



**Director of Public Prosecution v Nanguye (Criminal Case
67 of 2016) [2023] KEHC 3534 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 67 OF 2016
TW CHERERE, J
APRIL 20, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

PAPAYEI SUMUNGEN NANGUYE ACCUSED

JUDGMENT

1. Papayei Sumungen Nanguye (Accused) was 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 September 30, 2016 at Leparua Sub-Location Nurati Location within Isiolo County murdered Leleor Piroris

2. Accused denied committing the offence and the prosecution called a total of five witnesses in support of their case.

Prosecution case

3. The prosecution case as recounted by Joseph Nakaria is that on September 30, 2016, he received information that his nephew Leleor Piroris (Pirois) had been shot. He accompanied the Piroris to hospital and it was his evidence that the victim before he succumbed to the injuries stated that he had been shot by Accused herein.
4. Spiro Kepso Kinyaga arrived at the scene long after Piroris was shot and it was his evidence that Piroris said he had been shot by Accused. Salamet Mbatia Gitonga accompanied Piroris to hospital and upon returning to the scene of crime found Accused who was suspected to have shot Piroris had been arrested. He later received information that a gun suspected to have been used to shoot Piroris had been recovered.



5. CPL David Kungu took over this matter in 2019 long after Accused was charged. He received from CPL Ngetich a gun make Cabine Rifle Serial No xxxx which was suspected to have been used to shoot Piroris. The gun was examined by a ballistic expert and a memo form, the ballistic report and the rifle were tendered in evidence as PEXH. 2, 3 and 4 respectively.
6. Joseph Nkume identified the body of Piroris to the doctor that conducted an autopsy on October 3, 2016 at Isiolo Hospital Mortuary. The postmortem report PEXH. 1 filled by Dr. Waliaula on October 3, 2016 reveals that Piroris suffered a gunshot wound on the lower abdomen with no exit wound. The doctor formed an opinion that he died of intra-abdominal bleeding secondary to a penetrating gunshot injury.

Defence Case

7. Accused in his sworn defence denied the offence. He also denied that he was in possession of a gun.

Analysis and determination

8. Section 203 and 204 of the Penal Code under which he learnt about the death of Pirois after his arrest. the accused is charged provide for the offence of murder and the punishment for it. They require 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.
9. 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.'
10. 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 deceased; that Accused caused the death and that he was actuated by malice.
 - a. The death of the deceased
11. The postmortem form tendered in evidence reveals that Pirois suffered a gunshot wound on the lower abdomen with no exit wound and had died of intra-abdominal bleeding secondary to a penetrating gunshot injury.
Proof that accused person committed the unlawful act which caused the death of the deceased
12. None of the prosecution witnesses saw Accused shoot Pirois. The investigating officer did not testify and the reason for Accused's arrest was therefore not explained. The evidence by Joseph Nakaria and Spiro Kepso Kinyaga however is that Pirois informed them that he had been shot by Accused.
13. 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)

14. 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*).
15. 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.
16. I have considered whether the evidence by Joseph Nakaria and Spiro Kepso Kinyaga is corroborative of the alleged dying declaration made by Pirosis. In cross-examination by Accused's advocate, Joseph Nakaria conceded that he did not in his statement to the police record that Pirosis had implicated Accused. From the foregoing, his evidence that Accused had been implicated by Pirosis is in my considered view an afterthought and of no probative value.
17. Concerning the evidence by Spiro Kepso Kinyaga, he did not see Accused at the scene and his evidence is only a report of what he was allegedly informed by Pirosis and is also of no probative value.
18. No evidence was led to demonstrate that Accused had been in possession of the gun that was produced or that it is the gun that was used to shoot Pirosis. The prosecution totally failed to explain the relevance of the gun as it did not seem to add any value to its case.
19. The prosecution has a duty to prove beyond reasonable doubt that the person accused is guilty of the offence charged. (See *Woolmington vs DPP 1935 A C 462* and *Bakare vs State 1985 2NWLR*).
20. The evidence on record demonstrates that this case was poorly investigated and that there no nexus was demonstrated between Accused and the death of Pirosis. The evidence on record falls short of prove beyond reasonable doubt that Accused caused the death of Pirosis.
21. Mativo, J (as he then was) in *Elizabeth Waitiegeni Gatimu v Republic [2015] eKLR* stated as follows:

“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”

Malice aforethought

22. The prosecution having failed to prove actus reus', it would be futile for this court to delve into the issue of malice aforethought.



23. In the end, I have come to the conclusion that Accused is Not Guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and is hereby acquitted. He shall be set at liberty unless otherwise

DELIVERED AT MERU THIS 20TH DAY OF APRIL 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For Accused - Mr. Wamache Advocate

For DPP - Ms. Rita (PC-1)

