



**Director of Public Prosecutions v Kirimi & another (Criminal Case 80 of 2016) [2023] KEHC 3339 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 80 OF 2016  
TW CHERERE, J  
APRIL 20, 2023**

**BETWEEN**

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

**AND**

**ANTONY KIRIMI ..... 1<sup>ST</sup> ACCUSED**

**PETER MWANGANGI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Antony Kirimi And Peter Mwangangi (Accused 1 and 2 respectively) are charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the 20<sup>th</sup> October, 2016 at Giika Location in Igembe South sub-county within Meru County murdered Robert Baarua.

2. Accused persons denied committing the offence and the prosecution called a total of six (6) witnesses in support of their case.

**Prosecution case**

1. On 21<sup>st</sup> October, 2016, Yusuf Gataya received word that his brother Robert Baarua (Robert) had been assaulted by the two Accused persons. He requested Joseph Kobia to take Robert to hospital. Kobia stated that he found Robert who was injured was lying in Accused 1's miraa farm and upon inquiry Robert informed him that he had been assaulted by Kirimi and Mwangangi. The witness escorted Robert to the police station and later to hospital where he died while undergoing treatment.
2. John Kirari stated that on 20<sup>th</sup> October, 2016 at about 10.00pm, he was walking home when he heard screams at the home of Accused 1. That he went to the home and found the two Accused persons assaulting Robert. He stated that there was moonlight that enabled him to identify Accused persons



and Robert that were well known to him. He stated that when he failed to stop Accused persons from assaulting Robert, he went away and reported the matter to Robert's brother. Job Kimba similarly stated that he was walking home at about 10.00pm when he heard screams from the home of his neighbor Accused 1 herein. That he went to the scene and saw Accused persons who are his neighbours assaulting Robert and when he failed to stop them went away.

3. On 21<sup>st</sup> October, 2016 at 19.55 hrs, Robert reported to Maua police station vide OB 88/21/10/2016 that he had been assaulted by Anthony Kirimi and Peter Mwangangi the previous day. He later died while undergoing treatment and Accused person were arrested and charged.
4. On 28<sup>th</sup> October, 2016, Naftali Giika identified the body of his brother Robert to Dr. Njeru that conducted an autopsy at Nyambene Sub-County Hospital. A postmortem dated 28<sup>th</sup> October, 2016, which was tendered in evidence by Dr. Wachira as PEXH. 1 reveals that Robert suffered bruise on left thigh, blunt injury to abdomen, inflamed intestines, perforated small intestines were discharging fecal matter, contusion on right side of head near right ear, brain contusion on right side of head and brain hemorrhage. As a result of the injuries, an opinion was formed that Robert died of head injury and peritonitis leading to septicemia as a result of assault leading to perforated intestines caused by blunt object.

### **Defence Case**

3. In his sworn defence, Accused 1 conceded that Robert and Accused 2 were his neighbours and friends. He stated that on 20<sup>th</sup> October, 2016, Robert and Accused 2 who were drunk went to his home and he afforded them a place the sleep until the next morning when they went away. He denied assaulting Robert.
4. Accused 2 similarly conceded that Robert and Accused 1 were his neighbours and friends. He conceded that him and Robert had spent the night of 20<sup>th</sup> October, 2016 at the home of Accused 1 but denied assaulting Robert.

### **Analysis And Determination**

5. Section 203 and 204 of the *Penal Code* under which the accused is charged provide for the offence of murder and the punishment for it. It requires that the prosecution prove beyond reasonable doubt that the accused by an unlawful act or omission caused the death of the deceased through malice aforethought. The sections read as follows:
  - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
  204. Any person who is convicted of murder shall be sentenced to death.”
6. The issue for determination is whether the prosecution has proved their case beyond reasonable doubt. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the Court of Appeal stated the three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction being: -
  - (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**

7. There is no dispute that Robert suffered bruise on left thigh, blunt injury to abdomen, inflamed intestines, perforated small intestines were discharging fecal matter, contusion on right side of head near right ear, brain contusion on right side of head and brain hemorrhage and had died of head injury and peritonitis leading to septicemia as a result of assault leading to perforated intestines caused by blunt object as shown by the postmortem tendered in evidence as PEXH. 1.

