



Director of Public Prosecution v Gitonga & another (Criminal Case E014 of 2022) [2023] KEHC 23629 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E014 OF 2022
TW CHERERE, J
OCTOBER 5, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION PROSECUTOR

AND

EZRA KAIMENYI GITONGA 1ST ACCUSED

FREDRICK KIMATHI GITONGA 2ND ACCUSED

JUDGMENT

1. Ezra Kaimenyi Gitonga and Fredrick Kimathi Gitonga (Accused 1 and 2 respectively) who are brothers are charged with the offence of Murder Contrary to section 203 as read with section 204 of the [Penal Code](#).

Prosecution case

2. The prosecution case as narrated by Aron Kiambi is that he had entrusted his two sons Geoffrey Mwenda Kiambi and Stephen Muriungi who had undergone the rite of passage to the care of Accused 1 Ezra Kaimenyi Gitonga. It was his evidence that on 22nd March, 2022 at about 08.00 am, one Mugambi called and asked him to get a vehicle to take his son Mwenda to hospital. That he immediately called one Mwangi whom he referred to as doctor Mwangi who upon examining Mwenda in the house he was staying with Accused 1 stated that he was dead. The matter was reported to the police and Accused 1 was arrested together with his brother Accused 2 whom it was alleged used to visit the house where Mwenda and Accused 1 stayed.
3. Stephen Muriungi and his brother Mwenda had undergone the rite of passage and it was his testimony that both Accused persons were taking care of them. He recalled that on 21st March, 2022 at about noon, Mwenda declined to eat and Accused 1 after asking him to get out of bed, boxed him on the face and stomach as Accused 2 hit him on the head as a result of which he started complaining of stomach



pain and bleeding from the mouth. That Accused 1 ordered Mwenda to sit on a stone in the corner of the house and he remained there until about 04.00 pm when one Sam visited and asked Mwenda to lie on his bed. That at about 07.00 pm, one Mugambi went to visit them and finding Mwenda looking sickly gave him water and some drugs. That in the night at about 01.00 am, Mwenda woke up to go for a short call and the witness noticed that he was looking sickly and was walking with difficulty from which he slipped and fell but managed to pull himself to his bed. He unfortunately died at about 06.00 am on 22nd March, 2022.

4. Jeremiah Munene bought Eno on 21st March, 2022 and gave it to Accused 1 to give to Mwenda. He went to the house Mwenda was staying on the morning of 22nd March, 2022 and found him with Accused 1. The following day, he received information that Mwenda had died. William Kinya was on the morning of 22nd March, 2022 called to take Mwenda to hospital. He rushed to the house where Mwenda was staying and found Accused 1 and 2 and another boy in the house where Mwenda who was unresponsive was lying on the bed. Before he could take Mwenda to hospital one Mwangi whom he referred to as doctor arrived and declared Mwenda dead.
5. Albert Mwangi Maingi, a retired nursing officer stated that he circumcised Mwenda and his brother Stephen Muriungi on 17th March, 2022. On the morning of 22nd March, 2022, William Kinya informed him that Mwenda was sick and he rushed to the house where Mwenda was staying and found Muriungi and two young men and Mwenda's body which had a distended stomach was lying on the bed.
6. An autopsy on Mwenda's body was conducted 28th March, 2022. The postmortem form tendered as PEXH. 1 reveals that Mwenda suffered bruises on both sides of the stomach (flanks), bruises on right hand, abdomen was distended, he had a ruptured spleen and part of small intestine was rotten and the doctor formed an opinion that he died of massive internal bleeding due to blunt abdominal trauma.
7. After investigations, both Accused persons were arrested and charged that on 22nd March, 2022 at Kiringo village, Naari Location in Buuri East Sub-County within Meru County jointly murdered Geoffrey Mwenda Kiambi

Defence Case

8. In his sworn defence, Accused 1 confirmed that he had been entrusted to take care of Mwenda and his brother Muriungi from 17th March, 2022 when they were circumcised. He stated that Mwenda started complaining of stomach pains on 18th March, 2022. It was his evidence that he went to work in the shamba of one Muriithi with his brother (co-accused) on 21st March, 2022 and left the boys under the care of one Mugambi and upon his return at 10.00 pm Mwenda informed him that Mugambi had beaten them. He stated that on the morning of 22nd March, 2022, Mwenda fell outside the house and as he put him on bed noticed he had bruises on the stomach and hands. That Mwenda died the same morning. He denied killing Mwenda.
9. Accused 2 similarly denied the offence. He also denied being at the scene of crime on 21st March, 2022 and said he was working with his co-accused in the shamba of one Muriithi on that day.
10. James Muriithi said he was with Accused persons on 21st March, 2022 from about 09.00 am to 09.00 pm. Gerald Kimathi said he visited Mwenda and his brother on 21st March, 2022 at about noon and found them with one Mugambi. Dennis Mutethia visited the boys in the evening at about 08.00 pm and found them with Mugambi. He stated that Mwenda's brother Kimathi also visited and they remained with the boys until Accused 1 arrived and stayed with them for the night but left the following morning after the health condition of Mwenda deteriorated.



