



REPUBLIC OF KENYA



**Republic v Njeru & 3 others (Criminal Case 2 of 2019)
[2023] KEHC 19141 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 2 OF 2019
LM NJUGUNA, J
JUNE 15, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNEDY MUNYI NJERU 1ST ACCUSED

JOSEPHAT GITONGA MAREGU 2ND ACCUSED

SAMUEL NDWIGA VUNGU 3RD ACCUSED

ANTHONY MUTEMBEI MUGO 4TH 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* and the particulars of the offence being that on 24th and 25th day of December 2018 at Kithimu Trading Centre in Embu West Sub-county jointly murdered Christopher Njue Njeru.
2. When the accused persons were arraigned in court they pleaded not guilty to the charge and a plea of not guilty entered and hence the case proceeded to a full hearing.
3. PW 1, GMM testified that on the fateful night, he found someone being beaten by boda boda operators and that they were about thirteen in number. He stated that there were some boda boda operators that he managed to identify since he knew them while others, he did not. That the persons whom he knew were: Kangure, Tony Wakavuti, Papa Wandai and another one in dreadlocks who had a T- Shirt and is called Desto. That he was able to identify the 1st, 3rd and 4th accused persons. He stated that the deceased had requested Kamure to take him home but upon Kamure refusing, he removed the ignition key from Kamure's motor bike. Kamure and his friends started calling the deceased a 'thief' and, they started beating him. That the deceased went to a nearby car wash and the accused persons followed him as he



was pleading with them not to harm him. That the deceased even offered to give away his phone but the accused persons continued to beat him. That he (PW1) ran to a nearby A.P. Post and while there, PW2 arrived on a motor bike and he narrated to him what had happened. On cross examination, he stated that he was the one who gave the police the names of the accused persons. He further stated that the 1st and the 3rd accused persons resemble and that they confuse him; that he knew the 1st accused by only seeing him but he did not know his name and that his name was not amongst the names that he shared with the court. In the same breadth, he reiterated that the deceased was beaten by people, some of whom were in court while others were not. That the ones not in court were: Kamure, Papa and Hardcore. He identified the 1st and the 4th accused persons in court. He reiterated that he knew the 4th accused person prior to the incident as he used to wash his motorbike.

4. PW2, Christopher Kyalo stated that on 24.12.2018 in company of PW3 while on patrol, they met with the deceased. That after thirty (30) minutes he was called by a guard of Mashariki Bar who informed him that there was a person who had been attacked by boda boda operators. That he communicated with his boss and as they were going back to the scene they met with two boda boda riders. One of them escaped and the rider refused to stop. That they managed to arrest the rider to the 2nd boda boda who is the 3rd accused person. It was his case that the 3rd accused was arrested for he rode his motor bike in a way to suggest that he was escaping from something.
5. PW3, Simon Mwathe stated that on 24.12.2018 at around midnight, together with colleagues, they were on patrol when they met the deceased who greeted them and they proceeded on their duties. That at about 02.30 hrs, P.C. Kyallo received a call from a member of public with information that there was someone who was being attacked. He stated that on their way back, they met the 3rd accused whom they arrested to help them find out what had happened. He further stated that he recorded a statement from a minor who witnessed the incident and that the minor had also mentioned the 3rd accused person as a perpetrator of the offence herein together with other people.
6. PW4, Alfred Mutwiri Nyaga testified that on 24.12.2018 at around midnight, he was working at Mashariki Bar at Kithimu when he saw boda boda operators beating somebody. He stated that they were ten in number and that he only managed to identify the 4th accused. It was his statement that the deceased had previously been drinking in their bar and upon leaving, he was attacked by boda boda riders. That he called a police officer by the name of Kyallo who arrived at the scene in company of other two officers and upon the arrival of the said officers, the boda boda operators ran away. On cross examination, he stated that he was summoned to attend the Identification Parade and he was able to identify the 4th accused person.
7. PW5, Samwel Wanyoike stated that he knew all the accused persons as they were his friends. That on 26.12.2018, he arrived home and he was informed that one of his laptops was being used at Paradise Club without his permission. He went to the said club to follow up on the laptop and on his way back after having picked the laptop, he found a crowd of people at a carwash where he also saw PW4. That there was a person lying on the ground after he had been beaten and he went to the bodaboda stage where he found Kamure and Papa but he was not able to get a vehicle to rush the victim to the hospital. It was his evidence that the police later came and took the victim to hospital. On cross examination, he stated that he did not see any of the accused persons herein.
8. PW6, James Opiyo testified that he was the investigating officer in the matter and on 25.12.2018 after he was assigned to investigate the murder, he visited the scene of crime but found that there was nothing to document as the scene had been interfered with. He stated that together with his colleagues they went to Kithimu Police Post and perused the OB entry No. 3 of 25/12/2018 wherein they found that the accused persons namely Sam Ndwiga Vunga had been booked as a murder suspect as he was found



