against each other, can form the basis of conviction of the accused persons for the offence of murder. The court notes that PW1 was arrested as a suspect for the murder of the deceased herein and it is not clear under what circumstances he was released. As such, his evidence should be treated with a lot of caution by this Honourable Court and corroboration is necessary. But even with what he told the court his evidence has left a lot of gaps.
22. It was his evidence that he did not know the deceased before this date and that he did not see the body to confirm if it was for the young man that he had seen in the house of the 1st accused on the material night. He could therefore not confirm that it was the same person who had been killed. Further, it emerged in cross examination that when he gave his statement to the police he gave the names of Muriithi and Kariuki as the people who were involved in the murder of the deceased herein. None of those two is an accused person in this case. It is also on record that he did not see any of the accused persons inflicting injury on the deceased and neither did he see any of them with any weapon.



23. The evidence of PW 3 materially contradicts that of PW1 yet they were the eye witnesses. According to PW1 the deceased was attacked in the house of the first accused. According to PW 3, he was hanged on a mango tree in his (PW 3) shamba before members of the public rescued him but not before he was thoroughly beaten by the accused persons whom he said he knew well and he identified at the material time. In his evidence, there were people who gathered where the deceased was hanged and they are the ones who rescued him. None of these members of the public was called as witness by the prosecution. Looking at the evidence of PW 3, there are material contradictions that leaves a lot of doubt in the mind of the court and which paints him as unreliable witness. Even the timings that he gave are not consistent with the events as he stated them. With all due respect to the prosecution, this witness did not look truthful. He also did not tell the court why he took so long to report the incident to the police, yet, he seemed to have followed the events so keenly from 6.30 p.m. up to the following day in the morning. One then would wonder what his interest was.
24. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Having read the evidence tendered by the prosecution holistically, I humbly hold the view that the inconsistencies and/or contradictions herein are quite substantial and fundamental to the main issues in question before this court and especially the alleged eye witnesses who were PW 1 and PW 3. Their evidence has created a lot of doubt in the mind of the trial court and cannot be used as the basis to find the 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein responsible for the death of the deceased herein.
25. That being the case, it therefore follows that the prosecution did not prove that the accused persons herein were the ones who caused the death of the deceased; despite having succeeded in establishing the death of the deceased and the cause of the said death. Having failed to do so, it is my considered view that the prosecution failed to prove all the elements of the offence of murder.
26. From the foregoing, the upshot of this judgment is that the accused persons herein are acquitted of the charge of murder and are hereby set free unless otherwise lawfully held.
27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MARCH, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the 1<sup>st</sup> Accused

.....for the 2<sup>nd</sup> Accused

.....for the State

