



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ngala & 2 others (Criminal Case 2 of 2017)  
[2023] KEHC 19593 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL CASE 2 OF 2017  
RN NYAKUNDI, J  
JULY 4, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**KATANA CHOME NGALA ..... 1<sup>ST</sup> ACCUSED**

**SERA CHOME NGALA ..... 2<sup>ND</sup> ACCUSED**

**KENO KARISA KATANA ALIAS NTHENGE ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were all charged with the offence of murder contrary to section 203 and 204 of the *Penal Code*. It is alleged in the information sheet between the night of 28<sup>th</sup>/December 29, 2016 in Majenjeni village of Mamburui they jointly with others not before court murdered Karisa Chome Ngala. Each accused denied the offence as such a plea of not guilty was entered to warrant a full trial.

**Prosecution Case**

2. The background to the incident comes from testimony of (PW1) Agnes Kahaso and (PW2) Karisa Bahati that on the fateful night accused person went to their home and walked the deceased away. In the first observation (PW1) and (PW2) testified that accused persons intimated to them that the deceased was required by the police at Marereni. It is also alleged by (PW1) and (PW2) that the following day each one of them received information of an unlawful assault against the deceased. Further PW1 testified that on the fateful night she presumed that the deceased was being sought by the police. The following morning, she heard some screams and on proceeding to that particular scene, she was confronted with the deceased body having been inflicted multiple deep injuries. She also recalled having identified the three accused persons as the perpetrators of the crime. As a matter of emphasis, PW2 stated that on the material day he was at home when the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> accused persons came to their



homestead wanting to know the whereabouts of the deceased. According to PW2 the accused persons introduced themselves as police officers who were looking for the deceased for purpose of interrogation. In a little while after the accused persons left the homestead with the deceased, he had screams and on rushing to the scene he was confronted with the burnt down body of the deceased. The next witness was PW3 Kenga Fredrick who testified that on December 28, 2016 at around 10.00pm while at home, he had a knock at the door when he was informed that his brother the deceased had been picked by police officers whose details he was given to be the accused persons. In the morning, they heard some screams which confirmed that the deceased had been killed. Similarly, PW4 Sifa Mwambegu told this court that he usually lives in Nairobi where he works as a mason. He further gave evidence that he had contracted the 1<sup>st</sup> accused to build a house for him but when he came to check the project was still incomplete. This prompted the deceased to initiate demand notices to the 1<sup>st</sup> Accused which later he learnt had occasioned threats against his life. He therefore reported the matter to the police but before any resolution he received a telephone call tht the deceased had been murdered. In addition PW5 Cpl Noramn Maroni gave evidence as the investigating officer of the murder incident involving the deceased. He further testified as the officer who visited the scene and documented various aspects of the incident. He also participated at the time of the postmortem which was conducted by the pathologist at Star Hospital on January 3, 2017. The Post mortem report was produced as an exhibit on behalf of Dr Gayo. It was opined by the pathologist that the deceased cause of death was severe head injury secondary to head trauma inflicted by sharp cutting object. At the close of the prosecution case, the accused persons were placed on their defence.

### **Defence Case**

3. The 1<sup>st</sup> accused person gave unsworn evidence in which denied being in company of the perpetrators who caused the death of the deceased. He also alluded to the fact that in the morning of December 29, 2016 he had screams from the direction of the deceased home and proceeding to check was informed that the deceased had been fatally assaulted. In so far as the 2<sup>nd</sup> accused is concerned, Sera Chome she also elected to give unsworn statement which she denied any involvement with the death of the deceased. Lastly the 3<sup>rd</sup> accused person also gave unsworn evidence in which he told this court that he didn't commit the offence as alleged by the state witnesses.