- at the scene of crime. Additionally, a witness had provided the names of the suspects whom he had seen assaulting the deceased with wooden sticks. He stated that it is PW1 who gave PW3 the names of the suspects; he further reiterated that an identification parade was conducted and that he recorded the statements of the witnesses. That post mortem was done and the findings were that the deceased died as a result of a head trauma.
9. PW7, Dr. Rosemary Wangari testified that on 29.12.2018, she conducted a post mortem on the body of the deceased and wherein, she concluded that the death was caused by a severe head injury (multiple fractures), global sub – dural haemotoma and brain tonsillar herniation) secondary to blunt trauma.
 10. PW8, Dr. Sheilla Shavulimo testified that one Anthony Mutembei Mugo had been previously assessed by Dr. Thuo and was found to be mentally fit to stand trial. She further produced the report as Pex 6 for the 4th accused person.
 11. PW9, Regina Syombua testified that she conducted the Identification Parade which comprised seven members and the witness (PW1) was able to identify the suspect who was standing between numbers 5 and 6 by pointing at him and his name. She testified that she informed the suspect of his rights prior to the conduct of the exercise. Upon objection raised by Counsel for 1st accused person to the effect that he had not been supplied with the correct Identification Parade Form, the witness was thus stood down. When she was later recalled, she stated that PW1 managed to identify the 1st accused by name and by pointing at him.
 12. PW 10, Sarah Guchu produced the ID Parade Form No. 156 that had been previously conducted by one Abraham Gordon.
 13. The prosecution proceeded to close its case and in a ruling delivered on 08.02.2023, the accused persons were put on their defence upon the court finding that the prosecution had established a prima facie case.
 14. DW 1, Kennedy Munyi Njeru denied having committed the offence. He testified that on the material day, he was at Kamuthatha village. He stated that he had not been arrested before this incident. On cross examination, he conceded that during the occurrence of the incident, he was engaged as a boda boda operator at Kithimu Trading Center, but denied killing the deceased. He further stated that he was never identified during the Identification Parade.
 15. DW2, Josephat Gitonga Maregu testified that on the fateful night, he went home at 9.30 p.m. and that he was only arrested because the registration number of his motor cycle had been given out but he was not informed how his motor bike was involved in the commission of the offence herein. That he had two motor cycles and on the material night, the motor cycle whose number plate had been mentioned was with one Mbogo. He denied any responsibility in relation to the death herein.
 16. DW3, Samwel Ndwiga Vungu testified that he is a mason and that he was not involved in the murder of the deceased. That on the fateful day, he had gone for work at a construction site where he left at 6.00 p.m. and went home using his motor cycle. That he later went to Muringari bar where he took some alcohol and on his way home, he met police officers who arrested him. He reiterated that he neither knew the accused persons nor the deceased but on cross examination, he stated that he is a mason but he owned a motor cycle which is for his personal use and not for business.
 17. DW4, Anthony Mutembei stated that on 24.12.2018, he woke up early and went to work until 7.00 p.m. when he went home. He denied killing the deceased person herein but further stated that the only reason he was arrested was because he was operating a boda boda.



