



**Republic v Ngalla & another (Criminal Case 10 of 2019)
[2023] KEHC 22002 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE 10 OF 2019
RN NYAKUNDI, J
SEPTEMBER 4, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAFARI KARISA NGALLA 1ST ACCUSED

PETER BAYA NGUWA 2ND ACCUSED

JUDGMENT

1. The accused persons jointly are facing a charge of murder contrary to Section 203 as pursuable with Section 204 of the [penal code](#). The brief facts of the charge are that on March 31, 2019at Ngamani village, the accused jointly and unlawfully murdered Kahindi Isumu. Each of the accused pleaded not guilty as a consequence the prosecution summoned evidence to proof the charge against them beyond reasonable doubt. The nature of the prosecution case was as follows:
2. PW1- Kadzo Shikari on March 31, 2019she heard screams from the neighborhood which prompted her to leave whatever she was doing for the scene. On arrival PW1 confirmed to the court the deceased had been murdered. As the circumstances were in the broad daylight, he recognized the accused persons in company of the deceased. In addition to PW1 testimony PW2 Jackline Mwenda who works as a cook in a school gave evidence that on March 31, 2019she received some visitor who ordered for Mnazi. In a short while the deceased also arrived and found the other two men. In the course of the time, it emerged that the deceased knew the two men whom he directed me to cook for them as they continue taking mnazi. PW2 further testified that on or about 3.00pm the mnazi in her premises got finished. This forced one of the patron described as a dark man to step out to purchase more of the mnazi across the road. He came back and demanded that the deceased join them to continue with the taking the mnazi. On receipt request the deceased agreed to leave PW2 premises to join the identified patron as a dark man and later the children served them with a meal. However, on reaching at that scene, PW2 stated in court the deceased was lying on the ground having sustained physical injuries.PW2 further



told the court that following the death of the deceased he was asked to record the statement with the police on observations made on March 31, 2019.

3. Next was PW3 Bendera Masha who testified that on March 31, 2019 while coming from the well to fetch water she saw two men at Mnazi club enjoying the Mnazi. According to PW3 one of them wearing a cap moved closer and was able to positively identify him as a son to his sister Kalembwe. In addition, It was also the evidence by PW 3, that he went about his duties until 3.00pm when he was walking within the neighborhood he saw the accused persons again. It was his evidence that on or about 7-7.30pm he heard screams from that same homestead and on making a visit he saw the deceased body lying motionless. What followed was a report being made to the police who visited the scene and collected the body for further investigations.
4. Next in line for the prosecution case was PW4 Nyevu Mramba who told the court that the circumstances surrounding the death of the deceased are traceable to a land dispute between Karisa and the deceased. It was his testimony that the deceased had earlier on sold land to Karisa. He also recalled that on March 31, 2019 he was at the Mnazi club where he saw two men also partaking of the same drink. According to PW4 the two men stepped out of the club and immediately thereafter they were followed by the deceased. He also left the Mnazi club for his home but later in the day he was informed of the deceased's death.
5. Similarly, PW5 Zebedo testified that on return from the field, the deceased sent them for food at the nearby grocery. Apparently PW5 told the court that they were to have a meal with the visitors. He then left for the grocery leaving behind the deceased and some visitors. It did not take long and on arrival at home the deceased had been killed. It was further the evidence of PW6 (Simon Kahindi) that on the material day he was in the company of PW5 when he witnessed the presence of the deceased with two men. As they went for food in the grocery only to come back to find the deceased murdered. In the ensuing evidence PW7 Bernard Barasa who operates a motorcycle testified that he was hired by the 1st accused to drop him at some destination. He denied witnessing the occurrence of the incident
6. As for PW8 Charles Kariba, he narrated that he was in need of purchasing land from Khamisi. This led to negotiations and on agreement he left for his home. He also confirmed that he had seen the deceased and two people having a conversation whose details he was not privy to.
7. PW9 – Dr Ruth Nyangi testified with regard to the postmortem examination exhibit on behalf of her colleague Dr Salim. PW9 in her evidence noted that the deceased body had sustained lacerations to the parietal region, compressed skull fracture involving the occipital region with internal hemorrhage. The cause of death was determined to be traumatic Brain injury with massive haemorrhage. From the Post Mortem examination PW9 opined that the cause of death was brain injury with massive haemorrhage. In furtherance of the prosecution case, PW10 Inspector Levi gave evidence on the conduct of the identification parade at Bamba police station. In his evidence, he narrated how he organized the members of the parade and the proposed witnesses. In conclusion, PW10 confirmed to the court that the 1st Accused person was positively identified by PW1: Kadzo Masha, PW2 Jackline Mwenda and PW3 Bendera Masha. As for the 2nd Accused PW10 stated in court that he was identified by PW1 Kadzo and PW2 Jackline Mwenda. Lastly, for the prosecution was the evidence of PW11 No. 49873 Senior Wanjala to the effect that on recording the witness statements, visiting the scene, recovery of the exhibits and information in the identification parade he recommended the accused person be charged with the offence of murder.