### **Analysis and Determination**

4. Considering all aspects of this case at the close of the prosecution and defence case, I am required to make a finding under section 203 of the question to be answered is whether from the evidence an offence of murder has been proved beyond reasonable doubt capable of sustaining a conviction. It has been held in the case of *Uganda b Bosco Okello* [1992-93] HCB 68 that for the offence of murder the prosecution is under a duty to prove the following elements.
  - a) The death of the deceased
  - b) That the death was unlawfully caused
  - c) That in causing death the accused person did so with malice aforethought.
  - d) That its proved accused persons participated in the killing of the deceased
6. It is trite that in criminal cases, the burdens and standard of proof beyond reasonable doubt is vested with the state and it never shifts to the accused person unless in compelling circumstances expressly stated under section 111 of the *Evidence Act*. The constitutional doctrine on the presumption of innocence in article 52(a) is of fundamental significance in criminal cases. The state therefore, is under legal duty to proof each of the elements of the offence against the accused persons beyond



reasonable doubt. (See in *Regina v Lesoronwa s/o Mbario* (1953-57) 2 TLR 45 (AbarnethyJ), *Raojibhai Bhailabhai Patel v R* [1959] EA 97 (Forbes VP, Gould and Windham JJA, *Woolmington v DPP* [1935] AC 462 and *Okethi Okale & Ors v Republic* [1965] EA 555), *Miller v Minister of Pensions* [1947] 2 ALL ER 372 at page 373 to page 374

7. In *Abdu Ngombi v Uganda* SC Cr appeal No 10 of 1991, the Supreme Court expressed itself as follows, with regard to treatment of evidence

“Evidence of the prosecution should be examined and weighted against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the reference has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted, but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged.”

8. Looking at the evidence by the state and the defence narration as to the circumstance of the offence of murder the threshold question to discharge the burden of proof of beyond reasonable doubt incorporates the following elements:

**Whether the death of Karisa Chome Ngala occurred on the night of 28<sup>th</sup> & December 29, 2017.**

9. The prosecution in answer to this question relied on the circumstantial evidence of PW1, PW2, PW3, PW4, and PW5. The post mortem report admitted in evidence as exhibit No 1 confirms the deceased was hacked to death between the 28<sup>th</sup> and 29<sup>th</sup>. The agreed facts from the prosecution witnesses is that the deceased in the night of December 28, 2016 was a live as he stated by PW1, PW2 and PW3. The postmortem report in respect of the deceased, opines that the cause of death was severe head injury inflicted by a sharp object. The deceased right to life was terminated on the night of 26<sup>th</sup> & December 29, 2016. I am therefor satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

**The 2<sup>nd</sup> pertinent element to be answered by the prosecution is whether the death of the deceased was unlawfully caused**

10. The starting point is article 26 (3) of the *Constitution* which provides as follows:-

“A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law”. It is settled law that the cause of death may be proved by direct or circumstantial evidence. One other consideration on this element is the inferential of section 213 of the *Penal Code* which defines is causing death include acts which are not the immediate or sole causes of the death. The accused would be held responsible for another person’s death although his act is not the immediate or sole cause under the following circumstances. (a) He inflicts bodily injury on another person and as a consequence of that injury the injured persons undergoes a surgery or treatment which causes his death: (b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appears natural to the person whose death is so caused: (d) He by any act hastens the death of a person suffering under any disease or injury



which apart from such an act or omission would have caused the death, and (c) His act or omissions would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

11. The evidence on record from PW1 shows that on the material day she was with the deceased in their house before the deceased was woken up by a voice of a person who introduced himself as a police officer and in need of talking to the deceased. That prompted the deceased to move towards the door in response to that command who immediately ordered him to sit down. In a short while the alleged police officers in company of the deceased left the homestead. The following day, PW1 heard screams and on rushing to the scene she encountered the deceased person with deep injuries. She was later to record a statement with the police. This testimony on the events culminating the death of the deceased was also corroborated by PW2 who happened also to be at the scene of the crime. On the part of the PW3 there was his evidence that the deceased had been picked from the house by known persons who participated in the killing of the deceased. Further PW3 told the court that on December 29, 2016 he heard screams from members of the public who had come into contact with the body of the deceased having suffered multiple injuries. He also moved to the scene only to confirm that the deceased had been killed and the motive of it was about a land dispute with the 1<sup>st</sup> and 2<sup>nd</sup> accused. To further confirm that the deceased did not die a natural death or one excusable within the parameters of the law the prosecution presented evidence on the findings in the post mortem report which revealed the following: deep cut on the head 3 in total 1<sup>st</sup> cut to the left temporal region descending the left ear with underlying fracture of mandible. 2<sup>nd</sup> cut to the right temporal parietal region with underlying still bone fracture brain tissue exposed, 3<sup>rd</sup> cut on the frontal bone exposing brain tissue with fracture of underlying frontal bone. From these findings, Dr Gayo opined the cause of death was severe head injury inflicted by sharp cutting object. This was therefore aggravated assault causing fatal injuries against the deceased. In essence, whatever lens one uses to evaluate the prosecution case it is beyond reasonable doubt that the death of the deceased was unlawfully caused. The specific results intended to be achieved by the perpetrators against the deceased was that of death.

