



REPUBLIC OF KENYA



**Republic v Nkarichia & 2 others (Criminal Case 68 of 2018)
[2023] KEHC 3340 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 68 OF 2018
TW CHERERE, J
APRIL 20, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROMANO NKARICHIA 1ST ACCUSED

DOMIANO MUTABARI 2ND ACCUSED

JOSEPH MIRITHO 3RD ACCUSED

JUDGMENT

1. Romano Nkarichia, Domiano Mutabari and Joseph Miritho (Accused 1, 2 and 3 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 night of 29th and July 30, 2018, at Matiru village, Athwana location in Tigania West Sub County within Meru jointly with others not court within Meru County murdered Isaack Karigori Nchebere

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

Prosecution case

The prosecution case as recounted by Henerino Nchebere was that on July 29, 2018, his son Isaack Karigori Nchebere (Issack) left home at about 05.00 pm and did not return. The following morning, he found Issack lying naked and dead beside the road surrounded by a crowd. The witness did not know how Issack met his death.

3. David M'Anampu stated that on July 29, 2018 at about 06.00pm, he saw Accused 1 and about 20 other men who were members of Njuri Ncheke beat up Issack whom they alleged was a thief. That the



group then escorted Issack to their house which was about 100 metres away from where he could hear the group singing in the night. The following morning, the witness received information that Issack had died and he informed Isaack's father what he had witnessed the previous night.

4. Joseph Kinyua a senior chief on July 30, 2018 received information that a man had been found lying dead. He went to the scene and then called police who removed the body to the mortuary.
5. Paul Kirianki stated that on July 29, 2018, Accused 2 and 3 and others arrested him at about 10.00 pm and was taken to a certain house where a big bon fire was burning outside with men surrounding it. That from its bright light, he saw a man lying naked and who appeared beaten and eh identified the man as Isaack Karigori Nchebere. The witness stated that he was stripped naked and tied together with Issack and was beaten continuously throughout the night by Accused 2 and 3 and other Njuri Ncheke members who were well known to him. It was his evidence that Isaack died on the same night but he was lucky to have survived and released to go home the following morning.
6. Police after receiving a report of murder collected the body of Isaack and removed it to the morgue. Accused persons were subsequently arrested after they were identified by Paul Kirianki who implicated them for assaulting him and killing Isaack.
7. Isaack suffered laceration on left parietal region, extra cranial hematoma at left parietal region, edema of left parietal region with mild intracranial bleeding and had died of severe head injury as shown on the postmortem PEXH 1 filled by Dr Munyoki on August 2, 2018. A P3 form for Paul Kirianki dated August 7, 2018 revealed he suffered soft tissue injuries o the hands and legs.

Defence Case

8. Accused 1 in his sworn defence denied that he assaulted Isaack or having been at the scene of murder having not left his home on the material night. Accused 2 in his sworn defence similarly stated eh was at home on the material night and only saw Isaack's body on the morning of July 30, 2018 and did not know how he died. Accused 3 in his sworn defence also stated he was at his home on the material night and denied assaulting Isaack.

Analysis and Determination

9. 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. 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.
10. 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.”
11. 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

12. The postmortem form PEXH 1 tendered in evidence reveals that Isaack suffered laceration on left parietal region, extra cranial hematoma at left parietal region, edema of left parietal region with mild intracranial bleeding and had died of severe head injury

b. Proof that accused persons committed the unlawful act which caused the death of the deceased

13. Paul Kiriarki who was assaulted together with Issack identified Accused 2 and 3 as some of the persons that assaulted them as a result of which Isaack died. He was the only eye witness to the incident.
14. I have warned myself of the dangers of relying on the evidence of Paul Kiriarki which is uncorroborated. I have considered that the witness knew Accused 2 and 3 well having come from the same village. There is evidence that the scene of crime was well lit with a huge bright bon fire that enabled the witness to recognize Accused 2 and 3 among the assailants. The witness also stated that he was with Accused 2 and 3 and other assailants who assaulted him and Isaack from 10.00 pm until 05.00 am and that Isaack had died during the assault. He therefore had an opportunity to know who the assailants were and the likelihood that Accused 2 and 3 were mistaken for other persons is therefore unlikely.
15. From the foregoing, I find that the prosecution case as to the identity of the persons that assaulted Isaack as a result of which he died is overwhelming as against Accused 2 and 3. Their defence that they were not at the scene of crime is therefore rejected.

Malice aforethought

16. 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.”
17. The formulation of the law in *Rex Versus Tubere s/o Ochen* 1945 12EACA 63 laid down the guidelines for trial Judges where the court held that:
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.



18. The injuries inflicted on the body of Isaack were serious and were concentrated on the head and Accused 2 and 3 ought to have known that such serious injuries could probably cause grievous harm or the death of Isaack.
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 Isaack was intentional and unlawful. I therefore find Accused 2 and 3 guilty of the offence of murder and convict him accordingly. Accused 1 who was exonerated by Paul Kiriarki is found not guilty and he shall be set at liberty unless otherwise lawfully held.

DATED THIS 20th DAY OF APRIL 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused 1, 2 & 3 - Present

For the Accused persons - Mr. Ashaba hb for Omari Advocate

For DPP - Ms. Rita (PC-1)