Defence Case

8. The 1st accused person elected to give unsworn statement of evidence in which he denied the events of March 31, 2019 as presented by the prosecution witnesses. The 1st accused was as a charcoal dealer and on the material day he went about looking for the commodity to purchase and hawk to his various customers. He denied any involvement with the death of the deceased.
9. On the other hand, the 2nd accused also elected give unsworn statement of defence. According to his testimony he recalled being in company of the 1st accused and the deceased enjoying a meal together in addition partaking of palm wine. He further told the court that on or about 4.00pm, he left the place took a motorcycle and went home leaving behind the 1st accused and the deceased to continue with the social evening activities. It was only later he was to be informed of the deceased death which he had nothing to do with it.

Determination

10. Upon scrutiny and evaluation of both the prosecution and defence case it is now my singular task to make a finding as to whether the prosecution has established the following elements for the offence of murder contrary to Section 203 of the [penal code](#) beyond reasonable doubt.
 1. The death of a human being
 2. The unlawful causation of that alleged death
 3. That the said unlawful causation was executed with malice aforethought.
 4. The accused persons were squarely placed at the scene of crime. (See [Republic v DWK](#) (2020) eKLR [Republic v Andrew Omwenga](#) (2009) eKLR .
11. An accused person in a criminal offence in Article 50(2) (a) of the [constitution](#) is presumed innocent until the contrary is proved beyond reasonable doubt whether he or she is entitled to a verdict of not guilty or that of guilty and subsequent conviction. Reasonable doubt is defined in the case of [State of U.P v Krishna Gopal & Another](#) AIR 1988 SC. P 2154 as follows:
12. There is a mistakable subjective element in the evaluation of the degree of probability and quantum or proof. On Forensic Probability and quantum of proof that the law envisages: Forensic Probability must, in the last analysis, rest on a robust common sense and ultimately on the trained intuition of the judge. While the protection given by the criminal process to the accused person is not to be eroded, at the same time uniformed legitimization of trivialities would make a mockery of administration of criminal justice”
13. The court also in [Vector v Nebraska](#) 114 S,C T 1994 on the same principle the trial Judge pointed out as follows on this concept: “ The burden is always on the state to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts. “Reasonable Doubt” is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transaction in life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such doubt as will not permit you, after full, fair and impartial consideration of all the evidence, to have an abiding conviction to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that early communicated the concept of reasonable doubt to the jury. See also [Mbugua Kariuki v The Republic](#) (1976-80) 1 KLR. Longinus Komba v



- Republic (1973) LRT 127. In *Kioko v Republic* (1983) KLR. 289 (1982 88) and in *Oremo v Republic* (1991) KLR 221.
14. It follows on the above principles that the burden of proof never shifts to the accused person save for the strict interpretation of Section 111 of the *Evidence Act* but even on that context the available evidence both direct and circumstantial must on this respect prove the accused committed the offence. So the facts especially within the knowledge of the accused as an exception does not qualify to shift the burden of proof from the state to the accused person. This is the yardstick upon which the prosecution evidence will be tested against the indictment facing the accused persons.
 15. From the above principles a reasonable doubt maxim means in this context a doubt which has the following features
 - a. It is rational. It can be logically identified
 - b. It concretises, it is founded on the facts of the case and it is relative, that is the determination of beyond reasonable doubt has been made within the scope of the nature and facts of the case.
 16. The question therefore is whether that burden vested with the prosecution has been discharged on all the elements of murder beyond reasonable doubt.
 17. First and foremost, is whether a human being right to life guaranteed by Article 26 of the *constitution* is dead. In the case of *Kimweri v Republic* (1986) EA 452 provides a proposition that proof of death can be established amongst other means by the evidence of an eye witness, corpus of medical evidence of a postmortem and other circumstantial evidence.
 18. In the instant case PW1 –PW8 in their evidence alluded to the fact of death of the deceased. PW9 Dr. Nyangi of Kilifi Hospital gave evidence on the details of the examination carried upon the body of the deceased which was positively identified. By Masha Maulia, Mit Zansha both relatives of the deceased. The accused persons offered no evidence to controvert the prosecution case that the deceased is dead. Therefore, the ingredient on proof of death has been discharged by the prosecution beyond reasonable doubt.
 19. The second element to be proven is that of causation as expressly provided for under Section 213 of the penal code. For in Article 26 (3) “ *A person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law*”. A charge of murder pursuant to Section 203 of the penal code requires proof of unlawful killing in any of the circumstances specified herein. Every case is unique and must be considered on its own merits.
 20. For this reason, there is no simple formula which can be applied to give a simple answer to the questions the prosecutor has to face in discharging the burden of proof beyond reasonable doubt on *actus reus*. The guidelines on causation or on proximate cause of death are outlined in Section 213 of the Penal Code which states as follows: That “ *causing death need not be caused by the immediate act of the accused. This provision of the code defines causing death to 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 person undergoes a surgery or treatment which causes his death. (b) He inflicts injury on another on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living; (c) He by act hastens the death of a person suffering caused the death; and (e) His act or commission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.* However, in law it is trite that what is necessary to prove is that the accused’s acts of omission or commission were a substantive or significant cause of the death of the deceased.