#### **Whether in causing the death of the deceased the perpetrators were motivated with malice aforethought?**

12. This is the intention spoken of in section 206 of the *Penal Code*. Under the provisions malice aforethought is said to be proved by evidence presented by the prosecution on any of the following circumstances: (a) an intention to cause the death of another, (b) an intention to cause grievous harm to another (c) knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused: (d) an intent to commit a felony: and (c) an intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it. The manifestation of direct or indirect malice aforethought, has been construed in the various decisions of the superior courts within our jurisdiction. The more significant decision on the guiding principles, is in the case of *Rex v Tubere s/o Ochen* (1945) 12 EACA 63 in which the court made the following observations: That it is the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured. It was further observed in the matter that ordinarily an inference of malice would flow more easily from the use of a spear or of a knife than from the use of a stick. (See also *Ernest Asami Bwire Abanga alias Onyango v Republic* Nairobi CACRA No 32 of 1990, *Morris Aluoch v Republic* Nakuru CACRA No 47 of 1996, *Karani and there others b Republic* [1991] KLR 622, *Njoroge v Republic* [1983].



13. In similar vein are the following remarks of Wessels J.A in *S.v Brandshaw*, 1977(1) PH H60 (A) that: “( the ) court should guard against proceedings too readily from “ought to have foreseen” to “must have foreseen” and thence to by necessary inference in fact foresaw the possible consequences of the conduct enquired into. The several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances which attends the conduct being enquired into.”
14. Alive to these doctrinal principles on intention or commonly known as *mens rea* in criminal law one must ultimately ask the question whether on all facts of this charge against accused persons as a matter of inference malice aforethought has been established beyond reasonable doubt. In the instant case relying on the evidence of PW1, PW2, PW3, the conceptualized acts of omission and commission by the accused persons point to a manifestation of conduct actuated with malice aforethought. PW1 and PW2 specifically stated that when the incident occurred the deceased was asleep in his house only to be woken up by the voice and a knock of the accused persons purporting to be police officers. Although PW1, PW2 & PW3 did not witness the actual infliction of harm but their evidence is categorical that the deceased was dragged out of his house in good health and no injuries. That on the morning of December 29, 2016, they were interrupted by screams from the scene constituting discovery of the deceased’s body which had sustained multiple injuries. The police investigated the murder as supported by the testimony of PW5 who on conclusion recommended the accused person to be charged accordingly under section 203 of the *Criminal Code*. Further in support of the prosecution case was the opinion arrived at on the cause of death by Dr. Gayo who conducted the post mortem report dated January 3, 2017. It is reflected in the findings by the medical officer that the deceased had suffered deep cuts to the temporal region dissecting the left ear with underlying fracture of the mandible. His evidence and final conclusion was to the effect that the fatal blow to the head occasioned the death of the deceased. It was therefore plain grievous harm which the accused person struck upon the deceased. Against this background all the evidence on record leads as a matter of inference and beyond reasonable doubt for the court to conclude that the accused persons had the intention and knowledge that there was a reasonable possibility of the deceased death in consequence of the acts of assault inflicted upon his body. I accordingly find the prosecution having discharged beyond reasonable doubt the element of malice aforethought.
15. Finally, it is necessary to inquire into ingredients with regard to identification of the accused persons.
16. What is crucial and critical is the importance of identification of the accused persons. The court of appeal in *Cleophas Otieno Wamunga v Republic* Court of Appeal criminal appeal No 20 of 1989 KLR 424 held that: “where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification are favorable and free from possibility of error before it can safely make it the basis of a conviction. Further in *Turbull and others* [1976] 3 ALL ER the court gave guidelines and parameters to establish positive identification of accused persons to the crime. “that the judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation.” At what distance” In what light” was the observation impeded in any way, as for example by passing traffic or a press of people” had the witness ever seen the accused before” how often” if only occasionally, had he any special for remembering the accused.” How long elapsed between original observation and the subsequent identification to the police.” Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”
17. The basis of identification and placing the accused persons at the scene is to be found in the testimony of PW1 who alluded with the fact of having prior knowledge on identification in respect of the 1<sup>st</sup> and