18. At the close of the hearing, the prosecution chose to rely on the evidence on record while the 1st and 2nd accused persons filed their submissions wherein it was submitted that the prosecution did not prove the case beyond any reasonable doubt as required by law. That the prosecution evidence was riddled with inconsistencies hence not capable of returning a conviction. In the end, it was prayed that the accused persons be acquitted of the charges they are facing.
19. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions by the defence. 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 offence of murder is defined under section 203 of the *Penal Code* in the following terms;-
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
- [See *Republiv Vs Boniface Isawa Makodi [2016]* eKLR].
20. From the above definition, it therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubts, three ingredients against an accused person. Those ingredients are as follows:-
- i. The death of the deceased and the cause of death;
 - ii. That the accused committed the unlawful act which caused the death of the deceased; and
 - iii. That the accused had malice aforethought.
- [See *Anthony Ndegwa Ngari v Republic [2014]* eKLR and *Johnson Njue Peter Vs Republic [2015]* eKLR].
21. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein murdered the deceased (See *Woolmington v DPP [1935]* AC 462). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See *Miller v Ministry of Pensions, [1947]* 2All ER 372). The question therefore is whether the above ingredients were proved to the required standards.
22. Right to life is protected by our Constitution under article 26 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. In *Guzambizi Wesonga v Republic [1948]* 15 EACA 63 the court held that;-
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- [See also *Sharm Pal Singh [1962]* EA 13 and *Daniel Nzioka Mbuti & Another v Republic (supra)*].
23. The cause of the death of the deceased herein was not excusable or authorized by law and thus was unlawful. According to PW7, the cause of death was severe head injury (multiple fractures), global sub – dural haemotoma and brain tonsillar herniation) secondary to blunt trauma.
24. As to whether the accused persons herein committed the unlawful acts which caused the death of the deceased herein, PW1 testified that he saw the accused persons assault the deceased and further, PW7 also testified that the deceased’s death was caused by a severe head injury (multiple fractures), global sub – dural haemotoma and brain tonsillar herniation) secondary to blunt trauma.



25. The evidence from the post mortem report clearly shows that the deceased met his death through unlawful acts of assault.
26. As to whether the accused had malice aforethought, malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the Penal Code defines it as follows;

206. Malice aforethought shall be deemed to be established by evidence proving 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.

1. The Court of Appeal in *Bonaya Tutu Ipu & Another Vs Republic [2015]* eKLR stated as follows on the prove of malice aforethought;-

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit Vs Uganda*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen [1945]* 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

28. In this case, the evidence adduced before this court points out to the fact that only PW1 witnessed when the incident happened and reported the same to the police and gave names of some suspects. [See *Turnbull & others [1976]* 3 ALL ER 549]. The lingering questions to the facts of the case in particular include: For how long did the witnesses have the accused persons under observations? At what distance? In what light? Was the observation impeded in anyway, such as by passing traffic or a press of people. Had the witnesses ever seen the accused persons before or how often?
29. In the present case, PW1 testified that he managed to identify the accused persons since he knew some of them. He stated that the persons whom he knew were: Kangure, Tony Wakavuti, Papa Wandai and



Desto and that he was able to identify the 1st, 3rd and 4th accused persons. On cross examination, he stated that he was the one who gave the police the names of the accused persons.

30. He further stated that the 1st and the 3rd accused persons resembled and they confused him; that he knew the 1st accused by only seeing him but he did not know his name and that his name was not amongst the names that he shared with the court.
31. In the same breadth, he reiterated that the deceased was beaten by people some of whom were in court while others were not. That the ones not in court were: Kamure, Papa and Hardcore. He identified the 1st and the 4th accused persons as present in court.
32. The 1st and 2nd accused persons submitted that the evidence by PW1 was full of contradictions and as such, this court ought not rely on the same. In *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred Vs Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

33. The question therefore is whether the lead witness evidence was contradictory on the occurrence of the event and whether the contradictions (if any) were grave and point to deliberate untruthfulness or whether they affected the substance of the charge.
34. In this regard, this court seeks to benefit from the definition by the Court of Appeal of Nigeria in *David Ojebuo Vs Federal Republic of Nigeria* [2014] LPELR 22555 that:-

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

35. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. [See *Osetola v State* [2012] 17 NWLR (Pt329) 251]. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its 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. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. [See *Theophilus Vs State* [1996] 1 nwlr (Pt. 423) 139].