21. In the present case PW1, PW2, PW3, PW4, PW5, PW6, PW7 all testified to the events of 31.3.2019 . The highlights being that the accused persons spent most of the time with the deceased earlier at Mnazi Club and later on happened to share a meal brought by PW5 & PW6. Prior to the deceased's meeting his death, there is clear evidence from PW1, PW2, PW3 PW4, PW5 PW6 & PW7 he was alive with no evidence of ill health or grievous bodily harm. It at the same scene where he enjoyed the company of the accused persons the screams emerged and some of the 1st responders visited the home only to confirm that he had been killed. Apparently, the accused persons could not be scene within the vicinity as even the police were alerted and made arrangements to collect the body to be taken to the Kilifi County Hospital. The analogy to be drawn from the prosecution case is hinged within the context of the following statement on the relevance and probative value of circumstantial evidence in a given scenario. *“ That for circumstantial evidence to be applicable the test must be combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit or any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocent. (Sarkar on Evidence pp. 32-33). The way to deal with circumstantial evidence was stated in Topper V.R (2952) A.C. at Page 489 as follows: “circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to case suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence.”*
22. The prosecution case in this respect cumulatively establishes the targeted criminal Acts were aimed at inflicting serious harm against the deceased. The accused persons were at all material times with the deceased between the Mnazi club of PW2 and subsequent scene of the crime as alluded to by PW5, PW6, and PW7. The element of intention to commit a dangerous Act which endangered life of the deceased is clearly manifested from the evidence of PW9 Dr. Nyangi of Kilifi County Hospital Mortuary. It is deducible from postmortem report that the deceased suffered compound skull fracture involving the occipital and both parietal bones with internal hemorrhage. The intentional application of force to the deceased in such a way to occasion grievous harm brings the prosecution case within the scope of a murder committed with unlawful Act or omission causing the death of the deceased. On this basis, the prosecution evidence as a whole in respect to the ingredient of unlawful Acts has been proved beyond reasonable doubt. `
23. With regard to malice aforethought, Section 206 of the Penal Code defines malice aforethought in the causation of death as follows:
- 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 the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish tht it may not be caused.”
 - d. Intent to commit a felony
 - e. Intention to facilitate the Escape from Custody of a person who has committed a Felony.
24. The circumstances upon which the court can draw and inference on whether the homicide was committed with malice aforethought within the meaning of Section 206 of the Penal Code has no hard and first rule save that the necessity of it is dependable upon specific facts of the case before the trial court. One such guidelines are those found in the case of: R. v Tubere s/o Ochen (1945) 12 E.



A. C. A. 63 in which the court observed as follows: That malice aforethought can be established by considering the weapon used, the manner in which it was used, the part or organ of the body targeted by the perpetrator and the gravity of the injuries inflicted. If the killing was premeditated, planned and executed with such a precision involving dangerous weapons like machetes, firearms and ammunitions, swords, or knives ordinarily for other uses but converted to effect the brutal killing there would be no doubt to conclusively infer malice aforethought. The inference on malice aforethought would therefore easily flow from the circumstances of each case. In the instant case the medical evidence in the form of a postmortem report was tendered in evidence by PW9 which is equally consistent with malice aforethought. The injuries against the deceased targeting the vulnerable part of his body being the head involving compound skull fracture and subsequent internal hemorrhage is sufficient evidence that the perpetrators had only one objective to cause the death of the deceased. Therefore, malice aforethought accompanied the unlawful Acts executed by the accused persons.