2<sup>nd</sup> accused. Whereas, PW2 gave evidence that he saw the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> accused person at the homestead of the deceased. This *prima facie* evidence on identification was never controverted by the defence in their respective evidence. Similarly, the co-existing circumstances, which emerges from the prosecution witnesses is that the doctrine of common intention on the events which resulted in the death of the deceased is fundamentally applicable in the instant case. (See section 21 of the [Penal Code](#)). According to section 10 of the [Evidence Act](#) anything said or done by any of the persons accused of a crime deemed to have a common intention in reference to their common intention is their relevant evidence of such common intention. It will be noted that from the evidence of PW1, PW2 & PW3 the accused persons premeditated and formed an intention of committing the crime of murder against the deceased person. There is no counter evidence that anyone of them withdrew in the common intention to inflict fatal injuries upon the deceased which occurred immediately after forcibly taking him out of his house under the pretext that he was required at the police station. This aspect of the decision brings me to the conclusion that the prosecution has fully discharged the burden of proof of beyond reasonable doubt against each of the accused person for the offence of murder contrary to section 203 of the [Penal Code](#) to warrant a finding of guilty and conviction for that offence jointly and severally.

### Sentence

18. The main facts leading to the conviction of the accused persons is not in dispute. Learned counsel M/s Ruttoh for the convicts filed written submissions dated June 1, 2023. She pleaded to the court to consider the following factors to on mitigation to impact on sentence<sup>7</sup>.
19.
  - a) That the convicts are first time offenders with no prior criminal records
  - b) That the convicts were arrested sometimes in 2017 and subsequently arraigned in court on January 13, 2017. They were subsequently granted bond to enjoy their right to liberty pending the hearing and determination of the criminal charge.
  - c) That the convicts are remorseful and regret their actions hence given a second chance they see no opportunity of re-offending. In addition to the mitigation, the probation officer Mr Silas Nderi conducted an interview of the community, circumstances of the offence, and personal antecedents of the convicts which are well captured in the pre-sentence reports dated June 12, 2023. It is understood that the convicts are persons of good character, with no previous record of violence save for the commission of the instant offence against the deceased. In my view in order to exercise the discretion on sentencing this court must have regard to the mitigating and aggravating circumstances of the offence. Due regard must also be paid to the personal circumstance of the convicts.
20. In considering the appropriate sentence to impose in this case, I take into account the gravity of the offence, the character, and record of the convicts as conveyed in the report of the probation officer and the mitigation offered on their behalf the learned counsel. Weighing on the balance the aggravating and mitigating factors I am satisfied to impose a specific custodial sentence of fifteen (15) years imprisonment taking into account that although section 333(2) of the [Criminal Procedure Code](#) may not be applicable to their case my concern is relation to the length of time spent to pursue justice before this court dating back to the January 13, 2017. It is an affront and a threat to a violation of article 50 (2) (e) of the [Constitution](#) which commands that an accused person has a right to a fair trial which includes to have the trial begin and conclude without unreasonable delay. 14 days right of appeal explained.

Orders accordingly.



**DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF JULY 2023**

**In the Presence of**

**M/s Rutto for the Accused**

**Mr. Mwangi for the State**

**1st & 2nd Accused Present**

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**R. NYAKUNDI**

**JUDGE**