**(b) Proof that accused persons committed the unlawful act which caused the death of the deceased**

8. Joseph Kobia upon being informed by Robert that he had been assaulted by Kirimi and Mwangangi escorted him to the police station on 21<sup>st</sup> October, 2016 where he reported vide OB 88/21/10/2016 that he had been assaulted by Anthony Kirimi and Peter Mwangangi the previous day. Robert died the same day while undergoing treatment.
9. Under the provisions of Section 33 of the *Evidence Act*, statements, written or oral of admissible facts made by a person who is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstance of the case appears to the court unreasonable are themselves admissible in the following cases—
- a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question; (Emphasis added)
10. The germane element of the law as stated hereinabove is that the statement must relate to the death of the person making the statement and not of any other person. (See *Republic v Yiende* [1990] eKLR).
11. In this case, it is apparent that before his death, Robert implicated both Accused persons as the ones that inflicted the injuries from which he later died.
12. The Court of Appeal in the case of *Musili v Republic* [1991] eKLR considered the circumstances under which a dying declaration becomes acceptable and held as follows:
1. The law in Kenya relating to acceptance of a dying declaration as evidence is clear that whilst corroboration of a statement as to the cause of death made by the deceased before his death is desirable, it is not always necessary in order to support a conviction.
  2. Although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, it is generally unsafe to base a conviction solely on an uncorroborated dying declaration.
  3. The learned judge in his summing up had given correct directions with regard to the cautious manner in which the dying declaration was to be approached.
  4. There was strong corroboration in the suspicious circumstances in which the appellant, armed with a bow and arrows was seen during the two material occasions. This court concurred with the High Court's finding that the appellant was guilty of murder.



13. Other than Robert's dying declaration, John Kirari and Job Kimba stated that they had seen both Accused persons assaulting Robert at the home of Accused 1 on 20<sup>th</sup> October, 2016. Accused persons have admitted that they were with Robert at the home of Accused 1 on the material night thereby conceding that they were at the scene of crime.
14. The degree of proof in criminal cases was properly established in the classic English case of *Woolmington vs. DPP 1935 A C 462*. Similarly, in *Bakare vs. State 1985 2NWLR*, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”. (Emphasis added).
15. With those parameters in mind, I have considered whether the evidence by the prosecution witnesses proved beyond doubt that Accused persons caused the death of Robert.
16. The evidence by John Kirari and Job Kimba in my considered view corroborates Robert's dying declaration in which he implicated Accused persons as the person that inflicted the injuries from which he subsequently died.
17. From the foregoing, I find that the prosecution case that Accused persons assaulted Robert causing his death is well corroborated and proved beyond any reasonable doubt.

### **c) Malice aforethought**

18. The offence of murder is complete when, “malice aforethought” is established if, pursuant to section 206 of the *Penal Code* evidence proves any one or more of the following circumstances:
  - “(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - (c) An intent to commit a felony;
  - (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
19. In the case of *Republic v Tubere s/o Ochen [1945] 12 EACA 63* the court held that:

“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack”



20. That the most severe injuries inflicted on Robert were concentrated on the head and stomach leaves no doubt in the kind of eth court that they were intended to cause him grievous harm if not death and Accused persons ought to have known that such serious injuries could probably cause the death of or grievous harm to the Robert.
21. From the foregoing, I find that the defence by the two Accused persons has not dislodged the watertight prosecution case and the defence is hence rejected. Consequently, both Accused persons are found guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#) and both are convicted accordingly.

**DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Kinoti

Accused 1 - Present

Accused 2 - Present

For both Accused - Mr. Mungai hb for Ms. Nelima Advocate

For DPP - Ms. Rita (PC-1)