25. Finally, the court has to answer to the question of placing the accused persons at the scene of the crime. The key principles as whether the accused persons were correctly identified and placed at the scene of the crime are to be found in the cases of: *Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A. 166 Roria v Republic (1967). E.A 583. In the case of R- v Turnbull and Others (1976) 3 All ER an English Case. Lord Widgery C.J had this to say:-*

"First wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identification. In addition, he should instruct them to as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observations" 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. However often if only occasionally, had he any special reason for remembering the accused" How long elapsed between 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."

26. Based on this principles in the instant case, PW1, PW2 PW3,&PW6 testified that the deceased and the accused persons spent considerable amount of time together during the day taking Mnazi. Further the evidence points to the fact of them observing the accused and the deceased person at around 3.00pm. Although they did not have prior acquaintance it was in broad day light and their faces were not covered. The witnesses also pointed out that the accused persons called the deceased aside to the location to where they were seated. It is this locus in quo PW5 & PW6 served a meal to the deceased and the so called visitors apparently later identified in the identification parade by PW1, PW2, & PW3. As to the compliant of the identification parade PW10 Inspector Levi gave cogent evidence on the manner he went about arranging the parade and the rooms in which he kept the witnesses. Having examined the evidence, I find sufficient evidence that supports positive identification of the accused persons as the perpetrators of the offence of murder against the deceased. Throughout the evidence given by the accused persons when weighed alongside the prosecution I am convinced that an offence of murder was committed and the ones to be held culpable are the accused persons. The result is that I find each of the accused guilty of the offence do hereby convict as per the law established.



Decision on Sentence

27. The accused persons were jointly convicted by this court of the crime of murder of Kahindi Tsuma Iha. It is now the court's task to proceed and hand down an appropriate sentence of the offence. It is trite that the imposition of a fair and proportionate sentence is not a mechanical function but one which is nuanced with legislative framework and the anatomy of judicial discretion. The court is required to weigh and balance a variety of factors as outlined in the Francis Muruatetu case (2017) eKLR to determine the measure of the blameworthiness of the accused person. As developed by the Supreme Court on the Muruatetu case, the court has to consider the accused's personal circumstances, the seriousness of the crime and the surrounding circumstances in which it was committed, the sentencing principles like deterrence, rehabilitation, proportionality, reparation, equality, and etc. In the case of **Veen v The Queen (No. 2) (1987-88) 164 CLR at 476 Per Mason CJ**, the court had this to say on sentencing discretion: “ *However sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.*”
28. In arriving at the sentence of the accused persons, I have taken into account the submissions by learned counsel Ruttoh dated 21st June 2023 on incorporating the aspects of the accused persons being first time offenders, that as appropriate each is remorseful and regrets the criminal acts which culminated in their arrest and subsequent prosecution. It was also the case for the 1st accused person that since his arrest on 19th June 2019 he has been in custody pending the prosecution and conclusion of the criminal process, unlike the 2nd accused who has had the advantage of being on bond under Article 49 (1) (h) of the [constitution](#). In S v Matyity 2011 (1) SACR 40 (SCA) para 13 the court provided the differential minimum between regret and remorse as follows: “ *There is moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all before a court can find that an accused person genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed: what has since provoked his or her change of heart. Whether he or she does indeed have a true appreciation of the consequences of those actions.*”
29. Given this background, one has to take into account the surrounding circumstances upon which the cruelty of that high magnitude used by the accused persons against the deceased. In consideration of the aggravating factors, the mitigation offered by learned counsel on behalf of the accused and further their respective personal circumstances a serious crime of this nature impacting on the right to life in Article 26 of the [constitution](#) it is appropriate to impose a sentence with a deterrent effect. Such sentencing regime calls for this court to exercise discretion and to have each accused person sentenced to 20 years imprisonment. However as for the 1st accused being an offender who has been held in remand custody since 17th June, 2019 under Section 333(2) of the CPC the commencement date of the sentence to take into account of that period as provided for in the code. His committal warrant shall therefore be



backdated to 17th June 2019. Whereas for the 2nd accused custodial sentence shall commence with effect from the 4th of September, 2023. 14 days Right of Appeal

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THE 4TH DAY OF SEPTEMBER 2023

In the Presence of:

Accused persons

Mr. Mwangi for the State

M/s Ruttoh for the Accused Persons

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R. NYAKUNDI

JUDGE