Analysis and determination

11. 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.
12. I have considered all the evidence availed in this case as set out above and submissions filed on behalf of Accused persons and the issue in question is whether the prosecution has proved the death of the deceased; that Accused persons caused the death and that they were actuated by malice.

a.The death of the deceased

13. The postmortem form tendered in evidence PEXH. 1 reveals that Mwenda suffered bruises on both sides of the stomach (flanks), bruises on right hand, abdomen was distended, had a ruptured spleen and part of small intestine was rotten and the doctor formed an opinion that he died of massive internal bleeding due to blunt abdominal trauma.

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

14. Muriungi who had undergone the rite of passenger with Mwenda and was staying with him stated that on 21st March, 2022 at about noon, Accused 1 boxed Mwenda on the stomach from which Mwenda bled from the mouth and thereafter complained of stomach pains. The witness denied that they had been left under the care of Mugambi on that day but however confirmed that Mugambi had visited them on the evening of 21st March, 2022 and left whereas they had spent the night with Accused 1 and Dennis Mutethia as confirmed by Mutethia in his evidence.
15. Accused 1 on the other hand raised the defence of alibi that he was not at scene of crime. The alibi was supported by James Muriithi who said he was with Accused 1 in his shamba the whole day on 21st March, 2022 and by Gerald Kimathi and Dennis Mutethia who stated that they visited Mwenda on 21st March, 2022 and found him with Muriungi and Mugambi.
16. Alibi is defined in the [Black's Law Dictionary](#), 10th Edition as: "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
17. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In *Republic v Sukha Singh S/O Wazir Singh & Others* [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa held that:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".



18. It is trite that once a Respondent raises an alibi defence, the onus is on the prosecution to displace the defence of alibi. This was held in the Court of Appeal case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR as:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution”.

19. The Court of Appeal in the case of *Wang’ombe v Republic* [1980] KLR 149 held as follows:

“..... In *Ssentale v Uganda* [1968] EA 365, 368 (Sir Udo Udoma CJ) said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion..... The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible”.

20. In this case I note that this defence of alibi was raised at the defence hearing and not at the beginning of the trial. Accused 1 was not only placed at the scene of crime by Muriungi but was identified as the person that boxed Mwenda on the stomach thereby inflicting the fatal injuries. Consequently, it is my finding that the defence of alibi raised by Accused 1 and his attempt to blame one Mugambi and to shift the cause of the injuries to a fall are an afterthought and must fail.

Malice aforethought

21. In *Morris Aluoch v Republic* Cr. Appeal No. 47 of 1996 [1997] eKLR), the Court of Appeal cited the case of *Rex v Tuberes/o Ochen* [1945] 12 EACA 63 with approval where it was stated as follows:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

22. In this case, there is no evidence of repeated blows. This factor leads me to believe that the single blow on Mwenda’s stomach by Accused 1 was an isolated one probably without any malice aforethought on the part of Accused 1. In other words, it was likely that Accused 1 did not intend to kill the Mwenda.

23. The evidence as adduced by the prosecution established beyond reasonable doubt the act of unlawful killing of Mwenda by the Accused 1 herein without malice aforethought. Sections 179 of the *Criminal Procedure Code* stipulates:

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

24. As a result, Accused 1 is found guilty of a lesser charge of manslaughter contrary to section 202 (1) of the *Penal Code* as read with section 205 of the *Penal Code* and is convicted accordingly.



25. Muriungi stated that Accused 2 hit Mwenda on the head. There was no evidence of any injury to Mwenda's head and I find the charge against Accused 2 not proved and he is accordingly found not guilty and acquitted.

DATED THIS 05TH DAY OF OCTOBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Accused 1 & 2 - Present

For Accused persons - Mr. Kuria Karatu Advocate

For DPP - Ms. Rita (PC 1)