36. Similarly, the Court of Appeal in *Richard Munene v Republic [2018]* eKLR set the law on what inconsistency or contradiction would sway the court when it said :-

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”(Emphasis added).

37. Of importance to note is the fact that PW1 who witnessed the accused persons allegedly assaulting the deceased herein stated that he knew the 1st accused by only seeing him but he did not know his name and that his name was not amongst the names that he gave to the police. That given that it was at night, he was not able to correctly identify the 1st and the 3rd accused persons.

38. PW2, PW3 and PW6 stated that the only reason why PW3 was arrested was that he rode his motor bike in a way to suggest that he was escaping from something. The question that I ask is whether in the circumstances, the prosecution proved its case beyond reasonable doubt against the 3rd accused person?

39. I say so for the reason that the defence raised by the 3rd accused person in an attempt to dissociate himself from the charges, raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. [See Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime’s Criminal Law Dictionary]. Of importance to note is the fact that PW1 who saw the incident herein stated that he knew DW1 but on the other hand, he did not know his name. In as much as he stated that he also saw DW3, it was his statement that he was not very sure as DW1 and DW3 somewhat resembled and therefore, he was confused. The situation was further complicated when he stated that it was at night and he was unable to correctly identify the 1st and 3rd accused persons. In the premises, I humbly hold the view that the 1st accused person was properly identified as he was a person well known to PW1; similarly, PW8 who conducted the identification parade stated that PW1 managed to identify the 1st accused person by name and further by pointing at him.

40. In regards to the 3rd accused person, I hold the view that should be given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right.

41. Further, in reference to the 2nd accused person, PW1 in his evidence in chief stated that he managed to see the 1st, 3rd and 4th accused persons. That, the 2nd accused person offered lift to some two gentlemen in a motor bike. In the same breadth, it was his submissions that all the accused persons herein assaulted the deceased person. The 2nd accused person in defence stated that he was only arrested because the registration number of his motor cycle had been given out but he was not informed how his motor bike was involved in the commission of the offence. That he had two motor cycles and on the material night, the motor cycle whose number plate had been mentioned was with one Mbogo. In order to convict the accused persons, there should be sound evidence that goes to satisfy the criteria of consistency and credibility to prove that the accused persons were at the scene and that they were the perpetrators of the offence herein, beyond reasonable doubt.



42. The 4th accused person raised the defense of alibi to the effect that he was not at the scene of crime on the material date. The burden of proving the falsity of the defense of alibi rests on the prosecution. [See *Victor Mwendwa Mulinge Vs R [2014]* eKLR].

43. However, the Court of Appeal in *Erick Otieno Meda v Republic [2019]* eKLR while discussing the defence of alibi laid down rules to be applied in considering the defence of alibi and the Learned Judges of Appeal held as thus;-

“23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. [See *Mhlongu v S (AR 300/13) [2014] ZAKZPHC 27 2014*].

44. In the instant case, the said defence was not raised during the prosecution’s case to allow them time to disprove the same but nonetheless, PW4 testified that on 24.12.2018 at around midnight, he was working at Mashariki Bar at Kithimu when he saw boda boda operators beating somebody. He stated that they were ten in number and that he only managed to identify the 4th accused; PW1 in the same breadth stated that he saw the 4th accused person on the fateful night; further, he reiterated that he knew the 4th accused person prior to the incident herein as he used to wash his motorbike. In my view therefore, the identification of the 4th accused person was by way of recognition and thus connecting him directly to the cause of the death of the deceased herein.

45. In the end, I humbly find that:

i. The prosecution has proved the case of murder against the 1st and 4th accused persons and I therefore find them guilty as charged and convict them accordingly.

ii. The prosecution failed to prove their case against the 2nd and 3rd accused persons and I hereby acquit them.

46. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Accused Persons

.....for the State

